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Free Trade Area of the Americas: The Viability of a Regional Legal Order

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Abstract

The creation of a Free Trade Area of the Americas (FTAA) by the year 2005 has been a serious undertaking in the hemisphere since the first Summit of the Americas held in Miami in December of 1994. This entails the creation of a free trade agreement that would include virtually all the nations of the Western Hemisphere. However, this is not the first attempt at the creation of trade agreements within the region. From early efforts such as the Latin American Free Trade Agreement to current ones such as the North American Free Trade Agreement and the MERCOSUR, there has been a push for the past 40 years at the use of free trade as a tool for economic development. Nevertheless, traditionally there has been a lack of legal and institutional analysis in the formation of these trading blocs. The same thing appears to be happening in the formation of the FTAA. This thesis analyzes and compares the differing trading blocs in the Western Hemisphere in terms of institutions and capacity to create regional norms and proposes the institutional framework needed for successful regional integration for the FTAA. It then looks at legal obstacles within the Constitutions of select States to the formation of this framework and problems that may arise in jurisdictional uncertainties between the plethora of trading blocs.

Résumé

L'établissement d'une Zone de Libre Echange des Amériques pour l'année 2005 fut un sérieux compromis entrepris lors du Premier Sommet des Amériques, tenu à Miami en décembre 1994. Ceci comprend la création d'un accord de libre échange capable d'inclure presque toutes les nations de l'hémisphère occidental. Toutefois, ce n'est pas la première tentative de créer un accord de commerce dans la région. Il s'est passé plus de 40 ans entre le premier essaie de l'Accord de Libre Echanges de l'Amérique Latine et les deux instruments en vigueur de nos jours, l'Accord de Libre Echange Nord Américain et le MERCOSUR. D'ailleurs, la formation de tels blocs a été traditionnellement dépourvue d'une analysée juridique et institutionnelle. Ce qui semble être encore le cas dans la formation de la Zone de Libre Echange des Amériques. Cette thèse analyse et compare les différences dans les blocs de commerce de l'hémisphère occidental à travers des institutions et des normes régionales. De plus, elle propose un modèle institutionnel qui permettra la réussite de l'intégration régionale de la Zone de Libre Echange des Amériques. Finalement, elle pose un regard critique aux obstacles constitutionnels de certains Etats à la formation de ce modèle et aux possibles problèmes d'ordre juridictionnel issus d'une multitude de blocs de commerce.

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I. INTRODUCTION

The acceptance of free trade as the proper road towards economic development has brought about a reality in which serious consideration is made upon the formation of a 'Free Trade Area of the Americas' (FTAA). Concrete steps towards this goal have been made at the two Summit of the Americas held in Miami in December of 1994 and in Santiago, Chile in April of 1998. In the first Summit, the adopted Declaration of Principles and Plan of Action (Summit Declaration) calls for, inter alia, the formation of a hemispheric free trade agreement by the year 2005 while the Second Summit of the Americas: Santiago Declaration and Plan of Action (Santiago Declaration) initiates the negotiations for this process.[1] However, it would be wrong to consider these events as being a recent manifestation of relations among the nations of Latin America. Economic integration has been seen since the days of Simón Bolivar as a solution to the problem of Latin American disunity.[2] This ideal was first expressed in the Treaty of Perpetual Union, League, and Confederation of 1826[3] and then further attempted in the Continental Treaty of 1856.[4] However, these attempts failed because, as the Chilean government had then observed, the purpose of these agreements were:

> [D]irected primarily towards forming a league of governments, rather than trying to unify the people, to eliminate national boundaries within the continent and to harmonize the elements of progress towards the development of the entire Latin American people.[5]

The first practical steps towards economic integration occurred during the 1950's. It was at this

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[1] Summit of the Americas: Declaration of Principles and Plan of Action, (1995) 34 I.L.M. 808 [hereinafter Summit Declaration] and Second Summit of the Americas: Santiago Declaration and Plan of Action, (1998) 37 I.L.M. 947 [hereinafter Santiago Declaration]. The first step towards Western Hemisphere integration for Latin America in this decade for the creation of a "free trade zone from the port of Anchorage to Tierra del Fuego" was the Enterprise for the Americas Initiative (EAI) in June of 1990 by the United States. The EAI concentrated on three different but interrelated aspects: trade, debt and investment. See G. Ryd & E. Gitli, "Latin America Integration and the Enterprise for the Americas Initiative" (1992) 26 J. World T. 25.

[2] R. Vargas-Hidalgo, "Economic Integration, Development Planning and Sovereignty; A Latin American View" (1977) 9 Law. of Am. 318 at 319.

[3] Treaty of Perpetual Union, League, and Confederation, (1826), reprinted in F.V. García-Amador, The Inter-American System: Treaties Conventions & Other Documents, vol. I, part 1 (New York: Oceana, 1983) at 8.

[4] Continental Treaty (1856), reprinted in García-Amador, ibid. at 21. See R. Vargas-Hidalgo, "The Process of Integration in Latin America" (1977) 15 Comp. Jur. Rev. 105 at 111.

[5] Vargas-Hidalgo, ibid. Note that there also exists Pan-Americanism that culminated with the formation of the Organization of American States in 1948. For a discussion of the role of the Organization of American States in

period the Economic Commission for Latin America of the United Nations (ECLA) had considered the notion of Latin American integration.[6] The structuralist school of this organization emphasized import substitution policies on an enlarged regional market in order to accelerate domestic industrialization.[7] To this end, the Latin American Free Trade Association (LAFTA) was formed, the forerunner to the current regional integration agreement, the Latin American Integration Association (LAIA). However, what distinguishes today's efforts from the past is the acceptance by Latin America on the merits of world market linkages rather than on protecting domestic markets.[8] The prevalence of the free trade agreements in the region attests to this new thinking.[9]

To carry out this goal, the Summit Declaration provided that the Trade Ministers initiate a series of meetings to take "concrete initial steps" to advance the formation of the FTAA.[10] This was followed up in the Santiago Declaration whereby the Trade Ministers were instructed to initiate the negotiations. So far, five ministerial meetings have taken place which have established nine negotiating groups.[11] In the meeting held in San Jose, Costa Rica, the negotiating groups were

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facilitating the process for the creation of the FTAA, see J. Tramhel, "Free Trade in the Americas: A Perspective from the Organization of American States" (1997) 19 Hous. J. Int'l L. 595.

[6] Vargas-Hidalgo, supra note 4 at 118.

[7] M. Haines-Ferrari, "MERCOSUR: A New Model of Latin American Economic Integration" (1993) 25 Case W. Res. J. Int'l L. 413 at 416.

[8] Ibid. at 418.

[9] Chile alone has close to thirty agreements for economic cooperation, see D. Gantz, "The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?" (1997) 14 Ariz. J. Int'l & Comp. Law 381 at 400.

[10] Summit Declaration, supra note 1 at 822. This was followed up in the Second Summit of the Americas that was held in Santiago, Chile in April of 1998 whereby in the Santiago Declaration, supra note 1 at 965, the Trade Ministers were instructed to initiate the negotiations in accordance with the principles and objectives as set out in Annex 1 of The San Jose Ministerial Declaration, online: FTAA Official Website <http://www.ftaa-alca.org/ministerials/costa_e.asp> (date accessed: 15 November 1999) [hereinafter San Jose Declaration].

[11] The first ministerial meeting was held in Denver, Colorado in June of 1995. This meeting formed seven working groups in market access, customs procedure and rules of origin, investment, standards and technical barriers to trade, sanitary and phytosanitary measures, subsidies, antidumping and countervailing duties and smaller economies, see The Denver Ministerial Declaration, online: FTAA Official Website <http://www.ftaa-alca.org/ministerials/denver_e.asp> (date accessed: 15 November 1999) [hereinafter Denver Declaration]. The second meeting was held in Cartagena, Colombia in March of 1996. This meeting formed four further working groups: government procurement, intellectual property rights, trade on services and competition policy, see The Cartagena Ministerial Declaration, online: FTAA Official Website <http://www.ftaa-alca.org/ministerials/carta_e.asp> (date accessed: 15 November 1999). The third meeting was held in Belo Horizonte, Brazil in May of 1997. This meeting formed the working group on dispute settlement, see The Belo Horizonte Ministerial Declaration, online: FTAA Official Website <http://www.ftaa-alca.org/ministerials/belo_e.asp> (date accessed: 15 November 1999) [hereinafter Belo Horizonte Declaration]. The fourth meeting was held in San Jose, Costa Rica in March of 1998. This meeting established the nine negotiating groups in market access, investment, services, government procurement, dispute settlement, agriculture, intellectual property rights, subsidies, antidumping and countervailing duties and competition policy, see San Jose Declaration, supra note 10 para. 11. Also formed in the Ministerial meetings were the Consultative Group on Smaller

instructed to follow, inter alia, the principles of consensus, transparency and be consistent with the rules and disciplines of the World Trade Organization (WTO).[12]

However, one aspect of this process that has been largely ignored are institutional matters. This is not surprising given that, generally, past efforts at regional economic integration, including those of Latin America, have concentrated on economic analysis rather than on legal and institutional concerns.[13] However, given the potential wide scope of the FTAA, and the all or nothing approach that is being taken by the Trade Ministers, the institutional framework of the agreement will be paramount in order to gauge its success.[14] Given the differing institutional frameworks the North and South of the Western Hemisphere have taken towards the formation of regional economic blocs, it would only seem prudent that this issue be eventually addressed and analyzed.[15]

There has, however, been a preponderance of literature written on the legal and judicial issues on the merger of the differing trading blocs and the path needed for successful hemispheric integration. Five possibilities have been identified: the North American Free Trade Agreement

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Economies, the Committee of Government Representatives on the Participation of Civil Society and the Joint Government-Private Sector Committee of Experts on Electronic Commerce. The last meeting was held in Toronto, Canada in November of 1999, see The Toronto Ministerial Declaration, online: FTAA Official Website < http://www.alca-ftaa.org/ministerials/minis_e.asp > (date accessed: 15 November 1999) [hereinafter Toronto Declaration].

[12] San Jose Declaration, ibid. Annex 1.

[13] P. Kenneth Kiplagat, "An Institutional and Structural Model for Successful Economic Integration in Developing Countries" (1994) 29 Texas Int'l L.J. 39 at 50. Because of the emphasis of economic analysis within past regional integration efforts, the discussion has been dominated by economists and political scientists, ibid. Doctrinal writers have lamented this emphasis in terms of regional integration efforts in Latin America and have noted an anti-legalism sentiment by which the economic draftsmen have consciously de-emphasized the role of lawyers in the integration process, D. Padilla, "The Judicial Resolution of Legal Disputes in the Integration Movements of the Hemisphere" (1979) 11 Law. of Am. 75 at 91 and see F. Orrego-Vicuña, "La Creation D'Une Cour de Justice dans le Groupe Andin" (1974) 10 Cah. Dr. Eur. 127 at 127-128 .

[14] See Denver Declaration supra note 11 para. 2 for the reference that the FTAA will represent a single undertaking comprising of mutual rights and obligations. This approach of a single undertaking entails the all or nothing conclusion. See also H.E. Elbio Rosselli, "MERCOSUR and the Free Trade Area of the Americas" (1996) 27 R.G.D. 83 at 88 where he states:

> The idea of a single undertaking, which we are borrowing from the Uruguay Round negotiations of the GATT is of paramount political importance in this exercise, for it means that the agreement is going to be one and only one. There is no pick-and-choose, à la carte menu. Namely, you are going to be part of a free trade area with all the elements included...It is a recognition here that this Free Trade Area of the Americas is going to be one whole commitment and this means, in practical terms for the negotiation, that you will not be able to come to a point and say: "O.K., we got this far on these areas, let's agree on this, let's leave the others for further agreement in the future". No, it is an all or nothing, approach which makes for a very far reaching and ambitious process.

[15] On the differing approaches by Latin America as compared with the NAFTA, see generally P. O'Hop Jr. "Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System" (1995) 36 Harv. Int'l L. J. 127 at 130-151.

(NAFTA) as a core agreement that would be expanded to encompass all the countries in the hemisphere, a view shared by the United States and Canada; the Mercado Común del Sur (MERCOSUR) as a pole by which it would encompass all of South America to create a South American Free Trade Area that would amalgamate with the NAFTA; bipolar amalgamation between the NAFTA and the MERCOSUR; convergence of the principal trading blocs in the region, the NAFTA, MERCOSUR, Caribbean Community (CARICOM), the Central American Common Market (CACM) and the Andean Community on a common integration goal; and individual hemispheric negotiations by which all the countries of the hemisphere would reach an agreement to liberalize trade in accordance with a designated schedule.[16] Of these five paths, the NAFTA regime, or one similar to it representing the traditional free trade agreement, is seen as the probable model towards integration either through individual or bloc accession.[17] This model favours the intergovernmental or decentralized system for the enforcement and application of the free trade rules as opposed to an agreement that creates centralized or supranational authority.[18] Looking at

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[16] R. Bernal, "Regional Trade Arrangements and the Establishment of a Free Trade Area of the Americas" (1996) 27 Law & Policy Int'l Bus. 945 at 950-955. In the same vein, the FTAA could be a new agreement in which the other regional agreements are subsumed, or it will become a series of linkages with the underlying agreements still intact, see P. Fauteux, "Discussion: International Institutions and Economic Integration" (1996) 90 Proc. ASIL 508 at 520.

[17] See, e.g., F. Abbott, Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1995) [hereinafter Law and Policy of Regional Integration]; F. Garcia, "NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession" (1995) 35 Va. J. Int'l L. 539, A.M. de Aguinas; "Can MERCOSUR Accede to NAFTA? A Legal Perspective"(1995) 10 Conn. J. Int. L. 597; F. Garcia, ""Americas Agreement"- An Interim Stage in Building the Free Trade Area of the Americas" (1997) 35 Colum. J. Transnat'l L. 63 [hereinafter "Americas Agreement"]; and F. Garcia, "Decision Making and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance" (1997) 18 Mich. J. Int'l L. 357 [hereinafter "Trade Governance"]; and O'Hop supra note 15. In fact, one of the General Principles of the FTAA negotiations, states that the "countries may negotiate and accept the obligations of the FTAA individually or as members of a sub-regional integration group negotiating as a unit," see San Jose Declaration, supra note 10.

[18] See J. Fried, "Two Paradigms for Rule of International Trade Law" (1994) 20 Can.-U.S. L.J. 39 at 46-53 and F.V. Garcia-Amador, "The Law and Institutions of the Andean Subregional Economic Integration" in OAS, General Secretariat, Comparative Law Series: Law and Legal Systems of the Commonwealth Caribbean States and the Other Members of the Organization of American States, rev. ed. (Washington: Secretariat for Legal Affairs, 1967) at 21-22. This dichotomy is also looked at as either positive or negative integration. Positive integration signifies that states agree to transfer some powers to a central authority whereas in negative integration, states agree to restrict their actions but there is no transfer of powers to a central authority, see J. Pelkmans, "The Institutional Economics of European Integration" in M. Cappelletti, M. Seccombe & J. Weiler, eds., Integration Through Law: Europe and the American Federal Experience, vol.1, book 1 (Berlin: Walter de Gruyter, 1985) 318 at 321. Another dichotomy is to look at the organs of an integration process as being either facilitative or productive. Facilitative bodies emphasize decentralized cooperation to achieve integration while productive bodies require a significant degree of independence in order to carry out the goals of the international organization, see "Trade Governance," supra note 17 at 364-365. For a different view on the institutional framework needed for economic integration, Professor Thomas Cottier has focused on the appropriate structure needed in international economic relations for the substance that is to be achieved, see T. Cottier, "Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings in the EFTA Experience" in M. Hilf & E. Petersmann, eds., National Constitutions and International Economic Law (Deventer, The Netherlands: Kluwer Law and Taxation, 1993) at 409.

the Summit Declaration,, the Santiago Declaration and the work of the Trade Ministers in their meetings, it appears that this is the approach that will be taken. The Summit Declaration, although very comprehensive for a free trade agreement, indicates that the FTAA is thought be no more than what its name suggests, a free trade area.[19] Moreover, there is recognition that any decisions regarding the process are to remain as a sovereign right of each nation and thus be made by consensus, a statement that appears to be contrary to the transfer of competences to supranational institutions.[20]

Yet it is argued that a decentralized institutional framework is insufficient for successful economic integration in the hemisphere. Successful market integration occurs when there is an institution that promotes and oversees the integration process and a dispute settlement mechanism that can enforce the rules adopted in the agreement or any subsequent actions.[21] The reliance on the predominantly intergovernmental bodies to supervise a comprehensive regional agreement will ultimately lead to disintegration.[22] What is needed are effective supranational bodies, such as central law making ones, that are in charge of supervising and promoting such a process as well as a FTAA Court of Justice to enforce the integration of the economies in the Western Hemisphere.[23] After all, the FTAA is a massive undertaking at integration, and no successful integration has occurred without judicial oversight and centralized law making bodies

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[19] "Trade Governance," supra note 17 at 385.

[20] Summit Declaration, supra note 1 at 821, Item 9 para. 4. Also, see the General Principles for the FTAA negotiations where the first point states that decisions shall be made by consensus, San Jose Declaration, supra note 10.

[21] W. Davey, "European Integration: Reflections on its Limits and Effects" (1993) 1 Ind. J. Global Leg. Stud. 185 at 198-99. See also B. Carl, Economic Integration among Developing Nations: Law & Policy (New York: Praeger, 1986) at 64-66 [hereinafter Economic Integration among Developing Nations].

[22] Some doctrinal writers have stated that in terms of North America alone, the lack of a decision making and judicial institution does not bode well for the future for free trade under the NAFTA, see J. 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) 19 Hous. J. Int'l L. 1 at 7.

[23] Doctrinal writers in Latin America have been considering this problem for years and have been recommending the creation of an 'Inter-American Integration Court' to oversee the regional integration process or the creation of stronger dispute settlement mechanisms within the existing trading blocs, see, e.g., M. Casanova, "Réflexiones sur les Progrés du Processus D'Intégration et de Coopération en Amérique Latine" (1976) 53 Rev. D.I. & D.C. 317; H. Majdalani, "Corte de Justicia Latinoamericana (Una Necesidad Impostergable)" (1987-B) La Ley 713; and J. Vicente Ugarte del Pino, "Un Tribunal Interamericano de Derecho de la Integración" (1994) 43 Revista Peruana de Derecho Internacional 78.

to promote these ends.[24] Nor does effective integration occur simply with the existence of centralized bodies, but also by the degree the acts of these bodies are implemented and recognized within the participating States.[25] Without this type of institution building and normative recognition, it is argued that successful integration will not occur.[26]

Part I contains a description of the differing trading blocs in the hemisphere focusing on their institutional framework, dispute settlement mechanisms and the effect regional norms have had on national law, if any.[27] Part II identifies the reasons as to why the current institutions found in the NAFTA or typical free trade agreement will not be sufficient to ensure successful economic integration. It will then provide what this author states is needed, centralized bodies and a permanent dispute settlement system in order to encourage integration. Part III will be an analysis of selective States in the Western Hemisphere in regards of the problems that may arise with the incorporation of regional norms within national legal orders and the problems of jurisdictional conflict between trading regimes. Part IV concludes that the incorporation of a NAFTA based or typical free trade institutional framework for the western hemisphere is not a viable avenue for successful integration.

II. REGIONAL TRADING BLOCS

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[24] M. Cappelletti & D. Golay, "The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration" in M. Cappelletti, M. Seccombe & J. Weiler, eds., supra note 18, 261 at 261-262.

[25] F. Jacobs & K. Karst, "The "Federal" Legal Order: The U.S.A. and Europe Compared-A Juridical Perspective" in M. Cappelletti, M. Seccombe & J. Weiler, eds., supra note 18, 169 at 199. This approach would entail 'normative supranationalism', whereby a legal hierarchy is created in which measures and decisions taken by the FTAA bodies have effective precedence over national ones, see J. Weiler, "The Community System: the Dual Character of Supranationalism" (1982) 1 Y.B. Eur. L. 267 at 272-273.

[26] According to the most oft quoted theorist on economic integration, Bela Belassa, economic integration occurs in varying degrees: a free trade area, a customs union, a common market, an economic union and complete economic integration, B.Belassa, The Theory of Economic Integration (Homewood, Illinois: Richard D. Irwin, 1961) at 2.

This section will examine the differing trading blocs in the Western Hemisphere, the LAIA, the Group of Three, the NAFTA, the MERCOSUR, the Andean Community and the Central American Common Market. It will become apparent that the trend is to rely on traditional intergovernmental organizations that are created with a strong emphasis on the virtues of cooperation and joint efforts.[28] The LAIA, the Group of 3, and the NAFTA represent classic free trade agreements whereby decision making and dispute settlement is centered on intergovernmental bodies. The MERCOSUR relies on intergovernmental bodies as well, but is unique because it lets certain norms pronounced by its organs to be binding on the member States. Just two trading blocs, the Andean Community and the Central American Common Market contain elements of the supranational model of regional integration.

1. The LAIA

The origin of the LAIA[29] is found in failure of the first integration treaty that encompassed Latin America,[30] the LAFTA.[31] The LAFTA was formed at the Intergovernmental Conference for the Establishment of a Free Trade Area Among Latin American Countries held at Montevideo in 1959 and 1960. This agreement was very much influenced by the General Agreement on Tariff and Trade (GATT) and the Treaty of Rome of 1957 that formed the European Economic Community.[32] The

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[27] This paper will concentrate on the major regional integration efforts in the hemisphere, but does not consider the efforts made by the Caribbean nations.

[28] O. Ribbelink, "Institutional Aspects of Regional Economic Integration: Latin America" (1992) Hague Y.B. Int'l L. 86 at 102.

[29] Treaty Of Montevideo Establishing The Latin American Integration Association, (1980) 20 I.L.M. 672 [hereinafter LAIA Treaty] (parties to the treaty are Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela). In Spanish, this association is known as the Asociación Latinoamericana de Integración (ALADI).

[30] Excluding Surinam, Guyana and French Guiana.

[31] Treaty Establishing a Free Trade Area and Instituting the Latin American Free Trade Association, 18 February 1960, reprinted in Inter-American Institute of International Legal Studies, Instruments of Economic Integration in Latin America and the Caribbean vol.1 (Dobbs Ferry, New York: Oceana Publications, 1975) [hereinafter LAFTA Treaty] at 3 (The seven original parties to the treaty were Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru and Uruguay. Venezuela joined in 1966 and Bolivia in 1967, ibid. at 18). In Spanish, this association is known as the Asociación Latinoamericana de Libre Comercio (ALALC)

[32] E. Aimone Gibson, "ALALC y ALADI" in G. Luke, G. Ress & M. Will, Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco (Köln: Carl Heymanns Verlag, 1983) 1 at 1.

purpose of this treaty was to establish a free trade area that would eventually be transformed into a customs union suitable to the needs of Latin America.[33] In order to reach this goal, it was decided this would be achieved through two mechanisms: (1) gradual reduction of custom barriers through periodic negotiations aimed at two schedules, a Common and National Schedule[34] and (2) regional integration of industrial sectors through complementation agreements.[35]

However, this framework proved to be too ambitious for the region.[36] The goals of the LAFTA did not reflect the original aim of its founders[37] and eventually, the member States did not want to extend anymore trade preferences.[38] From this ending, the LAIA was formed.

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[33] S. Riesenfeld, "Legal Systems of Regional Economic Integration" (1974) 22 Am. J. Comp. L. 415 at 432.

[34] LAFTA Treaty, supra note 31 art. 4. Under article 7 of the LAFTA Treaty, the Common Schedule, which was to cover substantially all of the existing trade among member countries, was to be created by which the listing of a product would free it from all intrazonal duties and restrictions at the end of a twelve year period. Round of negotiations would be held every three years. At the end of the first three year period, the products on this schedule would consist 25% of trade among the member countries, and then this would be increased to 50% at the second three year period, 75% at the third three year period and then all trade by the end of the fourth three year period. Under article 5, the National Schedules, each year the LAFTA members would make concessions on a bilateral basis although they were to be extended to all members under the most favoured nation clause found in article 18 of the treaty. These concessions were to be not less than 8% of the weighted average applicable to imports from third countries, of which this was to be determined in Protocol no. 1 to the Treaty. Under article 8, any concession given on the National Schedule was revocable upon which adequate compensation was to be given. However a listing on the Common schedule would make it irrevocable. See Riesenfeld , ibid. at 433 for a description of the liberalization programme under the LAFTA.

[35] LAFTA Treaty, supra note 31 art. 14, 15, 16, 17. The industrial complementation agreements would be formed in one of three types. The first of these would simply be a mutual reduction of tariffs on a product by product basis. The second type would involve an entire branch of industrial activity which would not only involve the product itself, but also components, parts and raw materials. Such an agreement was reached by Argentina, Brazil, Chile and Uruguay covering the manufacture of electric radio tubes. The third form would involve bilateral marketing and production agreements whereby a country with a more advanced industry would establish plants in another member state for production of simple parts to be assembled in the first country, see M. McDermott & W. Weiland, "Latin American Experience With Economic Integration" (1969) 10 Va. J. Int'l L. 139 at 151.

[36] At the first meeting for discussion of the Common Schedule, only 175 out of a possible 10 000 proposed were placed. At the second meeting that was to have placed goods amounting to 50% of intra regional trade, no agreement was reached. As a result, the last two conferences were never held. As for the National Schedule, at first, the easy concessions were made amounting to 8000 items. By 1979, this number only reached 11 017 items. As well, the industrial complementation agreements would invariably involve only Argentina, Brazil and Mexico as parties or with Uruguay and Chile, with minimal participation from the Andean states. See, B. Carl, "The New Approach to Latin American Integration and its Significance to Private Investors" (1987) ICSID Rev. 335 at 343 and D. Ferrere, "New Trends in Latin American Foreign Trade: The LAIA and its Work" (1985) 19 Int'l Lawyer 933 at 935.

[37] Ferrere, ibid. at 933-934. Argentina, Brazil, Chile and Uruguay wanted to keep in place the de facto trade preference they had given themselves through exchange controls, but was under heavy criticism from the International Monetary Fund (IMF). As a result, the LAFTA was created under Article XXIV of the GATT in order to institutionalize their trade preferences, only to find that the other countries of the region were also interested in joining the agreement, and that the smaller countries adopted the theoretical underpinnings of the treaty into national policy.

[38] Ferrere, ibid. at 934. The conflicts and frustrations between the six member countries not part of the Andean Group (Argentina, Brazil, Chile, Mexico, Paraguay and Uruguay) and the Andean Group (Bolivia, Colombia, Ecuador, Peru and

The long term goal of the LAIA is the gradual and progressive establishment of a Latin American common market, although unlike the LAFTA, a fixed term was not set.[39] To its credit, the LAIA has taken a much more flexible and less ambitious approach tc integration than its predecessor. It provides three mechanisms for regional integration, Regional Tariff Preferences, Agreements of Regional Scope and Agreements of Partial Scope or Reach.[40]

The most important of these mechanisms in terms of regional integration are the agreements of partial scope or reach,[41] the most successful type of agreement in the LAIA.[42] These agreements provide that member States extend concessions to some LAIA States but not to others,[43] and the excluded members are not able to insist on those concessions under the most favoured nation clause as was possible under the LAFTA.[44] These accords under the LAIA Treaty are varied. For example, there are "commercial" accords, accords of "economic complementation," "agricultural" pacts or any other type as provided for in Article 14.[45] All these accords must comply within certain general rules:[46] they must be open to membership to other members of the LAIA; their duration should be a minimum of one year, three years for accords of economic complementation, and they should contain provisions for differential treatment favouring the less developed States. However, the most important requirement in terms of integration is that they must contain provisions to facilitate the convergence or progressive multilateralization with the other accords of partial

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Venezuela) over the granting of automatic trade preferences resulted in the end of LAFTA in 1980 and a renegotiation of what remained into the eventual formation of the LAIA.

[39] M. Ekmekdjian, Introducción al Derecho Comunitario Latinoamericano (Buenos Aires: Ediciones Depalma Buenos Aires, 1994) at 133 and Ribbelink, supra note 28 at 96.

[40] Ibid. arts. 5, 6 and 7.

[41] LAIA Treaty, supra note 29 art. 7.

[42] It is through these agreements that the LAIA was able renegotiate concessions in over 10 600 products, the "historic patrimony", that were granted from 1960 to 1980 under the LAFTA, Ferrere, supra note 36 at 934.

[43] Carl, supra note 36 at 344. She further points out that under a 1971 GATT Article 1 waiver, concessions could now be granted to developing countries without extending those same privileges to all other GATT members. This waiver is found in GATT, Basic Instruments and Selected Documents, GATT Doc. L/3636, 18th Supp. B.I.S.D. (1972) 26.

[44] LAIA Treaty, supra note 29 art. 44. However, the most favoured nation clause of the treaty requires that the member states do extend any concessions to other members for agreements made outside of the LAIA Treaty or the Cartagena Agreement that formed the Andean Group which in effect means with developed states. Also note the similarity of this policy with that of the Bello Clause common in trade agreements entered into by Chile the last century, see F. Orrego-Vicuña, "Estudio sobre la claúsula Bello y la crisis de la solidaridad latinoamericana en el siglo XIX" in F. Orrego-Vicuña, ed., America Latina Y La Clausula De La Nacion Mas Favorecida, (Santiago, Chile: Ediciones Paulinas, 1972) at 33.

[45] LAIA Treaty, supra note 29 art. 8.

reach reached by the other members of the LAIA. Through the principal of convergence, the individual members negotiate these specific accords from which the LAIA tries to link into wider pacts.[47] Under the LAIA Treaty, the principle is explained in the following manner:

> Article 3. In applying this Treaty, and in evolving toward its final objective, the member countries shall be mindful of the following principles:
>
> b) Convergence, understood as the progressive multilateralization of agreements of partial scope through periodic negotiations among the member countries, as a function of establishing the Latin American common market[48]

It is through this principle by which balkanization does not occur among the member States and extension to other member States occurs.[49] It is not enough to put in place a generous convergence provision if at the same time prohibitive measures are put in place that impede the other members of the LAIA from joining.[50]

Of the different types of accords of partial scope, the most important are the accords of economic complementation.[51] The objective of these agreements are to "promote the maximum utilization of factors of production, stimulate economic complementation, assure equitable conditions of competition, facilitate the export of the products to the international market, and promote the balanced and harmonious development of the member countries."[52] It is under this framework in which the MERCOSUR and the bilateral agreements, such as those concluded between Chile and

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[46] Ibid. art. 9 and see de Aguinas, supra note 17 at 621.

[47] O'Hop, supra note 15 at 134.

[48] LAIA Treaty, supra note 29 art. 3(b).

[49] Carl, supra note 36 at 345.

[50] It is for this reason the Treaty of Asunción, which created the MERCOSUR, had to be modified when it was presented to the Committee of Representatives, which is in charge of examining the compatibility of partial agreements under the LAIA, for review, de Aguinas, supra note 17 at 621. Article 20 of the Treaty of Asunción, 26 March 1991, (1991) 30 I.L.M. 1041, stated that a request to join the MERCOSUR would be reviewed by the parties after it had been in effect for five years, but allowed member states that were not a party to a subregional bloc to be considered for membership before the referenced timeframe, i.e. Chile. However, once the treaty was incorporated under the LAIA framework as Acuerdo de Complementación Económico No. 18 (ACE No.18), the waiting period was eliminated under article 15.

[51] "Commercial" agreements "are exclusively intended to promote trade among the member countries," LAIA Treaty, supra note 29 art. 10. It appears that these agreements are relevant for regional integration, but concession reached under these agreements are to be automatically extended to the least developed countries in the region, Council of Ministers supra note 38 on Resolution Number 2 article 6. Therefore an economic complementation agreement is the most used mechanism to reach either a free trade deal or customs union.

[52] LAIA Treaty, supra note 29 art. 11.

most of the LAIA members are negotiated.[53] In this regard, its importance is not to be understated.

i. Institutions

Institutionally, there are three decision making bodies, the Council of Ministers, the Conference of Evaluation and Convergence and the Committee of Representatives[54] as well as a technical organ, the Secretariat.[55] Each body renders decisions by two-thirds majority vote, however vital decisions, such as amendments to the LAIA Treaty or the approval of new members into the agreement, will only be passed so long as there no negative vote.[56]

The Council of Ministers (Council), which is made up of the foreign ministers from the member countries, is vested with broad supervisory powers.[57] It is the highest body of the LAIA and it issues general norms that are binding on the other organs of the LAIA Treaty in order to guide better the integration process.[58] It also reviews applications of new members into the LAIA as well it decides on any modifications to the agreement.[59] Meetings are periodically held, but they must be first convoked by the Committee of Representatives.[60]

The powers to encourage and supervise trade negotiations vests with in Conference of Evaluation

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[53] See Acuerdo de Complementación Económica entre Gobierno de la República de Chile y el Gobierno de los Estados Unidos Mexicanos (ACE No. 17), entered into force 1 January 1992, online: Foreign Trade Information System <http://www.sice.oas.org/trade/chimex/chmexind.stm> (date accessed: 15 November 1999) [hereinafter ACE No. 17]; Acuerdo de Complementación Económica para el Establecimiento de un Espacio Económico Ampliado Entre Chile y Venezuela (ACE No. 23), entered into force 1 January 1993, online: Foreign Trade Information System <http://www.sice.oas.org/trade/chventoc.stm> (date accessed :15 November 1999) [hereinafter ACE No. 23]; Acuerdo de Complementación Económica para el Establecimiento de un Espacio Económico Ampliado Entre Chile y Colombia (ACE No. 24), entered into force 1 January 1994, online: Foreign Trade Information System <http://www.sice.oas.org/trade/chcol_s/chcoltoc.asp> (date accessed: 15 November 1999) [hereinafter ACE No. 24]; and Acuerdo de Complementación Económica para el Establecimiento de un Espacio Económico Ampliado entre Chile y Ecuador (ACE No. 32), entered into force 1 January 1995, online: Foreign Trade Information System <http://www.sice.oas.org/trade/checl.stm> (date accessed: 15 November 1999) [hereinafter ACE No. 32].

[54] LAIA Treaty, supra note 29 art. 28.

[55] Ibid. art. 29. See H. Grigera Naón, "Latin American Integration Association" in R. Bernhardt, ed., Encyclopedia of Public International Law, vol. 6 (Amsterdam: Noth-Holland, 1983) at 248.

[56] LAIA Treaty, supra note 29 art. 43. See Grigera Naón, supra note 55 at 249.

[57] Ibid. art. 30.

[58] Ekmekdjian, supra note 39 at 135 and Grigera Naón, supra note 55 at 248.

[59] Ekmekdjian, ibid.

[60] Ibid.

and Convergence which meets every three years.[61] This organ, made up plenipotentiaries from member countries, meets every three years and is convoked by the Committee of Representatives.[62] Additional responsibilities are the analysis, promotion, extension and deepening of the integration process.[63]

The Committee of Representatives (Committee) provides supervision of the organization, examines the compatibility of the partial agreements, and is the dispute settlement body of the Association.[64] Unlike the other decision making bodies, the Committee, which is made up of a representative of each member state, is the permanent body of the LAIA.[65]

The Secretariat is responsible for the administrative, technical and representative functions of the LAIA.[66] The head of the Secretariat, the Secretary General, is independent form any member state and is elected for a period of three years.

Although under the framework of the LAFTA there were some regional norms that were automatically incorporated into the national legal orders without requiring an act of transformation, this is not the case under the LAIA framework.[67] The LAIA Treaty does not provide for direct and immediate application of the norms reached by the different decision making organs, nor does the principle of supremacy apply, as is the case of the European Community.[68]

ii. Dispute Settlement

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[61] LAIA Treaty, supra note 29 art. 33.
[62] Grigera Naón, supra note 55 at 249.
[63] Ibid.
[64] Ibid. art. 35. Also, see O'Hop, supra note 15 at 134-135.
[65] Ekmekdjian, supra note 39 at 136.
[66] Grigera Naón, supra note 55 at 249.
[67] F. Orrego-Vicuña, "Economic Integration in Latin America: A Comparative Interlude" in E. Stein, P. Hay & M. Waelbroeck, European Community Law and Institutions in Perspective (New York: Bobbs-Merrill, 1976) at 471 [hereinafter "Economic Integration in Latin America"].

The LAIA Treaty has not developed a general mechanism from which to resolve disputes among member States as to the interpretation or application of the norms in the LAIA legal regime.[69] However, there were two ways in which grievances between member States could be resolved as to the application of the agreement. Under Article 35(m), the Committee was responsible to "propose formulas for resolving matters presented by the member countries, when it is alleged that some of the norms or principles of this Treaty are not being observed." Additionally, article 38(l) provided that the Secretariat "analyze at its own initiative, for all the countries, or at the request of the Committee, the fulfillment of the commitments agreed upon, and evaluate the legal provisions of the member countries which directly or indirectly alter the concessions adopted." This provision allowed the Secretariat to review the provisions of the domestic law of the member States as to how it could affect their obligations under the LAIA regime.[70] This did not, however, signify that the Secretariat could propose solutions or edict decisions to rectify any disparities in domestic law of the member States and their international obligations.[71]

For many years, these were the only provisions that dealt with the issue of dispute settlement. This changed with the adoption by the Committee of Resolution 114[72] that creates the process for dispute resolution under Article 35(m) of the LAIA Treaty. Under this Resolution, there are essentially two steps taken in order to resolve a dispute between member States, consultation and mediation. The first calls for consultations to take place between the disputants whereby the complaining party puts forward the reasons it believes that a particular member state has not

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[68] Ekmekdjian, supra note 39 at 138. For the experience of the European Community in direct effect and supremacy of European Community Law, see Case 26/62, Van Gend & Loos v. Nederlandse administratie der belastingen, [1963] E.C.R. 1 and Case 6/64, Costa v. Ente Nazionale per L'Energia Elettrica (ENEL) [1964] E.C.R. 585.

[69] A. Zelada Castedo, "Regimenes Sobre Solucion de Controversias en el Ambito de la Asociación Latinoamericana de Integración" in OAS, Comité Juridico Interamericano, Dimensión Jurídica de la Integración: Estudios de los Métodos de Solución de Controversias en los Esquemas Regionales y Subregionales de Integración o Libre Comercio en el Hemisferio, (on file with the author), 118 at 119 [hereinafter Dimensión Jurídica].

[70] R. Bloch & D. Iglesias, Solución de Controversias en el MERCOSUR (Buenos Aires: Ad Hoc, 1995) at 32.

[71] Ibid.

[72] Ibid. at 33 and Zelada Castedo, supra note 69 at 125.

complied with or has taken steps in contrast to its obligations under the LAIA regime.[73] The consultations should take place within five days of the complaining party's submission and take no longer than ten days. If at the end of this process a satisfactory solution has not been reached, then at the request of the parties involved, the second step begins whereby the Committee intervenes and acts as a mediator. The Committee is then obligated to propose to the parties any arrangement it feels will be most satisfactory for the parties involved within fifteen days of being requested to do so.[74] However, it appears that the proposal of the Committee is not binding on the parties.[75]

Additionally, there is a separate dispute settlement system for any controversies that may arise in the application of the most favoured nation (MFN) principle found under article 44 of the LAIA Treaty. This provision reads:

> Article 44. The advantages, favors, rights, immunities and privileges which the member countries apply to products originating in or being sent to any other country, whether or not a member, in accordance with decisions or agreements which are not contemplated in this Treaty or the Cartagena Agreement shall immediately and unconditionally be extended to the other member countries.

Under the Interpretative Protocol to Article 44 of the Treaty of Montevideo (Interpretative Protocol), any of the member States, after complying with certain requirement, may ask that the MFN provision be suspended from any advantages or preferences granted under another treaty to a third party.[76] Once a request is made, the member State asking for this suspension must commit to negotiations with any other member State that requests this. There are three purposes for these negotiations: (1) they must assure that the concessions granted to the member State is maintained at a level no less favourable than what was granted before the agreement with the third party; (2)

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[73] Zelada Castedo, supra note 69 at 126. An action may be brought if a complaining party feels that a member state has not complied with its obligations under the LAIA Treaty, agreements concluded between the member states and the resolutions reached by the organs of the LAIA.
[74] Ibid. at 127.
[75] Ibid. at 127.
[76] Ibid. at 128.

extend the MFN concession to third parties on non tariff barrier matters to those member States who would have complied with the obligation to eliminate these type of barriers under the LAIA framework; and (3) adopt particular rules of origin in case that the rules of origin in the agreement with the third party provide for more favourable treatment than those under the LAIA Treaty.[77] The objective is to assure that the member States receive sufficient compensation for the loss in trade by virtue of the preferences granted to the third party.[78] The Committee will grant a 'definite' suspension for a period of five years, renewable for another period of no longer than five years, so long as no member State seeks negotiations. If a member State does request it, the suspension will be 'conditional.'[79]

It was contemplated that disputes may arise during these negotiations, particularly over the proper compensation to be given to a member State for any harm derived from the advantages granted to a third party. As a consequence, the Council adopted Resolution 44(I-E), which is a dispute settlement system for any controversies that may arise in the application of the Interpretative Protocol. There are two steps taken in this process, direct negotiations and submission to a Special Group. If negotiations do not settle the matter, the Committee is responsible to designate, in consultations with the member States involved, a Special Group. This Group is to be made up of three members selected from a list submitted by the member States and is to solely look at the proper compensation to be given for any harm that may arise from the preferential treatment given to a third party.[80] No national of the member States involved in the dispute may be a member. The Group is to examine the positions of the member States involved, evaluate if sufficient compensation has been offered and if it concludes it is not, determine, in its judgment, what is.[81] The Group, before issuing its final decision is to initiate a conciliation process in order to propose a compromise. If this process is rejected, then the Group is to continue with its

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[77] Ibid. at 128-129.
[78] Ibid.
[79] Ibid. at 129.
[80] Ibid. The Special Group may also be composed of five members if the member States involved so agree.

functions until it adopts its final decision.[82] This decision is described as being 'definitive' on the member States involved in the dispute. At the same time, it serves as a base from which the Committee may pronounce on the request for the suspension of article 44.[83]

iii. Concluding Remarks

The LAIA regime has come under heavy criticism for its approach to regional integration.[84] For one, despite efforts to make the LAIA a system that is more flexible and less ambitious than the LAFTA, the fact that the norms reached by the bodies of the agreement are not directly applicable and that there is no permanent dispute settlement body have led some to believe that this has caused the failure of the LAIA to achieving its objectives.[85] Furthermore, there are problems in that the importance of the subregional accords, negotiated as agreements of partial scope, seems to encourage disintegration rather than promoting regional integration.[86] Despite these difficulties, the LAIA is still important in regards to regional integration. First, the principle of convergence in the agreements reached under the LAIA regime provides a forum for possible expansion into a region wide agreement for the expansion of a FTAA. Secondly, it has been suggested that the LAIA provides a forum from which these agreements may be made without having to endure the scrutiny of the General Agreement of Tariff and Trade (GATT) system.[87] However, the fact that a region wide free agreement has not been achieved under this system seems to indicate the weakness of the LAIA in promoting this objective.

iv. Bilateral Accords Reached by Chile

At this point, it will be useful to see how the bilateral subregional accords, concluded as

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[81] Ibid. at 130.

[82] Ibid. Any decision adopted should take into account the provisions of the LAIA Treaty, the agreements reached within the LAIA framework, in particular Interpretative Protocol of Article 44 and the agreements and decisions adopted by the political bodies of the LAIA, ibid. at 131.

[83] Ibid. at 131.

[84] G. Magariños, "Evolución de la Integración en el Marco de la ALADI" (1991) 185 Integración Latinoamericana 3 at 3.

[85] Ekmekdjian, supra note 39 at 139.

[86] Magariños, supra note 84 at 3.

agreements of partial scope under the LAIA, have addressed the problems of institutions and dispute settlement. The focus will be on Chile's practice because not only has it negotiated free trade agreements with almost all the countries in the region, but it also has concluded a free trade agreement with the MERCOSUR and Canada, although these last two agreement will be looked at when the MERCOSUR and the NAFTA are analyzed. Because the free trade agreements that Chile has reached bear remarkable similarity, perhaps due to the fact that they are done under the auspices of the LAIA, they will be discussed here in general terms, although differences will be noted.

The first point to note is that the objectives of these agreements are virtually identical. They all want to establish a free trade area, intensify economic and commercial relations, coordinate and complement their economic activities and stimulate investment.[88] These objectives are much more ambitious than that has typified these types of agreements in the past.[89]

Institutionally, they are much more limited than that of the LAIA, however their responsibilities are very wide in scope. These agreements provide for the creation of an Administrative Commission that is usually made up of the Minister for Foreign Affairs although the agreement with Mexico makes no mention of the makeup of this group.[90] The typical powers of this body are to evaluate and oversee the implementation of the provisions of the agreement, recommend to the member States any modifications to the agreement, propose recommendations to resolve disputes that may arise in the interpretation and application of the agreement, name the mediators and arbitrators for dispute settlement, and to periodically supply a report to the member States on the operation of the agreement and recommend how its objectives may be better achieved. Moreover, each State has to establish a national body that will act as national secretariat for each

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[87] See T. O'Keefe, "An Analysis of the Mercosur Economic Integration Project from a Legal Perspective" (1994) 28 Int'l Lawyer 439 at 445.

[88] See ACE No. 17, supra note 53 art. 1, ACE No. 23, supra note 53 art. 1, ACE No. 24, supra note 53 art. 1 and ACE No. 32, supra note 53 art. 1.

[89] Zelada Castedo, supra note 69 at 132.

agreement. Its functions are to be determined by the Administrative Commission.[91]

Dispute settlement is strikingly similar in each accord. In each case, if a problem arises as to the application, interpretation or non execution of the agreement, the first step to be taken are direct negotiations or consultations between the member States by making a written submission to the national secretariat for that particular agreement. If this fails, either member State may ask that the Administrative Commission to mediate. If there is no resolution, then arbitral proceedings may be initiated by either party.[92] Each step must be taken in order for the next one to occur.

These agreements attest to the simple structures that a typical free trade agreement entails. There are no supranational authorities, nor do they have international legal personality to speak of. Because of their limited nature, even more pronounced than the LAIA, these agreements represent the ideal bilateral agreement whereby shared institutions and effective dispute settlement are not emphasized in favour of compromise to keep friendly relations in place and therefore keep the accords in force. It is significant that despite the principle of convergence in these agreements, as required by the LAIA, these accords have not expanded beyond the parties involved. Even more telling in this regard is the fact that these accords are virtually identical, yet the States involved have pursued individual bilateral deals rather than accede to an existing agreement.

2. The NAFTA[93]

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[90] ACE No. 17, supra note 53 art. 34.

[91] See ACE No. 17, supra note 53 art. 34, ACE No. 23, supra note 53 art. 33 ACE No. 24, supra note 53 art. 33 and ACE No. 32, supra note 53 art. 33.

[92] See ACE No. 17, supra note 53 art. 33; ACE No. 23, supra note 53 art. 31; ACE No. 24, supra note 53 art. 32 and ACE No. 32, supra note 53 art. 32. Also see Zelada Castedo, supra note 69 at 133.

NAFTA, which took effect January 1, 1994, is a wide ranging free trade agreement. It is comprised of Mexico, Canada and the United States. As a trading bloc, its population is 360 million and the combined Gross Domestic Product makes up one third of the world total.[94] NAFTA covers a wide range of areas: trade in goods including tariffs, non-tariff barriers, trade-related investment measures; trade in services; and intellectual property rights. It is grounded on the principles of most favoured nation, national treatment, transparency and multilateral dispute settlement.[95] The agreement was not designed to coordinate the activities of the Parties and not to make decisions on their behalf, nor was it designed to promote social and political integration, but rather it is a means of promoting economic growth in the member States.[96] Moreover, it does not have an international legal personality. Therefore, it does not have the power to enter into treaties or otherwise contract in its own name.[97] However, the NAFTA is unique from previous free trade agreements, as exemplified by the following passage from Professor de Aguinas:

> The NAFTA establishes a free trade zone in a legal framework that exceeds the classical theory of regional integration. The NAFTA creates a free trade zone with all its implications, fundamentally a system of origin and technical trade barriers. But in addition, it contains themes that go beyond what which is conventionally understood as a free trade zone: the circulation of products by frontiers with zero tariff and the elimination of non tariff restrictions. In effect, it incorporates a very complete system for intrazonal investment, regulates the provisional entry of business people, the national treatment of buying in the public sector, the cooperation and coordination of policies in the areas of competition, monopolies and State businesses, dispute resolution in the area of antidumping and compensation quotas, cultural industries, and even provides a code of conduct for the members of panels and committees that intervene in dispute resolution. All this regulation gives the NAFTA Treaty a complexity that significantly exceeds the traditional notions of free trade zone.[98]

1. Institutions

Despite the wide breadth of the NAFTA, there are very limited institutional provisions.[99] They are intergovernmental in nature and lack any supranational characteristics and have been described

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[93] North American Free Trade Agreement, 17 December 1992, (1993) 32 I.L.M. 289, 605 (Canada, United States of America, Mexico) [hereinafter NAFTA].
[94] D. Gilmore, "Expanding NAFTA to Include All of the Western Hemisphere: Making Chile the Next Member" 3 D.C.L. J. Int'l L. & Prac. 413.
[95] See de Aguinas, supra note 17 at 632.
[96] Law and Policy of Regional Integration, supra note 17 at 23.
[97] Ibid. at 30.
[98] de Aguinas, supra note 17 at 633.
[99] Fitzpatrick, supra note 22 at 38.

as being "intergovernmental administrative organizations rather than international or supranational bodies."[100] This is a reflection of the member States' intention of preserving their individual sovereignty.[101] The principal institutions of the NAFTA are made up of the Free Trade Commission (Commission) and the Secretariat.[102]

The function of the Commission, which is composed of cabinet level representatives of the Parties, are supervisory. It oversees the implementation of the agreement as well as the committees and working groups established by the agreement.[103] Moreover, it has the power to assist in dispute resolution,[104] to negotiate the accession of a third state to the agreement[105] as well as consider any other matter that may affect the operation of the agreement.[106] It meets once a year and any decision made is by consensus unless as otherwise agreed.[107] It does not issue legislative rules binding on the member States and there is no provisions for a common external policy.[108] Additionally, it may be called upon to give an opinion on the proper interpretation of the application of the NAFTA when the issue arises in the domestic courts or administrative bodies of the Contracting Parties.[109] Either the Contracting Party asks for the opinion from its own initiative or it is requested from the courts or administrative body that has taken up the issue. The opinion

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[100] Ibid. at 40.

[101] L. Del Duca, "Teachings of the European Community Experience for Developing Regional Organizations" (1993) 11 Dick. J. Int'l L. 485 at 542.

[102] NAFTA, supra note 93 arts. 2001 and 2002.

[103] Ibid. art. 2001(2). The committees and working groups are listed on Annex 2001.2. They have been established throughout the agreement in order to facilitate its implementation. The Committees consist of, inter alia, the Committee on Trade in Goods, the Committee on Trade in Worn Clothing, the Committee on Agricultural Trade, the Committee on Sanitary and Phytosanitary Measures, the Committee on Standards-Related Measures, the Committee on Small Business, the Financial Services Committee and the Advisory Committee on Private Commercial Disputes. The Working Groups consist of, inter alia, the Working Group on Rules of Origin, the Working Group on Agricultural Subsidies, the Bilateral Working Group (Mexico United States), the Bilateral Working Group (Canada Mexico), the Working Group on Trade and Competition and the Temporary Entry Working Group. It is also expected that these working groups and committees will take an important role in dispute settlement as the consultations that take place within them substitute for formal consultation under Article 2007, see A.L.C. de Mestral and J. Winter, "Dispute Settlement Under the North American Free Trade Agreement and the Treaty of European Union" (1994) 17 J. Eur. Integration 234 at 244.

[104] Ibid.

[105] Ibid. art. 2204.

[106] Ibid. art. 2001(2)(e).

[107] Ibid. art. 2001(4).

[108] F. Abbott, "Remarks: International Institutions and Economic Integration" (1996) 90 Proc. ASIL 508 at 509.

[109] NAFTA, supra note 93 art. 2020.

of the Commission will be submitted to the administrative body or court, but if the Commission cannot agree on the proper interpretation or application, the Contracting Party may submit its own views.[110]

The Secretariat, which the Commission establishes and oversees, is an administrative body which provides assistance to the Commission. It also provides administrative assistance to the dispute settlement panels under Chapter 19 and 20 of the agreement, as well as the committees and working groups.[111] It is divided into national sections with each member State virtually responsible for all aspects of its section's operations.[112]

Mention should be made of the North American Trade Secretariat. This was created in January of 1994 in a subsequent agreement to the NAFTA. Seeing as Canada was selected to be home to the NAFTA Environmental Secretariat and the United States was selected to be home to the NAFTA Labour Secretariat, the parties agreed that it was important for Mexico to have NAFTA Secretariat as well.[113] Its precise role has not yet been delineated, but it is envisioned to be a mechanism by which to coordinate the work of the national sections of the NAFTA Secretariat, to produce and translate official NAFTA documents, to archive records of all the NAFTA working groups and decisions reached by the Commission and to supervise the dispute settlement processes.[114]

It should be noted that the NAFTA does not confer any rights to individuals to bring the Parties to court in order to force them to comply with the provisions of the treaty. Article 2021 specifically prohibits these types of actions. Moreover, the NAFTA is not self-executing in either Canada or the United States and therefore the provisions are not directly applicable within their domestic legal

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[110] Ibid.
[111] NAFTA, supra note 93 art. 2002.
[112] Ibid. See also Fitzpatrick, supra note 22 at 40.
[113] J. Ernesto Grijalva & P. Brewer, "The Administrative Bodies of the North American Free Trade Agreement" (1994) 2 San Diego Justice J. 1 at 4.
[114] Ibid. and Fitzpatrick, supra note 22 at 41.

systems.[115]

ii. Dispute Settlement

As mentioned earlier, the Commission is responsible for resolving disputes that arise as to the application and interpretation of the NAFTA or examine if an actual or proposed measure by a member State would be inconsistent to the NAFTA or cause nullification or impairment.[116] Chapter 20 establishes a three-step dispute settlement system in order to come to an amicable agreement: (1) consultations; (2) if this fails, good offices, conciliation and mediation by the Commission; and (3) as a last resort, arbitration.[117] However, the Contracting Parties have the option to pursue any matter covered by the NAFTA and the GATT under either dispute settlement process.[118] Once a process is initiated under one of these dispute settlement systems, it may not pursue the matter in the other.[119]

The underlying principle for settlement of disputes is to cooperate and consult in order to come to a mutually satisfactory resolution.[120] The consultation process begins by a Contracting Party request in writing for consultations with another member State regarding any measure, actual or proposed, that it thinks will affect the operation of the NAFTA. The other member State may participate in the process by delivering a written notice to the Parties involved and its section of the Secretariat if it considers it has a substantial interest in the matter. All participating Parties involved are to make every attempt to arrive at a mutually satisfactory solution by providing

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[115] In Mexico, this is not the case. Under their Constitution, international treaties are self-executing and are to be considered as law. For a discussion of the problems this has posed for Chapter 19 actions on antidumping and countervailing duties see J.C. Thomas & S. López Ayllón, "NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area" (1995) 35 Can. Y.B. Int'l L. 75.

[116] NAFTA, supra note 93 art. 2004. Although there are other dispute settlement mechanisms in the NAFTA, most notably those found for investment disputes under Chapter 11 and for financial services under Chapter 14, only the dispute settlement provisions found under Chapters 19 and 20 will be examined for the purpose of this paper.

[117] See J.L. Siqueiros, "NAFTA Institutional Arrangements and Dispute Settlement Procedures" (1993) 23 Calif. W. Int'l L.J. 383 at 387 and J. Bialos and D. Siegel, (1993) "Dispute Resolution Under the NAFTA: The Newer and Improved Model" 27 Int'l Lawyer 603 at 615.

[118] Ibid. art. 2005(1). With the establishment of the World Trade Organization, the process would now be pursued under the dispute settlement system found therein.

[119] Ibid. art. 2005(6).

[120] NAFTA, supra note 93 art. 2003.

sufficient information so that a proper analysis of the measure can be made and any solution may not adversely affect the interests of the Contracting Party not involved in the dispute.[121]

If this process fails within thirty days of the request for consultations, or 45 days if the other member State participated, the disputants may then request in writing a meeting of the Commission.[122] The Commission is to meet within ten days of this request. To resolve the dispute promptly, it may call on technical advisors, create working groups or expert groups, have recourse to good offices, conciliation, mediation or any other dispute resolution procedure and make recommendations.[123]

If 30 days have passed and the intervention of the Commission has not resulted in a satisfactory solution, the matter may then be brought to an arbitral panel.[124] This panel is to be established by the Commission. If the member State not involved in the dispute wants to participate in the proceedings, it must deliver in writing to its section of the Secretariat and the parties involved within seven days after the request for arbitration.[125] The arbitration panel is to be made up of five members selected from a trilateral roster of 30 individuals of legal, trade or other experts. These roster members are to not take any instructions from any of the parties involved and are to comply with a code of conduct established by the Commission.[126] A panel chairman is to be selected within fifteen days of the delivery of the request for arbitration, and once selected, the parties have a further fifteen days to choose two panelists who are citizens of the other disputing party. If the dispute involved more than two parties, then the complaining parties are to select two panelists who are citizens of the defendant party, while the defendant party selects one citizen

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[121] Ibid. art. 2006.
[122] Ibid. art. 2007(1).
[123] Ibid. arts. 2007(4) and 2007(5).
[124] Ibid. art. 2008(1).
[125] Ibid. art. 2008(3).
[126] Ibid. art. 2009.

from each complainant party.[127] The arbitration panel is to conduct itself by the Model Rules of Procedure established by the Commission, which at a minimum guarantee a hearing as well as provide for initial and rebuttal written submissions.[128] Moreover, the panel or either of the disputing parties may seek further information and technical advice from experts it deems appropriate or from scientific review boards on any scientific matter raised during the proceedings.[129] Within ninety days of the selection of the last panelist, the panel is to present an initial report containing its finding of facts, its determinations on the validity of the measure and recommendations for the resolution of the dispute. From this, a party may make written submissions to the report within fourteen days of the presentation of the report. The panel will then consider these submissions and then, either on its own initiative or request from one of the parties, request the views of any participating party, reconsider its report or make any further examinations it deems appropriate. Within thirty days of the presentation of the initial report, the panel is to submit its final report, including dissenting opinions.[130] The disputing parties are to conform to the determinations and recommendations of the panel and reach an agreement upon the resolution of the dispute, preferably the non-implementation of the impugned measure. If a resolution is not possible, the noncomplying party may redress the other party with the payment of compensation. If within thirty days of the final report an agreement has still not been reached, then benefits of equivalent effect under the NAFTA may be suspended until the matter is settled.[131] It is important to note that there is no obligation by the parties to abide by the reports of the arbitral panel. These reports are not formal, binding decision, and have no legal effect in the Contracting Parties, but are rather recommendations made to the Commission.[132] This system tries to avoid the danger of undermining the legitimacy of the agreement by forcing one of the member

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[127] Ibid. art. 2011.
[128] Ibid. art. 2012.
[129] Ibid. arts. 2014 and 2015.
[130] Ibid. arts. 2016 and 2017.
[131] Ibid. art. 2018.
[132] A.L.C. de Mestral and J. Winter, supra note 103 at 249.

States to accept the decision wholesale.[133]

A separate dispute settlement mechanism is established for antidumping and countervailing duty (AD/CVD) matters under Chapter 19 of the NAFTA. One of the key Canadian negotiating objectives under the Canada-U.S. Free Trade Agreement was the elimination of the application of AD/CVD laws on each other's goods.[134] It believed that the United States trade remedy laws had become complainants driven, highly politicized and expensive method of harassing Canadian exporters.[135] They were unable to agree to any changes to their trade remedy laws, but did agree to replace judicial review for final determinations on AD/CVD laws with a binational panel review.[136] It is this system that has been incorporated virtually wholesale into the NAFTA.[137]

The Annex to Chapter 19 provides the procedure for the establishment of this panel.[138] The Contracting Parties are to prepare a roster of 75 candidates to serve as panelists twenty five from Canada, twenty five from the United States and twenty five from Mexico. These candidates are to be of good character, high standing and repute and chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. These candidates were not be affiliated with any of the Contracting Parties, nor take any instructions from them. Any panel that is established must have as a majority lawyers in good standing. Within 30 days of a request for a panel, the Contracting Parties must appoint two panelists from the roster and within 55 days, it must choose the fifth panelist and a chairman is to be appointed among the lawyers.[139]

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[133] D. Huntington, "Settling Disputes under the North American Free Trade Agreement" (1993) 34 Harv. Int'l L.J. 407 at 428.
[134] Canada-U.S. Free Trade Agreement, 22 December 1987, (1988) 27 I.L.M. 281.
[135] Thomas & López Ayllón, supra note 115 at 82.
[136] Ibid. at 82-83.
[137] The only real difference is that while both the Canadian-U.S. Free Trade Agreement and the NAFTA require that this system be replaced, there is no specific time frame in the latter for this substitution to occur.
[138] NAFTA, supra note 93 annex 1901.2.
[139] Ibid. annex 1901.2(1) to 1901.2(5).

There are two forms of actions before this panel: (1) a Contracting Party may ask for a declaratory opinion be issued as to whether an amendment to another Party's AD/CVD laws are in conformity with the NAFTA or GATT;[140] or (2) it may ask the panel to examine whether the final AD/CVD determination of a Party's investigating authority is in accordance with the laws of that Party.[141]

If a panel issues a declaratory opinion finding that the amendments to the AD/CVD laws need to be modified, a 90 day consultation period begins whereby the two parties seek to achieve a mutually satisfactory solution such as corrective legislation. If within nine months form the end of the 90 day period the Party has still not enacted corrective legislation and no other mutually satisfactory solution is reached, the Party that requested the panel may retaliate by enacting comparable executive or legislative action or withdraw from the NAFTA vis-à-vis the infringing Party.[142]

As stated earlier, a binational panel may be convened to review the final determinations of AD/CVD matters. The request for the panel is to be made in writing to the other Party within 30 days following the publication of the final determination in the official journal of the importing Party, or, if there is no official journal, within 30 days of being notified of the determination. A decision must be rendered within 315 days of the initial request for review.[143] These decisions are to be written, made by majority vote and include dissenting or concurring opinions. The panel is apply the same standard of review as the reviewing courts of the Contracting Party whose determination is being challenged and it should conduct the proceedings in conformity with judicial rules of appellate procedure.[144] Their findings are binding on the Parties, however only with respect to the particular matter and only to the Parties involved.[145] Therefore, these decisions are not to be

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[140] Ibid. arts. 1902-1903.

[141] Ibid. art. 1904(2).

[142] Ibid. art. 1904(3). See also, H. Grigera Naón, "Sovereignty and Regionalism" (1996) 27 Law & Pol'y Int'l Bus. 1073 at 1157 [hereinafter "Sovereignty and Regionalism").

[143] Ibid. art. 1904(14).

[144] Ibid. arts. 1904(3), 1904(5) and 1904(14).

[145] Ibid. art. 1904(9). Some doctrinal writers have gone so far as to say that the decision is 'directly applicable' in the domestic law of the Parties involved, see K. Oelstrom, "A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA" (1994) 25 Law & Pol'y Int'l Bus. 783 at 791.

accorded any precedential value under national or binational law nor are they to be accorded the same status in domestic law as the decisions of their national courts.[146] An extraordinary appeal is allowed but in only in three cases: (1) where a panel member violated the rules of conduct such as being guilty of gross misconduct, bias or a serious conflict of interest; (2) the panel violated a fundamental rule or procedure; or (3) it manifestly exceeded its powers, authority or jurisdiction.[147] Furthermore, the challenging Party must demonstrate that the panel's actions affected its decisions and threatens the integrity of the binational process.[148] This three member extraordinary challenge committee is to be made up of judges or former judges selected from a 15 person roster. Each Party names one person to the committee while the third is selected by lot. They are to examine the legal and factual analysis underlying the findings and conclusions of the panel decision. If it is found that the allegation has merit, the committee may vacate the original panel decision and have a new panel established, or remands it back to them for action not inconsistent with its decision. A decision is to be provided within 90 days of its establishment and it shall be binding on the Parties with respect to the matter brought before it. This process is not meant to be an appellate body as the committee's scope of review is so limited, most panel decisions will never be reviewed.[149]

The binational panel has been described as sui generis.[150] For one, it provides individuals with a right to access to the binational panel proceedings.[151] The process is not triggered by governmental decision, but by a complaint by one of the private parties who exercise the same rights to judicial review as what they would enjoy before their domestic appellate tribunal.[152] Moreover, the Contracting Parties must comply with the request of individuals for access to the

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[146] Huntington, supra note 133 at 435 and Thomas & López Ayllón, supra note 115 at 88.
[147] Ibid. art. 1904(13). See Law and Policy of Integration, supra note 17 at 101-102.
[148] Ibid.
[149] Fitzpatrick, supra note 22 at 85 and R. Burke & B. Walsh, "NAFTA Binational Panel Review: Should it be Continued, Eliminated or Substantially Changed?" (1995) 20 Brook. J. Int'l L. 529 at 540 where they cite an extraordinary challenge committee opinion.
[150] Thomas & López Ayllón, supra note 115 at 84.
[151] NAFTA, supra note 93 art. 1904(5).
[152] de Mestral & Winter, supra note 103 at 247.

binational panel.[153] Secondly, it is essentially an international body reviewing and interpreting domestic law in place of a domestic court.[154] However, it should be kept in mind that what is being created is not a binational court, but rather an ad hoc tribunal. Once the panel had completed its work, it ceased to exist.[155] This is rather clear when one considers that the panelists act more like private arbitrators subject to compliance with a code of conduct and allowed to carry out remunerative work before, during and after panel proceedings.[156]

iii. Canada-Chile Free Trade Agreement[157]

This agreement is to be looked at because it represents Canada's efforts to expand free trade to the rest of the Western Hemisphere using the NAFTA as the model. The objective of the agreement with Canada is essentially a bridge for eventual accession into NAFTA. Its objectives are essentially the same, but it is much more limited in that it covers only trade in goods and services, investment and dispute settlement mechanisms.[158]

In the agreement reached with Canada, a Free Trade Commission and a Secretariat will be formed. These provisions are virtually identical to that of the NAFTA, thus its composition and functions are the same. The Commission will oversee the implementation of the Agreement, supervise the work of the committees and working groups established by the Agreement as well as assist in dispute resolution.[159] Just as with the NAFTA, it may also be called upon to give an opinion on the proper interpretation of the application of the Agreement when the issue arises in the domestic courts or administrative bodies of the Contracting Parties.[160] The Secretariat provides assistance

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[153] Huntington, supra note 133 at 431.
[154] Thomas & López Ayllón, supra note 115 at 84.
[155] Ibid. at 86.
[156] Ibid.
[157] Canada-Chile Free Trade Agreement, online: Department of Foreign Affairs and International Trade <http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/menu.asp> (date accessed: 15 November 1999) [hereinafter Canada-Chile Free Trade Agreement].
[158] Government of Canada, Department of Foreign Affairs and International Trade, New Release 211, "Canada and Chile Sign Free Trade Agreement" (18 November 1996) [hereinafter News Release of Canada Chile Agreement].
[159] Canada-Chile Free Trade Agreement, supra note 157 art. N-01.
[160] Ibid. art. N-19.

to the Commission, the committees and working groups as well as the dispute settlement panels established under Chapter N.[161]

The real novelty of the Agreement is in terms of dispute settlement. It follows the dispute settlement provisions of Chapter 20 of the NAFTA. The process from consultation, to the good offices, conciliation and mediation of the Commission to the establishment of the arbitral panel are identical.[162] Moreover, even in the implementations of the final report of an arbitral panel, its legal effect on the parties, and the recourse for non-implementation are the same.[163] What makes this agreement different is in terms of AD/CVD matters. Canada and Chile have agreed not to apply its domestic anti-dumping laws on their goods.[164] Seeing as Chile is a potential NAFTA Party, this exemption is consistent with the Canadian government's long-standing public commitment to minimizing and eventually eliminating the use of anti-dumping duties within NAFTA.[165] However, this exemption will be phased in over six years at the latest.[166] Consultations may take place for exceptional circumstances that may significantly divert trade.[167] Additionally, a Committee on Anti-Dumping and Countervailing Measures is established so that the Parties may consult on defining subsidy disciplines and eliminating the need for domestic countervailing duty measures, work together to improve trade remedy regimes in the WTO, and in the FTAA. It also serves to consult on Chile's accession to the NAFTA in regards of Chapter 19 of that agreement.[168] If disputes do arise, recourse can be made to the institutional dispute settlement system or under the WTO Agreement for AD/CVD matters not covered by this Chapter.[169]

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[161] Ibid. art. N-02.
[162] Ibid. arts. N-03 to N-14.
[163] Ibid. arts. N-15 to N-18.
[164] Ibid. art. M-01.
[165] News Release of Canada Chile Agreement, supra note 158.
[166] Canada-Chile Free Trade Agreement, supra note 157 art. M-03.
[167] Ibid. art. M-04.
[168] Ibid. art. M-05.

3. The Group of Three[170]

In 1992, Venezuela and Colombia were concerned of the abilities the smaller members of the then Andean Group to block and stall progress within that regional integration scheme.[171] As a result, they formed a free trade agreement within themselves, using the legal frameworks of the LAIA and the Andean Group.[172] From here, a three way free trade agreement was signed between Colombia, Venezuela and Mexico, the Group of Three (G-3), in 1994. The agreement is comprehensive and is modeled after the NAFTA, although it is concluded under the LAIA as an agreement of partial scope.[173] The agreement is not limited to the free circulation of goods, but also covers other areas such as investment, services, intellectual property and government procurement. It is hoped that the agreement could serve as a basis from which accession to the NAFTA is made possible.[174] Complications do arise in that Venezuela and Colombia are members of the Andean Group while Mexico is not. As a result, throughout the G-3 Treaty, provisions appear addressing the compatibility of the Andean Group with the G-3. In general terms, the Cartagena Agreement, which is the agreement that founded the Andean Group, regulates the relationship between Colombia and Venezuela, while the G-3 Treaty regulates their relationship with Mexico.[175] The G-3 Treaty has also been designed in order to facilitate accession of new members and for creating links with other economic organizations.[176]

i. Institutions

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[169] Ibid. art. M-07.

[170] Tratado de Libre Comercio entre los Estados Unidos Mexicanos, la República de Colombia y la República de Venezuela, online: Foreign Trade Information System <http://www.sice.oas.org/trade/go3/G3INDICE.stm> (date accessed: 15 November 1999) [hereinafter G-3 Treaty].

[171] K. Abbott & G. Bowman, "Economic Integration in the Americas: "A Work in Progress"" (1994) 14 Nw. J. Int'l L. & Bus. 493 at 503.

[172] Ibid. It has been pointed out that the frustration felt with the slow pace of progress in the Andean Group is similar to what was felt with the LAFTA, which was a catalyst for the formation of the Andean Group, see "Americas Agreement," supra note 17 at 73 footnote 44.

[173] L. Herrera Marcano, "La Solución de Controversias en el Tratado de Libre Comercio entre Colombia, Mexico y Venezuela (Grupo de los Tres)" in Dimensión Jurídica, supra note 69, 151 at 153.

[174] "Americas Agreement," supra note 17 at 74.

[175] Herrera Marcano, supra note 173 at 154.

Typical of the agreements of partial scope under the LAIA, the highest body of the G-3 is the Administrative Commission, which is to be made up of the foreign trade minister of each contracting party.[177] As well, each contracting party must create National Sections that are to support the Commission. Decisions reached by the Commission are to be made by consensus. As in the bilateral agreements reached by Chile, the Commission has the responsibility of overseeing the correct application and development of the agreement. It is also responsible for recommending to the contracting parties as to the necessary steps needed for the implementation of decisions made by the Commission, although they do not have the character of being directly applicable seeing as the obligations of the agreement rest with the contracting parties themselves.[178] However, since the agreement is based on the NAFTA, the G-3 Treaty does make provisions for the creation of committees and working groups that are to facilitate and aid in the agreement. As a result, the Commission is charged with supervising over these committees and working groups.[179]

Finally, just as with the NAFTA, the Commission may be called upon to give an opinion on the proper interpretation of the application of the G-3 Treaty when the issue arises in the domestic courts or administrative bodies of the Contracting Parties.[180] Either the Contracting Party asks for the opinion from its own initiative or it is requested from the courts or administrative body that has taken up the issue. However, there are no provisions indicating that the domestic courts or administrative bodies of the Contracting Parties must comply with the opinion.[181]

ii. Dispute Settlement

Chapter 19 of the G-3 Treaty regulates the dispute settlement between the contracting parties. One can see the influence of the NAFTA under these provisions, in that not only do they apply to

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[176] Abbott & Bowman, supra note 171 at 503.
[177] G-3 Treaty, supra note 170 art. 20-01(1).
[178] An Analytical Compendium of Western Hemisphere Trade Arrangements in Trade Unit, Organization of American States, Interim Report of the OAS Special Committee on Trade to the Western Hemisphere Trade Ministerial (Washington, D.C.: Organization of American States, 1995) 1 at 5 [hereinafter An Analytical Compendium].
[179] G-3 Treaty, supra note 170 at Annex 2 to art. 20-01.
[180] Ibid. art. 19-18.

disputes that arise as to the proper interpretation and application of the agreement, but also in cases where a contracting party alleges that a measure by another contracting party is or could nullify or impair rights granted in the agreement.[182] Additionally, just as in the NAFTA, a contracting party has the option of either bringing an action under the dispute settlement provisions of the G-3 Treaty or those of the GATT.[183] Once an action is taken in one of those forums, it is through that process that will be exclusively used. As well, there are provisions regarding disputes that may arise between Colombia and Venezuela. For issues which are covered by both the G-3 Treaty and the Cartagena Agreement, as well as for situations that are not directly related to obligations that arise within the agreement, these will be dealt with under the Andean Court of Justice, the Andean Group's dispute settlement forum. The G-3 Treaty applies between these contracting parties when it addresses an issue that is exclusively covered by the agreement, such as investment.[184] Disputes which involve Mexico are to be resolved through the provisions in the G-3 Treaty. Under these provisions, dispute settlement follows the typical process found under the bilateral agreements of partial scope formed under the LAIA. There are three steps to be taken: consultations, intervention by the Commission and finally arbitration.[185] Each step must be taken before the next is to begin.

A written request to the contracting party that has alleged to have taken measures that have or could affect the rights and obligations of another Contracting Party begins the process of consultations. The third Contracting Party that is not involved in the dispute may take part in these consultations if it feels it has a substantial interest in the outcome.[186] If within 45 days of the written request a satisfactory solution has not been reached, then either of the Contracting Parties may request in writing that the Commission intervene. The Commission at this point must

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[181] Herrera Marcano, supra note 173 at 157.
[182] G-3 Treaty, supra note 170 art. 19-02. Also see Herrera Marcano, supra note 173 at 153.
[183] Ibid. art. 19-03.
[184] Ibid. art. 19-04. Also see Herrera Marcano, supra note 173 at 153-154.
[185] Ibid. art. 19-05, 19-06 and 19-07.
[186] Ibid. art. 19-05(3).

meet within ten days from receiving the request.[187] In order to resolve the dispute in a satisfactory manner, the Commission may ask that a working group of experts be convened in order to advise on the matter, resort to a non-binding process for the settlement of the dispute, or make recommendations.[188] If after 45 days from the request for intervention by the Commission, the dispute is still not resolved, then either of the Parties involved may then ask for the matter to be brought to arbitration.[189] The Commission supplies a list of possible arbitrators who meet the requirements set out in the G-3 Treaty. Each Party to the dispute must select a president of the tribunal. If there is no agreement as to who should have this position, then a draw is held from the list maintained by the Commission. The President may not be a national of either Party involved. Obviously, if a dispute involved all three Contracting Parties, this signifies that the list may contain possible arbiters who are not nationals of either Party. After a President is chosen, then within fifteen days of this decision, each Party must select two arbiters who are nationals of the other Party involved.[190] It is up to the Commission to set up the procedural rules for the arbitration. At minimum, they must guarantee that a Party be heard before the tribunal in order to bring forward allegations and an opportunity to reply to them; and that any preliminary decisions and deliberations, such as written communications, are kept confidential.[191] Decisions reached by the tribunal are to be by majority vote.[192] Within 90 days of being formed, the tribunal will issue a preliminary decision. The Parties involved then have 14 days from which to present their views, from which the tribunal may reconsider their decision or take any further action.[193] A final decision is issued with 30 days of the preliminary decision. Unlike the NAFTA, this decision is final and binding on the Parties.[194] A decision that determines that a measure taken by a Contracting Party does negatively affect the rights and obligations of another Contracting Party should also

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[187] Ibid. art. 19-06 (4) and Herrera Marcano, supra note 173 at 154.
[188] Ibid.
[189] Ibid. art. 19-07.
[190] Ibid. art. 19-09.
[191] Ibid. art. 19-12.
[192] Herrera Marcano, supra note 173 at 155.
[193] G-3 Treaty, supra note 170 art. 19-14.

include the extent that those rights and obligations are affected and the appropriate compensatory steps needed.[195] However, a Party is to comply with the decision only to the extent possible. Therefore the situation may arise that the appropriate steps are not taken in order to address the matter in dispute. Then the complainant Contracting Party may then unilaterally suspend benefits to the Contracting Party that still maintains the impugned measures. This suspension must be made in the same sector that is being affected by the measures, but if it is not feasible or ineffective, then the suspension may be applied in another sector.[196]

4. MERCOSUR

The process of creating the MERCOSUR began in July of 1990 when it was announced that a common market was to be created between Argentina and Brazil by 1995.[197] Out of fears that their largest trading partners would shut them out of the common market, Paraguay and Uruguay both asked to be included in the process.[198] This led to the signing of the Treaty of Asunción[199] between Argentina, Brazil, Paraguay and Uruguay. This treaty is really a framework in which it is specified the instruments and mechanisms that are to be used during the "transition period" to establish the common market by December 31 1994. The objectives of the MERCOSUR are the free movement of goods, services and factors through the elimination of duties and non-tariff barriers, the establishment of a common external tariff and common trade policy, the coordination of macroeconomic and sectoral policies and the harmonization of domestic legislation in the relevant

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[194] Ibid. art. 19-16. This provision goes much farther than its equivalent under the NAFTA. The decision of the NAFTA Free Trade Committee is not binding on the parties, but they are expected to agree on the resolution of the dispute in conformance with the award, see "Sovereignty and Regionalism," supra note 142 at 1106.

[195] Herrera Marcano, supra note 173 at 155.

[196] G-3 Treaty, supra note 170 art. 19-17.

[197] For a discussion of the process that led up to the proposed Common Market between Argentina and Brazil, see T. O'Keefe, "The Legal Framework and Institutions of Mercosur: The Newly Emerging Economic Bloc in South America's Southern Cone" 6 Inter-Am. Legal Mat. 90.

[198] T. O'Keefe, supra note 87 at 439.

[199] Treaty of Asunción, supra note 50.

areas for the strengthening of the integration process.[200]

i. Institutions

Institutionally, the Treaty of Asunción created two transitionary bodies, the Common Market Council (CMC) and the Common Market Group (CMG) that were charged with the administration and execution of the treaty.[201] The CMC is a political body made up Ministers of Foreign Affairs and the Economy of the member States[202] while the CMG is an executive body made up representatives of the Ministers of Foreign Affairs and the Economy and of the Central Banks.[203] The CMC was the highest body of the Treaty of Asunción in charge of the political leadership of the MERCOSUR. This body is intergovernmental in nature as the make up of the CMC is made up of government representatives.[204] The CMG was responsible, inter alia, for monitoring the compliance of the Treaty of Asunción, to take necessary steps to enforce decisions taken by the CMC and negotiate agreements with third parties.[205] It is important to remember that the Treaty of Asunción did not establish the legal rules of a functioning common market. Instead, it merely laid down the general, broad guidelines for establishing such a common market, and left the specifics to later agreements to be signed by the member States.[206] Therefore, the importance of these bodies was that they issued decisions and resolutions that facilitated the formation of the common market until a more definitive institutional structure were to be established by the end of the transition period.[207]

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[200] Ibid. art. 1. See also E.V. de Davidson, "The Treaty of Asunción and a Common Market for the Southern Cone: A Timely Step in the Right Direction" (1991) 32 Va. J. Int'l L. 265 at 273.

[201] Ibid. art. 9.

[202] Ibid. art. 11.

[203] Ibid. art. 14.

[204] J. Pérez Otermin, El Mercado Comun del Sur: Aspectos Juridico-Institucionales (Montevideo: Fundación de Cultura Universitaria, 1995) at 19-20.

[205] C. Chatterjee, "The Treaty of Asunción: An Analysis" (1993) J. World T. 63 at 68.

[206] T. O'Keefe, "An Assessment of Mercosur's Present Legal Framework and Institutions and How They Affect Mercosur's Chances of Success" (1993) 6 Int'l L. Practicum 14 at 14.

[207] Ibid. at 16. Article 18 of the Treaty of Asunción reads:
Prior to the establishment of the common market on 31 December 1994, the States Parties shall convene a special meeting to determine the final institutional structure of the administrative organs of the common market, as well as the specific powers of each organ and its decision-making procedures.

With the adoption of the Ouro Preto Protocol, this goal was accomplished.[208] The principal institutions remain the CMC and the CMG, however, the Protocol also includes the following: the Trade Commission, the Joint Parliamentary Commission, the Economic and Social Consultative Forum and the Administrative Secretariat.[209] Of these bodies, only the CMC, CMG and Trade Commission have the jurisdiction to issue binding norms on the member States.[210]

The CMC remains as the highest body of the MERCOSUR. It oversees the implementation of the Treaty of Asunción and its protocols and has the authority to act as its legal personification.[211] It issues decisions, made on a consensus basis, which is now binding for the member States.[212] It has the power to create subsidiary organs and appoint the director of the Administrative Secretariat.[213] Moreover, it represents the MERCOSUR in treaty negotiations with third parties, although this could be delegated to the CMG.[214] The CMC must meet with the Presidents of the member States at least once every six months.[215]

The CMG is still the executive body of the MERCOSUR and it is also charged with overseeing the implementation of the Treaty of Asunción and its protocols, but within its competencies. It meets when deemed necessary, in either ordinary or extraordinary meetings.[216] It also receives all proposals and recommendations coming from other organs of the MERCOSUR. As mentioned before, it also has the capacity to negotiate with third parties so long as the CMC has expressly delegated this function.[217] Its resolutions are binding as well, made on a consensus basis.[218]

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[208] Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR ("Protocol of Ouro Preto"), 17 December 1994, (1995) 34 I.L.M. 1244 [hereinafter Ouro Preto Protocol].
[209] Ibid. art. 1.
[210] Ibid. arts. 9, 15 & 20 and see S. Viejobueno, "MERCOSUR: A Decisive Step Towards South American Economic Revival" (1995) 20 S.A. Y.B. Int'l L. 81 at 111.
[211] Ouro Preto Protocol, supra note 208 art. 8 and de Aguinas, supra note 17 at 609.
[212] Ouro Preto Protocol, ibid. art. 9. Also see A. Pastori, "The Institutions of Mercosur: From the Treaty of Asuncion to the Protocol of Ouro Preto" 6 Inter-Am. Legal Mat. 1 at 5
[213] Ibid. art. 8.
[214] Ibid.
[215] Ibid. art. 6.
[216] Ibid. art. 13.
[217] Ibid. art. 14.

The Trade Commission oversees the common trade policy that is to be carried out. This means that it monitors the application of the common trade policies and decisions that are adopted by the member States.[219] It also aids in the harmonization of technical standards and other areas of public policy such as competition, rules of origin and any other trade issues.[220] It issues directives and proposals, although only the directives are compulsory on the member States, and again they are made by consensus.[221] As well, it will consider claims submitted by member States to allow for the settlement of small claims through technical decisions and directives.[222]

The three remaining bodies play minor roles in terms of the integration efforts as compared to the CMC, CMG and the Trade Commission. The Joint Parliamentary Commission is made up by Members of Parliament with the task of harmonizing legislation by ensuring the timely incorporation of the MERCOSUR legislation in the member States legal systems.[223] The Economic and Social Consultative Forum acts as an organ "for representation of the economic and social sectors" with a consultative capacity the CMG.[224] Finally, the Administrative Secretariat publishes the Official Records of the MERCOSUR and provides logistical support to the meetings of the other organs.[225]

Despite the appearance of relying on the organs of the MERCOSUR for the enforcement and creation of 'community' law and the power to negotiate international agreements on behalf of the member States, it should be noted that these institutions are not supranational and therefore not independent of their governments.[226] In effect, there is nothing in the MERCOSUR that is inviolable

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[218] Ibid. art. 15.
[219] Viejobueno, supra note 210 at 112.
[220] Ibid.
[221] Ouro Preto Protocol, supra note 208 art. 20.
[222] Pastori, supra note 212 at 6.
[223] Ouro Preto Protocol, supra note 208 art. 25. See also Viejobueno, supra note 210 at 112-113.
[224] Ibid. art. 28.
[225] Ibid. art. 32.
[226] The absence of a supranational autonomous framework has come under criticism since the inception of the Treaty of Asunción, see "Sovereignty and Regionalism," supra note 142 at 1106.

nor can the provisions be applied against the wishes of the States involved.[227] This absence of supranationality is confirmed by Article 2 of the Ouro Preto Protocol that specifically states that the CMG, CMC and Trade Commission are intergovernmental bodies.[228] However, this regime has been characterized as being of a special international intergovernmental organization due to the makeup of the highest organ in the MERCOSUR, the CMC.[229] Since it is made up of the Presidents and Ministers of Foreign Affairs and the Economy of the States and not diplomatic representatives, there is the potential of it being a highly effective system.[230] Being responsible for the political direction of their respective States, decisions and compromises may be reached much faster and efficient than in any known intergovernmental structure.[231]

ii. Dispute Settlement

One commentator has compared the Benelux Treaty to the MERCOSUR in describing the its structure is "built for a relationship between governments, without any possibility of direct contact with it by citizens."[232] This is particularly true if one looks at the dispute settlement system of the MERCOSUR, the Protocol of Brasilia.[233]

This protocol does not create a supranational tribunal of justice that has the jurisdiction and power to interpret community law with overriding effect over national legislation.[234] What it does provide is an arbitration procedure to hear disputes between member States and claims about the

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[227] D. Ferrere, "MERCOSUR and Other Trade Blocs: A Trend for the Coming Decade" (1996) 24 IBL 253 at 258 [hereinafter "MERCOSUR and Other Trade Blocs"].

[228] It reads:
Article 2
The following are inter-governmental organs with decision-making powers: The Council of the Common Market, the Common Market Group and the Mercosur Trade Commission.

[229] A. Duran Martinez, "L'Uruguay dans le cadre du MERCOSUR" (1996) 27 R.G.D. 69 at 76.

[230] Ibid.

[231] Ibid.

[232] L.O. Baptista, "The Asunción Treaty Establishing the Southern Common Market (MERCOSUL)" (1992) 5 IBLJ 567 at 578.

[233] Protocol of Brasilia for the Settlement of Disputes, 17 December 1991, (1997) 36 I.L.M. 691 [hereinafter Brasilia Protocol]. This system was influenced by the dispute settlement systems found in the Canada-US Free Trade Agreement, the Chile-Mexico Free Trade Agreement, the 1967 LAFTA Protocol for the Settlement of Disputes, the Dispute Settlement System found in the Treaty of Antarctica as well as that of the GATT, see Pérez Otermin, supra note 204 at 31-32 and Bloch & Iglesias, supra note 70 at 62-63.

application, interpretation and non-fulfillment of the Treaty of Asunción and agreements entered within this framework as well as the norms adopted by the MERCOSUR bodies.[235] This system is limited to member States only, although private parties have may participate indirectly. The procedure for disputes between member States involves direct negotiations, conciliation and ends with an unappealable decision of an ad hoc arbitration tribunal.[236] Direct negotiations cannot exceed 15 days after which a complaint is initiated unless the parties to the dispute desire to extend this time frame.[237] During this time, the parties involved are to keep the CMG informed, through the Administrative Secretariat, of the status of the negotiations.[238] If direct negotiations do not resolve the dispute, then either party may submit the dispute to the CMG.[239] The CMG evaluates the dispute, hears the position of both parties and then within 30 days of the dispute being brought to the CMG, it issues its recommendations.[240] If the dispute is still not resolved, then either party may give notice to the Administrative Secretariat of its intention to pursue the matter to arbitration.[241] The arbitration tribunal will be made up of three arbitrators selected from a list previously submitted by parties to the Administrative Secretariat. The tribunal must then enter an award in writing within a maximum period of 90 days.[242] The decision will be decided by a majority of arbitrators and no dissenting opinions are allowed to be published.[243] The decision is final and binding on the parties to the dispute and shall be complied with within fifteen days.[244] This arbitral procedure is seen as the only instance where a MERCOSUR body has been granted a degree of supranationality in that the decision is final.[245] Moreover, it is the only stage in the process that is not affected by the political machinations involved in the intergovernmental

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234 Viejobueno, supra note 210 at 113.
235 Brasilia Protocol, supra note 233 art. 1. See also de Aguinas, supra note 17 at 606.
236 Brasilia Protocol, supra note 233 art. 21.
237 Ibid. art. 3(2).
238 Ibid. art. 3(1).
239 Ibid. art. 4(1).
240 Ibid. arts. 4, 5 and 6.
241 Ibid. art. 7.
242 Ibid. art. 20(1).
243 Ibid. art. 20(2).
244 Ibid. art. 21.
245 See Pérez Otermin, supra note 204 at 60 and Viejobueno, supra note 210 at 114.

processes of negotiation and conciliation.[246]

Seeing as the MERCOSUR does not intend to grant self-executing rights to private parties,[247] the dispute settlement process does not grant direct access to individuals or corporations willing to bring an action. The private party must present a claim to the National Section of the CMG or the Trade Commission depending on the type of case.[248] The private party must then persuade its own National Section that its claim has some merit, or else it will not be brought forward. In this sense, this step acts as a filtering device for the type of dispute that will go forward and leaves it up to the discretion of the government whether to proceed with the claim or not.[249] If the National Section does decide to bring the claim forward it then has the discretion to either seek consultations with the National Section of the offending party or to bring it directly forward to the CMG or Trade Commission.[250] If after 15 days consultations do not resolve the problem or if the matter is brought to them directly, the CMG and Trade Commission have the option of either making a decision or refer the matter to a three member committee comprised of experts.[251] This committee shall submit an opinion within 30 days after the request and submit an opinion back to the CMG or Trade Commission.[252] Under the process for disputes to the CMG, if the committee finds that the claim is justified, the offending party has 15 days to take corrective measures.[253] If these measures are not taken, then the matter may be taken up through the arbitration procedure in the Brasilia Protocol. On the other hand, matters taken up by the Trade Commission, in order to be rectified, are to be done on a consensus basis. If a consensus is not reached on the settlement of

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[246] F. González, "Solución de Conflictos en un Sistema de Integración: Los Casos del MERCOSUR y la CEE" (1992) 185 Integración Latinoamericana 33 at 34.

[247] "MERCOSUR and Other Trade Blocs," supra note 227 at 258.

[248] The procedure for bringing a claim to the National Section of the GMC is found in Chapter V of the Brasilia Protocol, supra note 233, while the procedure for bringing a claim to the National Section of the Trade Commission is found under article 21 and Annex to the Ouro Preto Protocol, supra note 208.

[249] C. O'Neal Taylor, "Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?" (1996-97) 17 Nw. J. Int'l L. & Pol'y 850 at 878.

[250] Ibid.

[251] Brasilia Protocol, supra note 233 arts. 28 and 29(3) and Ouro Preto Protocol, supra note 208 at Annex, arts. 2 and 3. See also O'Neal Taylor, supra note 249 at 878-879 for a description of this procedure.

[252] Brasilia Protocol, supra note 233 arts. 30 and 32 and Ouro Preto Protocol, supra note 208 at Annex, art. 4

[253] Brasilia Protocol, ibid. art. 32.

the claim, the matter is then brought forward to the CMG. If the CMG finds that the claim is justified, the offending State is to comply with the recommended solution. If it fails to do so, then the arbitration procedure of the Brasilia Protocol may be invoked. As can be seen, there are several layers of administrative review before a matter is to be taken to arbitration. The purpose of this system is to encourage a consensus by all the MERCOSUR States as to how to resolve the issue.[254]

Initially, this dispute system was to solely apply during the transition period after which a permanent dispute settlement system was to be adopted. Article 3 and paragraph 3 of Annex 3 to the Treaty of Asunción called for this. But with the adoption of the Ouro Preto Protocol, which signified the end of the transitional period, this still has not occurred. Indeed, article 44 of the Ouro Preto Protocol calls for a meeting in order to set up a permanent dispute settlement mechanism. So far this has not happened and there is no indication that such a system will be in place in the near future.

This situation does not sit well for many commentators who find this arrangement rather unacceptable if a common market is to be established and have called for the formation of a Court of Justice with the competences to issue binding decisions.[255]

iii. The Legal Effect of Regional Norms

An impact of this lack of supranationality is on the legislative abilities of these organs and their legal effect on the domestic legal systems. Since these bodies are intergovernmental in nature,

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[254] O'Neal Taylor, supra note 249 at 878.

[255] See Pastori, supra note 212 at 7; O'Keefe, supra note 87 at 446; O'Neal Taylor, supra note 249 at 898, and de Aguinas, supra note 17 at 614. Duran Martínez points out that there are four drawbacks to this system: (1) without a permanent court, it will be impossible for some sort of jurisprudence to develop; (2) there is no control over the legitimacy over acts issued by the organs of the MERCOSUR; (3) private parties do not have a direct access to the arbitral panel; and (4) private parties have a very limited options to pursue claims, see supra note 229 at 80. The National Commission of Jurists of Uruguay had recommended the creation of a permanent court as a fundamental element of the MERCOSUR process, H. Arbuet Vignali, "La Solucion de Controversias en el MERCOSUR: Un Aspecto Esencial aun por Resolver" in M. Rama-Montaldo, ed., El Derecho Internacional en un Mundo en Transformación: Liber Amicorum en Homenaje al Profesor Eduardo Jiménez de Aréchaga vol. 2 (Montevideo: Fundación de Cultura Universitaria, 1994) at 1260-1261.

they are in essence mere delegates of the member States whose consent is still needed for the enactment and enforcement of these norms.[256] As seen by the discussions of the CMC, CMG and Trade Commission, any norms that are to be issued have to be made on a consensus basis. The legal basis for this requirement is found in Article 37 of the Ouro Preto Protocol.[257] What this means in practice is that the member States have an effective unilateral veto over any measures that they find contrary to their own interests but not necessarily that of the MERCOSUR. Moreover, the quorum requirements of Article 37 indicate that the adoption of a measure may be halted if a member State decides not to participate in the relevant deliberations.[258] Doctrinal writers have suggested that this be changed because this could effectively paralyze the integration process.[259]

The Ouro Preto Protocol did institutionalize the need for the MERCOSUR acts to be incorporated into the member States domestic legal frameworks.[260] However these acts are not directly applicable in the member States. Article 41 of the Ouro Preto Protocol lists the legal sources of community law in the MERCOSUR. Along with the Treaty of Asuncion, its protocols and additional instruments and agreements concluded within the framework of the Treaty of Asuncion and its protocols, the Decisions of the CMC, the Resolutions of the CMG and the Directives of the MERCOSUR Trade Commission adopted since the entry into force of the Treaty of Asuncion are part of the MERCOSUR legal order. The legal effect of these norms are found under Article 42:

> The decisions adopted by the Mercosur organs provided for in Article 2 of this Protocol shall be binding and, when necessary, must be incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation.

This language is very confusing because the norms are on one hand to be binding on the member States, thus inferring that they are directly applicable within the domestic legal systems, but on

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[256] Viejobueno, supra note 210 at 112.

[257] Article 37 reads:
The decisions of the Mercosur organs shall be taken by consensus and in the presence of all the States Parties.

[258] "Sovereignty and Regionalism," supra note 142 at 1106 footnote 202.

[259] de Aguinas, supra note 17 at 609 and see N. Rodriguez Olivera, "MERCOSUR en Tant Qu'Instrument pour la Création d'Un Droit Communautaire" (1991) 13 J. Soc. Leg. Comp. 247.

the other hand, it calls for these norms to be incorporated into these systems when deemed necessary thus requiring an act of transformation.[261] Confusion further sets in when analyzing the provisions of Article 38 and 40. Article 38 calls for member States to adopt "the measures necessary to ensure, in their respective territories, compliance with the decisions adopted by the MERCOSUR organs provided for in Article 2 of this Protocol."[262] Article 40 provides that the member States will simultaneously "take the necessary measures to incorporate it in their domestic legal system,"[263] while Article 42 states that this is only to be deemed when necessary. Essentially, Article 38 indicates an agreement to comply with the norms issued by the bodies, Article 40 establishes a procedure for this to be done simultaneously, yet Article 42 only requires incorporation when deemed necessary.[264] Despite the confusion in the language of the Ouro Preto Protocol, it is generally recognized that the norms issued by the bodies of the MERCOSUR are not directly applicable within the legal orders of the member States.[265] The process that is in place for the adoption of these norms is the principle of 'simultaneous application.' Under this principle, each member State must notify the Administrative Secretariat when it has taken the measures to incorporate the norms within their legal orders. Once all the member States have so informed the Administrative Secretariat, the norm shall enter into force simultaneously thirty days after such

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[260] Pastori, supra note 212 at 7.

[261] Viejobueno, supra note 210 at 117.

[262] The Article reads:
Article 38
The States Parties undertake to take all the measures necessary to ensure, in their respective territories, compliance with the decisions adopted by the Mercosur organs provided for in Article 2 of this Protocol.
Sole paragraph. The States Parties shall inform the Mercosur Administrative Secretariat of the measures taken to this end.

[263] Article 40 in its entirety reads:
Article 40
In order to ensure the simultaneous entry into force in the States Parties of the decisions adopted by the Mercosur organs provided for in Article 2 of this Protocol, the following procedure must be followed:
(i) Once the decision has been adopted, the States Parties shall take the necessary measures to incorporate it in their domestic legal system and inform the Mercosur Administrative Secretariat.
(ii) When all the States Parties have reported incorporation in their respective domestic legal systems, the Mercosur Administrative Secretariat shall inform each State Party accordingly.
(iii) The decisions shall enter into force simultaneously in the States Parties 30 days after the date of the communication made by the Mercosur Administrative Secretariat, under the terms of the preceding subparagraph. To this end, the States Parties shall, within the time-limit mentioned, publish the entry into force of the decisions in question in their respective official journals.

[264] de Aguinas, supra note 17 at 610.

[265] Viejobueno, supra note 210 at 117; Duran Martinez, supra note 229 at 77; and Pérez Otermin, supra note 204 at 101. During the negotiations of the Ouro Preto Protocol, the delegation from Uruguay had proposed that the norms be directly applicable, but was in the minority as Brazil, Argentina and Paraguay all opposed this development, see Duran Martinez, supra note 229 at 77-78 and Pérez Otermin, supra note 204 at 101-102. However, not all doctrinal writers have felt that the norms are not directly applicable because the confusion indicates that perhaps some of the norms are to be autooperative, see de Aguinas, supra note 17 at 612.

communication.[266] This process has been described as being imaginative and ensuring a greater degree of legal certainty in MERCOSUR law,[267] but others have lamented that the lack of direct applicability will only encourage "sluggishness, confusion, and legal uncertainty."[268]

So far, there is no indication what is the relationship between MERCOSUR law and domestic law in terms of hierarchy or whether they may be invoked by in the national courts of the member States.[269] Within the Brasilia Protocol, there is not process in which an arbitral ruling may be made part of the law of a MERCOSUR country. Without the concept of supremacy being established, there is no control over the interpretation of the legal rights and obligations created within the domestic legal systems.[270] This imprecision as to the effectiveness of these norms in relation to domestic legal orders is deemed to be the weakest aspect of the MERCOSUR regime.[271]

iv. Free Trade Agreements with Chile and Bolivia[272]

The MERCOSUR free trade agreements with Chile and Bolivia will be looked at because it exemplifies the possible structure and expansion of the MERCOSUR into the eventual formation of a South American Free Trade Agreement and thus facilitate the establishment of a FTAA.[273] The first thing to note is that Chile and Bolivia are only associate member of the MERCOSUR, but not full scale members. Both countries may participate in its intraregional free trade scheme, but not

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[266] Articles 38, 39 and 40. See also Viejobueno, supra note 210 at 117.

[267] Viejobueno, ibid. note at 117.

[268] de Aguinas, supra note 17 at 611.

[269] Viejobueno, supra note 210 at 117-118.

[270] O'Neal Taylor, supra note 249 art. 896.

[271] de Aguinas, supra note 17 at 613. If one subscribes to the view that the confusion in the Ouro Preto Protocol does indicate that perhaps some norms could be directly applicable, then this uncertainty only exacerbates the problem of determining which ones are 'self-executing' and which norms need to go through a process of incorporation, see de Aguinas, ibid.

[272] Acuerdo de Complementación Económica MERCOSUR-Chile, 25 June 1996, online: Foreign Trade Information System <http://www.sice.oas.org/trade/msch/mschind.stm> (date accessed: 15 November 1999) [hereinafter MERCOSUR-Chile Agreement] and Acuerdo de Complementación Económica MERCOSUR-Bolivia, 25 June 1996, online: Foreign Trade Information System <http://www.sice.oas.org/trade/mrcsbo/merbo_s.stm> (date accessed: 15 November 1999) [hereinafter MERCOSUR-Bolivia Agreement].

[273] T. O'Keefe, "The Chile-MERCOSUR Free Trade Agreement" (12 November 1996), online: LEXIS (Intlaw, TNI).

in its customs union project.[274] Neither country wanted to drop their external tariff rates and adopt a common external tariff. Moreover, these agreements are concluded as agreements of partial scope concluded under the LAIA. As well, it should be noted that these agreements do not provide for comprehensive institutions and dispute settlement processes as those found in the MERCOSUR.

The objectives of these agreements are similar. They are to establish a legal and institutional framework for cooperation and economic and physical integration in order to create a free trade area for goods and services within ten years. They are also committed to building the proper infrastructure to connect the various States to facilitate trade and in the case of Bolivia, consult with each other in trade negotiations with third parties and extraregional trading blocs.[275] The administration and evaluation of the agreements are to be done by an Administrative Commission made up of, in the case of Chile, the CMG of the MERCOSUR and the Minister of Foreign Affairs represented by the General Management of International Economic Relations, and in the case of Bolivia, the CMG and Minister of Foreign Affairs and Culture represented by the National Secretariat of International Economic Relations.[276] Their functions are similar in both agreements: to oversee the fulfillment of the provisions of the agreements and its additional protocols and annexes, to periodically evaluate the progress of trade liberalization and general operation of the agreements and supplying an annual report in this regard, and to contribute in dispute settlement. In addition, it is to determine the method and time frame in which to carry out negotiations so as to reach the objectives of the agreement, including the establishment of working groups.[277] Any decisions made by the Commission are to be made by consensus.

Any dispute concerning the interpretation, application and nonfulfillment of the free trade agreement, and its protocols and instruments are to be submitted to a two step process consisting

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[274] Ibid.
[275] MERCOSUR-Chile Agreement, supra note 272 art. 1 and MERCOSUR-Bolivia Agreement, supra note 272 art. 1.
[276] MERCOSUR-Chile Agreement, ibid. art. 46 and MERCOSUR-Bolivia Agreement, ibid. art. 39.
[277] MERCOSUR-Chile Agreement, ibid. art. 47 and MERCOSUR-Bolivia Agreement, ibid. art. 40.

of: (1) mutual consultations and direct negotiations, (2) intervention by the Administrative Commission and (3) formation of a Group of Experts.[278] The consultation process begins by written notification to the other party and Commission. These consultations are to last a maximum 30 days, but this may be extended another 30 days if the parties agree.[279] If consultations do not resolve the dispute, any of the parties may make a written request that the Commission intervene. The Commission is to meet within 15 days from receiving the request, and this process should not last any longer than 45 days. The Commission will evaluate the situation, giving each Party a chance to be heard and, if necessary, request technical information.[280] If the Commission cannot resolve the dispute, it will establish an ad hoc Group of Experts (Group) made up of three trade experts. Each Party is to submit a list of 8 experts and then provide a further list of 8 experts who are not nationals of either Party from which the Group of Experts may be chosen. They are to adopt its own procedural rules within 5 days from its formation, which at a minimum guarantees each Party an opportunity to be heard and that the process be handled expeditiously. Within 30 days of being formed, the Group will submit its opinion to the Commission for its appraisal. Within 15 days of receiving the Group's opinion, the Commission will make its recommendations and it will oversee that they are being fulfilled by the Parties.[281] In the agreement with Chile, this dispute settlement system will be in effect for the first 3 years, from which a new system is to be established that includes an arbitral procedure starting in the fourth year. If, however, no agreement can be reached, then the arbitral procedure found in the Brasilia Protocol will be adopted.[282]

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[278] MERCOSUR-Chile Agreement, ibid. art. 22 and Annex 14, Régimen de Solución de Controversias, online: Foreign Trade Information System <http://www.sice.oas.org/trade/msch/A_14.stm> (date accessed: 15 November 1999), art. 1 [hereinafter MERCOSUR-Chile Dispute Settlement]. Any reference to dispute settlement refers solely to the free trade agreement with Chile. Unfortunately, the dispute settlement system for the free trade agreement with Bolivia is not available with the only reference in the agreement is to an annex 11, MERCOSUR-Bolivia Agreement, ibid. art. 21.

[279] MERCOSUR-Chile Dispute Settlement, ibid. arts. 2-4.

[280] Ibid. arts. 5-6.

[281] Ibid. arts. 7-13.

[282] Ibid. art. 14 and MERCOSUR-Chile Agreement, supra note 272 art. 22.

5. The Andean Community

The Andean Community, formerly the Andean Pact, is the oldest major subregional trading bloc.[283] Originally made up of Bolivia, Colombia, Chile, Ecuador and Peru, while Venezuela joined in 1973, it was formed as a result of the frustration felt by many of the Andean countries with the LAFTA in that it was seen that its procedures were not sufficient to accelerate a Latin American integration within a reasonable amount of time.[284] Moreover, it was designed to enable the less developed Andean States to take part in LAFTA as a single body in a position more equal with the more developed countries of Argentina, Brazil and Mexico.[285] Although created under the LAFTA regime, it was not affected when its failure transformed it into the LAIA.[286]

The Andean Pact was created by the Agreement on Subregional Integration (Cartagena Agreement) in 1969 and this integration process subscribed to the import substitution model for development.[287] Its goal was to establish a customs union. In order to meet this goal, the Cartagena Agreement provided for the establishment of a common external tariff through the gradual elimination of all tariff barriers and quantitative restrictions not enjoyed under the LAFTA by December 31 1980.[288] It also developed sectoral industrial development programs whereby the member countries would produce components of manufactured goods not already made within the Andean Pact that when they were completed, would be traded among them free of tariffs and quantitative restrictions.[289] Because of Bolivia's and Ecuador's special status as less

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[283] For a description of the Andean Group and its legal order, see F.V. Garcia-Amador, The Andean Legal Order: A New Community Law (Dobbs Ferry, New York: Oceana, 1978) [hereinafter The Andean Legal Order].

[284] Bogota Declaration, 16 August 1966, reprinted in Inter-American Institute of International Legal Studies vol.1, supra note 31 at 149. It was also felt that the LAFTA was only benefiting the bigger and more industrialized economies of Brazil, Argentina and Mexico, see T. O'Keefe, "How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise" (1996) 30 Int'l Lawyer 811 at 812 [hereinafter "Friend of Foreign Enterprise").

[285] "Economic Integration in Latin America," supra note 67 at 472.

[286] Ribbelink, supra note 28 at 96.

[287] Agreement on Andean Subregional Integration, 26 May 1969, (1969) 8 I.L.M. 910 (hereinafter Cartagena Agreement).

[288] Ibid. art. 61. See also "Friend of Foreign Enterprise," supra note 284 at 813. It gave Bolivia and Ecuador preferential treatment by giving them more time to eliminate their import restrictions because of their lesser developed status, see ibid. art. 46.

[289] "Friend of Foreign Enterprise," supra note 284 at 813.

developed countries, factories would be set up within them to produce any product that was not manufactured within the Andean Pact and not part of the sectoral industrial development program. These programs proved to be quiet popular as it was seen to be promoting a more balanced regional growth rather than permitting market forces within the LAFTA to decide where the new industries would be located.[290] Moreover, in an attempt to control foreign investment within the region, in 1976 Decision 24 was adopted to create a common Andean Pact policy towards foreign investment, trademarks, patents and licenses. This was a very restrictive policy that, among other things, forbade foreign investment in activities carried out by Andean enterprises and prohibiting foreigners from buying stock in Andean firms.[291] Although initially successful, problems surfaced which led to the virtual standstill of the integration process.[292] Chile left in 1976 over opposition to Decision 24 as it now wanted to pursue a more aggressive free market policy. Moreover, problems would arise when not all the provisions of the Cartagena Agreement were incorporated into the domestic legal systems of the member States because of domestic opposition and coordination would prove impossible because of unresolved territorial and political disputes.[293] The final nail in the coffin would prove to be the oil shock of 1979, which led the member States to pursue different macroeconomic policies.[294]

In order to revive the process, the member States signed the Quito Protocol in May of 1987.[295] Its objective is numerous. They are to "promote the balanced and harmonious development" of the member States "under conditions of equality through integration and economic and social cooperation," to "facilitate their participation in the regional integration process, with a view to the gradual formation of a Latin American common market," to secure "a reduction in external

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[290] Ibid.

[291] Ibid. at 813-814.

[292] Intraregional trade grew from $143 million 1969 to $213 million by 1974 and a minimal common external tariff was instituted by Colombia, Peru and Venezuela by December 31 1975, see "Friend of Foreign Enterprise," supra note 284 at 816.

[293] Ibid. at 816.

[294] Ibid. at 816-817.

[295] Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, 12 May 1987, (1989) 28 I.L.M. 1165 (hereinafter Quito Protocol).

vulnerability" by improving the position of the member States in the international economic plane, to "strengthen subregional solidarity" and to reduce differences in development among them.[296] Overall, it is a much more flexible framework than the Cartagena Agreement as it eliminates the need for the strict time deadlines for the establishment of a common external tariff, the industrial sectoral program is less imperative and fixed deadlines to take specific steps or meet certain obligations have been curbed.[297] Currently, no duties are charged in goods native to Bolivia, Colombia, Ecuador and Venezuela as well as nontariff barriers. Peru participates to a limited extent because its economic policies are much more market oriented than the other member States.[298] Moreover, since February 1 1995, a four tiered common external tariff of either 5, 10, 15 or 20 percent is in place for the majority of goods imported into Colombia, Ecuador and Venezuela. Bolivia is specifically exempted from the four tier common external tariff as it is allowed to retain a two-tiered system of 5 and 10 percent. Peru does not participate in the four tier system and maintains its own two-tiered system of 15 and 25 percent.[299]

However, it was seen that deepening integration was needed in order to harmonize macroeconomic policies, incorporate social policies of a communitarian character and to develop more efficient ties with the rest of the world.[300] More importantly, more political involvement was needed in order to legitimize further the integration process. An important step towards this goal is the adoption

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[296] Quito Protocol, ibid. art. 1. The mechanisms that are to be used to achieve these objectives are, inter alia, harmonization of policies on foreign investment, trademarks, patents and licenses, the creation of Andean multinational enterprises, intensification of subregional industrialization and liberalization of inter-subregional trade, see "Sovereignty and Regionalism," supra note 142 at 1109-1110.

[297] "Friend of Foreign Enterprise," supra note 284 at 818 and "Sovereignty and Regionalism," supra note 142 at 1110. It also did away with Decision 24 and replaced it with Decision 220 so as to lift any prohibitions stock purchases by foreigners and eliminate restrictions on earning remittances. Decision 220 was subsequently replaced by Decision 291 that is a much more investor friendly regime.

[298] "Friend of Foreign Enterprise," supra note 284 at 820.

[299] Ibid.

[300] "Informativo Andino," online: Official Website of the Andean Community <http://www.communidadandina.org/boletines/infand11.htm> (date accessed: 15 November 1999) at 2. All members of the Andean Group wanted a more active political presence in the management of the integration process, see O. Castañeda Arrascue, "La Comunidad Andina y el Nuevo Sistema Andino de Integración" (1996) 46 Revista Juridica del Peru 21 at 21.

of the Protocol of Trujillo,[301] which in effect replaced the Andean Group with the Andean Community and created the Andean System of Integration. The changes introduced by this protocol are to make the institutions of the Andean Group into a much more modern and flexible model and to grant them, above all, the highest political support.[302] The institutions created are, among other things, to help in the development of the FTAA through the deepening and convergence of existing regional trading agreements.[303] Additionally, these changes will also facilitate the participation of the member States as a coordinated bloc in World Trade Organization ministerial meetings.[304] In this way, the Andean Community will further embed itself in the globalization taking place today. The Andean Integration System came into existence in January of 1997.[305]

i. Institutions

Originally, the principal institutions of the Andean Group were the Commission and the Board. The Commission was the highest body made up of plenipotentiary representatives from the government of each member State. It had exclusive legislative capacity, which were acted through Decisions.[306] These were generally adopted by an affirmative vote of two-thirds of the member States, except for certain matters where a higher threshold was required.[307] Its main function was to formulate the general policies of the Andean Pact and adopt the necessary measures to reach its objectives.[308] Additionally, it was responsible to promote joint action among the member States

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301 Protocolo Modificatorio del Acuerdo de Integración Subregional Andina, 10 March 1996, found in "Informativo Andino," supra note 300 at 16 [hereinafter Protocol of Trujillo]. With ratification of this protocol by the government of Colombia in October of 1996, the organisation will now elect a secretary general and set up a secretariat, see "Bloc to Bloc Negotiations?" Mexico and NAFTA Report (10 October 1996) at 3.

302 "Informativo Andino," supra note 300 at 2.

303 "Sovereignty and Regionalism," supra note 142 at 1111-1112.

304 Ibid. at 1112.

305 Castañeda Arrascue, supra note 300 at 21.

306 Quito Protocol, supra note 295 art. 6. See also L. Sachica, Derecho Comunitario Andino, 2d ed. (Bogotá: Editorial Temis, 1990) 47-51 and The Andean Legal Order, supra note 283 at 80-83.

307 Quito Protocol, ibid. art. 11.

308 Ibid. art. 7(a) and Sachica, ibid. at 47. It was charged with, inter alia, to approve norms needed for the coordination and harmonization of development plans and economic policies, designate and remove Board members, delegate functions to the Board, monitor the fulfillment of the obligations of the Andean Pact as well as that of the LAIA, and represent the Andean Pact, Quito Protocol, supra note 295 art. 7.

with respect to any problems that could arise from the international economy and present a common position to other international organizations.[309] The Commission met three times a year or convoked by its president at the request of a member State or of the Board.[310]

The Board is the technical body of the Andean Pact consisting of three members who may be nationals of any Latin American State. It was the responsibility of the Board to act solely in the best interest of the Andean Pact.[311] Appointment and removal of Board members is the responsibility of the Commission.[312] The Board was directly responsible to the Commission, not to their own governments, and they were to act on behalf of the common interest and not seek nor accept instructions from any government, national or international entity.[313] Its autonomy was further assured in that its members were appointed by the Commission and that there were fewer members than member States in the Andean Group.[314] The Board made decisions in the form of Resolutions, which were to be unanimous.[315] It was charged with monitoring the application of the Andean Group and ensure that its Resolutions and the Decisions of the Commission were being fulfilled.[316] It also played a role in the legislative and decision making process by submitting proposals to the Commission in order to facilitate the process of integration in the shortest time possible and participating in the ensuing discussions.[317] Additionally, it was to annually evaluate the Group's efforts in light of the objectives of the Cartagena Agreement,[318] and in initiating non-compliance actions before the Court of Justice of the Cartagena Agreement (Andean Court).[319] Finally, it acted as the secretariat for the Commission by hiring technical experts capable of

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[309] Ibid. art. 8. See also Sachica, supra note 306 at 48.
[310] Ibid. art. 10.
[311] Ibid. art. 13. See generally The Andean Legal Order, supra note 283 at 84-85 and Sachica, supra note 306 at 51-54.
[312] Ibid. art. 7(c).
[313] Ibid. art. 14.
[314] "Sovereignty and Regionalism," supra note 142 at 1111.
[315] Quito Protocol, supra note 295 art. 15.
[316] Ibid.
[317] Ibid. See also "Sovereignty and Regionalism," supra note 142 at 1111.
[318] Ibid. Also see Padilla, supra note 13 at 82.
[319] Treaty Creating the Court of Justice of the Cartagena Agreement, 28 May 1979, (1979) 18 I.L.M. 1203 arts. 23 and 24 [hereinafter Court of Justice Agreement].

sophisticated assignments, which it must carry out.[320]

The Quito Protocol added the Andean Parliament and Andean Court as major organs of the Andean Group.[321] The Andean Parliament was to be first made up representatives of the national congresses of the member States, and then subsequently made up of directly elected representatives.[322] However, there was not timetable in which this would happen and no elections have taken place. The Andean Parliament's purpose was to further the political integration of the Andean Group through recommendations and to oversee to a limited extent the institutional bodies.[323] Until the representatives were to be directly elected, the Andean Parliament was limited to examining the integration process in the Andean Group through the annual reports submitted to them from the institutional bodies and any other information that is requested.[324] The Andean Court will be examined when the dispute resolution system of the Andean Group is looked at.

The Protocol of Trujillo significantly changed the institutional structure of the Andean Group. Now, the member States and the bodies of the Andean Integration System (AIS) forms the Andean Community. The AIS is the new institutional structure of the subregional agreement. There are essentially three reforms to this structure: the new Andean Council of Foreign Ministers (ACFAM) is the now the guiding force for integration, the Commission, now known as the Commission of the Andean Community, is no longer the highest organ and the Board has been replaced by the newly created General Secretariat of the Andean Community (General Secretariat).[325] These bodies, along with the Andean Parliament, Andean Court and newly created Andean Presidential Council (APC) are the principle bodies of the AIS.[326]

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[320] Padilla, supra note 13 at 82.
[321] Quito Protocol, supra note 295 art. 5.
[322] Sachica, supra note 306 at 54.
[323] Ibid.
[324] Ibid.
[325] Castañeda Arrascue, supra note 300 at 22.
[326] Article 6 of the Protocol of Trujillo also states that the following make up the AIS as well: the Business Advisory Council, the Labor Advisory Council, the Andean Development Corporation, the Latinamerican Reserve Fund, the Simón Rodríguez Convention and the Social Conventions ascribed to the AIS and any other formed within it, the Universidad

The APC is the highest organ of the Andean Community. It is made up of the Heads of States of the member States and it issues Directives containing political orientations in order to facilitate the integration process.[327] These Directives are to be implemented by the bodies of the AIS bodies as identified for this purpose by the APC.[328] Among the responsibilities of the APC is to define the policies regarding subregional Andean integration, orient and foster actions in the common interest of the integration process among the bodies of the AIS, evaluate the development and results of the integration process, consider and pronounce itself on reports, initiatives and recommendations presented by the bodies and institutions of the AIS and examine all the questions and issues concerning the Andean integration process and its external projection.[329] The APC is to meet once a year in the State that holds the Presidency. The President is the highest political representative of the Andean Community. This post is held by one member State for one year.[330] Among the responsibilities of the President is to convoke and chair the APC meetings, supervise the fulfillment of the Directives by the bodies of the Andean Community, take any actions requested by the APC and represent the APC and Andean Community.[331] The meetings may be attended by the ACFAM, Commission and representatives of the other bodies of the AIS as observers.[332]

The ACFAM is charged with overseeing and evaluating the integration process. It is made of the Minister of Foreign Affairs of the member States and it issues Declarations and Decisions, which are adopted by consensus.[333] Among its responsibilities is to form the foreign relations policies of the member States that fall under the competence of the Andean Community, formulate, execute

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Andina Simón Bolivar, any other advisory councils formed by the Commission and any other body that may be created within the integration process.

[327] Protocol of Trujillo, supra note 301 art. 11.

[328] "Sovereignty and Regionalism," supra note 142 at 1112.

[329] Protocol of Trujillo, supra note 301 art. 12. See also "Sovereignty and Regionalism," supra note 142 at 1112-1113.

[330] Protocol of Trujillo, supra note 301 art. 14.

[331] Ibid. art. 14.

[332] Ibid. art. 13.

[333] Ibid. arts. 15 and 17.

and evaluate, in coordination with the Commission, the general policies of the integration process and sign agreements with other States or international organizations.[334] Additionally, it is charged with coordinating a common position among the member States in international negotiations and forums and representing the Andean Community, so long as it falls under its sphere of competence.[335] It meets twice a year in the State or it may meet in extraordinary meetings at the request of a member State.[336] Moreover, it must meet at least once a year with the Commission to discuss those matters that fall under both competences such as the preparation of the APC meetings, the appointment or removal of the Secretary General of the Andean Community and to consider any initiatives or proposals by the Member States or Secretary General.[337]

The Commission is now entrusted with overseeing the commercial and investment aspects of the integration process and when appropriate, in coordination with the ACFAM. It is still made up of plenipotentiary representatives and it still issues Decisions.[338] These Decisions are now to be adopted by an absolute majority except for certain matters that require an absolute majority with no negative vote.[339] Among its other responsibilities are to adopt the necessary measures to carry out the objectives of the Cartagena Agreement such as ensuring that the Directives of the APC are being complied with, monitor the harmonious provisions of the obligations of the Andean Community with the LAIA, and approve, disapprove or amend any proposals presented for its consideration by the member States or General Secretariat.[340] Just as with the ACFAM, it is charged with coordinating a common position among the member States in international negotiations and forums and representing the Andean Community, so long as it falls under its sphere of competence.[341] Additionally, the Member States or General Secretariat may ask that the

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[334] Ibid. art. 16
[335] Ibid.
[336] Ibid. art. 18.
[337] Ibid. art. 20.
[338] Ibid. art. 21.
[339] Ibid. art. 25.
[340] Ibid. art. 22
[341] Ibid.

Commission meet with the pertinent ministers or ministerial secretaries to deal with sectoral matters, consider norms to facilitate the coordination of development plans and the harmonization of economic policies as well as to learn or resolve any other matters of common interest.[342] The Commission is to meet three times a year, or whenever requested by a member State or the General Secretariat.[343] The Commission, however, it is no longer the maximum organ of the integration process and its legislative powers are now shared with the ACFAM.[344]

The General Secretariat acts as the executive body of the Andean Community. It provides technical support to the institutions of the Community and issues Resolutions.[345] It replaces the Board and takes over its functions. This is considered to be the major change of the institutional structure of the AIS.[346] Just as with the Board, it acts solely in the best interest of the Andean Community and it is still charged with monitoring the application of the subregional agreement and ensures that the norms issued by the bodies are being fulfilled.[347] It still plays a role in the legislative and decision making process by submitting proposals for Decisions to the Commission and the ACFAM in order to facilitate the process of integration in the shortest time possible.[348] Additionally, it may still initiate non-compliance actions before the Andean Court, now renamed the Court of Justice of the Andean Community.[349] Moreover, as its name indicates, it acts as the secretariat for the AIS and is entrusted with the technical and administrative workings of the Andean Community and any other functions entrusted to it under the this legal order.[350] The General Secretariat is represented by a Secretary General who is elected by consensus by the ACFAM.[351] The Secretary General is the legal representative of the General Secretariat and is to act solely in the best interests of the Andean

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[342] Ibid. art. 25. See also "Sovereignty and Regionalism," supra note 142 at 1113.
[343] Protocol of Trujillo, supra note 301 art. 24.
[344] Castañeda Arrascue, supra note 300 at 23.
[345] Protocol of Trujillo, supra note 301 art. 29.
[346] Castañeda Arrascue, supra note 300 at 23.
[347] Protocol of Trujillo, supra note 301 arts. 29 and 30.
[348] Ibid. art. 30(c).
[349] Protocolo Modifcatorio del Tratado de Creación del Tribunal de Justicia del Acuerdo de Cartagena, online: Foreign Trade Information System <http://www.sice.oas.org/trade/junac/tribunal/tratmodi.stm> (date accessed: 15 November 1999), arts. 23 and 24 [hereinafter Protocol to the Court of Justice Agreement].
[350] Protocol of Trujillo, supra note 301 art. 30.

Community.[352] Just as with the Board, this person is not directly responsible to their own governments, but must act on behalf of the common interest and not seek nor accept instructions from any government, national or international entity.[353]

The Andean Parliament, the deliberative body of the AIS, is made up of representatives from the national congresses of the member States. Within five years these representatives are to be directly elected through universal suffrage.[354] It is charged with promoting and orienting the integration process in order to consolidate Latinamerican integration, examining the progress and fulfillment of the objectives of the Andean Community, suggesting to the bodies of the AIS any modifications to the institutional structure, suggesting to the norm producing bodies of the AIS any actions that may be taken for its incorporation in the legal order of the Andean Community and promoting the harmonization of legislations among the member States.[355] It is thought that the participation of the Andean Parliament in the integration process will continually increase.[356]

ii. Dispute Resolution

Originally, the Cartagena Agreement did not have a formal method for resolving disputes and obtaining judgments regarding the authoritative application of Andean law.[357] Any disputes that did arise would be resolved first through direct negotiations, and if this failed, the Commission could intervene by exercising its good offices and taking other informal measures.[358] If these measures did not work, then the Commission was obligated to take formal efforts at conciliation by forming an ad hoc committee that would adopt a report containing its recommendations for the

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[351] Ibid. art. 32.
[352] Ibid. arts. 32 and 34.
[353] Ibid. art. 38.
[354] Ibid. art. 42.
[355] Ibid. art. 43.
[356] Castañeda Arrascue, supra note 300 at 23.
[357] Padilla, supra note 13 at 83.
[358] Ibid.

resolution of the dispute.[359] If this did not work, efforts could be made to resolve the dispute under the LAFTA Protocol on the Settlement of Disputes.[360] The problem with this system was that the recommendation of the Commission was non binding on the parties involved and not all the member States had ratified the Protocol on the Settlement of Disputes. This system proved to be totally inadequate as greater reliance was put on informal methods for the settlement of disputes.[361] This system could not ensure an adequate legal control of the integration process nor ensure a uniform interpretation of the legal regime, two fundamental needs of any integration process.[362]

In order to rectify this situation the Andean Court was created.[363] It is in charge of resolving disputes that may arise in the application and interpretation of the Cartagena Agreement as well as its protocols. It is the only true supranational body in Latin America.[364] The Court's jurisdiction is to hear actions of nullification and actions of noncompliance. It also has the power to interpret communitarian law. An action of nullification is a petition for the Court to strike down Decisions of the Commission or the resolutions of what was the Board.[365] Actions of Noncompliance may be initiated by the Board or by a member country when it considers that another member country is not complying with the tenets of Andean communitarian law.[366]

With the new institutional structure in place, the functions of the Andean Court have changed as

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[359] Ibid. See Cartagena Agreement, supra note 287 art. 23.

[360] LAFTA Protocol for the Settlement of Disputes, 2 September 1967, (1968) 7 I.L.M. 747.

[361] Padilla, supra note 13 at 83.

[362] A. Zelada Castedo, "El Control de la Legalidad, la Solución de Controversias y la Interpretación Uniforme del Derecho Común en el Esquema de Integración del Grupo Andino" in L. Sachica et al., El Tribunal de Justicia del Acuerdo de Cartagena (Buenos Aires: Instituto para la Integración de America Latina, 1985) 125 at 127 [hereinafter "El Control de la Legalidad"], Padilla, supra note 13 at 84 and "La Creation D'Une Cour de Justice dans le Groupe Andin," supra note 13 at 136-137.

[363] See Court of Justice Agreement, supra note 319, Commission Decision on the Statute of the Court of Justice of the Cartagena Agreement, (1983) 23 I.L.M. 422 and now the Protocol to the Court of Justice Agreement, supra note 349.

[364] See An Analytical Compendium, supra note 178 at 5.

[365] Court of Justice Agreement, supra note 319 art. 17. For a description of the Court of Justice, see N. de Pierola, "The Andean Court of Justice" (1987) 2 Emory J. Int'l Disp. Res. 11, E. Barlow Keener, "The Andean Common Market Court of Justice: Its Purpose, Structure, And Future" (1987) 2 Emory J. Int'l Disp. Res. 39 and E. Lochridge, "The Role of the Andean Court in Consolidating Regional Integration Efforts" (1980) 10 Ga. J. Int'l & Comp. L. 351.

[366] Ibid. art. 23, and de Pierola, ibid. at 31.

well.[367] The Protocol to the Court of Justice reflects the changes to the juridical structure of the integration process.[368] It still maintains actions of nullification, noncompliance and pronounce final interpretations on questions about the juridical structure of the Andean Community before the national courts of the member States in the course of private party litigation.[369] It can, however, now also preside over petitions for omissions or inactivities by the ACFAM, Commission or General Secretariat, preside over labour disputes that arise in the bodies of the AIS, and act as an arbitration tribunal to settle disputes that arise between third parties and the bodies of the AIS over contracts and agreements made between them.[370] Private parties may even call on the Andean Court to pronounce on the proper application and interpretation of Andean Community law or to settle contractual disputes between them.[371] Any judgment delivered by the Andean Court to settle these disputes will be final and binding on the parties involved.

The Andean Court has jurisdiction to nullify Decisions by the ACFAM and the Commission as well as Resolutions issued by the General Secretariat.[372] This also extends to the Industrial Complementation Conventions or any other adopted by the member States within the framework of the Andean subregional process.[373] Any member State, the ACFAM, the Commission, General Secretariat or natural or juridical persons may bring an action for nullification when these norms are adopted in violation of the Andean Community.[374] Persons may challenge the Decisions and

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[367] These changes will allow, inter alia, give individuals the right to bring an action against a member State for noncompliance of the norms of the AIS and to also serve as an arbitration panel for business disputes involving private parties, "Friend of Foreign Enterprise," supra note 284 at 823.

[368] Article 1 of the Protocol to the Court of Justice, supra note reads:

Article 1-The juridical structure of the Andean Community comprises of the following:
a) The Cartagena Agreement, its Protocols and Additional Instruments;
b) This Treaty and its Modifying Protocols;
c) The Decisions of the Andean Council of Foreign Affairs Ministers and of the Commission of the Andean Community;
d) The Resolutions of the General Secretariat of the Andean Community; and
e) The Industrial Complementation Conventions and others adopted by the Member States within the framework of the Andean subregional integration process.

[369] Ibid. arts. 17, 23 and 32.

[370] Ibid. arts. 37, 38 and 39.

[371] Ibid. art. 38.

[372] Ibid. art. 17.

[373] Ibid.

[374] Ibid.

Resolutions so long as they are applicable to them and cause them harm.[375] Member States may only challenge the Decisions or Conventions that they had voted against.[376] The action for nullification must be brought within two years of the norm being approved. However, even if two years have passed, any party involved in domestic litigation that relates to the application of the norm may argue its invalidity. The judge would then have to ask the Andean Court for its opinion, during which time the proceedings are halted. The decision of the Andean Court is binding on the parties involved.[377] Until the Andean Court does issue a judgment, the norm shall continue to be applicable. However, the affected party may petition the Andean Court to suspend the provisions of the norm or other measures if its continued application would cause irreparable harm or make reparations difficult after a decision is made.[378] If the Andean Court finds that a norm is not in compliance with the Andean Community, it must state the effects of the ruling and the time period in which the relevant body must comply with the ruling.[379]

The General Secretariat has the power to bring an action for noncompliance to the Andean Court if it considers that a member State is not complying with its obligations under the norms that comprise the juridical structure of the Andean Community. It may only bring the action based on its reports after the member State has had sixty days to respond to the allegations.[380] Member States may bring an action for noncompliance against another member State by making a submission to the General Secretariat. The General Secretariat then takes the same steps as if it was bringing its own action against the alleged infringing member State. If sixty-five days have passed when the complaint was presented to the General Secretariat and no action has taken place, then the member State may bring its complaint directly to the Andean Court.[381] Natural or

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[375] Ibid. art. 19.
[376] Ibid. art. 18.
[377] Ibid. art. 20.
[378] Ibid. art. 21.
[379] Ibid. art. 22. See also, "Sovereignty and Regionalism," supra note 142 at 1115.
[380] Protocol to the Court of Justice Agreement, supra note 349 art. 23.
[381] Ibid. art. 24. As well, article 26 allows the General Secretariat to issue a written opinion from which a member State may bring directly to the Andean Court if there has been a flagrant noncompliance or if a Resolution was issued verifying the existence of the restriction.

juridical persons have two options to pursue a claim for noncompliance. It may either ask that the General Secretariat review the matter or bring an action in its domestic legal system if its rights are affected by the noncompliance. However, it cannot bring a simultaneous complaint under both processes.[382] If the Andean Court determines that the member State is not complying with the legal order of the Andean Community, it has ninety days to take all the necessary measures to ensure compliance. If the non complying member State fails to do so, the Andean Court may, in consultation with the General Secretariat will determine to what extent the other members may restrict or suspend the advantages afforded to it under the Cartagena Agreement.[383]

The Andean Court may issue binding interpretations on the norms that comprise the legal order of the Andean Court.[384] In a case that involves the application of the norms of the Andean legal order, the National courts must ask the Andean Court to give a binding interpretation on its proper application.[385] This function of the Andean Court is important because it ensures the uniform interpretation and application of the norms and maintains the supremacy of Andean law over the laws of the member States.[386] This process furthers the integration process by involving the national courts in the application of Andean law and thus fostering cooperation between the two courts.[387]

Finally, the Protocol to the Court of Justice Agreement adds a new action for omission or inactivity. This action affects the ACFAM, Commission and General Secretariat. If either of these bodies do not carry out its obligations under the legal order of the Andean Community, any natural or juridical person, member State, or said bodies may bring an action for inactivity to the Andean

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[382] Ibid. arts. 25 & 31.
[383] Ibid. art. 27.
[384] Ibid. art. 32.
[385] Ibid. arts. 32 and 33. The Andean Court will only issue its interpretation only if the ruling is subject to appeal. If the ruling is not subject to appeal, the judge must suspend the proceedings and petition the Court for its ruling.
[386] "Sovereignty and Regionalism," supra note 142 at 117.
[387] "El Control de la Legalidad," supra note 362 at 160.

Court.[388]

As a result, the Andean Court is the only means from which procedures and remedies may be pursued in cases of alleged breaches of Andean law. This limits the sovereign powers of member States to pursue other avenues in order to avoid their obligations under the Andean Community.[389]

iii. The Legal Effect of Regional Norms

Even before the Andean Court was created, it was regarded that the regional law had a strong impact on national law with many of the norms having direct application and granting rights or imposing obligations upon the individual.[390] Moreover, the Board and Commission were granted numerous exclusive powers, replacing national law in those fields in which States are not longer competent to legislate and that generally, the regional law is automatically incorporated into national law.[391] However, problems arose because the Cartagena Agreement lacked provisions that specified the extent and applicability of these norms in the national legal order.[392] The interpretations of the Cartagena Agreement with regard to the validity of the norms of its bodies were not uniform and often contradictory in the domestic legal systems.[393] Moreover, not all the member States were as receptive to the extensive community law elements of the Cartagena Agreement.[394] Situations would arise where some Decisions would not be applicable in all the member States creating an uneven legal system that could benefit some members at the expense of another.[395] Therefore, the creation of the Andean Court was needed, inter alia, to guarantee

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[388] Protocol to the Court of Justice Agreement, supra note 349 art. 37.

[389] "Sovereignty and Regionalism," supra note 142 at 1117.

[390] "Economic Integration in Latin America," supra note 67 at 474.

[391] Ibid.

[392] The Andean Legal Order, supra note 283 at 147.

[393] F.V. García-Amador, "Some Legal Aspects of the Andean Economic Integration" in G. Wilner, ed., Jus et Societas: Essays in Tribute to Wolfgang Friedmann (The Hague: Martinus Nijhoff Publishers, 1979) 96 at 112 [hereinafter "Legal Aspects of the Andean Economic Integration"] and J. Guillermo Andueza, "La Aplicación Directa del Ordenamiento Juridico del Acuerdo de Cartagena" (1985) 98 Integración Latinoamericana 3 at 9.

[394] "Legal Aspects of the Andean Economic Integration," Ibid.

[395] Guillermo Andueza, supra note 393 at 9. For example, Venezuela and Colombia required that the norms issued by the Andean Pact be first approved by the legislature. This, in effect, amounted to a reservation to the Cartagena Agreement modifying the legal effect of those norms in their application. The whole operation of the Andean legal

strict compliance with the derived norms of the Cartagena Agreement and provide definitive interpretations on the application of those norms in the national legal systems.[396] The Court of Justice Agreement stated the juridical structure of the Andean Pact and the effects the Decisions of the Commission and Resolutions of the Board had on the domestic legal systems of the member States.[397]

The Protocol to the Court of Justice Agreement reflects the changes to the institutional structure of the Cartagena Agreement and changes to some extent the effect the derived norms have on the domestic legal systems. The Court of Justice Agreement provides that the Decisions of the Commission are obligatory for the member States from the date they are approved but now the Protocol adds that the Decisions of the ACFAM have the same effect.[398] Moreover, these Decisions and the Resolutions of the General Secretariat are directly applicable in the member States from the date of publication from the Official Gazette of the Cartagena Agreement, unless they provide for a later date. However, under the Court of Justice Agreement, only the Decisions were directly applicable in the domestic legal systems of the member States. Furthermore, all the member States are to adopt the necessary measures to assure the fulfillment of these norms and are not to adopt or apply any measure which may be contrary to them or prejudice their application.[399]

Just as important in the development of these norms in the internal legal orders of the member States is the role of the Andean Court. As mentioned before, its creation was instrumental in

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order was affected and this policy effectively overrode de facto the allocation of powers established by the Andean Pact and thus undermined the whole integration process, "Legal Aspects of the Andean Economic Integration," supra note 393 at 113.

[396] Sachica, supra note 306 at 98-99.

[397] Court of Justice Agreement, supra note 319 arts. 1-5. The Commission did have state its opinion on the effect the Andean legal order had on the domestic legal systems. It stated that: (1) the Cartagena Agreement legal order had its own identity and autonomy, constituting its own community law and forms part of the national legal orders; (2) the legal order, in its sphere of competence, prevails over national laws; and (3) the Decisions enter into force the day indicated in them, or in the date of the Final Act of the Commission's meeting that adopted it, see A. Zelada Castedo, "El Sistema Jurisdiccional de Solución de Controversias del Grupo Andino" in Dimensión Jurídica, supra note 69, 159 at 166 [hereinafter "Solución de Controversias del Grupo Andino"].

[398] Protocol to the Court of Justice Agreement, supra note 349 art. 2.

[399] Ibid. arts. 3 and 4. Additionally, when the Decisions so provide, they will be adopted as internal law by means of an express act indicating the date of entry into force in each member country.

ensuring a uniform interpretation and application of the Cartagena Agreement in the domestic law of the member States and ensuring that they were enforced. Through various decisions handed down, it has also developed the legal nature of these norms. It has especially developed two principles that it views as essential for the operation of the Andean legal order: (1) the principle of direct application as enunciated under articles 3 and 4 of the Court of Justice Agreement, and (2) the principle that the member States are not to take steps to impede the application of these norms, as mentioned under article 5 of the Agreement.. In this way, the concept of supremacy is developed where the Andean legal order prevails over national norms, a fundamental requisite for the integration process.[400] In one judgment, the court:

> As for the effect the integration norms have on the national ones, doctrine and jurisprudence indicate that in a case of conflict, the internal rule is displaced by the community one, which is to be applied preferentially when the competence corresponds to the community. In other words, the internal norm is inapplicable to the benefit of the communitarian norm...
>
> This is not to say that the later communitarian law derogates the preexisting national norm...since they are distinct, autonomous and separate legal orders...What it deals with is the direct effect of the principle of immediate application and of supremacy which in all cases must be conceded to the communitarian norms over the internal ones.[401]

In other words, Andean law displaces domestic law, so long as it is within their sphere of competence, but it does not derogate those laws, only that they are inapplicable when confronted with a communitarian norm. This line of reasoning runs through all of the judgments of the Andean Court when it has to decide on the status of norms of the Andean legal order in that of the national ones.[402] Moreover, the Court has also stated the obligations of the member States under article 5 of the Court of Justice Agreement, now article 4 of the Protocol to the Court of Justice Agreement, on the application of these norms in their internal legal order:

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[400] "Solución de Controversias del Grupo Andino," supra note 397 at 166-167.

[401] Proceso No. 2-IP-88 (25 May 1988) as cited and quoted in ibid. at 167-168.

[402] Ibid. at 8-9. Additionally, the Court has continually referred to the Van Gend & Loos and Costa judgments to find support for their positions, see Proceso No. 3-AI-96, 24 May 1997, Acción de incumplimiento interpuesta por la Junta del Acuerdo de Cartagena contra la República de Venezuela, online: Foreign Trade Information System <http://www.sice.oas.org/dispute/cartagena/PR3AI96S.stm> (date accessed: 15 November 1999).

> [T]he member States, by virtue of article 5, have a double obligation. The first is of a positive character, 'to do'; and the second of a negative one, 'to not do.' As for the first obligation, the member States are to adopt every type of measure, whether legislative, judicial, executive, administrative or of any other type such as regulations, procedures, requisites, decisions, resolutions, agreements, dictums, sentences or judgments, which can guarantee the fulfillment of the andean norm, that is, of the obligations and commitments acquired by virtue of the Treaties and of those that correspond by mandate to the secondary or derived norms of the same order...On the other hand, by virtue of the second obligation, the member States are to abstain from taking any measure, in whichever name or form it is adopted, from impeding the application of the andean legal order...[T]he member States may not adopt laws, issue regulations or issue administrative norms which, although not apparently contrary to the andean legal order, impede, in practice, the application of it.[403]

Finally, the Andean Court has had the opportunity to pronounce on whether these norms have direct effect in the domestic legal orders of the member States:

> While the principle of direct application refers to the norm itself, that of direct effect refers to the actions individuals my exercise for the proper application of the communitarian norm. In other words, its effects "generate rights and obligations for individuals as if they were the same as the norms in their national legal order," which permits the possibility the they may directly demand their observance before their respective tribunals...Between the principle of direct application and direct effect, there is a close connection: the andean communitarian norm, by being directly applicable within the member States, has an immediate effect on the citizens of the Subregion by having them being protected by the rights that these norms confer. It is lawful to open the possibility to demand the observance of these norms before the national justices.[404]

Therefore, through the judgments of the Andean Court, and the promulgation of the Court of Justice Agreement, Andean law is directly applicable within the member States national legal orders. Moreover, the norms of the Andean legal order, whether primary or secondary, are to be given preeminence over those national norms that conflict with them. Those norms are not derogated, only that they are inapplicable when in conflict with an Andean norm. Finally, the Andean Court has also stated that as a corollary of the direct application principle, it accepts the principle of direct effect and therefore grants private parties the right to bring an action before their national courts to demand that the subregional norms be complied with.

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[403] As cited and quoted in "Solución de Controversias del Grupo Andino," supra note 397 at 193-194.
[404] Proceso No. 3-AI-96, supra note 402.

6. Central American Common Market

The Organization of Central American States (ODECA), made up Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, was formed in 1951. It is in a sense a regional organization within a regional organization as it was originally formed to provide progressive economic, social and technical cooperation without derogating from the rights and obligations of the member States which derived from their membership of either the United Nations (UN) or Organization of American States (OAS).[405] The ODECA, along with the ECLA initiated a number of programs aimed at promoting integration among the member States during the 1950s.[406] This cooperation led to the formation of the Central American Common Market (CACM) in 1960 by the General Treaty on Central American Economic Integration (otherwise known as the Treaty of Managua)[407] under the principle aegis of the ODECA.[408] The purpose of the CACM were twofold: to eliminate barriers to trade between the member States in order to form a customs union and to harmonize the industrial and agricultural development policies.[409] Additionally the adoption of a common external tariff and the creation of a Central American Bank of Economic Integration was pursued as well.[410] To a large extent these objectives were reached and were the most successful integration scheme during the 1960s.[411] However, pervasive regional and civil strife, which plagued the region for the 1970s and 1980s virtually, stalled and undid the progress of the CACM.[412]

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[405] K.R. Simmonds, "The Central American Common Market" (1967) 16 I.C.L.Q. 911 at 914.

[406] See Simmonds, ibid. at 914-917. The second Charter of the ODECA stated that the five Republics "are an economic-political community which aspires to the integration of Central America" and makes provisions for a typically ambitious institutional structure, while the ECLA created a Central American Committee for Economic Cooperation in 1951 to take charge of a gradual and progressive integration programme in agricultural and industrial fields, Simmonds, ibid. at 914-915.

[407] General Treaty on Central American Economic Integration, 13 December 1960, reprinted in Instruments of Economic Integration vol. 2, supra note 31 at 385 [hereinafter Treaty of Managua].

[408] Padilla, supra note 13 at 84. It came into force for Guatemala, El Salvador and Nicaragua in June of 1961 and for Honduras in April of 1962. Costa Rica adhered to in September of 1963, Simmonds, supra note 405 at 917.

[409] "Economic Integration in Latin America," supra note 67 at 465.

[410] R. Cevallos, "The Central American Bank for Economic Integration" (1996) 4 Tul. J. Int'l & Comp. L. 245 at 248.

[411] "Economic Integration in Latin America," supra note 67 at 465.

[412] For example, due to the "Soccer War" between Honduras and El Salvador, Honduras withdrew de facto by imposing tariffs on imports from Central America in 1969. For a look at the impact the 1980s had on the CACM see G. Noriega Morales, "Breve Historia del Mercado Común Centroamericano y su Situación y Funcionamiento Durante la Crisis de la Década de 1980" (1992) 179 Integración Latinoamericana 3. See also Padilla, supra note 13 at 85 for further illustrations of the problems the region faced during this time.

At the XI Central American President Summit held in Tegucigalpa, Honduras in 1991, the five CACM countries, along with Panama, reinvigorated the integration process by adopting the Tegucigalpa Protocol to the ODECA Charter and creating the Central American Integration System (CAIS).[413] The CAIS encompasses social, legal, political, cultural and economic integration rather than just concentrating solely on economic integration under the CACM.[414] It is hoped that this will create a legally organized community in Central America and create a permanent region of peace, liberty, democracy and development.[415]

In order to modernize the CACM to the new developments in the region, the Protocol of Guatemala to General Treaty on Central American Economic Integration (Guatemala Protocol)[416] reformed its legal framework. The economic integration process is part of the CAIS and referred to as the Economic Integration Subsystem. Therefore, not only does the legal framework of the Guatemala Protocol direct the economic integration process, but also that of the CAIS.[417] The main objective of the modernized CACM is to form a Central American Economic Union.

i. Institutions

One issue that should be looked at is the relationship between the institutions of the ODECA with those of the CACM. Before the institutional reforms were put in place in the ODECA, it had an Executive Council and Central American Economic Council that were responsible for the economic objectives of the region, while the CACM had its own Councils in charge of economic integration.

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[413] Protocolo de Tegucigalpa a la Carta de la Organización de Estados Centroamericanos, 13 December 1991, online: Foreign Trade Information System <http://www.sice.oas.org/trade/sica/SG121391.stm> (date accessed: 15 November 1999) [hereinafter Tegucigalpa Protocol].

[414] R. Ramirez, "El Derecho de la Integración Centroamericana" in J.C. Castro Loria, ed., Libro Homenaje al Profesor Eduardo Ortiz Ortiz (San Jose: Universidad Autonoma de Centroamerica, 1994) 23 at 28.

[415] Tegucigalpa Protocol, supra note 413 art. 3.

[416] Protocolo al Tratado General de Integración Economica Centroamericana, 29 October 1993, online: Foriegn Trade Information System <http://www.sice.oas.org/trade/sica/S102993a.stm> (date accessed: 15 November 1999) [hereinafter Guatemala Protocol].

[417] Ibid. art. 1(d).

Under article 17 of the old Charter of the ODECA,[418] all the regional economic agencies and their organs ipso jure form part of the Central American Economic Council of the ODECA and are thus in theory were subordinated to the highest body, the Meeting of Heads of State.[419] Moreover, under a provisional article of the Treaty of Managua, the organs of the CACM were to eventually become part of the ODECA once Costa Rica had adhered to the economic integration process, but still maintain their structural and functional abilities. The Ministers of Foreign Affairs considered this relationship once Costa Rica did join the CACM, at an informal meeting in 1965. It was concluded that the organs created by the CACM were to maintain their functions and structure while forming a part of the ODECA. Any coincidence between the organs of the CACM and those of the ODECA were not to extend to the functions and powers conferred to them by the two instruments.[420] What they did serve was to provide a method in which the two parallel integration movements, one focused on economics, the other on politics, were to keep in close touch for the eventual convergence into one integration process for the region.[421]

Under the current integration movement, these parallel movements have converged to a significant extent. The economic integration process is now governed under the new institutional framework to the CACM introduced by the Guatemala Protocol, but as a subsystem of the CAIS, the main integration process also governs it as well.[422] As stated under article 36 of the Guatemala Protocol:

> The Economic Integration Subsystem will be launched and perfected by the acts of the organs created by the Protocol of Tegucigalpa and by the present Instrument.

As such, a cursory look at the institutions of the CAIS legal framework will be looked at before

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[418] Charter of the Organization of Central American States, reprinted in Inter-American Institute of International Legal Studies, vol. 2, supra note 31 at 561.
[419] Simmonds, supra note 405 at 925.
[420] Ibid.
[421] Ibid.
[422] Guatemala Protocol, supra note 416 art. 1(d) reads:

examining the bodies of the CACM.

The institutions created to reach the objectives of the CAIS are the Assembly of Presidents, the Council of Ministers, the Executive Committee and the General Secretariat. The Assembly of Presidents, made up of the Heads of States of the member States, is the highest organ of the CAIS. It adopts decisions by consensus and is responsible to define and guide Central American policies in order to ensure the coordination and harmonization of the institutions of the integration process and assure that the obligations of the CAIS are being fulfilled.[423] The Council of Ministers is composed of the corresponding Ministers in each member State. For example, there is the Council of Ministers for Foreign Affairs and the Council for Ministers of Economic Integration. These Ministers are to ensure the efficient execution of the decisions taken by the Assembly of Presidents that apply to their area of competence.[424] The Executive Committee is composed of one representative from each member State. It is charged with ensuring that the CAIS is being complied with and that the decisions of the Assembly of Presidents are being fulfilled.[425] The General Secretariat is the highest administrative body of the CAIS. It is represented by the Secretary General. The Secretary General is charged with representing the CAIS on the international plane as well as ensure that the Tegucigalpa Protocol and the decisions of the Assembly of Presidents and Council of Ministers are being complied with. It is to serve solely in the best interest of the CAIS, independent from any member State.[426]

Under the Treaty of Managua, the bodies of the CACM were the Central American Economic Council (Economic Council), the Executive Council and the Secretariat for Economic Integration of Central America (SIECA). The Economic Council, composed of the Ministers of the Economy, met

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The economic integration process is governed by this Protocol, in the legal order framework and institutions of the CAIS, and may be developed through complementary or derived instruments.

[423] Tegucigalpa Protocol, supra note 413 arts. 13-15.

[424] Ibid. art. 16.

[425] Ibid. art. 24.

[426] Ibid. arts. 26 and 27.

periodically to determine the integration policy and coordinate economic policies.[427] The Executive Council, made up of one delegate from each member State, was in charge of the administration and application of the Treaty of Managua.[428] Each body was able to issue resolutions, however those of the Economic Council were to be adopted unanimously, while those of the Executive Council were adopted by majority vote.[429] The SIECA served both Councils by providing the technical staff to carry out research studies and economic evaluations as well as supervise the proper application of the regional legal order.[430] It also came to represent a broad regional point of view instead of mere national perspectives, although it never was formally charged with this responsibility.[431]

The Guatemala Protocol maintains the SIECA, but it replaces the Economic Council with the Council of Economic Integration Ministers (CEIM), the Executive Council with the Executive Committee and introduces a new body, the Sectoral Council of Economic Integration Ministers (SCEIM).[432] The CEIM, also referred to as the Central American Economic Cabinet, essentially has the same responsibilities as the Economic Council. It is composed of the Ministers of the Economy and the Presidents of the Central Banks of the member States. It is responsible to coordinate, harmonize, converge or unify the economic policies of the member States.[433] Additionally, proposals for the general policies and fundamental directives of the CACM are to be formulated by the CEIM for eventual approval by the Assembly of Presidents, the highest body of the CAIS.[434] The Executive Committee, made up of a representative of each member State, replaces the Executive Council and takes over its responsibilities. It is responsible to approve any measures to execute the decisions

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[427] Treaty of Managua, supra note 407 art. XX.
[428] Ibid. art. XXI.
[429] Before adopting a decision, both organs undertook an elaborate procedure consisting of consultations with the SIECA, specialized agencies, governments and the private sector, "Economic Integration in Latin America," supra note 67 at 467.
[430] Treaty of Managua, supra note 407 arts. XXIII and XXIV. See Padilla, supra note 13 at 86 and "Economic Integration in Latin America," supra note 67 at 466.
[431] "Economic Integration in Latin America," ibid.
[432] Guatemala Protocol, supra note 416 art. 37.
[433] Ibid. art. 38.
[434] Ibid. art. 39.

of the CEIM.[435] The General Secretariat is the technical and administrative body of the CACM. It is represented by a Secretary General. It is responsible to oversee on a regional level the correct application of the Guatemala Protocol and the other legal instruments of regional economic integration as well as the execution of the decisions of the CACM bodies.[436] Another important function of the General Secretariat is that is must coordinate its actions with the other Secretariats of the CAIS and inform the General Secretariat of the CAIS its activities in order to harmonize its efforts in economic integration with those being pursued in the political, social and cultural sphere.[437] Just as with the Council of Ministers, the SCEIM is composed of the corresponding Ministers in each member State. Each Sectoral Council is to coordinate and harmonize its actions in its area of competence in order to strengthen the economic integration process.[438] All of these bodies are to be advised by the Consultative Committee of Economic Integration (CCEI). The CCEI is composed of representatives of the private sector who provide advice on aspects of economic integration when asked by one of these bodies or it may do so on its own initiative.[439] It is part of the General Secretariat of the CACM and is related to the Consultative Committee found under article 12 of the Tegucigalpa Protocol.[440]

Therefore, one can see that just as there was an apparent overlap with the Treaty of Managua and the ODECA, this situation is still maintained with today's regional integration movement. The Council of Ministers and Executive Committee of the Tegucigalpa Protocol and the SCEIM and Executive Committee of the Guatemala Protocol appear to have the same functions and structure. However, what makes today's reality different is that the parallel movements toward integration have converged under the Protocol of Tegucigalpa. This situation will perhaps make it somewhat

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[435] Ibid. art. 42.
[436] Ibid. art. 44.
[437] Ibid. art. 43 and Tegucigalpa Protocol, supra note 413 art. 28.
[438] Guatemala Protocol, supra note 416 art. 41.
[439] Ibid. art. 49.
[440] Ibid. The Consultative Committee of the CAIS is made up of businessmen, labour leaders, academics and other groups who represent the various economic, social and cultural sectors of Central America. Its function is to give advice to the General Secretariat of the CAIS on the policies and development of programs that are to be carried out, Tegucigalpa Protocol, supra note 413 art. 12.

difficult to determine which institutions will determine the future direction of the economic integration process.

ii. Dispute Settlement

The Treaty of Managua did not create a permanent dispute settlement body. Article XXVI provided that the member States were to settle their disputes amicably through either the Executive or Economic Council. If this does not settle the matter, the dispute was to be put to arbitration. Each member State was to submit the names of three judges from its Supreme Court to the General Secretariat of the ODECA. From this list, the Secretary General of the ODECA would draw one name by lot from each of the member States' candidates. The decision would be made by majority vote and have res judicata effect on all the member States so far as it pertained to the interpretation or application of the provisions of the Treaty of Managua.[441] In practice, no dispute ever reached the arbitral stage. The Councils normally settled any disputes that did arise.[442] This left the dispute settlement process being overly reliant on political compromise or bilateral negotiations. Because of this, a body of community law did not develop which led to uncertainty on the proper interpretation and application of the CACM within the legal orders of the member States.[443]

This situation changed with the formation of the CAIS. It was recognized that given the politicized period Central America is going through, it was necessary to have some form of jurisdictional control so that no member State could unjustly assert rights that they did not have or act in an arbitrary manner.[444] Therefore, the Tegucigalpa Protocol created as an institution of the CAIS the Central American Court of Justice (Central American Court). Article 12 of the Tegucigalpa Protocol guarantees the respect for law in the interpretation and execution of the Protocol, its

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[441] Treaty of Managua, supra note 407 art. XXVI.
[442] "Economic Integration in Latin America," supra note 67 at 467.
[443] Padilla, supra note 13 at 87.
[444] Statute of the Central American Court of Justice, 10 December 1992, (1995) 34 I.L.M. 921 at 926 [hereinafter Statute of the Central American Court] (In force for El Salvador, Honduras and Nicaragua; entered into force 2 February 1994).

complementary instruments and the documents derived from said Protocol.[445] To this extent, any controversies that arise as to the application and interpretation of the CAIS would be submitted to the Court.[446]

The issue arises on whether the Central American Court has jurisdiction over disputes that may arise within the CACM. The argument could be made that the Court is a creation of the CAIS, and as such, it only has jurisdiction over those matters that fall under it. But, by virtue of article 35 of the Tegucigalpa Protocol, the provisions found under the Protocol and its complementary instruments are to prevail over any other integration agreement in force between the member States. Furthermore, any disputes that may arise as to the application or interpretation of the provisions found in the Protocol and its instruments are to be submitted to the Central American Court. The 'instruments' refer to any convention, agreement or protocol entered into by the member States that relate to Central American integration such as the CACM.[447] Moreover, the Central American Court has issued a decision on the legal effect of this article. The Secretary General of the CAIS had asked for an advisory opinion on the legal position of the Tegucigalpa Protocol as it relates to past and future agreements.[448] It considered that the Protocol is a constitutional framework treaty, and as such, is the fundamental base for the integration process. It is at the top in the hierarchy of norms in the CAIS, including any other treaty, convention, protocol, agreements or other legal acts entered into before or after the Protocol came into force. Therefore, the institutions derived within it would have a significant role in any other integration process began before the CAIS came into being, such as the CACM. Seeing as the CACM is a subsystem of the CAIS, it could be argued that any controversies that arise in its application would now go onto the Central American Court. For example, under Article 22(a) of the Statute of the Central American

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[445] Tegucigalpa Protocol, ibid. See also M.A. Rivera Portillo, "Commentary" (1996) 40 St. Louis L.J. 1115 at 1116.
[446] Tegucigalpa Protocol, ibid. art. 35.
[447] Ramirez, supra note 414 at 32.
[448] Resolución emitida por La Corte Centroamericana de Justicia, en le caso de Opinión Consultiva, solicitada por el Dr. H. Roberto Herrera Cáceres, Secretario General del Sistema de la Integración Centroamericana, en el reacción con la situación jurídica del Protocol de Tegucigalpa, con respecto a instrumentos jurídicos anteriores y actos posteriores,

Court, it reads that the Court is to hear, at the request of any of the member States, the controversies that arise between them. This obligates the member States who have ratified both the Tegucigalpa Protocol and the Statute to submit any disputes that may arise between them.[449] As well, under Article 22(c), the Court may:

> [H]ear, at the request of any interested party, any matter related to the legal, regulatory or administrative provisions or any other type of rules prescribed by a state, when such provisions or rules affect the conventions, treaties or any other norm of the Law of Central American Integration, or the agreements or resolutions of its organs or organisms.

This provision is seen as giving the Court the competence to hear any dispute that may arise within any Central American treaty, not just those that may arise in the CAIS. These two provisions, when read together, is thought to give the Court competence to hear disputes over any bilateral trade agreements and more importantly, the CACM.[450]

The Court has a very wide jurisdiction to hear all types of matters. As noted by the Chief Justice of the Supreme Court of Honduras, Dr. Miguel Angel Rivera Portillo the Court can:

> [H]ear actions of nullity and nonfulfillment of the agreements of the bodies of the Sistema de Integración Centroamericana [Central American Integration System]; hear upon the request of any interested party, that which relates to legal regulatory, or administrative provisions or those of any other type promulgated by a state, when they affect agreements, treaties, and any other type of regulation of the Derecho de Integración Centroamericana [Central American Integration System], or of the agreements or resolutions of its agencies or bodies; act as a hearing agency for the agencies or bodies of the Sistema de Integración Centroamericana in the interpretation and application of the Tegucigalpa Protocol of Reforms to the Charter of the Organización de los Estados Centroamericanos (ODECA) and of the complementary instruments and documents derived from these instruments; hear any issues brought before it directly or indirectly by any party affected by the agreements of the agency or body of the Sistema de Integración Centroamericana; and, hear appeals cases involving administrative resolutions promulgated by the agencies and bodies of the Sistema de Integración Centroamericana which may directly affect one of their members and whose replacement has been denied; and preside over all conferences required by judges or courts of justice hearing a case pending decision.[451]

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24 May 1995, online: Official Website of the Central American Court of Justice <http://www.ccj.org.ni/resolnes/resol13.htm> (date accessed: 15 November 1999).

[449] It should be noted that so far only El Salvador, Honduras and Nicaragua have ratified the Statute of the Court of Justice Agreement. As such, disputes that may arise with Costa Rica and Guatemala are to be resolved under the dispute settlement mechanisms of the Treaty of Managua.

[450] M. Gutierrez Castro, "Solución de Controversias en el Mercado Común Centroamericano" in Dimensión Jurídica, supra note 69, 87 at 105-106.

For the CACM, the most relevant provisions in the Statute of the Central American Court are: (1) to hear actions that relate to the nonfulfillment or nullification of the agreements of the organisms of the CAIS (Article 22(b)); (2) to hear any matter related to the legal, regulatory or administrative provisions of a member State that may affect the operation of CAIS or its organs (Article 22(c)); (3) to act as a consultant to the organs of the CAIS in the interpretation and application of the Protocol of Tegucigalpa and its complementary instruments (Article 22(e)); (4) to resolve all prejudicial consultations requested by any judge or judicial tribunal which is hearing a pending case and wants to obtain a uniform application or interpretation of the norms of the CAIS (Article 22(k)); and (5) to hear matters submitted directly to them by individuals who are affected by the agreements of the organs of the CAIS.[452]

Decisions reached by the Court are to be made by an absolute majority and it should give the reasons for its judgment. Dissenting opinions may be set apart in writing. Its judgment is final and not appealable.[453] However, there seems to be some confusion on the legal effect these judgments have on the member States. On one hand, its judgments are to have res judicata effect but only binding on the parties involved in the dispute.[454] However, questions that involve the CAIS is binding on all the member States.[455] And yet another provision states that the decisions of the Court are binding on the member States, the organs and organisms of the CAIS and on natural and legal persons.[456] In these cases, the award will be executed as if it were a sentence of a national court. This confusion needs to be cleared up for the effective operation of this dispute settlement system.

Nevertheless, despite the presence of a regional court that apparently applies to the CACM, the

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[451] Rivera Portillo, supra note 445 at 1116-1117.
[452] Gutierrez Castro, supra note 450 at 92.
[453] Statute of the Central American Court, supra note 444 arts. 36 and 38.
[454] Ibid. arts. 3 and 37.
[455] Ibid. art. 24.
[456] Ibid. art. 39.

Central American countries are about to adopt the Central American Treaty on the Settlement of Trade Disputes (Trade Dispute Treaty).[457] It is applicable in two circumstances. First, it applies to all trade dispute matters on the application and interpretation of what it refers to as 'the instruments of economic integration': treaties, conventions, protocols, agreements, regulations and resolutions of the Central American Economic Integration.[458] Secondly, it applies when a State Party considers that an existing or proposed measure from another State Party is incompatible with the obligations in the instruments or where it may be the cause of nullification or impairment of the benefits that a State Party could reasonably expect to receive from its application.

The influence of the NAFTA becomes apparent after a review of its provisions. It follows the NAFTA model by providing the traditional three step process to dispute settlement: consultations, failing that the good offices, conciliation and mediation of the CEIM, and failing that arbitration. Also, as with the NAFTA, the parties have the option to either pursue dispute settlement either under the Trade Dispute Treaty or the WTO, however, if the dispute is to the application or interpretation of the instruments of economic integration, then only the Trade Dispute Treaty applies.[459] Once a process is initiated under one of these systems, it may not be pursued in the other.[460] Furthermore, the underlying principle for the settlement of disputes is to cooperate and consult in order to come to a mutually satisfactory solution, which is another indication of the influence of the NAFTA.[461]

The Trade Dispute Treaty also states that the SIECA should act as the administrative body of the dispute settlement process. As such, it has the power to notify or convoke the State Parties or arbitral tribunal, participate in all the hearings, support the arbitral tribunal, take down the

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[457] In Spanish, this reads as the Tratado Centroamericano sobre Solucion de Controversias Comerciales, online: Foreign Trade Information System <http://www.sice.oas.org/Trade/sica/solcontr.asp> (date accessed: 15 November 1999) [hereinafter Trade Dispute Treaty). The negotiations for this treaty were concluded in March of 1999 and needs the adoption of the national Legislative Assemblies of the countries involved.

[458] Ibid. art. 3

[459] Ibid.

[460] Ibid.

[461] Ibid. art. 2.

minutes of the proceedings as well as any other functions that the CEIM may designate.[462]

The first step is consultations. Any of the State Parties to the treaty may request in writing to one or more State Parties consultations on any adopted or proposed measure or any other matter that may affect the functioning of the instruments of economic integration.[463] A copy of the request is handed over to the SIECA so that it may be communicated to the CEIM and the other State Parties. Any of the other State Parties may participate in the consultations so long as a notification is given to the SIECA so that it may be forwarded to the State Parties involved in the dispute and the CEIM.[464] The State Parties are to provide the necessary information needed to determine whether the adopted or proposed measure might affect the instruments of economic integration.[465] The information exchanged during consultations is to remain confidential and any settlement reached must be compatible with the instruments of economic integration and may not repeal or diminish them in any way. If within ten days the State Party that consultations was asked from has not responded to the request, then the State Party asking for consultations may directly proceed to an arbitral tribunal for the settlement of the dispute.[466]

Any of the State Parties to the dispute may make a written request that the CEIM intervene if after 30 days from the request for consultation the dispute is still not resolved.[467] In the request, the State Party must indicate the adopted or proposed measure and the applicable provisions of the instruments of economic integration that is alleged to violate. Within ten days of the request, the CEIM will meet with the objective of reaching a mutually satisfactory solution to the dispute.[468] As such, the CEIM may convoke technical consultants or expert working groups that it considers necessary, use good offices, conciliation, mediation or any other dispute settlement process or

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[462] Ibid. art. 5.
[463] Ibid. art. 7.
[464] Ibid. art. 8.
[465] Ibid. art. 9.
[466] Ibid. art. 10.
[467] Ibid. art. 11.

formulate recommendations. If there is no consensus among the CEIM on how to proceed on the matter, than an arbitral tribunal shall be established. If conciliation or mediation is used, then the CEIM will select by lot from the list of arbitrators established by the Trade Dispute Treaty, a person who is not a national of the State Parties involved to act as a conciliator or mediator.[469]

If, however, after 30 days from the request made to the CEIM the dispute has still not been resolved or if the CEIM has not convened within ten days from the written request for intervention, then any of the State Parties involved may make a written request for the establishment of an arbitral tribunal.[470] The request will be handed over to the SIECA so that it may notify the other State Parties in writing. The other State Parties may then ask to participate in the arbitral proceedings as a party to the dispute or as a third party if they do so within ten days of receiving the request. If they elect to be a third party to the dispute, they will have the right to attend the hearings, be heard by the arbitral tribunal as well as present and receive written communications, which will be reflected in the final ruling of the arbitral tribunal.[471] A list of 25 arbitrators, of which 3 must be a national of each State Party and 10 that are not nationals of any of the State Parties will be maintained.[472] The members of the list are designated for a three year period from which they may be reelected for a further three. The arbitrators are: to have sufficient knowledge or experience in law, international trade or any other matter related to the instruments of economic integration, or in the settlement of international trade disputes; be selected strictly on their objectivity, honesty and good judgment; be independent from any of the State Parties; and comply with the Code of Conduct established by the CEIM.[473]

The arbitral tribunal shall be made up of 3 arbitrators. The Chairman of the tribunal is to be

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[468] Ibid. art. 12.
[469] Ibid. art. 13
[470] Ibid. art. 15.
[471] Ibid. art. 16. If a State Party decides not to participate directly or as a third party, it may only be involved in the arbitration if there is a significant change in their economic or trade circumstances.
[472] Ibid. art. 17. The arbitrators are to have the necessary qualities and disposition to be an arbitrator.
[473] Ibid. art. 18.

designated by the contending State Parties within 15 days of the presentation of the written request.[474] Once a Chairman is selected, then each State Party will select an arbitrator who is not one of their nationals from the list. The CEIM will establish the Model Rules of Procedure for the arbitration.[475] The rights to a hearing before the tribunal as well as the right to plea and rebut in writing are to be guaranteed. All hearings, deliberations, preliminary rulings as well as all writings and communications are confidential. Unless agreed to otherwise by the State Parties, within 60 days of the last appointment of the arbitrator, the arbitral tribunal may issue a preliminary decision based on the arguments and communications presented by the contending State Parties.[476] The preliminary decision is to include the finding of facts, determine whether the measure in question is or could be incompatible with the obligations derived from the instruments of economic integration or is the cause of nullification or impairment of the benefits that a State Party could reasonably expect to receive from its application and the proposed final decision. The State Parties then have 20 days in which to make their written observations known to the tribunal. The tribunal may then, at its own initiative or at the request of one of the State Parties and after examining the written observations conduct more proceedings it considers appropriate or reconsider its preliminary decision. Once a final decision is reached, the arbitral tribunal will then notify the State Parties involved and the CEIM.[477] The decision is to be made by majority voting and it shall be made public within 15 days of notification.

The final decision is binding on the State Parties involved in the dispute within the terms and timeframes determined by the tribunal.[478] If a measure is determined to be incompatible with the instruments of economic integration, the State Party is to refrain from carrying out the measure or repealing it. If it is determined that the measure will nullify or impair any benefits, then the

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[474] Ibid. art. 19. If an agreement cannot be reached within this time frame, then one of the contending State Parties will be chosen by lot to select the Chairman.
[475] Ibid. art. 20.
[476] Ibid. art 22. Also under article 21, either the State Parties or the tribunal may ask for information or technical assistance in order to assist in the preliminary decision.
[477] Ibid. art. 23.
[478] Ibid. art. 24.

arbitral tribunal will determine the level of the nullification or impairment and may, at the request of the State Parties, determine the appropriate compensation that it considers mutually satisfactory. However, if the impugned State Party does not comply with the final decision within the timeframe determined by the arbitral tribunal, then the complainant State Party may suspend any benefits derived from the instruments of economic integration that have an equivalent effect.[479] The arbitral tribunal will reconvene at the end of the timeframe for complying with its decision to determine whether this has occurred. It must then render a decision within ten days of reconvening. If the arbitral tribunal determines that its decision has not been complied with, the claimant State Party may then suspend any benefits. The suspension will continue until the arbitral tribunal determines that the final decision has been complied. When the claimant State Party unilaterally suspends benefits to the State Party that still maintains the impugned measures it must be made in the same sector that is being affected by the measures. If this is not feasible or ineffective, then the suspension may be applied in another sector.[480]

iii. The Legal Effect of Regional Norms

Under the Treaty of Managua, the derived norms of the bodies were in the form of resolutions, which were described as having law making powers similar to the institutions of the European Community.[481] However, their legal effect depended on the objectives of the bodies when adopting them. At times they would be mere recommendations, contain binding rules of general application, be similar to an EEC directive or even be addressed to individuals.[482] Therefore there was no consistency when considering the legal effects the resolutions had on the national legal orders. Nor was there anything in the Treaty of Managua to indicate what effect they would have. However, while it was up to each member State to put into effect the regulations according to their procedures, implementation and preparation of these norms in the domestic legal systems were

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[479] Ibid. art. 25.
[480] Ibid.
[481] F.V. García-Amador, "Institutional Developments in Central American Integration" (1967) Proc. ASIL 167 at 168.
[482] "Economic Integration in Latin America," supra note 67 at 467.

reserved to the CACM. In this way, it ensured that their effect would be equal within all the member States.[483] Furthermore, it was acknowledged that the CACM law was given a higher rank than domestic law of the member States.[484]

The Guatemala Protocol provides for the legal effect the derived norms of its bodies have on the domestic law of the member States. These norms are issued as Resolutions, Regulations, Agreements and Recommendations. The CEIM adopts Resolutions that are obligatory on the member States. Regulations have a general character, are obligatory on the member States and are directly applicable. Before they are adopted, the CCEI is to be consulted first. Agreements are designed to be applied only to those they are destined. Recommendations are only obligatory according to its objectives and principles and serve to prepare the issuance of Resolution, Regulations and Agreements.[485] The Executive Committee issues these derived norms in order to execute the decisions of the CEIM.[486]

The Central American Court has already had the opportunity to pronounce on the legal effect of these norms and the CAIS within the domestic law of the member States. In the first place, it said that the member States are to refrain from modifying or substituting the provisions of the treaties, Resolutions and Regulations adopted by the bodies of the CAIS and its subsystems. The national laws of a State may not unilaterally give them no effect.[487] Secondly, the Central American integration treaties are to be applied uniformly, directly and immediately. The Central American Community law is derived from these treaties, their complementary instruments, the norms issued by their bodes as well as the jurisprudence of the Court. This Community law is to

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[483] "Institutional Developments in Central American Integration," supra note 481 at 168.
[484] Ibid. at 173.
[485] Guatemala Protocol, supra note 416 art. 55.
[486] Ibid. art. 42(2).
[487] La Solicitud de Opinión Consultiva de fecha veintisiete de mayo de mil novecientos noventa y siete solicitada por el Licenciado Don Haroldo Rodas Melgar en su condición de Secretario General de la SECRETARIA PERMANENTE DEL TRATADO GENERAL DE INTEGRACION ECONOMICA CENTROAMERICANA (SIECA), sobre diversos problemas de aplicación e interpretación de disposiciones contenidas en le Convenio sobre el Régimen Arancelario y Aduanero

prevail over any conflict with national law.[488]

However, when it comes to the final decisions of the arbitral tribunal, it appears that it follows the traditional free trade agreement system in that it only is binding on the parties involved and does not affect the State Parties who were not parties to the dispute. Nevertheless, unlike the NAFTA, and following the G-3, the decision of the arbitral tribunal is to be complied with and it cannot be derogated for the parties involved. But, there is no indication that it can create a regional norm that is universally applicable.

III. THE REJECTION OF THE DECENTRALIZED MODEL FOR REGIONAL ECONOMIC INTEGRATION: REGIONAL LAW AND INSTITUTIONS

The direction in terms of institutional matters in the FTAA indicates that it will adopt decentralized bodies to oversee the operation of the agreement. This model favours institutions that have a typical traditional intergovernmental character that corresponds to the classical forms of international law.[489] This system coordinates action by member States but does not bind them beforehand to accept action nor transfer any binding decision making power.[490] It also provides a forum, an agenda, and possibly a secretariat to assist and advance action.[491] This is

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Centroamericano, 27 May 1997, online: Official Website of the Central American Court of Justice <http://www.ccj.org.ni/resolnes/reso113.htm> (date accessed: 15 November 1999).

[488] Ibid.

[489] F. Orrego-Vicuña, "Contemporary International Law in the Economic Integration of Latin America: Problems and Perspectives" in J. Rideau, Hague Academy of International Law Colloquium 1971: Legal Aspects of Economic Integration (Leiden: Sijthoff, 1972) 101 at 154.

[490] J. Trachtman, "The International Economic Law Revolution" (1996) 17 U. Pa. J. Int'l Econ. L. 33 at 48. According to Trachtman, the opposite of intergovernmentalism is integration which is a pooling of decision making power or sovereignty, ibid. However, in this system, there is no joint law making bodies, no central executive body responsible for implementation and enforcement of law, nor is there a permanent dispute settlement system to directly apply its decisions, F. Abbott, "The NAFTA Environmental Dispute Settlement System as a Prototype for Regional Integration Arrangements" (1994) 4 Y.B. Int'l Env. L. 3 at 9 [hereinafter "NAFTA Environmental Dispute Settlement"]

[491] Ibid.

typical of the majority of past and current efforts at integration by Latin America and is followed in the NAFTA.[492] Therefore, one finds in the NAFTA, G-3 and in the agreements of partial scope under the auspices of the LAIA a single-tier administrative structure which supervises and implements their respective treaties.[493] The LAIA and its predecessor, the LAFTA, although not a simple single-tier structure, are based on intergovernmental structures as well. The possibility of the lack of central institutions in these integration schemes may be explained by noting that what they propose to create is a free trade area, not a customs union or common market. Typically, these agreements do not create supranational institutions having direct enforcement powers equivalent to that of the Commission or the Court of Justice of the European Community.[494]

It is asserted that such a scheme will in the long term prove to disunite the nations of the region rather than bring them together. The problem lies in the fact that the substance of the FTAA is not sufficiently met in the structure being proposed and as such, in the decentralized model, there is no central authority that will be able to make the member States of the FTAA to effectively comply with the requirements of the integration process nor facilitate legal harmonization. Indeed, in these typical intergovernmental arrangements, there is a strong tendency to act solely for national interest with no fear of sanctions for their actions and thus the broad vision needed for the process of integration is easily set aside.[495]

1. Imbalance Between Structure with Substance

The assertion that such structures are unnecessary because of the simple agreements free trade

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[492] Ribbelink, supra note 28 at 102.
[493] "Trade Governance," supra note 17 at 110 and "Americas Agreement," supra note 17 at 371.
[494] K. Riechenberg, "The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues" (1995) 4 Tul. J. Int'l & Comp. L. 63 at 74.
[495] Orrego-Vicuña, supra note 489 at 155 and F. Orrego-Vicuña, "Comments: The Institutions of Economic Integration" in J. Rideau, supra note 489, 493 at 503.

areas are formed by is inapplicable when one examines the FTAA. Like the NAFTA, the FTAA is a much more ambitious attempt at integration than the typical free trade agreement that substantially eliminates all tariffs and incidental regulations applicable to goods moving between them. Conventional free trade agreements deal with issues such as trade in goods, rules of origin, customs procedure, agriculture, government procurement and emergency actions, all traditional subjects of international trade.[496] However, the FTAA goes beyond the typical free trade agreement by also dealing with issues of investment, antidumping and countervailing duties, smaller economies, intellectual property rights, services, and subsidies, with the potential of taking on more subjects that are either indirectly related or unrelated to international trade in goods. Moreover, the strong emphasis on the participation of civil society and interest in including electronic commerce in the negotiations further demonstrate the broad goals of this process.[497] The implementation of rules covering these non trade subjects has a possible greater impact on domestic law:

> [T]he adoption of rules covering non-trade subjects may well bring greater incursions into the domestic legal regime than the rules of international trade in goods. The latter may affect the levels of imports and exports in a society, with important secondary effects on, among other areas, employment and balance of trade. Non-trade issues, on the other hand, involve the application of domestic laws to ongoing activities within the society-the provision of local services, the recognition of property of rights, or (in the case of foreign investment in manufacturing) the employment and training of large numbers of workers Internationally agreed upon rules on these subjects may have a more profound effect on the domestic legal system than rules regulating the import or export of goods. Once the foreign enterprise enters the country-as service provider, manufacturer, or licensor of technology-it becomes a local actor, influencing society in ways that the circulation of foreign-made goods may not.[498]

Seeing as it is much more ambitious than the typical free trade agreement, and its possible impact on domestic law is much greater than past agreements, the question arises as to whether its

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[496] S. Zamora, "The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement" (1993) 24 Law & Pol'y Int'l Bus. 391 at 403.

[497] Summit Declaration, supra note 1 at 621; San Jose Declaration, supra note 10 and Toronto Declaration, supra note 11. See also Zamora who states that the inclusion of these subjects is a trend of many countries, including that of the United States, "to incorporate into international trade negotiations the conclusion of agreements on subjects that lie beyond the treatment of exports and imports of goods," supra note 471 at 403.

[498] Zamora, ibid. at 404. The inclusion of these trade issues in the NAFTA negotiations and now in the FTAA exemplifies the trend among countries with strong economic interests in these areas to include them in international trade negotiations, Zamora, ibid. at 403.

structure corresponds to the substance trying to be achieved. If an integration scheme governs only the elimination of tariffs and quotas, the powers of the institutions may be very limited.[499] However, once the objectives of the integration scheme go beyond this and more areas of law are covered within an agreement, there is then a greater need for central institutions to effectively supervise and implement the integration.[500] Therefore, even if an agreement purports to create a free trade agreement, its impact on domestic law and the substance covered may still require that there be a disregard for the simple institution building purported to be sufficient to administer the agreement over those that are more complex. As more issues are addressed in international economic agreements that were previously solely the preserve of domestic law, institutions will be needed and required to replicate the functions of the domestic ones and hence there will be a greater need for both international and domestic institutions to act in accordance.[501] The NAFTA is an atypical free trade agreement in that its scope and substance go beyond the liberalizing of trade and goods between States, but its dispute mechanism and decision making bodies do not provide a forum in which successful integration will occur on a larger scale. The adoption of its structure in a future FTAA will not be sufficient for success. An imbalance in the structure as compared to the substance being achieved will risk generating unfair results which "may bear the seed of failure" and lead to the FTAA becoming a brontosaurus: the economic goals and mechanisms representing a monstrous body with the legal structure representing the small brain.[502] As stated by Professor Abbott, although referring to the NAFTA, it is equal applicable to the FTAA:

> [T]here is nothing in the law of international trade which suggests that a free trade area is a more limited arrangement than a customs union. The member states may choose to harmonize their laws, establish juridical institutions and central legislative organs. If we create a NAFTA which is less comprehensive than the European Community it is because

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[499] Fitzpatrick, supra note 22 at 60.

[500] Ibid. at 23 and 60.

[501] Trachtman, supra note 490 at 57. The result is that decisions at the international level can have an immediate impact domestically, while domestic mechanisms that create and enforce rules may have global implications, S. Zamora, "Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration" (1997) 19 Hous. J. Int'l L. 615 at 618-619 [hereinafter "Allocating Legislative Competence"].

[502] Cottier, supra note 18 and R. Vargas-Hidalgo, "The Crisis of the Andean Pact: Lessons for Integration Among Developing Countries" (1979) 17 Journal of Common Market Studies 213 at 224 [hereinafter "Crisis of the Andean Pact"].

we choose to and not because of any constraint imposed by international trade law.[503]

2. The Promotion of Harmonization

Harmonization of national laws is a necessary component for the successful economic integration scheme in order to ensure that it runs smoothly.[504] The absence of unification, uniformity or harmonization produces a negative effect on the process of integration. It is necessary to adapt the national legislations to the new economic and juridical conceptions that are born from the process of integration.[505] If harmonization does not occur, then a regional norm will receive different applications as a consequence of diversity and thus create the possibilities of distortion and discrimination and thus become an obstacle to free trade.[506] The end result will be economic distortions and diminished regional trade.[507]

Even within the context of a free trade agreement, there is a trend towards harmonization between the countries involved. In terms of NAFTA, it has been said that it:

> [H]as a harmonizing effect on North American law. As a free trade agreement, NAFTA sets forth common rules for international trade and other transnational economic activity that must be adhered to by the NAFTA Parties, and it requires that national laws conform to

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[503] F. Abbott, "Regional Integration and the Environment: The Evolution of Legal Regimes" (1992) 68 Chicago-Kent L.R. 173 at 192 [hereinafter "Regional Integration and the Environment"]. Moreover, the fact that a free trade area is being created does not mean that it is a less significant attempt at economic integration nor less complicated than that of a customs union. The NAFTA model is more likely to divert trade than a customs union because a free trade agreement grants preferences to goods originating inside its boundaries without providing to imports from third countries the benefits of free circulation once within the customs tariff walls of a customs union. Therefore, although its purpose is less ambitious than a customs union, it is likely to be more diversionary, see F. Abbott, "Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime" (1992) 40 Am. J. Comp. L. 917 at 919.

[504] "Regional Integration and the Environment," ibid. at 189. Also see M. Cappelletti, M. Seccombe & J. Weiler, "Integration through Law: Europe and the American Federal Experience A General Introduction" in Cappelletti, Seccombe & Weiler, eds., supra note 18, 3 at 25; Orrego-Vicuña, supra note 489 at 149-150; P. Kenneth Kiplagat, "Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process" (1995) 23 Den. J. Int'l L. & Pol'y 259 at 284 [hereinafter "Legal Status of Integration Treaties"]; D. Vignes, "The Harmonisation of National Legislation and the EEC" (1990) 15 E.L.R. 358 at 362 and "Regional Integration and the Environment", supra note 503 at 189.

[505] Orrego-Vicuña, ibid.

[506] Ibid. and Fitzpatrick, supra note 22 at 62.

[507] Fitzpatrick, ibid. at 63.

> these rules. However, the implications of NAFTA for harmonization of Canadian, Mexican, and U.S. laws go far beyond the sphere of international trade in goods. For one thing, the NAFTA Agreement includes several chapters that deal with non-trade issues. For instance, NAFTA chapters on foreign investment (Chapter 11), cross-border trade in services (Chapter 12), and trade in financial services (Chapter 14) deal with subjects that are only indirectly tied to merchandise trade, although they do involve transnational legal problems.[508]

Additionally, Latin America has had some success in harmonizing their private law due to the similar socioeconomic structure, political culture and a common legal heritage.[509] The civil and commercial codes of the Latin American States share a general framework from which general principles on commercial contracts may be derived.[510]

However, it is argued that the NAFTA intergovernmental model will not be able to harmonize legislation. The fact of the matter is, there is no obligation to harmonize in the NAFTA and there is no institution with the power to mandate harmonization, not even the Free Trade Commission. Each member state maintains its own regulatory schemes subject to the broad proviso that they provide each other's enterprises with national and most favoured nation treatment.[511] With only three members, this is plausible as harmonization can be undertaken through the traditional process of direct negotiations and the adoption of supplemental harmonization treaties.[512] But problems will arise in terms of the sheer numbers of States in the region as to make the traditional approach through negotiation impractical.[513] Moreover despite a common language, a similar political structure and a common legal heritage, traditional notions of sovereignty and protectionist tendencies have hindered past efforts at harmonization in Latin America.[514] Finally, the difference in economic development and legal regimes may provide friction in terms of adopting a common framework of laws for integration. In terms of the differing economic

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[508] S. Zamora, "NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade" (1995) 12 Ariz. J. Int'l & Comp. L. 401 at 402-403.
[509] A. Garro, "Unification and Harmonization of Private Law in Latin America" (1992) 40 Am. J. Comp. L. 587 at 587. See García-Amador supra note 3 for a copy of the treaties dealing in the private international law sphere throughout the history of the Americas.
[510] Garro, ibid.
[511] Ibid. at 938.
[512] Abbott, supra note 503 at 943.
[513] O'Hop, supra note 15 at 163.
[514] Ibid. at 164.

development, Professor Abbott addressed this in the context of the NAFTA but it could equally apply in terms of the hemisphere and the lack of harmonization:

> Significant disparities in legal regimes will inevitably lead to an allocation of economic resource at least partially based on the identification of the least restrictive regulatory environment...If regulations affecting business enterprises in areas such as health and safety, labor-related practices, pollution control, taxation and other matters reflect a substantial disparity, the rational firm will move to take advantage of such disparities where a sufficient economic advantage can be demonstrated. To suggest otherwise-on the basis of national sentiment, for example-is to ignore the fundamental rules of economics which support the establishment of a liberal trading regime...[F]irms exporting capital to the NAFTA will be engaged in the same decision-making process as firms presently located within the NAFTA and other factors being equal will choose the less restrictive regulatory environment, accelerating whatever effects such decision criteria will have.[515]

To avoid this, a central authority is needed to ensure compliance with the provisions of a future regional agreement, whereby the decisions that effect all member States have the same significance, force and obligation of a legal character. [516] This will be only possible if there are supranational bodies to enforce equal application of these norms, or else it will fail to facilitate the necessary steps towards harmonization of legal regimes.[517] It is not necessary that domestic legislation be uniform, nor is it desirable. However, as has been noted:

> [A]s the volume of intraregional trade increases, so too will the number of intraregional transactions. Impediments to trade created by divergence in national laws can be minimized by uniform rules regarding private international law and harmonized rules governing international commercial arbitration.[518]

By not having institutions that can remove and minimize divergence between the various legal regimes and facilitate ongoing revision in order to adjust to changing circumstances and an independent court to oversee this process, harmonization is not likely to occur.[519] The disparate legal regimes that exist within the hemisphere, and the difference in economic development, will not make integration viable.

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[515] Abbott, supra note 503 at 939-940.
[516] A. Brewer-Carias, Los Problemas Constitucionales De La Integración Economica Latinoamericana (Caracas: Banco Central de Venezuela, 1968).
[517] Abbott, supra note 503 at 944.
[518] Fitzpatrick, supra note 22 at 66.

3. The Establishment of a Framework Treaty: Institutions and Law

Structurally, if the FTAA is to work as a viable economic integration scheme, it is argued that the negotiators should aim for a framework treaty rather than the typical public international law treaty that explicitly states the rules that are to be complied with. A framework treaty is one that sets up institutions or arrangements in which decisions can be made by or on behalf of the parties. It is more concerned with the principles, objectives and fundamental machinery of the process itself and leaves the detailed regulation of the subject matters over to the institutions it establishes.[520] Unlike a treaty like the NAFTA which remains static to changes or developments in the relationship between the parties nor foresee all possible situations, a framework treaty can effectively deal with changing circumstances and developments that is needed for an ambitious and broad regime that is being proposed in the FTAA.[521] Moreover, past efforts also demonstrate that developing countries can only participate successfully in advanced forms of economic integration such as those that are contemplated in a framework treaty.[522] A fixed legal regime with the lack of substantive institutions being proposed by in the FTAA will have difficulty in not only in the removal and minimization of divergences in the legal regimes between the parties, but will be in danger of becoming a 'fossil.'[523] The continued insistence on these formal structures of the relationship between the parties and that legal power should only be in the hands of the nation State will not ensure lasting and substantial success.[524]

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[519] Ibid. at 61-62 and C. Reymond, "Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area" (1993) 30 C.M.L. Rev. 449 at 478.

[520] J. Temple Lang, "Institutional Aspects of EC-EFTA Relations" in M. Robinson & J. Findlater, eds., Creating a European Economic Space: Legal Aspects of EC-EFTA Relations (Dublin: Irish Centre for European Law, 1989) 17 at 39 and F. Orrego-Vicuña, "Developments in the Latin American Free Trade Association" (1967) 61 Proc. A.S.I.L. 174 at 179 [hereinafter "Developments in Latin American Free Trade"]. See also Orrego-Vicuña, supra note 489 at 107-108.

[521] Temple Lang, ibid. at 39; Orrego-Vicuña, supra note 489 at 109; and M. Cremona, "The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry" (1994) 17 Eur. L. Rev. 508 at 509.

[522] Kenneth Kiplagat, supra note 13 at 60.

[523] Fitzpatrick, supra note 22 at 61-62.

[524] Simmonds, supra note 405 at 930.

Now, it could be argued that the institutions being proposed would go beyond what is being proposed and that past 'grandiose' integration processes in Latin America has shown that economic integration is not always assured if strong institutions are put in place. But, as has been stated before, the substance of the FTAA require institutions with powers beyond the typical intergovernmental character that are part and parcel of the NAFTA and other similar free trade agreements as its subject matter goes beyond the traditional free trade agreement. Moreover, the history of past integration regimes demonstrate that the problem with them is not so much that few meaningful or overly ambitious institutions were created, but rather they were never given a chance to succeed.[525] The lack of political will of the participating States to allow the integration process to operate was the principal problem in these efforts.[526] It is precisely this reason that a framework treaty is needed to institutionalize the integration process with bodies and powers taking into account regional interests rather than that of the States that make up the process.[527] Now, this is not to say that the State has no role in determining the direction of the integration process. Only that its own interests do not supersede and hinder those that have been agreed to in a collective manner.[528] Thus, the framework treaty should establish three bodies to this effect: a decision making body, the FTAA Council, that is ensured with facilitating legal harmonization and unification and representing the interests of the States involved; a FTAA Commission that provides surveillance and enforcement of the process; and a FTAA Court that would ensure uniform interpretation and enforcement of the FTAA process.[529] No successful integration scheme has realistically proceeded without these permanent institutions actively promoting and overseeing

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[525] Kenneth Kiplagat, supra note 13 at 59.

[526] F. Orrego-Vicuña, "Los Presupuestos Jurídicos de un Proceso de Integración Económica Efectivo" in R. Díaz Albónico, ed., Nuevas Perspectivas de la Integración Latinoamericana: Estabilidad y Flexibilidad en el Ordenamiento Jurídico de la Integración vol. 1 (Santiago: Editorial Universitaria, 1977) 18 at 31 [hereinafter "Los Presupuestos Jurídicos"].

[527] Orrego-Vicuña, supra note 489 at 107 and see J.R. Bustamante, "The Growing Influence of Private International Law Issues in the Public International Law Field, with Particular Focus on the Andean Region" (1993) 5 Hague Y.B. Int'l L. 115 at 122.

[528] Bustamante has stated this point in this manner:
[C]ommon rights should be given priority as a common expression of the sovereignty of the states prevailing over their internal rights.
Ibid. at 121.

the process in order to bring together "separate sovereign state economic systems.'[530]

i. FTAA Council

The FTAA Council is required to represent the national interests of the States in the integration process and politically orientate the FTAA.[531] It would act as a decision making body and act very much like the Administrative Commission found under the NAFTA and G-3. However, if the FTAA is to function effectively, it will need to go further than these bodies and act very much like the Council of Ministers of the European Community by being able to create and amend regional norms that have direct application to the subjects of the States involved and to supervise any further developments that may arise.[532] In this manner, the FTAA Council would act as a the principal law and policy making power in the institutions of the FTAA. Such a body with these attributes is critical in order to adapt, protect and improve upon the framework agreement.[533] In this capacity, it would be instrumental in the promotion of harmonization among the differing legal regimes of the Western Hemisphere, and important aspect of successful regional integration.

The formation of this body has been recommended by other authors in order to facilitate the integration process with powers to consider any relevant issue and through resolutions adopted by consensus that have no legal effect without subsequent implementation.[534] Nevertheless, there is still a recognition that these limited powers is not enough to promote the integration process as

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[529] Fitzpatrick, supra note 22 at 23.

[530] Davey, supra note 14 at 21 and Abbott, supra note 503 at 945.

[531] Orrego-Vicuña, supra note 489 at 158.

[532] Fitzpatrick, supra note 22 at 61; Bustamante, supra note 527 at 122; and S. Norberg, "Legal and Institutional Aspects of EC-EFTA Relations in a Dynamic and Homogeneous European Economic Space-an EFTA Point of View" in Robinson & Findlater, supra note 520, 63 at 69.

[533] Fitzpatrick, ibid. Now given that the FTAA Council would have legislative competence, issues of sovereignty and democracy arise. However, as has been noted by an author, the democracy deficit is one of direct democracy as the States who participate in the process have acted in accordance with the mandate given by their voters and has decided to pursue the FTAA as something that will be beneficial for them. Moreover, it has to be remembered that the competences the FTAA Council may have are those that the States have consented. It cannot act beyond the areas that it has been given competence and intrude in the national legal order of the States involved. In this case, sovereignty is viewed as something that is being shared among the nations, but not as something that is being ceded. Moreover, what in effect is that the competence of the FTAA with that of the national legal order co-exist when one looks at is as one of subsidiarity, an issue that will be considered under subsection iv. Legal Effect of FTAA Norms infra, see Trachtman, supra note 490 at 57.

the FTAA Council is seen in the context of the typical free trade agreement. An important corollary of the law making powers is that the FTAA Council can evaluate and make binding decisions, not just resolutions, to promote the objectives of the FTAA and react to any changing circumstances.[535] Moreover, the FTAA Council should vote by super or weighted majority rather than that of unanimity. Through this type of voting, the decisions can be better reached as a collective group rather than that of international negotiations which typically require consensus for adoption of a norm and thus making it easier to stifle the integration process if a State acts unilaterally, particularly giving the number of States involved.[536] The States must then act jointly if they are to implement or alter policy in the FTAA process.[537] It does not mean that all matters are not to be decided by unanimity.[538] Issues such as the creation of new obligations or bringing in new competences under the FTAA would be properly addressed by unanimous vote. What is important to keep in perspective is that the sovereign interest of a State should not be able to frustrate the FTAA process, particularly one that has been consented to in the first place.[539] In that way, developed and developing countries can feel that the integration's benefits and direction is being shared and thus avoid institutional disintegration.[540]

ii. FTAA Commission

The existence of an FTAA Council without a regional body, an FTAA Commission, representing regional interests as a counterpart would prove to be worthless. Without such a body, the FTAA Council would be in danger of operating as a traditional intergovernmental body. A balance is needed to ensure that not only State interests are being represented, but also regional ones as well that is capable of adequately representing the region, help in maintaining equality in the

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534 "Americas Agreement," supra note 17 at 115 and "Trade Governance," supra note 17 at 390-391.
535 "Americas Agreement," ibid. at 116 and "Trade Governance," ibid. at 391-392.
536 Bustamante, supra note 527 at 122.
537 Weiler, supra note 25 at 282.
538 See the discussion of this in terms of the European Community in Jacobs & Karst, supra note 25 at 185.
539 "Trade Governance," supra note 17 at 392.
540 Kenneth Kiplagat, supra note 13 at 61.

distribution of the costs and benefits and have integration as its primary goal.[541] A technical body like this one has been deemed to be absolutely essential for an integration process to be successful, as its absence will be seen to retard its progress.[542]

An imperative characteristic of the FTAA Commission for it to be efficient is its independence from the States involved. It may not be able to take any instructions from any government and work only in their technical capacity for the regional interests that has been entrusted to them.[543] In this way, it should be seen as the guardian and driving force of the integration process and will help in making it depoliticized. For this purpose, it will have the executive powers of the FTAA and thus will have surveillance functions, meaning supervision, monitoring and enforcement, and have legislative powers as well.[544] It should have these competences and specific powers in order to carry out these functions or else it will be worthless as it will be virtually limited to making studies, something that can be accomplished by any other institution such as a working group. Moreover, it is appropriate that the FTAA Commission is entrusted with these powers as it will have the broadest vision of the integration process and because its activities are, if the FTAA functions properly, permanent.[545] Thus, it cannot be compared to the NAFTA or G-3 Commissions or the typical secretariat which may prepare decisions and implement them, but only by the authority of the States involved.[546]

In terms of surveillance, it will supervise and administer the proper implementation and application of the FTAA and ensure that the member States are fulfilling their obligations.[547] In this regard, it should be able to act upon its own initiative to bring forward complaints of

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[541] Orrego-Vicuña, supra note 489 at 159 and "Developments in Latin American Free Trade," supra note 520 at 180. This body is also required given the tendency of national governments to engage in more intergovernmental bodies if more areas of competence are placed under the FTAA process, Trachtman, supra note 490 at 58.
[542] Davey, supra note 21 at 199.
[543] Orrego-Vicuña, supra note 489 at 160 and F. Weiss, "The Oporto Agreement on the European Economic Area - A Legal Still Life" (1989) 8 Y.B. Eur. L. 385 at 424.
[544] Weiss, ibid. at 423.
[545] Orrego-Vicuña, supra note 489 at 159 & 167.
[546] Reymond, supra note 519 at 459.

violations of the FTAA to the FTAA Council and for consistent violations, to bring infringement proceedings before the FTAA Court of Justice, which will be discussed in the next section.[548] In terms of legislative powers, ideally, it should be able to initiate the norms that it deems necessary for the proper operation of the FTAA. While the FTAA Council issues the binding norms, it is the FTAA Commission that should have the power for proposals for these norms as it is the institution that is most responsive to the interests of the region and thus ensure that the norms issued by the FTAA Council will reflect this as well.[549] As well, in order to ensure that the FTAA Council does not modify a proposal for the gain of the State interests over those of the region, a stricter majority should be required.[550]

In this way, an institutional equilibrium is maintained between both the FTAA Council and Commission. Both maintain certain executive and legislative powers. Although it may be generally convenient that these powers be separated from the body that creates the norm and the one that executes it, in an integration process, the importance of maintaining balance between regional and State interests concerning the objective and purpose of the integration process makes it necessary that the FTAA Council and Commission share these powers.[551] A 'reciprocal relation' is created to maintain this equilibrium.[552]

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[547] Orrego-Vicuña, supra note 489 at 170.

[548] Norberg, supra note 532 at 72.

[549] Jacobs & Karst, supra note 25 at 187-188.

[550] Orrego-Vicuña, supra note 489 at 167.

[551] Ibid.

[552] See also the quote in The Andean Legal Order, supra note 283 at 86 where the Committee of Experts that drafted the Andean Pact had stated in reference to the Commission and Board:
The former is similar to the traditional conferences or plenary sessions with governmental representation. The latter, on the other hand, departs from the single powerless executive and the inter-governmental secretariat. The draft agreement defines the Board as a technical community organ composed by three members designated by the Joint Commission. Five delegations gave their assent. Peru reserved its vote on the question of formation of the standing Executive Board.
Because of their differentiated structure and competence, these organs ensure a system of institutional equilibrium which responds satisfactorily to the objectives of the Agreement. The adoption of advanced goals for subregional planning and coordinated development would serve no purpose if a legislative authority and a technical community authority were not established to serve them, each with the hierarchy, strength and functionality necessary for the continual solution of the problems inherent in such a vast, complex and difficult operation.
Also, the security offered to the subregion and its countries by the equilibrium between the governmental force and the community force, between the political aspects of the former and the technical aspects of the latter should be noted.
The same consideration and issues are equally applicable to the FTAA process that is being proposed in this paper.

iii. FTAA Court of Justice

The importance of an FTAA Court of Justice cannot be underestimated to ensure the legal control and uniform application of the FTAA treaty and norms issued. This is very relevant when once considers that the necessity of a strong dispute settlement system will be acute if the decision making and surveillance institution's powers are minimal.[553] In fact, the strength of the dispute settlement system will determine the success of the process as it is the infrastructure that supports the rest of the integration process and the lack of an elaborate and well thought out system is perhaps the main factor for the failure of regional economic integration.[554] In this regard, an FTAA Court of Justice should be established rather than one based on the NAFTA, typical free trade agreement.

A dispute settlement system based on the NAFTA or typical free trade agreement is insufficient to settle disputes effectively and lead to the slow disintegration of the integration process. This is due to the fact that these dispute settlement systems are rather weak, presumably out of fear that a strong central dispute settlement institution would undermine national institutions and make it harder for regional economic integration treaties be approved.[555] Presently, under the NAFTA inspired model for dispute settlement, if a member state desires not to comply with an adverse ruling of an arbitration panel over the proper application and interpretation of the agreement, it can elect to have a trade concession withdrawn by the complaining party.[556] This system which allows withdrawal of concessions rather than obligating member States to conform their laws for the integration process, allows for the slow disintegration of the union because it encourages parties to withdraw concessions they initially granted.[557] Moreover, unilateral responses by the

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[553] Fitzpatrick, supra note 22 at 72 and D. Kommers & M. Waelbroeck, "Legal Integration and the Free Movement of Goods: The American and European Experience" in M. Cappelletti, M. Seccombe & J. Weiler, eds., supra note 18, 165 at 227.

[554] P. Kenneth Kiplagat, "Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience" (1994) 15 Nw. J. Int'l L. & Pol. 437 at 489-490 [hereinafter "The COMESA Experience"].

[555] For example, this was the case for the NAFTA, Abbot, supra note 13 at 945.

[556] See, e.g., NAFTA, supra note 93 art. 2019(1); ACE No. 17, supra note 53 art. 33(d) and G-3 Treaty, supra note 170 art. 19-17.

[557] Abbot, supra note 13 at 945.

member States are encouraged if the concessions withdrawn are not sufficient to make up for the violation of their obligations. This leads to a domino effect whereby disputes are settled, or not, in a haphazard way thus resulting in each member State responding individually to each others' violations.[558] A body of law cannot be created in such a system using a mix of solutions and thus ensuring that the 'law' plays a minor role, especially given the number of States involved.[559]

Additionally, the experience in Latin America has shown that weak dispute settlement systems lead to inert integration. The problem of what was the Andean Group in settling its disputes before the adoption of their Court of Justice is instructive. In its original structure, the first step taken to resolving the dispute was direct negotiation between the parties to the dispute. If this fails, the Commission, the supreme organ of the group, would then intervene by exercising its good offices and take other informal measures. If this failed, then the Commission would have to take formal efforts at conciliation, meaning an ad hoc committee by the Commission would be formed, with a representative of each national sitting in to hear the dispute. This committee would then issue a report to the Commission.[560] This system is virtually identical to the dispute settlement system of the MERCOSUR-Chile free trade agreement[561] and is strikingly similar in procedure to the Chapter 20 NAFTA dispute. It was found that this procedure was totally inadequate as an effective dispute settlement mechanism, since the decision of the Commission was not binding, which occurs in a de facto manner under the NAFTA by the instrument of withdrawing concessions as a manner of resolving disputes. More emphasis was placed on informal negotiations, which seriously undermined the integration process. Similar problems occurred in the LAFTA that as well had the typical dispute settlement system: consultation, mediation and arbitration. Because informal consultations were mostly relied on, problems occurred in that most settlements were the result of

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[558] "The COMESA Experience," supra note 554 at 442 and T. O'Leary, "The Andean Common Market and the Importance of Effective Dispute Resolution Procedures" (1984) 2 Int'l Tax & Bus. Lawyer 101 at 115.

[559] Burke & Walsh, supra note 149 at 545-546 and "Crisis of the Andean Pact," supra note 502 at 224. Another danger of a weak dispute settlement system is that recourse could be made to the WTO dispute settlement system rather than the one provided in a future FTAA if the member States feel that it is weak and not likely to resolve any conflict in a legal fashion and thus ensuring that a regional body of law is not created, de Mestral & Winter, supra note 103 at 252.

[560] Padilla, supra note 13 at 83.

a compromise, which seldom took into account the legal merits of each case. This resulted in a substantial weakening of the rule of law in the integration process.[562] Thus a mandatory compliance system in the form of a permanent tribunal is needed, the FTAA Court of Justice, that respects the rule of law rather than one that tolerate deviations.[563] This is an absolute necessity to guarantee the observance of rights and fulfillment of obligations.

There three primary functions of the FTAA Court would be dispute settlement, interpretation and enforcement of regional norms.[564] An independent dispute settlement system will be able to resolve disputes in a neutral and legal fashion and avoid the risk of instability and political interpretation.[565] Moreover, the powers of interpretation and enforcement will allow for the uniform interpretation of the regional law and derived norms within the member States. This is an essential element of any integration process.[566] Without the power for uniform interpretation, disintegration will occur. This is especially relevant given the ad hoc nature of the typical free trade agreement that could lead to a divergent body of law.[567] This has led Professor Orrego-Vicuña made the following observation on the problems with this system, which although made in the context of the Andean Group, is still relevant in making the member States of a future integration scheme comply with the free trade agreement:

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561 Mercosur-Chile Agreement, supra note 272, Annex 14, Régimen de Solución de Controversias.

562 "Economic Integration in Latin America," supra note 67 at 470.

563 NAFTA Environmental Dispute Settlement," supra note 490 at 12. As stated before, doctrinal writers from Latin America have been recommending the establishment of a regional court for integration, see supra note 23. Doctrinal writers have also recommended the establishment of a permanent dispute settlement system for the NAFTA, see, Henry King, T. Bradbrooke Smith & H. Rojas, "American Bar Association Section of International Law and Practice Reports to the House of Delegates: Dispute Settlement Under a North American Free Trade Agreement" (1992) 26 Int'l Lawyer 855 at 856.

564 Fitzpatrick, supra note 22 at 90.

565 Orrego-Vicuña, supra note 489 at 133.

566 On this point, see, e.g., Fitzpatrick, supra note 22 at 90-91; "The COMESA Experience," supra note 554 at 444; Vicente Ugarte del Pino, supra note 23 at 94-95; Weiss, supra note 543 at 427; "El Control de la Legalidad" supra note 362 at 127, Economic Integration among Developing Nations, supra note 21 at 65; E. Barlow Keener, supra note 365 at 45 and E. Lochridge, supra note 365 at 375. Moreover, although the notion of stare decisis is not followed technically in the European Economic Community, the existence of a tribunal was highly effective in achieving this uniformity and observance by the member States. Such a tribunal could also be applicable to the countries of the Western Hemisphere who have a civil law tradition, see Economic Integration among Developing Nations, ibid. at 64.

567 For the problems NAFTA may face in this regard see, Burke & Walsh, supra note 149 at 545-546. Also, the divergent body of law occurred in the Andean Pact when in the absence of a permanent tribunal, the Cartagena Agreement was subject to the variant readings of the highest courts of the six member States, see S. Horton, "Peru and ANCOM: A Study in the Disintegration of a Common Market" (1982) 17 Texas Int'l L.J. 39 at 50-51.

> The experience derived from the few years the Agreement has been functioning has shown that these mechanisms for the solution of controversies are impractical insofar as they fail to respond to the true legal needs of the integration process. In the first place, they do not provide for a permanent legal function, in circumstances where the volume and importance of subregional law fully warrant it. In the second place, they fail to insure a uniform interpretation of the legal regime...problems which probably could have been avoided had there been a formal opinion by a subregional judicial organ. [568] (emphasis mine)

The method to ensure the uniform interpretation of the regional norms is not only through powers to determine actions of nullification and non-fulfillment by the member States and through advisory opinions, but by also giving the FTAA Court the power of 'judicial review,' in conformity with the provisions and principles of the framework treaty, over not only the norms issued by the FTAA, such as those from the Council and Commission, but also the acts of the member States.[569] Effective review of the former ensures that the FTAA does not overstep its competences while the latter is essential to ensure compliance by the member States and thus ensure predictability and stability in the integration process.[570] This 'rule oriented' approach, as it has been labeled, will aid in the success of the FTAA process, especially if the member States are reluctant to give over legislative powers over to a supranational body and an equilibrium is needed for the strong intergovernmental element.[571]

In this legal structure, for this to function properly, it is absolutely imperative that the national courts play a role in ensuring that the FTAA does not go beyond the competences that have been assigned to them. Their cooperation is another important aspect in any integration process.[572] Given the implications and far reaching effects that regional law could have on the national legal

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[568] F. Orrego-Vicuña as quoted in Padilla, supra note 13 at 84.

[569] Weiler, supra note 25 at 298; Jacobs & Karst, supra note 25 at 204-205; "El Control de la Legalidad," supra note 362 at 159; Orrego-Vicuña, supra note 489 at 131 and Arbuet Vignali, supra note 255 at 1260.

[570] Weiler, ibid.

[571] J. Jackson, "International Economic Law: Reflections on the "Boilerroom" of International Relations" (1996) 10 Am. U. J. Int'l & Pol'y 595 at 605. In particular, it has been observed that in the experience of the European Community, as normative supranationalism has deepened, decisional supranationalism has receded whereby the functions of the EC Council and Commission are acting more in the traditional intergovernmental character, see the works of Weiler in this regard, J. Weiler, "Community, Member States and European Integration: Is the Law Relevant?" (1983) 21 Journal of Common Market Studies 39 at 47 [hereinafter "Is the Law Relevant?"] and Weiler, supra note 25 at 273.

order, they have an important role in maintaining the equilibrium between both legal systems. In this regard, national courts have a duty to recognize the jurisdiction of the FTAA and ensure that the regional institutions do not go beyond those of the member State where they have not been granted. Moreover, there is a duty that in the case of concurrent powers, judgments should not conflict with those of the FTAA Court.[573] However, the FTAA Court's competence can only extend to those aspects that have been specifically provided to it by the FTAA Treaty. All other residual competences are reserved to the national courts.[574] Once the FTAA institutions do go beyond their competences, the equilibrium is broken which could lead to paralysis and rupture in the system.[575] Thus, it is important that both legal systems function together to avoid this problem. Additionally, it is important to remember that the FTAA Court's function should not be that of an appellate court or one having superior jurisdiction over that of the national courts. The relationship is one based on cooperation and thus, the national court's must respect the FTAA Court's competence to give an authoritative interpretation of the regional process while the FTAA Court must respect the national court's exclusive jurisdiction to apply the regional law to the facts in any disputes before them.[576]

iv. Legal Effect of FTAA Norms

As has been stated earlier, effective integration does not occur simply with the existence of centralized bodies, but also by the degree the acts of these bodies are implemented and recognized

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[572] Cappelletti & Golay, supra note 24 at 310.

[573] J. Temple Lang, "The Duties of National Courts under Community Constitutional Law" (1997) 22 Eur. L. Rev. 3 at 12. For a general analysis of the role of national courts in international trade law see, M. Hilf, "The Role of National Courts in International Trade Relations" (1997) 18 Mich. J. Int'l L. 321.

[574] "The COMESA Experience," supra note 554 at 483. Thus, in this regard, the FTAA Court has the power to determine whether the act of a member State complies with the FTAA Treaty while the national courts may not give definitive rulings on the validity and interpretation of regional law, see de Mestral & Winter, supra note 103 at 255.

[575] "Los Presupuestos Juridicos," supra note 526 at 23.

[576] de Mestral & Winter, supra note 103 at 256.

within the participating States.[577] The way in which these norms operate will determine to a great extent the progress, problems and degree of efficiency of the integration process.[578] Issues, then, will arise as to not only the incorporation of the regional norm within the national legal order, issues of direct effect, but also its hierarchy in regard to national law, issues of supremacy.[579] The observance of these principles are essential if the norms are to be enforced, particularly since the FTAA goes beyond the typical free trade agreement.[580] Once a regional integration agreement goes beyond free trade the incorporation of the norms in the member States and their status within becomes more pronounced for its success.[581] The combination of these two principles aid in the formation of a cohesive and integral legal order for the uniform interpretation and application of regional law.[582]

In the past Latin-American efforts, disintegration occurred when decisions reached by the regional bodies were not incorporated or applied uniformly nor promptly thus making them meaningless documents.[583] These norms would only be in force when the national legal orders of the member States would enact them. Thus, some legislatures may not pass specific legislation, but rather rely on the constitutional supremacy of treaties while in other cases, judicial review of a treaty would not be available.[584] Varying degrees of effectiveness of a binding regional norm would then be carried out, which in turn would cast doubt on the basic fairness of the system.[585] The mix of

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[577] Jacobs & Karst, supra note at 25 at199 and Hilf, supra note 573 at 326. This is an important feature of any integration process as it will determine the binding character and uniformity of the regional law, see Trachtman, supra note 490 at 58.

[578] "Crisis of the Andean Pact," supra note 502 at 224. Thus, the issue is not whether countries have put into force regional norms, but rather how they do it, "Legal Aspects of the Andean Economic Integration," supra note 393 at 113.

[579] Orrego-Vicuña, supra note 489 at 146.

[580] Davey, supra note 21 at 200.

[581] F. Orrego-Vicuña, "Comments: The Relation Between the Law of Economic Integration and the National Laws" in J. Rideau, supra note 489, 445 at 457.

[582] Weiler, supra note 25 at 276.

[583] O'Leary, supra note 558 at 111; "Crisis of the Andean Pact," supra note 502 at 219 and Horton, supra note 567 at 44.

[584] P. Trimble, "International Trade and the "Rule of Law,"" (1985) 83 Mich. L. Rev. 1016 at 1018.

[585] Ibid. For example, in the Protocol on transit of persons of the LAFTA, Paraguay chose to enter into force this instrument by notifying their 'conformity' to the depositary while in the case of Chile, a simple official note stating their conformity was communicated. Moreover, in the approval of the Andean Pact within the legal orders of the original member States, under the auspices of the LAFTA, Bolivia and Ecuador proceeded to parliamentary approval and ratification while Colombia, Chile and Peru did this through executive authority, Orrego-Vicuña, supra note 489 at 115, 118-119. Also see the discussion on the Andean Pact in this regard at footnote 395.

solutions for the legal implementation of regional norms, to the detriment to the creation of a viable regional law, is not sufficient for successful regional integration. It is not just the fact that norms are created that guarantees this success if there is not a legal structure to implement them and give them practical content.[586] Thus, the direct effect and supremacy of a regional norm within the national legal order is necessary for the effective operation of the FTAA and avoid it being at the mercy of the member States regarding the formulation and implementation of policies.[587]

For these principles to operate there is a need for the FTAA Treaty to recognize that certain binding norms are directly applicable within the national legal order of the member States. In effect, that they automatically become an integral part of the law of the member States.[588] This does not mean that all norms that are derived from it will have this effect. Only those that are clear, precise and not requiring further legislative measures by the member States are appropriate.[589] Once this occurs, then the norms have direct effect within the national legal orders meaning that enforceable legal rights are created between member States and individuals.[590] Essentially, an individual before their own courts may invoke the norms. As a consequence, member States cannot invoke the weakness of international law as a reason for not complying with the provisions and norms of the FTAA Treaty.[591] Member States cannot shift the settlement of the violation of their international obligations to the international sphere. Under this principle, the member States would then be liable within their own courts, something not considered in the

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[586] "Crisis of the Andean Pact," supra note 502 at 224.

[587] "The Legal Status of Integration Treaties," supra note 504 at 273.

[588] J. Winter, "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law" (1972) 9 C.M.L. Rev. 425 at 436. In theory, this would occur regardless of the monist or dualist character of the national legal order of the member State, "Is the Law Relevant?" supra note 571 at 42.

[589] Winter, ibid. at 434 and J. Weiler, "The Transformation of Europe" (1991) 100 Yale L.J. 2403 at 2413 [hereinafter "The Transformation of Europe"].

[590] Winter, ibid. at 425-426 and "The Transformation of Europe," ibid. See also the discussion by Guillermo Andueza, supra note 393 at 7-8.

[591] This weakness is based on part on the exclusion of individuals in public international law, Weiler, supra note 25 at 274 and "Is the Law Relevant?" supra note 571 at 42. Thus, individuals, who are most affected by the consequences of regional integration, are not subject to the will of their governments, Orrego-Vicuña, supra note 489 at 135 and Padilla, supra note 13 at 84.

typical free trade agreement.[592] This element helps depoliticize the regional integration process with individuals being instrumental in keeping the process moving as they are most likely to bring forward controversial cases that under normal circumstances would be resolved by State to State negotiations.[593]

The next principle to consider is that of supremacy. In the hierarchy laws in the national legal order, only the primacy of the regional norm will be compatible with the requirements of economic integration.[594] This applies even if a conflicting member State law is subsequently enacted or if its constitutional in nature.[595] While the first principle is particularly accepted in those States whose constitutional order follows the monist school of thought whereby international treaties are automatically incorporated within the national legal order and some provisions may be found to be "self-executing," it is this second principle, combined with the first, that fortifies regional law in the FTAA. Normally, if a State automatically accepts the provisions of an international treaty within their national legal order, its status is equivalent to that of national legislation. Thus, if a statute is passed after the incorporation of an international norm, the lex posterior rule applies whereby where two legal instruments are in conflict, it is the one that is enacted later that will prevail. Thus, a national legislature may pass a law to override an international norm it is

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592 "The Transformation of Europe," supra note 589 at 2414.

593 M. Schaefer, "Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?" (1996-97) 17 Nw. J. Int'l L. & Bus. 609 at 620; E. Stein, "Lawyers, Judges, and the Making of a Transnational Constitution" (1981) 75 AJIL 1 at 6; "Legal Status of Integration Treaties," supra note 504 at 274 and "The Transformation of Europe," supra note 589 at 2414. The United States did make proposals at the end of the Uruguay Round to increase the participation of individuals in the dispute settlement process. However, this were initially rejected and watered down, Schaefer, ibid. at 626-627. The current FTAA negotiations do indicate that individuals will play an important role in the integration process. In particular the participation of civil society is seen as an important step in keeping the FTAA process transparent. All countries are to take civil society into account through mechanisms of dialogue and consultation. To this end, a committee of government representatives has been established to take into consideration the interests and concerns of different sectors of society such as business labour, environmental and academic groups. This development was not considered when the FTAA process began. The importance of the participation of the individual is the possibility that they will have rights at the end of this process and thus be able to enforce them in their national courts. Thus, much like in the European Community, the participation of the individual makes it probable that direct effect could operate in the FTAA, see Santiago Declaration, supra note 1 at 965;Belo Horizonte Declaration, supra note 11 para.14 and San Jose Declaration, supra note 10 para.17.For a discussion of the importance of the individual in the institution of direct effect in the European Community, see W. van Gerven, "The Genesis of EEA Law and the Principles of Primacy and Direct Effect" (1992-93) 16 Fordham Int'l L.J. 955 at 981.

594 Orrego-Vicuña, supra note 489 at 148.

595 Weiler, supra note 25 at 274.

unhappy with and thus, for all intents and purposes, nullify its effect.[596] However, on the basis of the principle of supremacy, the regional norm will prevail, even in the face of a statute that has been subsequently enacted.

Finally, as a further principle to consider in the legal reception of regional norms in the national legal order is that of subsidiarity. What this principle entails is a recognition that the appropriate allocation of power among the national and regional level leads to a conclusion that certain types of decisions should be made at one and not the other.[597] This is an important issue considering that as the integration process proceeds, it will be more difficult to separate national concerns from regional ones.[598] Through subsidiarity, it is hoped that this can be addressed and for an end result whereby the establishment of effective regional institutions will not only protect local values, but also facilitate integration.[599] Through this process, the acceptance of regional norms should receive less resistance than in the past.

IV. LEGAL OBSTACLES TO SUPRANATIONAL AUTHORITY: CONSTITUTIONAL AND JURISDICTIONAL CHALLENGES

1. Constitutional Challenges

As has been noted by commentators on the law of regional integration, for successful integration,

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596 "Transformation of Europe," supra note 589 at 2415.

597 Jackson, supra note 571 at 605.

598 "Allocating Legislative Competence," supra note 501 at 619.

599 J. Trachtman, "L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity" (1992) 33 Harv. Int'l L.J. 459 at 473. For a comprehensive analysis of this principle in the European Community and the United States see, G. Bermann, "Taking Subsidiarity Seriously: Federalism in the European Community and the United States" (1994) 94 Colum. L. Rev. 331.

there are three essential principles which need to be observed: direct applicability of the regional norm in the member States; supremacy of the regional norm over the laws of the member States and uniform interpretation of those norms in the legal regimes of the member States.[600] Problems arise in respect of the first two principles. It may be that the legal orders of some States are more receptive to the transfer of authority to a supranational authority than others. This may arise in terms of a constitution that makes no reference to the relationship of international agreements in the domestic order, to the declaration of the supremacy of the constitution in regards to international agreements or to the approval of participation in supranational organs that issue norms.

Additionally, the "constitutionalization" of these norms, meaning that the norm has been given a sort of constitutional status almost equivalent to that of a State's Constitution, adds problems to the acceptance of the regional integration scheme by the participating States.[601] This problem becomes particularly enhanced when one State directly applies treaty and regional norms while others do not. This is due to the State's approach to the relation between its national law and international law. Under international law theory, the reception of international law in the domestic legal order falls under either the monist or dualist school of thought. Dualist thought points to the essential difference between international and national law as they both regulate different subject matters. Neither legal order has the power to create or alter rules for the other.[602] For an international rule to have effect within the national legal order, it must first be expressly incorporated by an act of the legislature. Without this express assent, in a conflict between an international and national rule, the national one will prevail. Monist thought, however, asserts the supremacy of international law over national law. Once an international norm is accepted by a State, either by ratification of a treaty or international customary law, it automatically becomes

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[600] Orrego-Vicuña, supra note 489 at 146.
[601] J. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86 AJIL 310 at 330.
[602] I. Brownlie, Principles of Public International Law, 4th ed. (New York: Oxford University Press, 1990) at 32-33.

part of the law of the land.[603]

It should be noted that under international law, it has long been established that a party may not invoke the provisions of its internal law as a justification for failure to perform a treaty.[604] There has been consistent jurisprudence by the Permanent Court of International Justice and the International Court of Justice on this matter.[605] This prohibition of invoking internal law also extends to when a provision of a constitution is relied. For example, in the Polish Nationals in Danzig case, the Permanent Court of International Justice made the following observation:

> It should, however, be observed that...a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[606]

Therefore, there is a general duty on the parts of nations to bring its internal law into conformity with its obligations under international law.[607] However, failure to bring about conformity will not arise to a breach of international law, but only when the state concerned fails to observe them on

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[603] See, generally, Brownlie, ibid. at 32-34; J. Michel Arrighi, "Aspectos Teóricos de las Relaciones entre el Derecho Internacional y los Derechos Internos" (1997) 24 Curso de Derecho Internacional 33; and J. María Ruda, "Relacion Jerarquica entre los Ordenamientos Juridicos Internacional e Interno. Reexamen de los Problemas Teóricos" in Rama-Montaldo, ed., supra note 255 at 115.

[604] See, Vienna Convention on the Law of Treaties (1969), online: Multilateral Project of the Fletcher School of Law & Diplomacy <http://www.tufts.edu/departments/fletcher/multi/texts/BH538.txt> (date accessed: 15 November 1999) arts. 27, 46. For a discussion of the European experience and problems that arose in conflicts with the constitutions of their member states and community law, see T. de Berranger, Constitutions Nationales et Construction Communautaire (Paris: Librairie Générale de Droit et de Jurisprudence, 1995). Moreover, it should be noted that regionally in the Americas, there existed the Inter-American Convention on Treaties adopted in Havana, Cuba in 1928, whereby under articles 10, 11 & 12 of that convention established the primacy of international law over national law, including that of a State's Constitution, see J. Michel Arrighi, supra note 603 at 36-37.

[605] Brownlie, supra note 602 at 35-36.

[606] (1931), P.C.I.J., Ser. A/B, no. 44, p. 24 as quoted in L. McNair, The Law of Treaties (New York: Oxford University Press, 1961) at 60. Also see, G. Schwarzenberger, International Law vol.1 (London: Stevens & Sons, 1957) at 69-70 where he states this principle as elaborated and developed by the International Court of Justice:
(1) A State is estopped from pleading before the Court that the non-fulfillment of its international obligations or the violation of an international treat is due to its constitution, or to acts or omission on the part of the legislative, judicial and administrative organs or any self-governing body under its control.
(2) Municipal law cannot prevail over either over the obligations of a State under international customary law, including the minimum standards of international law, or over its obligations under international treaty law.
(3) A State which has contracted international obligations is bound to make in its municipal law such alteration as may be necessary to ensure the fulfillment of its international obligations.
(4) A violation of international law does not cease to be so because a State applies the same measure to its own subjects.
(5) The evasive form of a measure under municipal law is irrelevant if, in fact, it amounts to a violation or non-fulfillment of an international obligation.
(6) A measure of a municipal character which endangers treaty rights of other States is a violation of an international obligation.

[607] Brownlie, supra note 602 at 36.

a specific occasion.[608] Moreover, under international law, the failure to comply due to a constitutional limit may be valid if the other party is aware of this limitation and the "irregularity is manifest."[609] This was codified in the Vienna Convention on the Law of Treaties,[610] article 46:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice in good faith.

It is for this reason that in the NAFTA, a provision was placed to ensure that compliance is met from all levels of the Canadian government due to the problem of the division of powers under the Canadian Constitution.[611]

In terms of binding resolutions of international organizations under international law, the question raised in this regard by Professor Conforti is the following:

> [I]f a treaty requires some conference or international body to adopt binding resolutions, and if the treaty has acquired formal validity, are treaty-based resolutions directly enforceable by domestic legal operators?[612]

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[608] Ibid.

[609] Ibid. at 611.

[610] This convention is considered to have codified customary international law. See Brownlie, ibid. at 604.

[611] This is Article 105 whereby it states:
The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement including their observance, except as otherwise provided in this Agreement, by state, provincial and local governments.
See B. Appleton, Navigating NAFTA (Scarborough, Ontario: Carswell, 1994) at 16-17. This provision was added even though no supranational obligations are created in the NAFTA. Under the proposed institutional and legal framework of this thesis, further constitutional challenges will arise in three broad areas: separation of powers, federalism and due process requirements. The first point involves how the distribution of powers is defined between the supranational organization and the branches of the federal state. The second point deals with the possible alteration in the division of powers with the delegation of powers to the supranational entity and thus may make strengthen one of the branches of government over the others or dilute the power of the judiciary. The third point is concerned with the extent the delegation of sovereign competences alters the distribution of powers between the federation and the constituent states, P. Tangney, "The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany" (1996) 21 Yale J. Int'l L. 395 at 413. This problem does not only apply to Canada, but also other federal states in the Hemisphere such as Argentina, Mexico, Venezuela and Brazil, J.R. Vanossi, "El Derecho Internacional en las Constituciones Americanas: El Problema Constitucional de la Integración" (1985) 12 Curso de Derecho Internacional 111 at 119.

[612] B. Conforti, International Law and the Role of Domestic Legal Systems (Norwell, Massachusetts: Kluwer Academic, 1993) at 34

Leaving the experience of the European Communities aside, Professor Conforti comes to the conclusion that the internal practice of States offers a negative response to this question. Most countries take the position that binding resolutions are only have domestic effect if it has been incorporated by a legislative act or adopted by the executive upon delegation by the legislature.[613] This requirement undermines the understanding of international law in that if a treaty has already acquired formal validity and confers upon an institution the power to make binding decisions, the force of those decisions flow directly from the treaty's own binding character.[614] Nevertheless, it appears the trend is to deny them a self-executing character.[615]

Latin America has for years considered this problem of the effect regional norms have on the their domestic legal orders.[616] One commentator has asserted that the national courts of Latin America have been very receptive to integration treaties and the norms that are issued from them and that there has not been a need to amend their constitutions in this regard.[617] However, there is still the problem that norms may conflict with provisions of a constitution.[618]

In this section, the problems that may arise constitutionally will be looked in the United States, Canada, Chile, Argentina, and Colombia. It will be seen how receptive these States are to the incorporation of regional norms and their placement in the hierarchy of their laws.[619] It will look

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[613] Ibid. at 35.

[614] Ibid. at 36.

[615] Ibid. at 34.

[616] See, e.g., Inter-American Institute of International Legal Studies, Roundtable on the Integration of Latin America and the Question of Constitutionality (Washington: Inter-American Institute of International Legal Studies, 1968); G. Martin-Marchesini, "La Supranacionalidad en la Integración Latinoamericana" (1988-A) La Ley 929; and A. Brewer-Carias, supra note 516.

[617] "Los Presupuestos Juridicos," supra note 526 at 22. The Courts in Europe have also been instrumental in the integration process of the European Community, see H. Schermers, "Comment on Weiler's The Transformation of Europe" (1991) 100 Yale L.J. 2525 at 2528.

[618] One manner to get around this is to follow the European example and have a future FTAA Court to be bound to protect the individual fundamental rights as a matter of a general principle that forms the unwritten part of the regional law. In this way, the integration process must respect the constitutional traditions common to the member States, Stein, supra note 593 at 14-16.

[619] In Latin American constitutions, as a general rule, all treaties require the approval of the legislative assembly before the ratification of the President. The procedure, however, varies from country to country. Thus divergences may arise. The more modern constitutions are not as strict in this regard as some treaties may be concluded without the intervention of the legislative assembly. However, ratification is of the utmost importance in order to ensure that a

at the possible conflicts that may arise between their constitutions and the approval of the transference of authority to a supranational organ. In other words the question to ask is whether the constitutions "provide for participation in international organizations endowed with powers which presuppose restrictions on the sovereignty of member States."[620] In this context, the status of treaties will be looked at in the internal order as well as any restrictions that have been interpreted as to apply to treaties with the constitutions of the respective States, particularly if there is a conflict.

i. The United States

Under the Constitution of the United States, there are essentially two categories of international agreements, self-executing and non self-executing. A self-executing agreement is one in which it states or implies that it will become operative directly and immediately upon ratification.[621] These agreements enter US domestic law when they come into effect. The U.S. courts have articulated the test of self-execution in a variety of ways. In People of Saipan v. United States Dept. of Interior, the Court of Appeals for the Ninth Circuit said:

> The extent to which an international agreement establishes affirmative and judicial enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[622]

State has not entered into an agreement that violates their constitutions. Thus compliance with constitutional requirements is seen as condition of international validity for Latin America, K. Holloway, Modern Trends in Treaty Law (London: Stevens & Sons, 1967) at 222-223 and H. de Vries, Cases and Materials on the Law of the Americas: An Outline of Latin American Law and Society (New York: Parker School of Foreign and Comparative Law, Columbia University, 1972) at 214. A general pattern emerges whereby for a treaty to be binding on the national courts, a four step process is followed: (1) negotiations; (2) ratification by the proper constitutional body (which, as been mentioned, is generally the legislative body); (3) exchange of ratifications; and (4) promulgation or publication, E. Dihigo, "Treaties as Law in National Courts: Latin America" (1956) 16 Louis. L. R. 734 at 735-741.

[620] A. Cassese, "Modern Constitutions and International Law" (1985) 192 Rec. des Cours. 331 at 413.

[621] R. Hudec, "The Legal Status of GATT in the Domestic Law of the United States" in M. Hilf, F. Jacobs & E. Petersmann, eds., The European Community and GATT (Deventer, The Netherlands: Kluwer Law and Taxation, 1986) at 188.

[622] 505 F.2d 90 (9th Cir. 1974) as quoted in F. Abbott, "Regional Integration Mechanisms in the Law of the United States: Starting Over" (1993) 1 Ind. J. Global Leg. Stud. 155 at 160. In another case, Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985), the Court of Appeals for the Seventh Circuit listed six factors: (1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of alternative enforcement mechanisms; (5) the implications of permitting a private

A non-self-executing agreement is one in which some separate act of domestic law-making is needed to make it operative.[623] These agreements do not become part of the US domestic law until domestic law making procedure creates domestic law that parallels the international agreement.[624]

In terms if this legal order permits accession into a free trade agreement with supranational authority, the Constitution of the United States makes no express reference to international organizations or transfers of competences to them. However, there seems to be agreement that since the US Constitution permits the President to make and enter into treaties, this implies that the United States may conclude treaties that entail the transfer of some sovereign competences to them.[625]

That being said, despite the express terms of the Constitutions stating that treaties are the "supreme Law of the Land,"[626] the Constitution takes precedence over a treaty.[627] This was affirmed in the case of Reid v. Covert where the Supreme Court established the fundamental proposition that a treaty may not be used to deprive a US citizen of a right protected by the Constitution.[628] This became an issue during the negotiations of the NAFTA in terms of the Chapter 19 dispute settlement system on anti-dumping and countervailing duties. The objection was in terms that it was unconstitutional to subject US administrative agencies in anti-dumping and countervailing duties involving US citizens solely to review by arbitrators who were not federal

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right of action; and (6) the capacity of the judiciary to resolve the dispute, J. Jackson, "United States" in F. Jacobs & S. Roberts, The Effect of Treaties in Domestic Law (London: Sweet & Maxwell, 1987) at 153.

[623] Hudec, supra note 621 at 188.

[624] Ibid.

[625] F. Abbott, "The Maastricht Judgment, the Democracy Principle, and US Participation in Western Hemispheric Integration" (1995) Ger. Y.B. Int'l L. 137 at 147 [hereinafter Maastricht Judgment].

[626] United States Constitution, online: Official Site-House of Representatives <http://www.house.gov/Constitution/Constitution.html> (date accessed: 15 November 1999) art. VI, cl. 2.

[627] See S. Riesenfeld & F. Abbott, "The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties" in S. Riesenfeld & F. Abbott, eds., Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study (Norwell, Massachusetts: Kluwer Academic, 1994) at 264.

judges.[629] This limitation has profound implications for a regional free trade agreement. There may be objections that the supranational bodies that could issue binding regulations and issue decisions binding on the member States are unconstitutional if there is a perception that it will infringe on a citizen's rights.[630]

As well, self-executing international agreements and federal statutes are of equal status. As a consequence if there is an inconsistency between a treaty and a statute, it will be the latter in time that will prevail (the Lex Posterior Principle).[631] In terms of issuing regional norms, even if it becomes self-executing in the domestic law of the United States, there is always the possibility that the Congress could pass laws that would contravene these norms. This is what happened in the case of Diggs v. Schultz.[632] The United Nations had imposed sanctions upon the government of then Southern Rhodesia, but the US Congress passed legislation in order to contravene the UN resolution. The federal courts held that the later domestic statute, rather than the earlier international obligation from the UN Charter, would prevail.[633]

Moreover, there are problems in the manner in which the US has traditionally implemented trade agreements. In the Canada US Free Trade Agreement and the NAFTA, the implementing legislation provided that those agreements did not create private rights from which a citizen could ask to be enforced in the domestic courts. In effect, these agreements are not self-executing. By treating trade agreements like this, it sets an example for the region by eroding trade agreements through

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[628] Maastricht Judgment, supra note 625 at 152.
[629] Ibid. at 149.
[630] See the discussion of the problems that may arise in Maastricht Judgment, supra note 625 at 155-160. Also see D. Metropoulos, "Constitutional Dimensions of the North American Free Trade Agreement" (1994) 27 Cornell Int'l L. J. 141; J. Senior, "The Constitutionality of NAFTA's Dispute Resolution Process" (1994) 9 Fl. J. Int'l L. 209; and E. Boyer, "Article III, the Foreign Relations Power, and the Binational Panel System of NAFTA" (1996) 13 Int'l Tax & Bus. Lawyer 101.
[631] J. Jackson, "US Constitutional Law Principles and Foreign Trade Law and Policy" in Hilf & Petersmann, eds., supra note 18 at 79.
[632] 470 F.2d 461 (D.C. Cir. 1972).
[633] F. Morrison & R. Hudec, "Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States" in Hilf & Petersmann, eds., supra note 18 at 101.

inconsistent national rules.[634]

Additionally, one cannot discount the traditional hostility to supranational bodies by the United States.[635] Consistent Senate hostility to US adherence to human rights treaties has focused on the potential subrogation of US constitutional principles. It has withdrawn from the compulsory jurisdiction of the ICJ. In the Interhandel case,[636] US hostility towards international adjudication was traced back to the 1890s. Obviously, it will be very difficult to implement those bodies for regional integration unless there is a change in perspective by the United States.[637]

ii. Canada

Due to the separation of powers between the federal government and the provinces under the Constitution of Canada,[638] the constitutionality of acceding to an international organization go beyond the traditional problems of the supremacy of the Constitution. The authority by the federal government to make treaties is found under the Letters Patent Constituting the Duties of the Governor-General of Canada issued in 1947.[639] This provided that the Royal Prerogative powers of the Queen in Great Britain to enter into treaties and ratify them were o be delegated to the Governor-General of Canada, who would exercise the powers upon the advice of the Canadian Government. Prominent among the prerogative powers are those in the field of foreign affairs,

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[634] Law and Policy of Regional Integration, supra note 17 at 116.

[635] Abbott, supra note 503 at 931-32. One commentator has strongly argued against the 'rule of law' in international trade disputes. Five reasons are given: (1) impractical given the traditional hostility to any supranational authority; (2) its philosophical underpinnings does not reconcile with American political tradition; (3) it overemphasizes economic over political values; (4) it cannot be applicable to agreements that are intentionally vague or general; and (5) not clear that the 'rule of law' would serve to promote an open trading system, Trimble, supra note 584 at 1026-1031.

[636] Interhandel Case (Switzerland v. United States), [1959] ICJ Rep. 6.

[637] However, this is not to say that the courts would be hostile to having international courts have competence and rule on subject matters under their competence. In the case of Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. the United States Supreme Court stated:
The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts...We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.
473 U.S. 614 (1985) as directly quoted in Y. Kim, "The Beginning of the Rule of Law in the International Trade System Despite U.S. Constitutional Constraints" (1996) 17 Mich. J. Int'l L. 967 at 982.

[638] Constitution Act, 1867 ss. 91 & 92.

including:

> [T]he power to do all acts of an international character, such as the declaration of war and neutrality, the conclusion of peace, the making or renouncing of treaties, and the establishment or termination of diplomatic relations.[640]

Support for the treaty making powers of the federal government is also found in the most important case regarding treaty law in Canada, the Labour Conventions case.[641] Lord Atkin approved the following statement made by Chief Justice Duff at the Supreme Court of Canada level of this decision:

> As regards all such international arrangements, it is necessary consequence of the respective positions of the Dominion Executive and the Provincial Executives that this authority (to enter into international agreements) resides in the Parliament of Canada. The Lieutenant-Governors represent the Crown for certain purposes. But, in no respect does the Lieutenant-Governor of a Province represent the Crown in respect of relations with foreign Governments. The Canadian Executive, again, constitutionally acts under responsibility to the Parliament of Canada and it is that Parliament alone which can constitutionally control its conduct of external affairs.[642]

Therefore, the treaty making powers reside in the federal executive and they are allowed to enter into and ratify treaties on behalf of Canada, including ones that require a transfer of authority to a supranational body. The problem that arises is in the force of treaties once they are ratified. Ratification of a treaty does not make it effective in Canadian law unless it is implemented. This was pronounced in the Labour Conventions case where Lord Atkin stated:

> It will be essential to keep in mind the distinction between (1) formation, (2) the performance, of the obligations constituted by the treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligation, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.[643]

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639 Reproduced in R.S.C. (1985), App. II, no. 31.

640 R.M. Dawson, The Government of Canada (4th ed., 1963) at 158, quoted from A.E. Gotlieb, Canadian Treaty-Making (Toronto: Butterworths, 1968) at 4.

641 Attorney-General for Canada v. Attorney-General for Ontario, [1937] 1 D.L.R. 673 (P.C.) at 682 [hereinafter Labour Conventions].

642 Attorney-General for Canada v. Attorney-General for Ontario, [1936] S.C.R. 461 at 488.

643 Labour Conventions, supra note 125 at 678.

Therefore, a ratified treaty that purports to alter existing domestic law requires implementing legislation in order for it to have force and effect in domestic law. Lord Atkin was also concerned about the effects the treaty would have on the division of powers under the British North America Act:

> For the purposes of ss.91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it to be ascertained. No one can doubt that this distribution is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect...It would be remarkable that while the Dominion could not initiate legislation however desirable which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by provincial Parliaments need only agree with foreign country to enact such legislation: and its Parliament would be forwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial autonomy.[644]

Not only does a ratified treaty in Canada have no force due to a "well-established rule in the British Empire," but also our Constitution prohibits the federal government to bind and change provincial law. The division of powers between federal and provincial governments is unaffected by the fact that the Royal Prerogative to conclude treaties is exercised exclusively in the name of the Crown in the right of Canada, i.e., by the federal government. Therefore when a treaty is ratified by the federal executive, domestic legislation, either federally or provincially, or both, is needed for its implementation in order for it to have force and effect in Canada.[645] It is assumed that in the implementation of decisions by international organizations, they are subject to the

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[644] Ibid. at 681-682.

[645] B. Mawhinney, "Canadian Practice in International Law: At the Department of External Affairs, 1991-1992" (1992) 32 Can. Y.B. Int'l L. 363. Note that all treaties do not need to be implemented to be binding. The Crown can enforce a treaty without legislation so long as the actions required lie within its prerogative powers and do not change internal law. Support for this contention is found in the case of Francis v. The Queen (1956), 3 D.L.R. (2d) 641 (S.C.C.) at 647 where Judge Rand states:
Speaking generally, provisions that give recognition to incidents of sovereignty or deal with matters in exclusively sovereign aspects, do not require legislative confirmation. For example, the recognition of independence, the establishment of boundaries and, in a treaty of peace, the transfer of sovereignty over property, are deemed executed and the treaty becomes the muniment evidences of the political or proprietary title.
See also R. St. J. MacDonald, "International Treaty Law and Domestic Law of Canada" (1975) 2 Dal. L. J. 307 at 313.

same rules as treaty implementation.[646] However, this is not to say that this is impossible under the constitutional framework. Regulations having the force of law have been enacted to implement decisions of international organizations and treaties contemplated within an implemented statute have been given the force of law once the treaty has become binding on Canada.[647] As well, Canadian courts have assumed, as a rule of statutory interpretation, that the legislature does not intend to violate international law and have consistently stated that in absent of a clear intention expressed by a statute, they will interpret domestic laws in a manner compatible with Canada's international obligations.[648] It is also believed that much in the same context, the provincial legislatures may not legislate in violation of international law.[649] However, this does not change the situation that ultimately, the consequences for Canada is that although an unimplemented treaty will have no force and effect domestically, internationally its ratification will bind and create obligations for which Canada will be responsible. Moreover, if a statute is enacted that expressly conflicts an earlier one that implements a treaty, according to statutory interpretation, it will be that latter one that will prevail. All the same, it is believed that the Canadian courts will give great weight to the text of treaties and considerable lengths will be taken that they be given effect in Canada.[650]

Overall, the result of the Constitutional limitations on the federal government is the creation of a very decentralized federal system.[651] Federal jurisdiction over international trade is not easy to define as it might be with other market economies. What is clear is that Parliament can legislate

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[646] J.Y. Morin, "Canada" in E. Lauterpacht & J. Collier, eds., Individual Rights and the State in Foreign Affairs: An International Compendium (New York: Praeger Publishers, 1977) 94 at 112.

[647] A.L.C. de Mestral, "The Implementation of Canada's International Economic Obligations" in Conference on International Law, Proceedings of the Conference on International Law: Critical Choices for Canada 1985-2000 (Kingston, Queen's Law Journal, 1986)192 at 200 [hereinafter "International Economic Obligations"]. However, there is an absence of any consistent policy in the implementation of Canada's treaty obligations and there is no adequate method to ensure that the implementation of the international obligations are made in a timely fashion, ibid at 201-203.

[648] "International Economic Obligations", ibid. at 196 and Morin supra note 646 at 110.

[649] G.V. La Forest, "May the Provinces Legislate in Violation of International Law?" (1961) 39 Can. Bar Rev. 78 at 80.

[650] "International Economic Obligations", supra note 647 at 196.

[651] A.L.C. de Mestral, "Constitutional Law and Foreign Trade Law in Canada: The Impact of the Canada-USA Free Trade Agreement" in Hilf & Petersmann, eds., supra note 18, 443 at 450 [hereinafter "Foreign Trade Law in Canada"].

over tariffs, quotas and other conditions of entry or exit of goods, services, persons and capital, while the regulation of contracts remains in the hands of the provinces.[652] This conflict could limit the incorporation of a regional norm in the Canadian legal order. But, this point is rather unsettled because there has been no notable examples of the successful invocation of constitutional freedoms in litigation involving international trade law questions.[653] It can truly be said that the principles of international economic law, and the implications of economic integration, have not had a significant impact on Canadian constitutional law.[654]

iii. Chile

The treatment of international agreements in Chile is somewhat difficult because its Constitution does not have a provision that states the relationship of these agreements with its internal law. Moreover, there is no provision on the cooperation with other States of the region for eventual integration. Pursuant to the Constitution, international treaties are negotiated by the President but must be approved by the national congress before ratification.[655] In order to enact the treaty, the same steps are used as that of a regular statute, i.e. the treaty becomes enforceable after promulgation and publication in the Diario Oficial.[656] All these steps have to be taken in order for a treaty to have the force of law in Chile. If not, then the treaty is not enforceable in the domestic

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[652] Ibid. at 450-451.

[653] Ibid. at 453. The Constitution of Canada, under s. 91(2), does confer on the federal government competence over "the Regulation of Trade and Commerce," Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3. However, given the decentralized federal system and the court's reluctance to disturb the division of powers in the Constitution, jurisdiction over this competence has never been expansive, H. Scott Fairley, "Jurisdiction Over International Trade in Canada: The Constitutional Framework" in M. Irish & E. Carrasco, The Legal Framework for Canada-United States Trade (Toronto: Carswell, 1987) 131 at 145. In a leading case on the matter, Citizens Insurance Company v. Parsons (1881), 7 A.C. 96 (P.C.), three categories of subject matters were established whereby it "would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion," Parsons, ibid. at 113. However, the provision has always been interpreted rather narrowly in order to maintain the division of powers in the Constitution, see generally Scott Fairley, ibid.

[654] "Foreign Trade Law in Canada" supra note 651 at 455. Also see Library of Parliament Research Branch, NAFTA: Resolving Conflicts Between Treaty Provisions and Domestic Law (Background Paper) by D. Dupras (Ottawa: Supply & Services Canada, 1993).

[655] Constitución de la República de Chile, 1980, online: Political Database of the Americas < http://www.georgetown.edu/pdba/Constitutions/Chile/chile97.html > (date accessed: 15 November 1999) art. 50(1).

[656] United Nations Legislative Series, Laws and Practices Concerning the Conclusion of Treaties, UN Doc.ST/LEG/SER.B/3 (1952) at 36; A. Evans, "Treaty Practice in Chile, Argentina, and Mexico" (1958) 52 Proc. A.S.I.L. 302 at 302; and S. Benadava, "Las Relaciones entre Derecho Internacional y Derecho Interno ante los Tribunales Chilenos" in A. Leon Steffens, ed., Nuevos Enfoques del Derecho Internacional (Santiago, Chile: Editorial Juridica de Chile, 1992) 9 at 35; and

legal order.[657] Thus, a treaty may be ratified, and thus bind Chile to fulfill those obligations found in the treaty on the international sphere, but it will have no validity in the domestic legal order until it has been promulgated and published.[658] However, if they have been taken, then an individual may resort to them before the national courts.[659] However, not all international agreements entered into by the executive have to be approved by the national congress. These are agreements that are understood to be "agreements in simplified form" those do not require parliamentary approval or ratification. These are matters that fall under the executive competence and thus would have no effect or force of law in the domestic legal order, as they would not be an act of congress.[660] For example, administrative agreements, agreements specifying measures of execution, the interpretation of previous conventions and conventions of similar type would fall under this category.[661] In essence, they are executive agreements that deal with administrative or regulatory matters.[662]

The importance of these executive agreements is that it is this method in which regional norms that have emanated from past international trade agreements have been brought into force in Chile. The decisions of economic integration agreements have always been implemented by executive authority, never by means of parliamentary approval.[663] Thus, these executive actions

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Holloway, supra note 619 at 227. The fact that a treaty is brought before Congress, however, does not guarantee automatic approval, see Evans, ibid. at 302.

[657] See Cassese, supra note 620 at 397 where he recites a Supreme Court of Chile case that pronounced that the United Nations Covenant on Civil and Political Rights of 1966 was inapplicable in Chile despite being promulgated by the President. Since it was not published in the Diario Oficial, it had no effect. Also see Benadava, supra note 656 at 36-40 on other sentences by the courts of Chile applying this same principle.

[658] It should also be noted that in the past, the date of publication of a treaty was not necessarily the date of it coming into force, unless it had been expressly stated, but six days after publication, H. de Vries & J. Rodriguez-Novás, The Law of the Americas: An Introduction to the Legal Systems of the American Republics (Dobbs Ferry, New York: Oceana Publications, 1965) at 177-178.

[659] Benadava, supra note 656 at 35.

[660] United Nations Legislative Series, supra note 656 at 35 and Evans, supra note 656 at 303.

[661] United Nations Legislative Series, ibid.

[662] F. Vallejos de la Barra, "El Rol de los Parliamentos en la Orientación de las Relaciones Internacionales de los Estados y en los Procedimientos de Incorporación de los Tratados al Orden Jurídico Interno, con Especial Atención al Caso del Congreso Nacional de Chile" (1997) 24 Curso de Derecho Internacional 127 at 152-155. Moreover, in the past, importantly, international economic treaties enjoyed a special legal position. The President of Chile, under Article 2 of Act No. 5142 of May 10, 1933 had the power to alter the rates of duty established in the Customs Tariff in order to comply with a treaty that had still not been ratified if it was in the best interests of the country, United Nations Legislative Series, supra note 656 at 35 and Evans, supra note 656 at 303.

[663] F. Orrego-Vicuña, "Chile" in Lauterpacht & J. Collier, supra note 646, 123 at 163-167.

are of special importance in Chilean constitutional practice as they have been instrumental in executing the decisions that have emanated from the LAFTA and LAIA, but also in the way Chile has entered into agreements of partial scope and the Andean Group.[664] The following opinion issued by the Office of the Comptroller General on the legality of entering the Andean Group through supreme decree rather than having the agreement approved by Congress is enlightening in this regard. Although it is in the context of the Andean Group, the principles enunciated are essentially the same in accepting regional norms in a wider integration agreement:

> In regard to the decree of reference, this office is of the opinion that it is essential to take into account the legal nature of the Montevideo Treaty. In effect, this international instrument constitutes what is called a "traité-cadre", that is to say, a treaty that only sets general principles, creates mechanisms and establishes organs for the execution of the purposes of the treaty, which with their actions fill out the entire structure of the Treaty.
> ...
> Thus, the Treaty of Montevideo did not spell out the manner of accomplishing its purposes, but granted powers to do so to its organs, which, in essence, in accomplishing their powers determined that the subregional agreements were a feasible means of integration, through which they indicated and regulated this so that the countries entering into such agreements would come under the system of the Treaty of Montevideo and accomplish its purposes. In this form, legislative approval of the subregional integration agreement would not be necessary, from the time that the provisions of the Treaty are being executed through implementation of the resolutions of the organs established by it. Those resolutions were issued within the spheres of their competence, clearly set forth in that Treaty.[665]

A problem arises in the legal effect these norms will have in the Chilean domestic legal order. The Chilean government has officially stated that these agreements do not have the force of law.[666] However, one noted commentator has stated that these executive agreements have the force of law because they are carrying out the provisions of a treaty that has already been approved, ratified, promulgated and publicized. The validity of these norms and force of law that they carry within the domestic legal system flows from the valid enactment of the treaty that provides for the emanation of regional norms to carry out its objective.[667] If this was not possible, then the approval of a framework treaty, as this thesis proposes the FTAA should be, will involve the

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[664] Vallejos de la Barra, supra note 662 at 154.
[665] Translated and cited in The Andean Legal Order, supra note 283 at 169-70.
[666] United Nations Legislative Series, supra note 656 at 35.

adoption of a hollow treaty in the Chilean legal order.[668] But, this point does not appear to have been clarified and if the case is that they do not have effect, it would seriously undermine the uniform application of the FTAA within Chile and hamper any involvement by the individual to bring actions forward to the national courts to ensure compliance with the FTAA process.

If these norms do have the force of law in the Chilean legal order, a further problem that arises is the manner in which the Chilean courts have interpreted treaties in the past. Although they may have the force of law in Chile, in order for an individual to rely on the provisions, it will need to acquire self-executing status.[669] Again, it is believed that since the norms that are issued by regional economic integration treaties are to be directly applicable into the legal order of the member States, these norms will be considered to be self executing in Chile.[670] Moreover, others believe that the distinction between self-executing and non self-executing treaties is not meaningful in Chilean practice given their parliamentary experience.[671]

But probably the most serious obstacle to Chile's participation in the proposed FTAA process is the potential conflict between the treaty and norms with their Constitution and subsequently enacted legislation. Since treaties take the same steps for it to be enacted as that of a regular statute, scholars consider that treaties have the same status as regular statutes or laws.[672] Consequently,

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667 F. Orrego-Vicuña, "La Incorporación del Ordenamiento Jurídico Subregional al Derecho Interno: Analisis de la Practica y Jurisprudencia de Chile" (1970) 7 Derecho de la Integración 42 at 47-48 & 57 [hereinafter "Incorporación del Ordenamiento Jurídico"].

668 Ibid. at 48.

669 Benadava, supra note 656 at 42.

670 "Incorporación del Ordenamiento Jurídico," supra note 667 at 58. A further point to consider is the manner in which treaties have tradtionally been interpreted under Chilean law. Under the Civil Code, treaties are subject to the canons of intepretations established for laws which entails a strict interpretation when it touches on private rights, but a more expansive one when it is a matter regulated by international law, Evans, supra note 656 at 304-305. However, in a 1987 Supreme Court decision, instead of relying its competence to make an interpretation on a treaty before them, it relied on the interpretation supplied by the Ministry of External Relations. This broke the practice whereby it was the judiciary that had to determine the proper interpretation of a treaty, not the executive. But, it is believed that future decisions will not rely on the executive for the interpretation of a treaty, but rather on the interpretive provisions found in the Vienna Convention on the Law of Treaties, Benadava, supra note 656 at 45-46.

671 Evans, supra note 656 at 304.

672 R. Medina & C. Medina-Quiroga, Nomenclature & Hierarchy: Basic Latin American Legal Sources (Washington, D.C.: Library of Congress, 1979) at 23 and A. Golbert & Y. Nun, Latin American Laws and Institutions (New Yorlc Praeger, 1982) at 415.

it has traditionally been posited that a latter statute that is inconsistent with a prior treaty abrogates the treaty as to those matters in conflict.[673] Modern practice, however, proves that the Chilean courts have consistently interpreted that treaties that have the force of law will prevail over statutes that have been subsequently enacted.[674] Although this bodes well for the incorporation into Chilean law an economic integration treaty, the same principle does not apply to executive agreements. Chilean courts have been consistent in affirming the validity of a later statute over those of an executive agreement.[675] This could present problems in terms of accepting regional norms in that they will not have supremacy in the internal legal order because a latter statute can easily abrogate them. Moreover, laws of public order, laws deemed to be essential for the sovereignty of Chile, cannot be abrogated by a treaty. This has been consistently followed in Chilean jurisprudence.[676]

Importantly, if there is a conflict between the provisions of a treaty or the norms emanating from them, which has been determined to have inferior status in the form of executive agreements, with the Chilean Constitution, then it is the Constitution that will prevail. The supremacy of the Constitution is presumed and treaties have to conform to it.[677] This has been consistently upheld in Chilean courts that the Constitution is the supreme law that prevails over any domestic law, even those enacted to bring in effect an international treaty.[678] Moreover, since treaties have the same status as statutes, and are enacted in the same way, the courts have the power to judicially review them for compliance with the Constitution and declare them unconstitutional if contrary to

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[673] Evans, supra note 656 at 304; de Vries, supra note 619 at 227; and de Vries & Rodriguez-Novás, supra note 658 at 186.
[674] Benadava, supra note 656 at 53-58. Note that although it in the past it has consistently been stated that a later statute prevails over an earlier enacted treaty, there were some commentators who took the contrary view, see A. Cruchaga Ossa, "Relaciones entre el Derecho Internacional y las Legislaciones Nacionales" (1940) 10 Proceedings of the Eighth American Scientific Congress 49 at 56.
[675] Benadava, ibid. at 53-54.
[676] Ibid. at 52-53. These laws have also been referred to as "institutions of public order," Evans, supra note 656 at 303.
[677] Evans, supra note 656 at 303. But see Cruchaga Ossa, supra note 674 at 60, where he states that in the conflict between the Constitution and an international treaty, it should be resolved by constitutional rules in pereference to those of international law. See also Dihigo, supra note 619 at 744 in this regard.
[678] Benadava, supra note 656 at 47-52.

constitutional principles.[679] Thus, problems could arise if the Chilean courts decide that the provisions of the proposed FTAA Treaty do not comply with their Constitution and thus make them null and void.[680]

iv. Argentina[681]

Pursuant to the Argentine Constitution, international treaties are negotiated by the President but must be approved by both Houses of Congress before ratification.[682] Therefore, Congress has the power to approve or reject treaties while the President concludes and signs treaties of peace, trade, navigation alliance, boundaries and neutrality and concordants with the Holy See, and conducts negotiations for the maintenance of good relations with other foreign relations.[683] Unlike Chilean practice, a treaty will have the force of law internally once it has been ratified and in force internationally and it is not necessary that the treaty be published for this effect.[684] Not all international agreements have to be approved by Congress. Protocols concluded in accordance with the terms of an already ratified treaty and those that preserve the status quo do not require legislative approval.[685] These executive agreements are also referred to as agreements in simplified form and have covered areas such as military assistance, technical cooperation, trade

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[679] de Vries & Rodriguez-Novás, supra note 658 at 182. There is a minority of commentators tha believe that writs of unconstitutionality only for internal laws and is inapplicable to treaties. Even when treaties have the same status as national statutes, the courts would still be incompetent to declare such treaties as unconstitutional, ibid.

[680] In the past, Chile had proposed that the following provision would be added to article 43 of the Constitution of 1971 which would have avoided problems of conflicts with their Constitution, but it was never added:
With the majority vote of the Congress and Senate, they may approve Treaties that assign, in conditions of reciprocity, determined attributes or competences to supranational institutions, assigned for the advance and consolidate the integration of the Nations of Latin America. (authors translation).
Brewer-Carias, supra note 516 at 80.

[681] For a discussion of the treaty making process in Argentina, see J. Maria Ruda, "The Role of the Argentine Congress in the Treaty-Making Process" in Riesenfeld & Abbott, supra note 627 at 177.

[682] Constitution of Argentina of 1994, online: Political Database of the Americas <http://www.georgetown.edu/LatAmerPolitical/Constitutions/Argentina/argen94.html> (date accessed: 15 November 1999) articles 67 & 86.

[683] Ibid. The official position of the Argentine government has been that Congress may alter the provisions of a treaty when it is up for approval, United Nations Legislative Series, supra note 656 at 5. Doctrinal writers, however, have felt that that the powers of Congress are constitutionally restricted to approval or rejection, Evans, supra note 656 at 305.

[684] E. Rey Caro, "Los Tratados Internacionales en el Ordenamiento Juridico Argentino: Consideraciones sobre la Reforma Constitucional" (1994-95) 6 Anuario Argentino de Derecho Internacional 209 at 215; G. Bidart Campos, "La Incorporación del Derecho Internacional al Derecho Interno" (1965) 118 La Ley 1048 at 1063; and de Vries & Rodriguez-Novás, supra note 658 at 177. This practice of not publishing the treaty in the Argentine official gazette has come under criticism as it makes it ambiguous when a treaty will come into force, Bidart Campos, ibid. at 1063.

[685] United Nations Legislative Series, supra note 656 at 5 and Holloway, supra note 619 at 223.

and payments and financial matters.[686] The criteria for not submitting a treaty to Congress are sufficiently general and vague to allow the executive ample freedom to determine this requirement.[687] However, ratification is essential for any international agreement that directly or indirectly affects a constitutional principle, involves a new international commitment or appertains to the public revenue.[688]

Before the amendments to its Constitution in 1994, Argentine constitutional principles and jurisprudential interpretation would have made it difficult for Argentina to participate in a regional economic integration treaty. Article 27 of the Argentine Constitution states:

> The Federal Government is bound to consolidate its relations for peace and trade with foreign Powers by means of treaties that are in conformity with the principles of public law laid down by this Constitution.[689]

This was interpreted as granting, in the hierarchy of norms, constitutional supremacy over an international treaty.[690] This is especially clear when one reads Article 21 of Act No. 48 of 25 August 1863 that establishes the order or priority in the legislation to be applied by the courts:

> In the exercise of their functions, the courts and judges of the Nation shall apply the Constitution as the supreme law of the Nation, the Acts approved or which may be approved by Congress, the treaties with foreign countries, the individual laws of the provinces, the general laws applied in the country in the past and the principles of

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[686] Rey Caro, supra note 684 at 226.

[687] Holloway, supra note 619 at 224.

[688] United Nations Legislative Series, supra note 656 at 5

[689] Constitution of Argentina of 1994, supra note 682. See also article 31 which states that:
This Constitution, the laws of the Nation enacted by Congress in consequence thereof, and the treaties with foreign Powers are the supreme law of the Nation; and the authorities of each province are obliged to conform thereto, notwithstanding any provision to the contrary which the provincial laws or constitutions may contain, with the exception, so far as the province of Buenos Aires is concerned, of the treaties ratified following the Pact of 11 November 1859.
The effect of this article is to give international treaties supremacy over that of provincial laws and constitutions.

[690] C. Armas Barea, "Derecho Internacional Publico y Derecho Interno: Nuevo Criterio de la Corte Suprema Argentina" in Rama-Montaldo, ed., supra note 255, 141 at 144; United Nations Legislative Series, supra note 656 at 4; Rey Caro, supra note 684 at 213; Bidart Campos, supra note 684 at 1061; Dihigo, supra note 619 at 743; Evans, supra note 656 at 305; and de Vries & Rodriguez-Novás, supra note 658 at 179. One commentator has stated that the constitutional supremacy is limited in three ways. First, it only applies to peace and trade treaties but not in reference to war or when there are threats to the peace. Second, the treaties are to conform with the principles laid down by the Constitution therefore possibly leaving out other provisions that are not covered by this principle. Third, the article only mentions treaties thus leaving the possiblity that other sources of international law such international customary law, general principles of law, decisions from international organizations and jus cogens could have a superior status, Armas Barea, ibid. at 144.

international law, in the order of priority hereby established.

Therefore, treaties may not derogate from any precept of the Constitution.[691] Moreover, it appears that not only are treaties inferior to the Constitution, but also to federal legislation.[692] However, given the fact that international treaties receive approval of Congress and are therefore in the nature of law.[693] As well, since the practice of ratifying executive agreements "without the prior approval of Congress those international agreements which do not treat subjects of an essentially legislative character" affirms the legislative character of those treaties that are approved by Congress.[694] But, according to a past leading case from 1963, Argentina follows the lex posterior rule, and as such, a later federal law will override a previously enacted treaty.[695] This was the practice until quite recently. This practice, combined with the supremacy of the constitution over international treaties, was felt to hinder any participation by Argentina in economic integration schemes that necessitated the transfer of competences to a supranational entity. As such, many doctrinal writers felt that a constitutional amendment and change in jurisprudence was needed, especially in light of Argentina's participation in the MERCOSUR.[696]

This is what precisely happened. The Constitution of Argentina is now among the most receptive to economic integration. The amendments to the Constitution in 1994 provided the constitutional authority for the transfer of competence and jurisdiction to a supranational body, although only under equal and reciprocal conditions with the rest of the member States of the integration

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691 As such, it was common practice to include the "Argentine formula" in treaties of arbitration and conciliation making their provisions subject to the precepts of the Constitution, United Nations Legislative Series, supra note 656 at 4 and Rey Caro, supra note 684 at 213.

692 Except in the cases relating to diplomatic privileges and maritime prizes. Only then does international law prevail, Unitd Nations Legislative Series, ibid.

693 Evans, supra note 656 at 306.

694 Ibid.

695 Martin y Cia. Ltda. c. Administración General de Puertos, Bidart Campos, supra note 684 at 1064; Armas Barea, supra note 690 at 153-154 and de Vries & Rodriguez-Novás, supra note 658 at 184-185. But see Evans, supra note 656 at 306 whereby in the analysis of Argentine practice finds that the practice of the courts is to reconcile any conflicts between treaties and laws or rule in favour of an international agreement.

696 See the discussion of the points of views of Argentine academics on the matter in V. Bazan-M., "Aproximación a Ciertas Cuestiones Jurídicas que Suscita el Tratado Libre de Comercio de América del Norte y el Tratado de Asunción" (1994) 27 Boletin Mexicano de Derecho Comparado 285 at 306-307.

agreement.[697] Under article 75, paragraph 24 the powers of Congress include:

> Approving integration treaties that delegate competency and jurisdiction to supranational organizations in equal and reciprocal terms, and that respect the democratic order and human rights. These standards have superior hierarchy to the laws. The approval of treaties with the states of Latin America will require an absolute majority of all members of each House. In the case of treaties with other states, the National Congress, with an absolute majority of members present in each house will declare the suitability of approving the treaty, which can only be approved with an absolute majority vote of all the members of each house, one hundred twenty days after the declaration.[698]

Treaties that meet these conditions are to have primacy over national laws and supersede whatever standard contradicts them, either before or after the treaty.[699] Moreover, it allows for the transfer of competences to a supranational body and it is felt that the norms issued from them be granted the same status as treaties found under article 75, paragraph 24.[700]

The constitutional amendments have also coincided with a change in the direction of the case law of the Supreme Court of Argentina. These cases have asserted the priority of treaties over domestic law and support the immediate incorporation of the international treaties into domestic law thus adhering to the monist conception, which integrates the international and internal legal orders into a permanent flux of standards from one order to the other.[701] The most important of

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697 de Aguinas, supra note 17 at 603.

698 Moreover, article 75, paragraph 22 further underlines the supremacy of international treaties over Argentine laws: Congress shall have the power to approve or withhold approval of treaties concluded with other nations and international organizations and of concordants with the Holy See. These treaties and concordants have a superior hierarchy than the laws.
Also note the constitutional articles found in the other members of the MERCOSUR on this matter. Article 145 of the Constitution of Paraguay, 1992, online: Political Database of the Americas <http://www.georgetown.edu/pdba/Constitutions/Paraguay/para1992.html> (date accessed: 15 November 1999) states:
The Republic of Paraguay, on equal terms with other States, recognizes a supranational legal order that guarantees the validity of human rights, of peace, and justice, of cooperation and development, in political, economic, social, and cultural matters. Said decisions can only be adopted by an absolute majority of each House of Congress.
Article 4 of the Constitution of the Federal Republic of Brazil, online: Political Database of the Americas <http://www.georgetown.edu/pdba/Constitutions/Brazil/brazil99.html> (date accessed: 15 November 1999) states:
The Federal Republic of Brazil pursues the economic, political, social and cultural integration with the people of Latin America, for the formation of a latinamerican community of nations.
Article 6 of the Constitution of the Republic of Uruguay, 1997, online: Political Database of the Americas <http://www.georgetown.edu/pdba/Constitutions/Uruguay/uruguay97.html> (date accessed 15 November 1999) states:
The Republic will attempt total economic integration with the States of Latin America, especially in what is referred to as the common defense of products and primary materials. Likewise, the effective complementation of public services is also foreseen.
These provisions are the author's own translation.

699 de Aguinas, supra note 17 at 604.

700 Rey Caro, supra note 684 at 235.

701 de Aguinas, supra note 17 at 604.

these cases is the Cafés La Virginia.[702] This case went further and established the supremacy of accords of partial scope negotiated under the LAIA over national laws. In a dictum by Supreme Court Justice Antonio Boggiano, he stated that the Treaty of Asunción as superior in hierarchy to Argentine domestic law, and also insinuated that norms generated by the Treaty would also have the same status, which as we have seen, is being supported by doctrinal writers in terms of the constitutional amendments:[703]

> MERCOSUR being complex and involving extremely important goals, adapts itself to the foresight of article 87 of the Treaty of Montevideo (ALADI), relative to the Accords of Partial Reach, and explicitly foresaw rules to fulfill the mandates that these accords imposed; for example, it is open to the addition of the other members of ALADI (in accordance with Article 9 of the Treaty of Montevideo and Article 20 of the 1991 Treaty of Asunción that are the bases for the organization of MERCOSUR). In the same order of idea, one must take into consideration Article 4 of the Treaty of Asunción, that inserted the objectives of ALADI into MERCOSUR, just as Articles 4, 5, 11 and 12 of Annex I did, which established rules for the relationship with other accords of partial reach concluded under the framework of the Treaty of Montevideo. In such conditions, it seems clear that the thesis proposed by the representative of the Treasury Department would apply to the "obligations" undertaken within the framework of MERCOSUR. Lest we arrive at a situation in which when the time comes to construct the dome, we weaken the foundation.[704] (emphasis added by Professor de Aguinas)

From this decision, it is said that there are three important precedents for the institutional life of MERCOSUR and the relationship of international law with other schemes of integration, which reinforce the interpretation Article 75 of the Constitution.[705] The first is that an individual could enforce private rights granted by an integration treaty (LAIA). Secondly, the principle of the supremacy of international law over domestic law is accepted. Consequently, a later law cannot nullify an earlier treaty. Finally the MERCOSUR, as an accord of partial scope is hierarchically superior to domestic law.[706] As such, obligations that arise in the MERCOSUR, such as the

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[702] Judgment of Oct. 13, 1994 (Cafés La Virginia, S.A.) [CSJN], C.572.XXXIII, as cited in ibid. The first case that began the change in jurisprudence Ekmekdjian c. Sofovich, decided in 1992, first recognized the superiority of international agreements over internal laws. Thus the lex posterior rule no longer applies in Argentina, Armas Barea, supra note 690 at 160-161 and Bazan M., supra note 696 at 310-311.

[703] The position of the Argentine government is that these norms have the same status as international agreements under article 31 of the constitution, supra note 689. Thus the Argentine government has stated that they have the same status as federal laws, OAS, Permanent Council, Information Document on the Replies of the Governments to the Questionnaire on Legal Obstacles to Integration, OR OEA/Ser.G/OJI-15/93 (1993) at 21 [hereinafter Information Document].

[704] Ibid. at 605-606.

[705] Ibid. at 606.

[706] Ibid.

Decisions of the CMC, Resolutions of the CMG, and the Directives of the Trade Commission are automatically incorporated into the internal legal order and assume a superior position over the domestic laws. Moreover, the official Argentine position on the status of norms is that in principle they are directly applicable without the need of formal incorporation.[707] This makes the Argentine Constitution one of the most amenable to the acceptance of a supranational authority in the formation of a Free Trade Area of the Americas.

v. Colombia

Colombia is rather unique in that its past experience demonstrates the problems the acceptance of regional norms in the domestic legal order of a state may have. Colombia is one of the original member States of Andean Group, which is now the Andean Community. Colombian constitutional practice has always required that any international agreement be first by Congress.[708] As with Chile and Argentina, there existed executive agreements and it was in this form that the instruments issued from the LAFTA were incorporated in Colombia.[709] When the Colombian Government approved the Cartagena Agreement, it did so through a decree and not through legislative approval. Moreover, the date of coming into force of a treaty, both internally and internationally is governed by special legislation. Article 1 of Act No. 7 of November 30, 1944 states:

> Treaties, pacts, conventions, agreements or other international acts approved by Congress in accordance with articles 69 and 116 of the Constitution, shall not be considered to have the force of domestic law until they have been confirmed as such by Government by means of an exchange of letters of ratification or the deposit of instruments of ratifications or other similar formality, unless the law approving the treaty, convention, or agreement expressly determines that its terms shall have the force of domestic law. In this latter case the failure of the treaty to come into force as an international obligation for Colombia, shall not imply its failure to become binding as domestic law.[710]

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[707] Information Document, supra note 703 at 21.

[708] R. Nieto Navia, Estudios Sobre Derecho Internacional Público (Colombia: Pontifica Universidad Javeriana, Facultad de Ciencias Juridicas y Socioeconomicas, 1993) at 86-87 and United Nations Legislative Series, supra note 656 at 37.

[709] F. Orrego-Vicuña, "La Incorporación del Ordenamiento Jurídico Subregional al Derecho Interno: Analisis de la Practica y Jurisprudencia de Colombia" (1972) 11 Derecho de la Integración 39 at 44 [hereinafter "Incorporación del Ordenamiento Jurídico: Colombia"] and L. Thomas, "The Colombian Supreme Court Decision on the Andean Foreign Investment Code and its Implications for the Law of Treaties" (1973) 8 J. Int'l L. & Econ. 113 at 117.

[710] United Nations Legislative Series, supra note 656 at 37 and de Vries & Rodriguez-Novás, supra note 658 at 178.

Once a treaty becomes binding, the executive promulgates the treaty by decree in which the text of the treaty is included. If the executive so deems, it may order the application of the treaty as domestic law by means of an executive enactment even prior to the completion of the formalities under Article 1, paragraph 1 of the aforementioned Act. Thus, as a general rule, a treaty becomes valid internally through promulgation and publication once it becomes binding internationally.[711]

In terms of the hierarchy of norms in the Colombian domestic legal order, the courts had few instances in which they dealt with this problem. However, in a 1914 case, the Supreme Court had to determine whether the Concordant of 1892 had repealed Law 1805 of 1890 conferring jurisdiction on ecclesiastical courts over disputes concerning ecclesiastical institutions and privileges. The Court held that the Concordant prevailed because:

> [I]t is a principle of public law that the Constitution and treaties are the supreme law of the land and their provisions ought to prevail over ordinary laws which are in conflict, even though the ordinary laws are of a later date.[712]

Moreover, the Supreme Court reiterated the principle that a later statute cannot abrogate an earlier treaty in a decision in 1944.[713] In that decision, the Court stated:

> It cannot be left to the discretion of one of the parties to introduce any change in a public treaty, which is a contract or formal pact to be observed between two or more states or powers and which can only be abrogated or amended in accordance with the usages and practices sanctioned by international law.[714]

As for the review for the constitutionality of treaties within their internal legal order, Colombian jurisprudence was unique when compared with the rest of Latin America. Unlike Chile and Argentina, where the courts did have the power to judicially review the validity of treaties in their internal legal order, the Colombian courts had determined that they did not have the competence

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[711] de Vries & Rodriguez-Novás, ibid. and Holloway, supra note 619 at 228. This process is still used today, Nieto Navia, supra note 708 at 99.
[712] de Vries & Rodriguez-Novás, ibid. at 188.
[713] Ibid.

to do so. The old Constitution stated that the court had the power to review legislative acts for constitutionality.[715] As well, Article 215 stated that in the case of a conflict between the Constitution and a law, the Constitution will prevail, but no mention was ever made concerning treaties.[716] Thus, in a 1914 case, the Supreme Court stated that it did not have the power to review the constitutionality of a treaty because no mention is made of it in the Constitution. The Supreme Court stated:

> [T]his Court does not have, according to the Constitution, power to decide whether the provisions [of the treaty] agreed upon should or should not be maintained, because it is not within its power to decide questions involving treaties.[717]

Moreover, the Court had stated that since there was no express provision for the Court to participate in the formation of international treaties, it did not have the competence to acquire jurisdiction as this would violate the separation of powers between the President and Congress and thus constitute a violation of the Constitution.[718] Additionally, although the law that approves a treaty follows the same procedure as that of an ordinary one, it found that the law is substantially different from ordinary legislation. The Court stated:

> The latter are unilateral manifestations of the sovereign of a mandatory, permissive or prohibitive nature which become binding solely by the sovereign's sanction and promulgation. The former is product of a complex juridical act, it is the manner by which one of the high contracting parties manifests its consent to the provisions of a bilateral international compact, it does not by itself create any legal relation, and its effectiveness depends upon the consent of the other contracting nation, if the latter ratified the provisions agreed upon by its negotiators.[719]

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[714] Ibid. See also W. Gibson, "International Law and Colombian Constitutionalism: A Note on Monism" (1942) 36 AJIL 614 at 614.

[715] It reads:
To the Supreme Court is entrusted the guardianship of the integrity of the Constitution. Consequently, in addition to other powers conferred upon it by the Constitution and laws, it shall also have the following:
To render final decision in cases where legislative acts have been vetoed by the Government as being unconstitutional, or when the question of constitutionality of any law or decree issued by the Government in the exercise of the powers mentioned in subsections 11 and 12 of Article 76 and in Article 121 of the national Constitution has been brought before the court by any citizen.
In all actions concerning the question of unconstitutionality, the Attorney General of the nation shall be given opportunity to intervene.
de Vries & Rodriguez-Novás, supra note 658 at 183.

[716] Ibid.

[717] Ibid.

[718] Gibson, supra note 714 at 617-618 and de Vries & Rodriguez-Novás, ibid. at 184.

[719] de Vries & Rodriguez-Novás, ibid. at 184; Gibson, ibid. at 616; and "Incorporación del Ordenamiento Jurídico: Colombia," supra note 709 at 46.

This was the jurisprudence in Colombia for many years and consistently followed for over 70 years.[720]

This jurisprudence began to change with the Supreme Court decision of July 19, 1971. As stated earlier, Colombia had entered into the Cartagena Agreement through an executive agreement. This was implemented into the Colombian legal order through Decree 1243 of 1969. The reasoning put forward by the Government for implementation through this method rather than congressional approval essentially mirrored those of the Office of the Comptroller General of Chile:

> [U]nder the modern concept of international law and in the light of community and integration law, the Cartagena Agreement is not a treaty in the classical sense of the term, and its true legal nature is that of an agreement of complementation, development and execution, at the subregional level and for the Andean Group, of the outline Treaty of Montevideo, and of the legal structure of the Latin American Free Trade Association (LAFTA).[721]

The implementation of the Cartagena Agreement was challenged on the grounds that it violated the constitutional process for the implementation of treaties.[722] The court rejected the argument of the Colombian Government by pointing out that the objectives of the Andean Group, the obligations accrued under, and the institutions were all different to that of the LAFTA. As such, it could not be considered to by as a development of the LAFTA.[723] Moreover, when Decision 24 was taken for the creation of a Common regime for the treatment of capital, the decree issued to incorporate this decision was as well challenged on constitutional grounds. It was alleged that Decision 24 was an international treaty that was to be submitted to Congress for approval. The position of the Colombian Government was that the Decisions of the Commission of the Cartagena Agreement are

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[720] Nieto Navia, supra note 708 at 102.
[721] As translated and cited in The Andean Legal Order, supra note 283 at 172.
[722] Nieto Navia, supra note 708 at 102 and "Incorporación del Ordenamiento Jurídico: Colombia," supra note 709 at 50.
[723] The Andean Legal Order, supra note 283 at 172. See also J. Rideau, "La Cour Suprême de Colombie et L'Intégration Économique Latino-Américaine dans le Groupe Andin" (1973) 25 R.I.D.C. 331.

the legal instruments by which compliance to the objectives of the Andean Group.[724] It relied on the competence of the Commission for adopting decisions such as those stipulated under Article 27 of the Cartagena Agreement which dealt with the Common investment regime. In other words, the Decisions were binding regional norms issued in order to reach the goals of the Andean Group. However, the Supreme Court did not share this view:

> In conformity with the precise language of Article 27 of the Acuerdo de Cartagena, it is hardly possible to accept Decision 24...as having been submitted to the Government of Colombia "for its consideration;" it was intended to be a fully obligatory instrument. In as much as Decree 1299 [which incorporated the Cartagena Agreement into domestic law through Congress] wrongly grants effect to these Decisions, not carried out in accordance with Article 27, it becomes necessary to examine any other aspect of it.
> The second part of the Article 27 procedure, according to which the signatories of the Acuerdo de Cartagena are obligated to "to adopt the necessary measures to put this code into practice," has not been carried out. In the Colombian legal system, this procedure is not possible except by means of a law (enacted by the Congress or through the exercise of extraordinary powers of the Government). As long as there has been no legislative action adopting the provisions proposed for Colombia by Decision 24...of the Commission of the Acuerdo de Cartagena which touch upon diverse areas of existing legislation altering it in many particulars, those provisions do not acquire obligatory force by virtue of Article 76-11 and 76-12 of the Constitution.[725]

Clearly, in both cases, the Constitution prevailed over the inconsistency in procedure of implementation. However, it did declare that Colombia was still bound internationally although the procedure for implementing the agreements was not constitutional.[726] These decisions prompted the creation of the Andean Court of Justice. Finally, the Supreme Court in a decision of December 12, 1986 gave itself competence to review the constitutionality of the content of a treaty in its internal legal order. The Court stated:

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[724] The Andean Legal Order, supra note 283 at 177-78.

[725] Supreme Court Decision Concerning Andean Foreign Investment Code, (1972) 11 I.L.M. 574 at 581 [hereinafter Supreme Court Decision]. Moreover, it quoted with approval the following passage of its decision of on the implementation of the Cartagena Agreement:
> Supranational institutions generate rights and duties the effects of which do not always mechanically derive from their functioning. Often it is required that the national authorities act to give official sanction to the acts of the competent international entities; in such cases they have to issue laws or decrees which give internal force to the scheme of the community. For example, when it is necessary to adopt common tariff levels, or finally, when the community proceeds to harmonize different legislative schemes, the interested countries, in order to respect their commitments, find themselves obligated to include in them positive legal systems, through the action of the competent organ, the regulations capable of assuring the fulfillment of the respective international decisions. While there has been no resort to such steps of consolidation, if this becomes indispensable, the incomplete international measures will lack full force.

Supreme Court Decision, ibid. at 582. See also Thomas, supra note 709 at 118.

> The divorce or separation that is manifested in the law with respect to a treaty that results in its refutation for formal error, in contrast to attacking it substance, has no time frame nor is it necessary for there to be an exchange of ratifications; on the contrary, a constitutional error that affects the law is reviewable by the Court at any moment, and it is not made valid or redeemed by the fact that the treaty enters into force since its validity is made precarious by the irregularity it suffers from.
> It is a generally accepted principle in international law that in order for a unilateral or bilateral act to be valid in a State, it is necessary that the act be declared in conformity with the norms of competence contained in the internal law of a country or countries, for which the only conclusion is that only the national tribunals may verify or decide if it conforms with internal law. (author's translation)[727]

The result of this decision was to give the Court a system of jurisdictional control over international treaties.[728]

This has been reflected in the current Colombian Constitution with a tripartite control over the celebration of treaties.[729] Under Article 189, the President is given the exclusive competence over international relations and to negotiate treaties. Article 150 grants Congress the power to either approve or reject international treaties. Finally Article 241(10) the Constitutional Court analyzes the treaty to determine whether it conforms with the Constitution. Once these steps are taken, only then may the President ratify a treaty.[730] Thus, executive agreements are no longer a valid way to implement treaties as all international agreements have to be approved by Congress first. Moreover, Article 4 explicitly states that in a conflict between the Constitution and a law or any other legal norm, the former will prevail.[731] But, there is still no provision in the Constitution regarding the effect international agreements on national law other than granting supremacy of human rights treaties in the internal legal order.[732]

This is not to say that Colombia is not receptive to supranational authority. If not, it would not be

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[726] Nieto Navia, supra note 708 at 102-104 and "Incorporación del Ordenamiento Jurídico: Colombia," supra note 709 at 55.
[727] Nieto Navia, ibid. at 108.
[728] Ibid.
[729] Ibid. at 88.
[730] Information Document, supra note 703 at 18.
[731] O'Hop, supra note 15 at 174.
[732] Constitución de Colombia, 1991, online: Political Database of the Americas <http://www.georgetown.edu/pdba/Constitutions/Colombia/colombia.html> (date accessed: 15 November 1999) art. 93.

a member of the Andean Community. In the Constitution For example, Article 150(16) states:

> Approve or reject treaties that the government celebrates with other States or entities of international law. Through the treaties, the State may, on the basis of equity, reciprocity and national convenience, partially transfer determined attributions to international organizations that has as an objective to promote and consolidate economic integration with other States.

In terms of trade agreements, Article 224 states:

> Congress must approve treaties, for them to be valid. Nevertheless, the President of the Republic may grant provisional application to economic and trade agreements agreed upon in the area of international organizations. In this case, as soon as the treaty comes provisionally into force, it should be sent to Congress for its approval. If Congress does not approve, the application of the treaty shall be suspended. (author's translation)

Finally, Article 227 states:

> The State will promote economic, social and political integration with other nations and especially with the countries of Latin America and the Caribbean through the celebration of treaties based on equity, equality and reciprocity, create supranational organizations, for the creation of a community of Latin-American nations. The law shall establish direct elections for the Andean Parliament and Latin-American Parliament. (author's translation).

In term of regional norms, it is the position of the Colombian Government that in terms of the Andean Community, they shall have direct and immediate application once they are published in Colombia's Official Gazette. However, other regional norms have to be incorporated in their legal order to have the force of law.[733] Moreover, the Colombian Government's position is that jurisprudence and doctrine recognizes that the laws that incorporate treaties prevail over the internal laws and norms.[734] Additionally, once Colombia has ratified an international economic integration treaty and it has been approved by the legislature, the decisions of a supranational body prevail over the national laws of Colombia.[735] However, as stated before, the norms would have to be implemented at the domestic level if it is to have effect and they, as well as treaties, are

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[733] Information Document, supra note 703 at 19.
[734] Ibid.
[735] O'Hop, supra note 15 at 174.

subject to the Constitution.[736]

2. Overcoming the Objectives of the Differing Regional Blocs

There is another legal obstacle that has to be considered. This is the problem that may arise from the clash of the differing objectives from a regional trading bloc to the larger hemispheric trading bloc. This is probably the most problematic obstacle that may arise in attaining effective integration, and which a strong supranational authority may cause rather than solve disputes. In terms of the objective of the FTAA, assuming that the model is based on the NAFTA, decentralized model, its scope will be primarily be concerned with the free movement of goods and not expand beyond these parameters into a common market or customs union. Additionally, it appears that if regional integration is to occur, it will be done on a bloc to bloc negotiation basis. Witness the talks between the MERCOSUR and the Andean Community into creating a free trade agreement.[737] The problem that may arise from these arrangements is that each trade agreement has its own structures and differing objectives. This problem was made relevant in the recent creation of the European Economic Area (EEA) Agreement.[738] This was an agreement to bring the two trading blocs of the European Free Trade Association (EFTA) and the European Community (EC). Its objective was the following:

> The ambition of the EEA Agreement was to extend the four main liberties embodied in the rules of the EC internal market (social policy, consumer protection, the environment, statistics and company law), to the relations between the EC and the EFTA countries, as well as among the EFTA countries themselves. The free movement of goods, persons, services, and capital, with as few exceptions as possible, was the objective.[739]

As part of the agreement, the parties were to have formed a judicial authority where there would

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[736] Information Document, supra note 703 at 19.

[737] "Bloc to Bloc Negotiations?" supra note 301 at 3. Also see the San Jose Declaration, supra note 10, annex 1, para. 7 where it states that:
Countries may negotiate and accept the obligations of the FTAA individually or as members of a sub-regional integration group negotiating as a unit.

[738] Agreement on European Economic Area (EEA Agreement), (1993) 29 C.M.L. Rev. 1247.

have been a close link between that authority and the EC Court of Justice.[740] It was thought that this judicial system would achieve three objectives: resolution of conflicts between contracting parties, settlement of disputes among the EFTA countries and preservation of legal uniformity within the EEA. The EEA courts, of which there were to be two, were to be independent of, but fully integrated into the EC Court of Justice.[741] In order to see if this framework was legally compatible with the EC, an opinion was sought from the EC Court of Justice. The Court, in its decision, declared that the "system of judicial supervision which the [EEA] Agreement proposes to set up is incompatible with the EC Treaty."[742] Why this decision is important are the reasons for the incompatibility of dual judicial systems that will arise on a based on the premise that negotiation for a free trade area will be through a bloc by bloc basis.

> The basic rationale behind the Court's opinion is that, although the EEA is designed to be dynamic and homogeneous and to surpass free trade agreements, it is limited to the implementation of rules relating to certain freedoms in economic relations. In contrast, the EC pursues much more far reaching purposes and its rules on economic freedoms are merely the means to achieve those objectives. For that reason, the Court based its analysis on the premise that the homogeneity of legal rules throughout the EEA cannot be secured by provisions of EC law which are identical in content or wording to those of the EEA Agreement.[743]

Although in the context of the EEA, the rationale behind the ruling is very much applicable to hemispheric integration. Both the MERCOSUR and the Andean Community have a much more ambitious integration objective than what is being envisioned by the current negotiators of the FTAA. If there is a strong regional supranational authority that is capable of reaching decisions directly applicable on all member States, the possibility may arise these norms may conflict with those of the subregional trading blocs. In such a state, the conflict in objectives may arise in disunity because of the "either or" proposition that will occur between the clash of strong supranational bodies, the Andean Court of Justice, a probable MERCOSUR Court of Justice the Central American Court of Justice and the one needed for successful regional integration, the FTAA

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739 Riechenberg, supra note 494 at 78.
740 Ibid. at 85.
741 Ibid.
742 Case 1/91, 1991 E.C.R. at I-6 112.

Court of Justice. This leads to an imbalance of obligations whereby the substance of one set of laws will bind one group of States, while others who are not part of subregional bloc may feel a secondary role in the region. This is particularly true if the MERCOSUR or the Andean Community expands or join together as one community. The countries left out may be regarded as "B members" and therefore the diverging interests of those blocs will become a source of friction. Moreover, the duplication of legal regimes can only generate conflicts in results and legal contests. Forum shopping becomes a problem and two conflicting and binding judgments may arise if litigants bring a claim forward to differing dispute settlement systems. If no authoritative dispute settlement process is decided, the various dispute settlement regimes in the hemisphere will effectively collapse.[744] This causes an imbalance in not only the differing obligations a country will find itself in, but also in terms of compliance with their trade agreements. As Professor Cottier has observed about this problem in terms of the EEA, "in constitutional terms, the EEA Agreement may enter history as an example of unbalanced substance structure parings upon which lasting relationships cannot be built."[745] This statement is equally applicable to the hemispheric integration process and poses a real obstacle.[746]

V. CONCLUSION

> If only texts of international treaties on which the processes of integration are based are examined, it will be noticed that, at least from a formal point of view, institutions to which they give origin have a very accentuated intergovernmental and traditional character. Their powers are not well defined, making reference only in very general terms to the tasks required by the application of treaties and the general surveillance of the operation of the process. Within this traditional conception on which the majority of governments were inspired, powers of institutions were mainly for co-ordination purposes and in no case for subordination; therefore the function of member States in the implementation of the

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[743] Riechenberg, supra note 494 at 87.

[744] P. Kenneth Kiplagat, "Jurisdictional Uncertainties and Integration Processes in Africa: The Need for Harmony" (1995) 4 Tul. J. Int'l & Comp. L. 43 at 51.

[745] Cottier, supra note 18 at 408.

[746] Now, one of the General Principles for the negotiation of the FTAA in the San Jose Declaration, supra note 10 at Annex 1, paragraph 6 is that:
The FTAA can co-exist with bilateral and sub-regional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA.
This, however, does not sufficiently address the problem that a multiplicity of regional agreements and bodies will hamper the realization of an integrated market, "Jurisdictional Uncertainties," supra note 744 at 50.

> process and its development had an absolute and total character, keeping unaffected the plenitude of their privileges, which in some cases were even supported by the veto power.[747]

The classical notion of the formation of an integration agreement as quoted above is not an option that is to be pursued if a 'Free Trade Area of the Americas' is to be successful. The divergence in economic development, legal regimes and political power in the region makes it necessary for the adoption of strong supranational bodies that can oversee the problems that will arise in such an agreement. Latin America has been very adverse in creating these bodies despite the experience of past failures using the traditional free trade model. The United States has always been quite hostile and suspicious of supranational bodies. Canada's legal order still has not addressed the problem that this may cause if these norms affect the division of powers inherent in its Constitution. Either way, in the long term, it is asserted that without these bodies, any future regional integration scheme will be doomed to failure like past attempts at Simón Bolivar's dreams of hemispheric integration.

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[747] Orrego-Vicuña, supra note 489 at 140.

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A very comprehensive website with information on the Free Trade Area of the Americas process with copies of all the trade agreements in the Western Hemisphere.

Andean Community
http://www.andeancommunity.com

This is the official website for the Andean Community. It contains a rich source of information on the formation of the Community as well as its Official Gazette.

Sistema de Integración Centroamericana
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This is the official website for the Central American Integration System. It contains the treaties and documents that make up this newly formed scheme as well as information on its institutions and structures.

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