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DISPUTE RESOLUTION IN THE TRANS-PACIFIC PARTNERSHIP: PILLAR OR PITFALL?

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ABSTRACT

This paper explores the importance of strong institutions for successful international economic organizations. Focusing primarily on the judiciary, it compares and contrasts institutions in the European Union, the North American Free Trade Agreement, and the Southern Common Market. This serves as a basis for analyzing the organizational framework of the Trans-Pacific Partnership and making predictions as to what will become of the organization and its role in future economic integration.

I. INTRODUCTION

On February 4th, 2016, the twelve member Trans-Pacific Partnership was signed into existence.[1] The TPP will be the

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largest free trade agreement of its kind.[2] With two years to ratify the agreement, the interim period will be subject to endless speculation on what the TPP means for international trade and foreign relations. Undoubtedly, the success or failure of the TPP will rest largely on the function of its institutions and the will of the nations involved.

This paper explores the role of a judiciary[3] in the development of inter-governmental economic organizations. By comparing the arguable success of the European Union, the stagnancy of the North American Free Trade Agreement (NAFTA) and the relative irrelevancy of the Southern Common Market (Mercosur), one can see a correlation between the strength of judicial bodies and the strength of the organization as a whole. This article does not suggest that economic integration is good or bad; only that it is inevitable and countries seeking it can use past examples as guideposts for success.

The notion of supranational economic coordination is not new. Free trade agreements have existed at least since the 1860s bilateralism in the Cobden-Chevalier Treaty between France and the United Kingdom.[4] Alongside such attempts to foster a free market have been the formation of cartels, such as the Organization of Petroleum Exporting Countries (OPEC) which seeks to subvert the free market through quotas and price setting at the expense of those outside of OPEC.[5] Over the last two centuries, advancements in international coordination tend to occur in waves based on major changes in the contemporary geopolitical environment. For example, the Peace of Westphalia ushered in the supremacy of the nation-state as the new regime among Western nations.[6] Later, the same nation-states birthed in

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1. Rebecca Howard, *Trans-Pacific Partnership Trade Deal Signed, but Years of Negotiations Still to Come*, REUTERS (Feb. 4, 2016, 2:49 AM), http://www.reuters.com/article/us-trade-tpp-idUSKCN0VD08S.

2. Charles Riley, *Trump's Decision to Kill the TPP Leaves Door Open for China*, CNN MONEY (Jan. 24, 2017, 6:31 AM), http://money.cnn.com/2017/01/23/news/economy/tpp-trump-china/. While the European Union has more members than the proposed TPP, it differs significantly in its origin and function as something much more than a mere free trade agreement.

3. Within this paper, the term "judiciary" covers any sort of formal trial body, tribunal, or alternative dispute resolution body. This broader term serves to create space between the traditional paradigm of Black's Law Dictionary defining the judiciary within the confines of a court system. *Judiciary*, BLACK'S LAW DICTIONARY (10th ed. 2014).

4. Markus Lampe, *Explaining Nineteenth-Century Bilateralism: Economic and Political Determinants of the Cobden–Chevalier Network*, 64 ECON. HIST. REV. 644, 644 (2011).

5. R. James Woolsey, *Destroying Oil's Monopoly and OPEC's Cartel*, GEOPOLITICS OF ENERGY, Mar. 2012, at 2.

6. DAVID ONNEKINK, WAR AND RELIGION AFTER WESTPHALIA, 1648–1713 215 (2009).

Westphalia agreed upon an expansion of preferential trade agreements after the Cobden-Chevalier Treaty which created a network of interlocking trade comparable to the World Trade Organization (WTO) today.[7] Prior to WWI, this web of bilateral economic coordination was more complicated than at any other point in history.[8]

Economic ties were insufficient to stave off the Great War, and only after the Second World War did the world begin to rebuild trade agreements.[9] Détente and the end of the Cold War created a burst of cooperation. For example the GATT was subsumed by the WTO, and the ECSC along with its companion organization, the European Economic Community (EEC), merged first into the European Community (EC) which later became the European Union. Likewise. smaller organizations showed up in the developing world including Mercosur in 1991, NAFTA in 1994, and the Andean Community in 1996. [10]

Any supranational body can be viewed as an intent to integrate, even for the most minimal of purposes. When political bodies ceding some level of sovereignty for any purpose, whether it be economic integration or a defense pact, it means international egos bumping into each other from time to time. As such, it is hard to imagine not having at least a bare minimum method of dispute resolution. However, when entering the world of business, the conflicts go far beyond the realm of intergovernmental relations and touch on the conflicts between multiple corporations, multiple states, and even corporations in disputes with states. Here, one looks more to a supranational dispute resolution system. It need not be mighty or Byzantine, but at a minimum it must serve to provide a level of stability within any sort of integration whether it is an ever closer union in the EU[11] or the far weaker ties within NAFTA.

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7. Lampe, *supra* note 4, at 646.

8. Paul A. Papayoanou, *Interdependence, Institutions, and the Balance of Power: Britain, Germany, and World War I*, 20 INT'L SECURITY 42, 42 (1996).

9. This occurred first with the General Agreement on Tariffs and Trade (GATT) in 1947 and the European Coal and Steel Community (ECSC) in 1952.

10. BOB REINALDA, ROUTLEDGE HISTORY OF INTERNATIONAL ORGANIZATIONS 700–05 (1st ed. 2009 Routledge).

11. The initial drafts of this paper preceded the exit of the United Kingdom from the European Union. The "Brexit" does not discount the observations in this paper, but international legal scholars wait with bated breath as to what will become of the ever closer union in the foreseeable future.

The rise of successful integration is dependent on neo-functionalism: an "institution-based political process theory."[12] Paramount in this formation of institutions is the use of supranational judicial bodies.[13] As no foundation of law is complete upon inception, a judicial body is necessary to establish the meaning and scope of laws in a manner similar to that of the U.S. Supreme Court in *Marbury v. Madison*.[14]

A judicial system in international economic organizations can be organized in four ways. The first method allows for dispute to be left to independent negotiation among sets of individual states or among all states within a treaty body. The pitfalls of this option could be analogized to the pitfalls of direct democracy. Beyond the problems of deadlock created by a failure to even establish a quorum, the idea that each miniscule problem must be decided at a diplomatic level would likely make the management of any supranational body unwieldy. The second method creates a simple arbitration body that is not binding and performs on an ad hoc basis. The problem with this system is that rulings are non-precedential. For a binding policy taken from arbitration panels, each ruling would require an amendment to the existing treaty body. This amounts to continually revisiting the same issue, though the factual scenarios may not change. An ad hoc dispute resolution system that is meant to have any lasting effect will likely lead to an ad hoc administration system that is notably capricious. The third method is deferring to some third-party dispute resolution (e.g. the WTO). This option can be used in conjunction with the first two methods. Such an arrangement begs the question of why one would even bother with a treaty body? Especially when considering that most issues taken up by a treaty body that does not seek broader institutions can be accomplished within the existing framework of the WTO. The final method requires the establishment of a functioning court system. This is a dicey proposition in that, a binding judicial authority means the inherent ceding of national sovereignty to a supranational judicial body. So far, only the European Union has made such an attempt. Although the Court of Justice functioned solely as an economic tribunal in its early stages, as demonstrated in the next section, it has taken on greater responsibilities historically belonging within

12. Karen J. Alter, Laurence R. Helfer & Osvaldo Saldías, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*. 60 AM. J. COMP. L. 629, 636 (2012).

13. *Id.* at 637.

14. Marbury v. Madison, 5 U.S. 137 (1803). This seminal case established the concept of judicial review in the American legal system.

the realm of national courts. This serves as a klieg light directed toward both the greater possibilities of integration and on the inherent ramifications of heading down a road that will eventually reduce national sovereignty at one level or another.

This paper introduces the international bodies of the European Union, the North American Free Trade Agreement, and Mercosur. Each section will first explain the origin of the respective bodies as well as the overarching institutions. After these explanations, the relevant dispute resolution systems (or lack thereof) are explained in greater detail.

II. THE EUROPEAN UNION

Because it is still a novel judicial system, the EU's judiciary warrants further discussion regarding its function and its development of regional economic integration. In the realm of strong judicial bodies presiding over international economic organizations, the EU has the strongest institution thus far. This has helped to create subsequent political integration that, if enduring, could change the face of geopolitics in a manner not seen since the dominance of the nation-state with the Peace of Westphalia.[15] While the nation-state remains the dominant regime for now, an exploration of the successes and failures of the EU, when compared with other attempts at integration, may provide litmus for what can be done, what should be done, and what will be done in other supranational bodies.

A. The Institutions from the ECSC Until Now

The first true efforts of multilateral economic integration in Europe culminated with the 1951 Treaty of Paris[16] which

15. To be fair, this opinion could be rebutted by any number of assertions that the United Nations or other networks of nations are just as important, if not more so. I stand by the power of economics for the time being.

16. In common parlance, Treaty of Paris has become the abbreviated version for the Treaty Establishing the European Coal and Steel Community. Many historians point to the Treaty of Rome in 1957 and its formation of the European Economic Community (EEC) as the most important step in the modern framework of the European Union. See, for example, the prologue of Martin Dedman's work on the European Union which traces the European Union back to 1957 and only mentions the ECSC much later. MARTIN DEDMAN, THE ORIGINS & DEVELOPMENT OF THE EUROPEAN UNION 1945-2008: A HISTORY OF EUROPEAN INTEGRATION 1 (2d ed. 2009 Routledge). However, much of what has become the current political structure originated in some form with the Treaty of Paris. The Preamble to the Treaty of Rome is quite similar to that of the Treaty of Paris. Ultimately, it is the language of an "ever closer union" which distinguishes the Treaty of Rome from the Treaty of Paris.

established the European Coal and Steel Community (ECSC).[17] In its opening lines, the Treaty of Paris speaks not to mere economic coordination but to the end goal of safeguarding world peace through the means of economic development.[18] While seeking a common market in Article 4 of the treaty, one still sees economic coordination and solidarity as a means to an end of improving the welfare of people and the stability and security of Europe.[19] By no means is this observation meant to suggest the ECSC is a worker's paradise as most of the document is couched in free market analysis of zero sum equations and encouraging enterprise.[20] There is constant movement between free market and progressive economic theory throughout the document.[21]

Beyond that difference, the Treaty of Rome closely shadows that of the Treaty of Paris with slight discrepancies in the numbering of the Articles. The established institutions differ only in the lack of a clear executive agency in the high authority, but the council, and court would be shared. The Treaty of Rome does become bolder with the establishment of free movement of all goods rather than those related to coal and steel, and its push for a single customs union as well as a uniform tariff system. This trend continues for all other liberalization such as the elimination of quantitative restrictions, the free movement of workers from all sectors, free movement of capital, and nearly every other issue one would expect from an integrated economy. The dual bodies of the ECSC and the EEC existed for 10 years until they were merged in 1967 by the Merger Treaty (also known as the Treaty of Brussels 1965) which eliminated the high authority in favor of a council with a single president and effectively merged any other conflicting issues of the ECSC with the EEC.

17. Treaty Establishing the European Coal and Steel Community art. 2, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC]. The founding members included Germany, Belgium, France, Italy, Luxembourg, and the Netherlands. *Id.*

18. *Id.* pmbl. The Treaty of Paris was not the first or last champion of economic cooperation as a tool of peace. Immanuel Kant wrote, "The commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation." IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 157 (M. Campbell Smith trans., Swan Sonnenschein & Co. 1903) (1795). Thomas Friedman championed the Golden Arches Theory of Conflict Prevention, claiming "[n]o two countries that both had McDonald's had fought a war against each other since each got its McDonald's." THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 12 (Jonathan Galassi ed. 2000). The latter theory has been weakened significantly by a resurgent Russia which has been involved in two conflicts with the Golden Arches countries of Georgia and Ukraine. With a wry smile one points out that Russia subsequently closed McDonald's locations in Crimea in favor of Rusburger. Mr. Friedman did not account for that dynamic, perhaps. Ilya Khrennikov, *Czar Cheeseburger to Replace McDonald's in Crimean Outlet*, BLOOMBERG (July 1, 2014, 4:23 PM), http://www.bloomberg.com/news/articles/2014-07-01/czar-cheeseburger-replaces-big-mac-after-mcdonald-s-crimea-exit.

19. ECSC, *supra* note 17, art. 4. In its notion of safeguarding world peace, one might even argue that the ECSC presumed that a united Europe was instrumental in the overall civilization of the world. The Article 2 notion of "rational distribution of production" is the bluntest example of the progressive mindset of the founders. *Id.* art. 2.

20. *See id.* art. 3.

21. To avoid confusion in the changing face of economic theory, I use free market economic theory rather than the historical term of "economic liberalism." I will use progressive economics theory to cover the regime that has emerged since the writings of Meynard Keynes which focuses on normative gains by the worker.

Ultimately, the cornerstone of the Treaty of Paris was the common market of coal outlined in Article 4.[22] The expansion of this common market continued throughout later treaties leading to the creation of the EU.[23] The purpose of the common market was to abolish all restrictions on the movement of coal either quota based or tariff based.[24] Discrimination among producers, buyers or consumers, and subsidies was prohibited.[25] Finally, Article 4 sought to end the exploitation of markets created by divided markets. [26]

In an effort to ensure the goals of Article 4, Articles 7 through 45 establish institutions with the capability of guiding and enforcing member states.[27] Though some names have changed slightly and some institutions have merged, the High Authority,[28] Common Assembly,[29] Special Council [of Ministers],[30] and the Court of Justice[31] are ultimately the blueprint for the current EU institutions of the European Commission, European Parliament, the Council of the European Union and the European Court of Justice. Understanding the makeup and role of each institution is crucial to understanding the dominance of the EU in European affairs.

The High Authority functioned as a nine-member executive body of the ECSC and ensured that internal institutions and member states operated in accordance with the treaty.[32] Member state governments appointed eight members from their own nationals and allowed those eight members to choose the ninth member based on a 5-3 majority.[33] The High Authority's main force was its use of decisions, recommendations, and opinions which

22. ECSC, *supra* note 17, art. 4.

23. Most notably are the abolition of certain borders in the Schengen Agreement in 1985 and the Single Market in the Single European Act of 1986. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 14, 1985, 2000 O.J. (L 239) 1, 30 I.L.M. 84; Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

24. ECSC, *supra* note 17, art 4.

25. *Id.*

26. *Id.*

27. *See* ECSC, *surpa* note 17, arts. 4, 7–45.

28. *Id.* arts. 8–19.

29. *Id.* arts. 20–25.

30. *Id.* arts. 26–30.

31. *Id.* arts. 31–45.

32. *Id.* art. 9.

33. *Id.* art. 10. The purported role of the members was not to represent the interests of their respective countries but to defend the general interest of the member states collectively through the gathering of information on Community activities and forming the Consultative Committee consisting for the purposes of policy advice on interests of steel and coal producers, workers, and consumers. *Id.* art. 9.

remain today in EU law.[34] Decisions were binding directly upon the States in the manner outlined by The High Authority; recommendations were binding but executed by the States as they saw fit, and opinions were ideals of the Community but had no binding effect.[35] The responsibilities of the High Authority were eventually merged with those of other bodies to retain the power of decisions, recommendations and opinions.[36]

The legislative function of the ECSC rested in two bodies. The first is the Common Assembly, and the second is the Council.[37] The Assembly was set up for individual representatives selected by respective parliaments and organized proportionate to the population of the States.[38] The seventy-eight member body was the representative feature of the ECSC, and worked closely with the High Authority in determining ECSC goals and the method of execution.[39] The Assembly is also the predecessor of the current EU Parliament and, since 1979, its members are elected through universal suffrage.[40] The Council functioned as a second legislative body. One could analogize it to a bicameral system with the Common Assembly being directly proportionate to the respective populations of member states and the Council being a 1-1 ratio.[41] The Council provided a check against the executive power of the High Authority through its appointment of members in the Consultative Committee which functioned alongside the High Authority on issues pertaining to industry.[42] The Council was the might behind the sought-after harmonization of the six economies. This went on to become the Council of the European Union.[43]

The Judicial power of the ECSC rested in the Court of Justice.[44] The Court was perhaps predictable in its role of ensuring the rule of law in the interpretation and application of treaty regulations.[45] This is the foremost example of the supranational purpose of the ECSC in that it not only provided the three

34. *Id.* art. 14; Consolidated Version of the Treaty on the Functioning of the European Union art. 288, June 7, 2016, 2016 O.J. (C 202) 47.

35. ECSC, *supra* note 17, art. 14.

36. *Id.* art. 16; Consolidated Version of the Treaty on the European Union art. 22, June 7, 2016, 2016 O.J. (C 202) [hereinafter TEU].

37. ECSC, *supra* note 17, art. 7.

38. *Id.* art. 21.

39. *See id* arts. 21–23.

40. Originally Assembly members had been appointed by their respective states, but the ideal of actual elections was realized in 1979. *The European Parliament: Historical Background*, EUROPEAN UNION, http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf.

41. ECSC, *supra* note 17, art. 27.

42. *Id.* art. 18.

43. TEU, *supra* note 36, art. 16.

44. ECSC, *supra* note 17, art. 7.

45. *Id.* art. 31.

branches of republican governance, but also enabled the Council and nations to seek review of decisions made by the High Authority.[46] The establishment of jurisdiction at a supranational level, rather than some sort of arbitration or deference to state courts, is indicative of the higher purpose of the Treaty of Paris. In addition to ensuring that the High Authority operated within its legal bounds and performed its assigned duties,[47] the Court was responsible for ruling on the failure of national bodies to perform as required by directives and recommendations.[48] Through appeals by sates or the High Authority, the Court could also annul the acts of the Assembly and the Council.[49] The Court could also assess damages against the Community by injured parties.[50] All of these powers were bracketed by exclusive jurisdiction for any issues regarding the High Authority, the Council,[51] and other Community institutions including external contracts.[52]

B. Analysis of the Judiciary

Although a foundational institution, Europe's court system was not crucial in the slow integration process. This is likely due to the threats of disintegration posed by those who began to obstruct consensus on the direction of both the Community and the continent such as De Gaulle.[53] Though unwilling to enforce controversial decisions, early rulings from the Court did serve to have doctrinal significance if not political significance which provided a foundation for later case law. Foremost the fledgling doctrine of judicial primacy was detailed in the decision of *Costa v. ENEL*.[54] Over time, the three institutions within the Court of Justice of the European Union (CJEU) have grown to serve as a dominant force in eliminating lingering barriers in the Community. Those institutions include the European Court of

46. *Id.* art. 33.
47. *Id.* art. 35.
48. *Id.* art. 33.
49. *Id.* art. 38.
50. *Id.* art. 40.
51. *Id.* art. 41.
52. *Id.* art. 42.
53. De Gaulle quickly embraced the Treaty of Rome, but later proved to be an obstructionist when it came to expansion and administration. DESMOND DINAN, EVER CLOSER UNION, AN INTRODUCTION TO EUROPEAN INTEGRATION 47–49 (4th ed. 2005). De Gaulle was also the impetus for a nuclear France that viewed NATO as a threat to French sovereignty and prompted its absence from the defense pact for 43 years. Edward Cody, *After 43 Years, France to Rejoin NATO as Full Member*, WASHINGTON POST (Mar. 12, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/11/AR2009031100547.html.
54. *See* Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 614.

Justice (ECJ), the Court of First Instance (now the General Court), and The EU Civil Court and are outlined in detail below.

The original court was the ECJ, which was responsible for "[e]nsuring EU law [was] interpreted and applied the same in every EU country" and "ensuring countries and EU institutions abide by EU law."[55] Such is the importance of the ECJ that it has been accused of favoring Community interests over those of the individual state interests.[56] Standing in the ECJ has been relatively broad in recent years with access provided to the Secretariat, member states, and private litigants, and at times the ECJ is propelled into touching on human rights.[57]

The European Union has also created special courts with unique functions, as the ECJ proved unable to handle the volume of cases by 1985.[58] In 1989, the EU created the Court of First Instance, now the General Court, which mostly grants standing to those affected by administrative procedural issues.[59] In addition, the EU Civil Services Tribunal was created to grant standing to employees for disputes within the confines of their employment.[60] The General Court previously exercised this function until 2005.[61] Both the General Court and the Civil Services Tribunal speak to an incipient federalism rising in the European Union, and both lack any contemporary in all other international economic organizations. Their mention in this note is cursory, only for the fact that their need and rise in any other institutions at this time is foreseeable but not anticipated in the near future.

The ECJ has one judge from each of the twenty-eight member states; said judges can meet in full court, a grand chamber of fifteen judges, or in regular chambers of three to five judges.[62] A full court is used for what amounts to impeachment proceedings or at the whim of what the judges find to be important.[63] Nations may request to be heard by a grand chamber and everything else is

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55. *Court of Justice of the European Union (CJEU)*, EUROPEAN UNION, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Oct. 28, 2016).

56. Roland Flamini, *Judicial Reach: The Ever-Expanding European Court of Justice*, WORLD AFFAIRS, (Nov./Dec. 2012), http://www.worldaffairsjournal.org/article/judicial-reach-ever-expanding-european-court-justice.

57. Opinion of Advocate-General Jacobs, Case C-50/00, Unión de Pequeños Agricultores v. Council of the European Union, 2002 E.C.R. I-6682.

58. Hon. Gordon Slynn, *Court of First Instance of the European Communities*, 9 NW. J. INT'L L. & BUS. 542, 543 (1989).

59. *Id.* at 545.

60 Council Decision 04/752, Establishing the European Union Civil Services Tribunal, 2004 O.J. (L333) 7 (EC).

61. *Id.*

62. *Court of Justice, Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/# jurisprudences (last visited Oct. 25, 2016).

63. *Id.*

relegated to lesser chambers.[64] In 2014, 719 new cases were brought before the Court, the largest number in a record that has been growing annually for decades.[65] In short, the ECJ has jurisdiction over any matter pertaining to the myriad of treaties and regulations relevant to the Union. Proceedings are binding upon national governments, placing sovereignty in question when pertaining to economic issues.[66]

With the origin of the European Union as a customs union, the case law[67] naturally bears out first to prevent the levying of any fine, fee, or tariff on goods crossing borders within the union.[68] Later case law expanded this doctrine to apply to taxation.[69] Then, the court targeted anything that amounted to a quota system on goods crossing borders.[70] Once goods were no longer restricted, relaxed restrictions on the delivery of nonemployment based services followed.[71] With the liberalization of the movement of capital and the movement of workers seeking employment in other nations, the original customs union has been largely perfected.

In addition to what one would expect pertaining to the free movement of goods and services, the Court has gradually made forays into areas only loosely related to international economies in a manner likely not envisioned in past decades.[72] Perhaps most notable is the entrance into rulings touching on human rights.[73] With rulings having a direct effect on member states, the court

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64. *Id.*

65. COURT OF JUSTICE OF THE EUROPEAN UNION, ANNUAL REPORT 2014 9 (Eur. Union ed., 2015), http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf.

66. Flamini, *supra* note 56.

67. An interesting aside is to note the role of the Advocate General as an advisor to the court. Typically the Advocate General will write an opinion on the case prior to the court reviewing the case. While the opinion is not binding, it is very common for the court to agree with the Advocate General and to write a similar decision.

68. *See* Case 7/68, Comm'n v. Italy, 1968 E.C.R. 424, 424; *See also* Opinion of Mr. Advocate-General Gand, Case 7/68, Comm'n v. Italy, 1968 E.C.R. 424, 434.

69. Case 323/87, Comm'n v. Italy, 1989 E.C.R. 2297, 2298.

70. Case 8/74, Procureur Du Roi v. Dassonville, 1974 E.C.R 838, 838; Case 120/78, Rewe v. Bundesmonopolverwaltung Für Branntwein, 1979 E.C.R. 650, 650.

71. Case 33/74, Van Binsbergen v. Bedrijfsvereniging Metaalnjverheid, 1974 E.C.R. 1300, 1312–13.

72. The Court may have taken note of American jurisprudence pertaining to the United States Constitution's Commerce Clause in its liberal interpretation of what touches on commerce. Based on subsequent writing, there is arguably no limit. "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." Gibbons v. Ogden, 22 U.S. 1, 194 (1824).

73. In the Court's defense, the many issues of human rights have been incorporated into later treaties such as the Amsterdam Treaty amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 1, Oct. 2, 1997, 1997 O.J. (C 340) 1.

"has played a central role in shaping the human rights discourse and the treaties that now incorporate human rights protection."[74] An example of this is enforcing equal pay for both men and women under Article 117 of the EEC Treaty.[75] With the Amsterdam Treaty providing an avenue to combat "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation," it is likely that the Court will continue to push the bounds of its jurisdiction.[76]

As of now, the European Union lacks a fundamental Bill of Rights, but with member states being signatories to myriad treaties and declarations affirming such principles, it will not be long before the Court crosses such a threshold. Additionally, the Court has shown a willingness to place a greater emphasis on environmental conservation.[77] Likewise, seemingly pure domestic issues have been threatened with a court ruling by the European Commission.[78]

With supremacy of the European Union and its courts over the sovereignty of member states and a growing list of cases and controversies stemming from issues unrelated to a customs union, the Court of Justice has been transcendent. Still, it is not immune from criticism, especially from member states.[79] Among others, Professor Michelle Everson has argued that a ruthless ECJ is "pursuing its program of the integration of Europe through law without attracting much public or even expert notice."[80] Ultimately, the European Union provides merely one example of

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74. Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104, 1112 (2008).

75. Opinion of Advocate-General Trabucchi, Case 43/75, Defrenne v. Sabena, 1976 E.C.R. 483, 493.

76. Defeis, *supra* note 74, at 1113.

77. The Court of Justice held that France was not doing enough to protect the European Hamster in a suit brought by the European Commission. Steven Erlanger, *Ruling Favors a 10-Inch Citizen of France*, N.Y. TIMES, June 10, 2011, at A4; Mary Beth Griggs, *France Is Spending 3 Million Euros to Save the Great Hamster of Alsace*, THE SMITHSONIAN (May 7, 2014), http://www.smithsonianmag.com/smart-news/saving-great-hamster-alsace-180951359/.

78. Nicole Winfield, *EU to Italy: Clean up Naples Trash or Face Fines*, ASSOCIATED PRESS (Oct. 24, 2010, 11:49 AM), http://www.nbcnews.com/id/39820487/ns/world_newseurope/t/eu-italy-clean-naples-trash-or-face-fines/#.Vt-eIpwrKM8. This pertains to an admonition against Italy over surplus street garbage in Naples.

79. The UK has remained half-in and half-out of the European Union since their invitation. Foremost they have always maintained a separate currency. In recent years, the United Kingdom Independence Party has questioned any participation in the union and brought the issue to the polls. In 2014, the Eurosceptic party took a plurality of votes. Patrick Wintour & Nicholas Watt, *Ukip wins European Elections with Ease to Set Off Political Earthquake*, THE GUARDIAN (May 25, 2014, 9:21 PM), https://www.theguardian.com/politics/2014/may/26/ukip-european-elections-political-earthquake.

80. Flamini, *supra* note 56.

an integrated judicial system. It is similarly instructive to examine the alternative judicial systems that have emerged in other regional economic organizations.

III. THE NORTH AMERICAN FREE TRADE AGREEMENT

There is a clear difference between European integration, "driven by that continent's political and intellectual elites, and North American integration, driven by . . . our business elites."[81] North American integration is not a case of the leaders of the countries seeking to impose its integration policies upon society and the economy. Rather, it is mainly the business community's agenda in particular which increasingly invites us to cooperate more fully and address many of the inadequacies within NAFTA.[82]

While NAFTA may have merely accelerated the process of inevitable trade liberalization that was already taking place,[83] a review of the numbers more than twenty years later suggests that the North American Free Trade Agreement is a success. NAFTA was unusual in that it was the first multi-lateral free trade agreement between the disproportionately strong and stable economies of Canada and the United States with the weaker Mexican economy.[84] Critics suggested that the cheap labor in Mexico would result in a "sucking sound" of American jobs going south of the border.[85] The reality has been that the period after NAFTA saw the largest job expansion in U.S. history.[86] In the first years of NAFTA, exports between the three nations grew by 10 percent annually with U.S. exports to Mexico quadrupling and exports to Canada doubling.[87] Likewise, direct investment to the United States by Mexico and Canada also increased significantly.[88] In light of its success, NAFTA's institutions function in a manner

81. Paul Wells, *Spring Break Summit*, MACLEAN'S, Apr. 10, 2006, at 16.

82. *Id.*

83. M. ANGELES VILLARREAL & IAN F. FERGUSSON, CONG. RESEARCH SERV., R42965, THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA) 10 (2015).

84. *Id.* at 2. Mexico's economy at the time was still suffering from years of central planning and protectionism. *Id.*

85. Ross Perot, Presidential Debate in East Lansing, Michigan (Oct. 19, 1992).

86. G. Alan Tarr, *NAFTA and Federalism: Are They Compatible?*, 2 NORTEAMÉRICA 137, 150 (2007). The author grants that the job expansion may have been unrelated to NAFTA. Nevertheless, it is hard to point to a job loss caused by the trade agreement. Certainly some sectors were hit hard including apparel, electronics, and transportation, but the net number increase is substantial. *Id.* at 150.

87. *Id.*

88. *Id.* Direct investment by Canada to the United States increased from $4.6 billion to $27 billion annually.

quite distinct from the European Union. This serves as yet another example of how a judicial system may further international economic integration agreements.

A. The NAFTA Institutions

NAFTA can be viewed as an extension of both the 1965 U.S.-Canada Auto Pact and the 1987 Canada-U.S. Free Trade Agreement (CUSFTA).[89] This was concurrent with the slow liberalization of the Mexican economy as it emerged from both a debt crisis and single-party rule with a state-controlled economy.[90] Negotiations took place for nearly four years between the three nations. NAFTA was signed into existence by President George H. W. Bush on December 17, 1992,[91] and went into effect January 1, 1994, after President Bill Clinton signed the NAFTA Implementation Act.[92] It is important to note that NAFTA is not an actual treaty body. Due to vocal criticism from both the Republican and Democratic parties, President Clinton presented NAFTA as a congressional-executive agreement requiring only simple majorities in the House and Senate for adoption.[93]

Rather than speak to the need for world peace,[94] the Preamble seeks only the development and expansion of world trade.[95] The crux of the issue in NAFTA is the name. Rather than a formal treaty among member states, NAFTA was merely an agreement to be executed at the national level by respective governments. In the United States, it retained legal force only through the North American Free Trade Agreement Implementation Act.[96] This execution was always intended to be done at the national level rather than coordination in a supranational body.[97]

If a criticism of the European Union is that it has retained too many institutions, the inverse could be said of NAFTA and its lack

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89. VILLARREAL & FERGUSSON, *supra* note 83, at 2. The reason that CUSFTA is not used as a basis for understanding NAFTA whereas the Treaty of Paris was used for the European Union is because, as a bi-lateral treaty, it differs so substantially that a comparison reaches the point of absurdity.

90. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA REVISITED: ACHIEVEMENTS AND CHALLENGES 3 (Inst. Int'l Econ. ed., 2005).

91. VILLAREAL & FERGUSSON, *supra* note 83, at 1.

92. *Clinton Signs NAFTA – December 8, 1993*, MILLER CENTER, http://millercenter.org/president/about/historical-events#12_08.

93. Tarr, *supra* note 86, at 137–38.

94. ECSC, *supra* note 17, pmbl.

95. North American Free Trade Agreement, Can.-Mex.-U.S., pmbl., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

96. 19 U.S.C. § 3301 (2017).

97. *See* NAFTA, *supra* note 95, art. 105.

of institutions.[98] Though the treaty speaks to the banalities of whether or not spirits from one nation may be mixed with the spirits of another as a matter of law,[99] there is little on the notion of governance akin to that found in the Treaty of Paris.

Administration was to be left to the North American Free Trade Commission (NAFTC) which was to supervise implementation and resolve disputes as well as to establish regulatory bodies; however, this is an institution more in spirit than in body due to its lack of headquarters and secretariat.[100] Functionally, there is no supranational body operating within NAFTA.[101] Rather than a supranational body pledged to work for the greater good of NAFTA or a North American Community, the best example of coordination is a handful of committees and working groups which "monitor and direct implementation of each chapter of the agreement."[102] This functions as an intergovernmental body, not a supranational body.[103] In analyzing NAFTA for comparison to the ECSC, the most important thing to consider is what is absent. NAFTA contains nothing to suggest joint customs or a monetary or political union.[104] It has been suggested that NAFTA is merely a creation of a GATT-consistent free trade arrangement.[105] Though NAFTA has at times exceeded the mandates of GATT and its successor, the WTO, it has not done so in a manner that staggers the imagination; even the "GATT plus areas" are merely applying national standards on a non-discriminatory basis, rather than attempting to achieve a common market or harmonized standards.[106] Despite its lack of apparent institutions, NAFTA manages to have a centralized dispute resolution body that has remained intact for over twenty years.

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98. Greg Anderson, *The Institutions of NAFTA*, 3 NORTEAMÉRICA 11, 12 (2008).

99. NAFTA, *supra* note 95, art. 312.

100. Tarr, *supra* note 86, at 139.

101. Clifford A. Jones, *Competition Dimensions of NAFTA and the European Union: Semi-Common Competition Policy, Uncommon Rules, and No Common Institutions*, 6 JEAN MONNET/ROBERT SCHUMAN PAPER SERIES 1, 1 (2006).

102. Tarr, *supra* note 86, at 139.

103. *Id.*

104. Steven B. Wolinetz, *Comparing Canada, The European Union, and NAFTA: Comparative Capers and Constitutional Conundrums*, 3 JEAN MONNET/ROBERT SCHUMAN PAPER SERIES 1, 3 (2003).

105. Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 863–64 (1997).

106. *Id.* at 866.

B. Dispute Resolution in NAFTA

Rather than a single tribunal entity, NAFTA is setup with multiple separate dispute settlement methods which provide a tailored approach to the issue at hand. The foundation of the strongest dispute resolution body in NAFTA originates from CUSFTA, which sought to bypass a "flawed" system in GATT by improving it.[107] NAFTA has also used a patchwork of other arrangements to account for concerns such as the environment and labor issues. The centralized dispute resolution in Chapter 20 serves as the overarching judicial body.[108] Though there are other judicial mechanisms in the agreement, Chapter 20 should be considered the strongest, as it provides the basis for interpreting the treaty body and determining whether a member state has violated such provisions.[109] However, Chapter 20 clearly outlines the concept that it is not meant to be the only dispute resolution body and that parties need not pursue their issues within the confines of the agreement at all.[110] This means that not only may parties seek redress in other dispute resolution bodies within NAFTA but that they may even go beyond NAFTA to domestic remedies and to the WTO (after notifying NAFTA of their intent).[111] For unfair trade practices such as dumping, Chapter 19 has a separate dispute resolution system.[112] This is seen also for investment disputes in Chapter 11.[113]

Additionally, the extra judicial bodies of the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC) each have their own dispute resolution mechanisms. The North American Agreement on Environmental Cooperation (NAAEC) is an intergovernmental agreement which forms the North American Commission for Environmental Cooperation (NACEC).[114] It is not directly affiliated with NAFTA, but it was formed concurrently and references NAFTA in its Preamble.[115] Both NAAEC and NAALC do not enforce specific treaty provisions; rather they enforce domestic

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107. *Id.* at 887.

108. NAFTA, *supra* note 95, at ch. 20.

109. *Id.* art. 2004.

110. *See id.* art. 2005; *see also*, Taylor, *supra* note 105 at 887 ("Article 2005 of the NAFTA clearly establishes that the chapter 20 mechanism was not intended to be the exlusive forum for settling disputes between the parties.").

111. Taylor, *supra* note 105, at 887.

112. NAFTA, *supra* note 95, art. 1902.

113. *Id.* art. 1101.

114. *About the CEC*, COMM'N FOR ENVTL. COOPERATION, http://www.cec.org/about-us/about-cec (last visited Feb. 1, 2017).

115. *Id.*

laws which are to be adjusted to fit treaty provisions.[116] In other words, a country is only in violation of provisions in NAAEC and NAALC if it is violating its own laws in a persistent and recurring manner.[117]

Articles 14 and 15 of the NAAEC are the mechanisms which provide a means of enforcing environmental laws.[118] Between 1994 and 2013, eighty-three submissions were filed with the Commission.[119] In addition to cases brought before the Commission via Articles 14 and 15, Article 22 also provides a form of dispute resolution.[120] Closely connected with the NACEC are funding bodies which seek to work toward better coordination on environmental issues. These efforts are predominantly directed toward ensuring Mexico's industrial growth is done in an environmentally responsible manner.[121] The NACEC created the Fund for Pollution Prevention Projects in Mexican Small and Medium Enterprises (FIFPREV) as well as the North America Fund for Environmental Cooperation (NAFEC) to fund industry and communities.[122]

The North American Agreement on Labor Cooperation (NAALC) is a less modest entity when compared to the NACEC; letting its website lapse since the initial draft of this paper speaks volumes to its irrelevance.[123] Explicitly under NAFTA Chapter 20, as well as in the NAALC, there is no direct participation of individuals.[124] The most viable way for an individual to seek redress within the confines of NAFTA is under the NAAEC, which allows the Secretariat to investigate private party complaints. Although textually barred from individual complaints, Chapter 11 allows investors to seek limited individual redres.[125] Most notably, such a course of action is not limited to citizens of the three

116. Taylor, *supra* note 105, at 881.

117. *Id.* at 882.

118. North American Agreement on Environmental Cooperation, Can.–Mex.–U.S., arts. 14–15, Sep. 9 & 14, 1993, 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

119. COMM'N FOR ENVTL. COOPERATION, ANNUAL REPORT 16 (2013).

120. NAAEC, *supra* note 118, art. 22.

121. Roberto Dominguez, *NAFTA: Will It Ever Have An EU Profile?*, 7 JEAN MONNET/ROBERT SCHUMAN PAPER SERIES 1, 9 (2007). It seems that the effort is to ensure the rapidly developing Mexican economy takes the opportunity to exercise more responsible planning in development, learning lessons from the United States and Canada.

122. *Id.* (citing KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 77 (Stan. U. Press, 2004)).

123. At the time of my intial draft, information on the NAALC could be found at naalc.org. The NAALC had not published a report since 2011. Now, that URL is no longer functioning and a search for NAALC information now takes one to a page on the website for the United States Department of Labor. https://www.dol.gov/ilab/trade/agreements/naalc.htm.

124. Taylor, *supra* note 105, at 876.

125. NAFTA, *supra* note 95, at ch. 11.

NAFTA nations.[126] This loophole granting access to litigants beyond the jurisdiction of NAFTA functions as the best example of an individual's ability to seek redress, if only as an investor.

This patchwork method of dispute resolution has taken root over time. Each body has narrow jurisdiction, and one could argue that they are merely created on an ad hoc basis given that Chapters 19 and 20 are legacies of CUSFTA.[127] The remaining resolutions have arisen based on the needs of the three countries since the inception of NAFTA. They were not part of the original treaty, but were later added. However, for the most part, there has been little added to NAFTA outside the bounds of these special dispute resolution bodies.

In the time since NAFTA's enactment, not much has been done to enhance the structure or to create parallel structures comparable to what was done after the ECSC.[128] The North American Energy Working Group (NAEWG) was created in 2001 to coordinate efforts for long-term energy development up to and including collaboration on nuclear energy.[129] Shortly after formation of the NAEWG, the North American Steel Trade Committee (NASTC) formed in 2002.[130] NAEWG eventually merged with another entity called the Security and Prosperity Partnership, formed in 2005.[131] Yet, none of these organizations have published a report since 2008.

It is not necessarily fair to dismiss such a decentralized dispute resolution framework due to its lack of centralization. This decentralized system could be analogized to separate civil and criminal systems in the United States or to a special Constitutional Court found in many European countries which deals solely with constitutional questions outside the bounds of their appellate bodies. However, in the case of NAFTA, the decentralized method of five separate bodies is indicative of a lack of function and organization. Chapter 20 ad hoc panels, administered by the ministers from each nation under the direction of a Secretariat, have no binding effect beyond the specific concerns brought to it.[132] On the other hand, Chapter 19 disputes, still under the Secretariat, are binding and replace domestic judicial review of antidumping and countervailing duty

126. Taylor, *supra* note 105, at 887.

127. *Id.* at 854. Chapters 19 and 20 are merely reworded from Chapters 19 and 18 of the CUSFTA respectively. *Id.*

128. *See supra* Section II.A.

129. Dominguez, *supra* note 121, at 10–11.

130. *Id.* at 11.

131. *Id.* at 10.

132. NAFTA, *supra* note 95, art. 2001.

administration.[133] With a separate Secretariat, Chapter 11 does provide binding ad hoc dispute resolution, but there is a lack of oversight by any superior organization in NAFTA.[134] The NAALC and NAAEC are inadequate in that their decisions are not binding; rather, both render mere recommendations for states to work it out on their own time.[135] It is unclear why a state would consult a body external to the original agreement of NAFTA only to end up solving the dispute through external cooperation among national representatives. Additionally, there is nothing in NAFTA that prevents nations from seeking recourse outside the agreement, such as remedies via the Dispute Settlement Body of the WTO.

Nations have varied respect for NAFTA institutions, which is especially clear for the arbitration tribunal. For example, in *Metalclad v. Mexico*, the tribunal held in favor of Metalclad, finding that Mexico had not met its NAFTA Article 1105[136] obligation to "ensure a transparent and predictable framework for Metalclad's business planning and investment."[137] In an unrelated case, a local Canadian judge said that the tribunal had exceeded its jurisdiction on interpretation of "transparency," despite explicit use of the word in NAFTA Article 102.[138] The justification for this is ultimately within NAFTA Article 1136, which provides that decisions by a tribunal "shall have no binding force except between the disputing parties and in respect of a particular case."[139] Did the founders of NAFTA intend a local judge not to apply precedent? If a tribunal such as this can have a judgment functionally invalidated by a local court, then what motivation might an entity have to invest time and money in a defense or suit?[140] Even hearings within the tribunal are binding only on the parties involved and within the specific case.[141] At the very least, it would seem that the tribunal would acknowledge a feeling of déjà vu at

133. Taylor, *supra* note 105, at 856.

134. *Id.*

135. *Id.*

136. NAFTA, *supra* note 95, art. 1105.

137. Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 99 (Aug. 30, 2000).

138. NAFTA, *supra* note 95, art. 102; Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 COLOM. J. TRANSNAT'L L. 35, 46–47 (2003).

139. NAFTA, *supra* note 95, art. 1136.

140. Mr. Weiler provides an explanation to these questions by pointing out that *Metalclad* was decided by international economic principles rather than the text of the treaty. *See* Weiler, *supra* note 138, at 46–7. Weiler suggests that by relying on principles rather than treaty language, the court had overstepped its bounds. *Id.* While such an observation is fair, given that two out of three NAFTA nations are common law systems that often rely on common principles in the absence of codified law, perhaps Mr. Weiler makes a distinction without a difference.

141. NAFTA, *supra* note 95, art. 1136.

times and analogize between cases. There is little evidence to show that this is the case.

The stark differences between NAFTA and the EU are the issues NAFTA has left unaddressed. Though certain measures have been taken to deal with subjects such as the protection of intellectual property,[142] little has been done in areas crucial to furthering integration such as worker mobility[143] and anti-trust measures.[144] Arguably, "the lack of any minimum standard [for antitrust measures] does not bode well for effective . . . antitrust law in the NAFTA area."[145] More than ten years into the existence of NAFTA, Canadian Prime Minister, Stephen Harper, put into perspective the fundamental differences between the two, noting that the European Union has a top down approach which has endured as opposed to NAFTA's horizontal approach.[146] Yet NAFTA is not the only example of a decentralized judicial system for integrated economic organizations. Mercosur also provides a working model worth discussing.

IV. MERCOSUR

Mercosur differs significantly from other regional agreements in the composition of its initial members. The European Union began with a coalition of strong economies, and only took on developing economies well into its existence. NAFTA joined Mexico's developing economy with the strong, developed economies of Canada and the United States, which had already been engaged in a protracted trade negotiation under CUSFTA. Mercosur was composed of four countries with developing economies: Argentina, Brazil, Paraguay, and Uruguay.[147] However, like the European Union, Mercosur sought a common market at the signing of the Treaty of Asunción.[148] While not as bold as early coordination in the European Union, the Treaty of Asunción established a paradigm of cooperation stronger than many multi-lateral

142. *Id.* pmbl.

143. Tarr, *supra* note 86, at 149.

144. Jones, *supra* note 101, at 1. Though Chapter 15 Article 1501 of NAFTA calls for each state to adopt measures to prescribe anticompetitive business conduct, Article 1501 also specifically states that there is no recourse for dispute settlement on this issue. Moreover, there is no restriction on state-run monopolies, which is crucially important when considering that Mexico allowed state monopolies on many industries including Petroleum and Telecommunications.

145. *Id.* at 9.

146. Dominguez, *supra* note 121, at 4.

147. Treaty Establishing a Common Market, Mar. 26, 1991, 2140 U.N.T.S. 257.

148. *Id.*

negotiations for economic coordination.[149] Efforts toward such a goal fell flat early on in negotiations, merely serving as a "skeletal framework"[150] for future negotiations like the Protocol of Ouro Preto three years later.[151] As a result, most of its institutions were interim in nature, and the development of a dispute resolution body was left entirely to later negotiations.[152] The Protocol called for a dispute resolution body which would determine compliance with the Treaty, decisions of the Council, decisions of the Group, and directives of the Trade Commission.[153] Though Mercosur remains economically weaker than NAFTA, it also remains politically stronger with the opportunity for growth.[154] Additionally, with all three NAFTA countries being a party to the TPP, the relevance of Mercosur may endure beyond that of NAFTA.

A. The Institutions of Mercosur

Examining Mercosur requires a departure from the earlier format of exploring nonjudicial entities before examining the dispute resolution body[155] because Mercosur has no judicial body of which to speak. Despite the original intent of a single, unified attempt at dispute resolution, the broad, independent dispute resolution body envisioned in Asuncion did not materialize in the first decade of Mercosur, and the function became a hodgepodge of ad hoc remedies. Rather than the permanent tribunal envisioned by the founders, the Protocol retained the interim dispute system and delayed the foundation of a permanent dispute resolution body.[156] Additionally, rather than solidify the role and power of an independent dispute resolution body, the Protocol established a separate Mercosur Trade Commission that would have the authority to hear disputes referred to it by the Commission, on behalf of interested states.[157] Economically stronger nations feared

149. The Treaty of Asunción indicated the goal of a common market. Taylor, *supra* note 105, at 859.

150. *Id.*

151. Protocol of Ouro Preto, Dec. 17, 1994, 2145 U.N.T.S. 298.

152. Taylor, *supra* note 105, at 860.

153. Protocol of Brasilia for the Settlement of Disputes art. 1, Dec. 17, 1991, 2145 U.N.T.S. 282; Protocol of Ouro Preto, *supra* note 151, art. 43.

154. As evidenced by the addition of Venezuela in 2012.

155. *See supra* Sections II.A, III.A.

156. Taylor, *supra* note 105, at 860–62.

157. *Id.* at 861.

a robust dispute resolution body that would allow economically weaker nations, like Argentina and Brazil, to restrict their strong growth.[158]

The lack of a strong judicial body has caused most disputes to go beyond the bounds of Mercosur. First, individual complaints were to be brought by a government rather than merely being granted standing as an individual.[159] Though this by itself is not unusual,[160] the lack of a clearly functioning dispute resolution body left most nations to resolve problems through political negotiations rather than tribunals.[161] Additionally, members could seek resolution in an external organization such as the WTO.[162] In addition to dispute resolution in the original body, the Common Market Group was also able to hear certain disputes.[163] It is hard to imagine how that garnered much respect for the Trade Commission as an institution and for Mercosur as a governing body in general.

The functional result of such a disorganized approach is arbitration panels and panel rulings wrought from negotiation.[164] Any results of such a panel are binding only on the specific parties and provide no guidance for future resolution of the individual parties or for similar cases.[165] Thusly, the benefits of a single dispute resolution system are negated by a lack of broad jurisdiction and binding precedent.

The same fear of stronger countries being bound by rules benefiting weaker countries is what led to reforms to the existing regime during economic crises in Brazil and Argentina.[166] Reforms in the 2002 Olivos Protocol for the Solution of Controversies[167] solidified an amorphous and largely nonfunctioning dispute resolution system into the Permanent Review Tribunal, a standing body with its own power and its own budget.[168] This permanent body has a judge from each country assigned to the court for

158. Christian Arnold & Berthold Rittberger, *The Legalization of Dispute Resolution in Mercosur*, 3 J. POL. LATIN AM. 97, 99, 113 (2013).

159. Taylor, *supra* note 105, at 861.

160. The idea that individuals may not have unlimited access to supranational tribunals is not a new one. For example, the European Court of Human Rights requires the exhaustion of domestic remedies. *Practical Guide on Admissibility Criteria*, EUR. CT. HUM. RTS. 7, (Jan. 1, 2014), http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf.

161. Taylor, *supra* note 105, at 862.

162. Arnold & Rittberger, *supra* note 158, at 99, 103.

163. *Id.*

164. Taylor, *supra* note 105, at 861.

165. *Id.* at 862–63.

166. Arnold & Rittberger, *supra* note 158, at 97, 99, 113–14.

167. Olivos Protocol for the Solution of Controversies in the Mercosur, Feb. 18, 2002, 2251 U.N.T.S. 242.

168. Arnold & Rittberger, *supra* note 158, at 97, 99, 102.

renewable alternating terms of two years and a presiding justice with three terms chosen by others; decisions made by this body are by majority rule.[169] Though the avenue for remedy in the Group does still exist, it has been functionally bypassed by the Tribunal.[170] Perhaps the most important aspect of the reforms is the removal of forum shopping.[171] Still, it is difficult to garner any practical benefits that Mercosur's dispute resolution system may provide for other regional trade agreements, especially for agreements that are trans-continental in nature.

V. TPP

The TPP is a free trade organization affecting some 800 million people across multiple countries.[172] It incorporates the economies of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.[173] By building upon the earlier Marrakesh Agreement[174] and subsuming regional free trade agreements such as NAFTA and the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP), the TPP serves to broaden the economic reach of the Pacific Rim countries and to eliminate or reduce tariffs on goods and services.[175] The language of the preamble has become boilerplate for economic organizations like the European Union, NAFTA and others.[176] As such, highlighting the unique language in the Treaty of Paris served more of a purpose in outlining the European Union.

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169. *Id.* at 102.

170. *Id.* at 103.

171. *Id.*

172. Press Release, Office of the U.S. Trade Representative, Summary of the Trans-Pacific Partnership Agreement (Oct. 4, 2015).

173. *Id.*

174. The Marrakesh Agreement was the round of negotiations in Uruguay which gave rise to the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

175. *Id.*; Trans-Pacific Partnership, pmbl., Feb. 14, 2016 [hereinafter TPP] (*available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text).

176. See, for example, the NAFTA Preamble which includes language to "STRENGTHEN the special bonds of friendship and cooperation among their nations" (NAFTA, *supra* note 95, pmbl.), while the TPP Preamble includes language to "STRENGTHEN the bonds of friendship and cooperation between them and their peoples," (TPP, *supra* note 175, pmbl.). It is unclear what differentiates mere bonds of friendship with "special" bonds of friendship. The devil is in the details.

A. Outline of the Development of the TPP

The TPP originated from the Trans-Pacific Strategic Economic Partnership, born of negotiations as early as 2002.[177] Though the United States only entered into the discussion as late as 2008, it was quickly at the forefront of negotiations, partly in an ongoing commitment to free trade, but undeniably in an effort to reinforce its hegemony against a rising China.[178] After meandering and contentious debate both at home and abroad, the US-led, twelve-member TPP was signed into existence on February 4, 2016.[179] If all twelve nations were to have ratified the treaty, it would have accounted for 40 percent of the world's economy.[180] With such a large portion of the economy at stake, the TPP must have a workable and efficient dispute resolution mechanism to enforce each nation's compliance.

1. Projected Dispute Resolution Within the TPP

a. Chapter 28

The dispute resolution portion of the TPP is in Chapter 28 of the TPP agreement.[181] However, before considering the bulk of Chapter 28, one must return briefly to Chapter 1, in which it is stated that past agreements, including that of the WTO, shall continue unless the TPP imposes a higher burden.[182] As such, Chapter 28 creates a presumption of deference to WTO panels.

Additionally, Article 28.4 creates the opportunity for the complainant to forum shop.[183] At a glance, dispute resolution in the TPP appears to be an exercise in pleasing all which will inevitably lead to pleasing none. Panels are composed of three members.[184] This is a complicated process with both parties being able to choose one member of the panel.[185] If the complaining party

177. T Rajamoorthy, *The Origins and Evolution of the Trans-Pacific Partnership (TPP)*, GLOBAL RESEARCH (Nov. 10, 2013), http://www.globalresearch.ca/the-origins-and-evolution-of-the-trans-pacific-partnership-tpp/5357495.

178. *Id.*

179. Howard, *supra* note 1.

180. *Id.* The United States is unlikely to participate at this point so the percent of GDP will change. This author suspects that China will pick up the slack, but its economy is still slightly more than half of the U.S. Economy.

181. TPP, *supra* note 175, at ch. 28.

182. *Id.* art. 1.2.

183. *See id.* art. 28.4.

184. *Id.* art. 28.9, ¶ 1.

185. *Id.* art. 28.9, ¶ 2(a).

fails to appoint a panel member, the proceedings lapse,[186] but if the responding party fails to appoint a panel member the complaining party may choose from three lists, in descending order.[187] The deference to parties continues with the appointment of a chair of the three member panel.[188] Though overly deferential to the parties, it appears the panels will often rely on past WTO interpretations insofar as the TPP members are all WTO members who have considered many hypothetical problems of TPP member states.[189]

In addition to the benefit of WTO precedent, the TPP provides access to non-parties to bring forth relevant arguments.[190] That Country X would have a dispute with Country Y which may be relevant to Country Z is a foreseeable circumstance, and it is best to get all cases and controversies off the docket in a timely fashion. The court uses simple methods for delivering its initial and final reports in Articles 28.17 and 28.18.[191]

Despite the brief flurry of efficiency in Articles 28.11 through 28.18, implementation of the report gives way to the desires of the parties and leaves compensation as a matter of negotiation unless negotiation breaks down. Implementation remedies the effect that caused the economic harm, but provides no compensation.[192] No mention is made of a situation in which a responding party fails to pay compensation or if reports by the panel are appealable. As arguably subordinate to the WTO, the TPP cannot be the tribunal of last resort for contentious issues of international trade. While the WTO panels provide for the opportunity to appeal, there is no such provision in Chapter 28.[193] Only time will tell what is to come of this fledgling judicial body.[194]

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186. *Id.* art. 28.9, ¶ 2(b).

187. *Id.* art. 28.9, ¶ 2(c)(i)–(iii). In theory, the responding party will already have compiled a list in accordance with Article 28.10.1. If not, they can appoint from a list of panelists pursuant to Article 28.11. Finally, if no panelist exists on either of those lists, then, pursuant to Article 28.9 ¶ 2(c)(iii), the panelist will be chosen at random from a list of three panelists chosen by the complaining party. It is unclear who will do the choosing of the final panelist under Article 28.9 ¶ 2(c)(iii).

188. *Id.* art. 28.9, ¶ 2(d)(i)–(iii).

189. *See id.* art. 28.12, ¶ 3.

190. *Id.* art. 28.13(e).

191. *Id.* arts. 28.17, 28.18.

192. *See id.* art. 28.19.

193. Stuart S. Malawer, *Looking at Dispute Resolution in the Trans-Pacific Partnership*, N.Y. L.J., Dec. 8, 2015, at 3, http://us-global-law.net/images/Malawer._Looking_at_the_Trans-Pacific_Partnership_New_York_Law_Journal_December_8,_2015_.pdf. Mr. Malawer demonstrates dismay for such an absence noting that it undermines transparency, but does not provide to where appeals would be made in his critique.

194. I am not punting on the issue of analyzing the relationship to the WTO. Until the TPP is ratified and in motion, the real ramifications have eluded those far more cued into the issue than myself. *See* Simon Lester, *WTO Jurisprudence in TPP Dispute Settlement,*

b. Chapter 9

Chapter 28 pertains to the issue of intergovernmental dispute settlement, but one must also note the avenue in Chapter 9 for investor-state dispute settlement.[195] Chapter 9 deals mostly with concerns of expropriation by member states.[196] Such concerns are not unfounded given a history of expropriation as a distraction from economic strife. In fact, past expropriation has been committed by member states against the investors of other member states, most notably in Vietnam at the close of the U.S.-Vietnam Conflict.[197] Article 9 states that foreign private entities will be held to the same standard as that of domestic actors.[198] This is comparable to the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution.[199] Certainly a government could expropriate foreign property, but only in a manner equal to that of locals. The analogy of the Fourteenth Amendment can be continued into the Fifth Amendment's Just Compensation Clause.[200] It seems that the language of the U.S. Constitution has played a role in the formation of the TPP. For example, Article 9.8 specifically states that property cannot be taken except by due process, for a public purpose and in a nondiscriminatory manner. Compensation must be "prompt, adequate and effective."[201]

Disputes are encouraged to be handled at the lowest level through writing by the claimant to the respondent.[202] Only after this has failed may parties resort to other means. First, if both the claimant and the respondent are parties to the International Centre for Settlement of Investment Disputes (ICSID), they may bring the case there.[203] Second, a claimant may bring the case under ICSID Additional Facility Rules, provided either the claimant or the respondent is a member of the ICSID

INT'L ECON. L. & POL'Y BLOG (Nov. 16, 2015, 8:48 AM), http://worldtradelaw.typepad.com/ielpblog/2015/11/wto-jurisprudence-in-tpp-dispute-settlement.html.

195. TPP, *supra* note 175, at ch. 9.

196. Malawer, *supra* note 193, at 3.

197. Thomas J. Lang, *Satisfaction of Claims against Vietnamese for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975*, 28 CORNELL INT'L L.J. 266, 266 (1995).

198. TPP supra note 175, arts. 9.4, 9.6.

199. U.S. CONST. amend. XIV.

200. *Id.* amend. V.

201. TPP, *supra* note 175, art. 9.8.

202. *Id.* art. 9.18.

203. *Id.* art. 9.19, ¶ 4. Mexico is the sole outlier in the TPP as it is not a party to the convention. *See List of Contracting States and Other Signatories of the Convention*, INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (Apr. 12, 2016) https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

Convention.[204] Third, the parties may bring the case under the United Nations Commission on International Trade Law (UNCITRAL).[205] Finally, the parties may elect to utilize an additional third-party arbitration.[206] The default arrangement is outlined in Articles 9.21 through 9.27,[207] and the measure of damages is outlined in Article 9.29.[208]

VI. CONCLUSION

A strong judiciary may be the linchpin for rule of law that creates the economic stability necessary for gradual economic growth. Knowing that any sort of hearing, trial, arbitration, or mediation will have a lasting effect for consenting parties means even the vanquished know where they stand and can adapt accordingly. However, without some sort of precedent to establish a standard mode of conduct, each case is reinventing the wheel. The chaos associated with such a tribunal will mean fettering integration, stifling business, and forced reliance on domestic remedies. This may be the strongest explanation for the swift growth in the power and function of EU institutions. The Court of Justice stood not only as a check against arbitrary and capricious executive and legislative institutions, but also as a final resolution body to set acceptable community standards and behavior. Until the nations in other economic integration bodies are willing to create a strong judiciary, the organizations will languish as its members seek remedies elsewhere. The fact that Mercosur has assimilated much of the ideas from the ECJ and that nearly a dozen other bodies have attempted to transplant the ECJ into their integration models is indicative of the importance of a strong judiciary as envisioned by the European Union.[209]

The context of the integration body is crucial to explain its purpose and function. Competition has been the key for success in the European Union, and the EEC treaty expanded the scope of integration in the ECSC with a common market. This allowed for four freedoms: free movement of persons, services, goods and

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204. TPP, *supra* note 175, art. 9.19, ¶ 4(b).

205. *Id.* art. 9.19, ¶ 4(c). Mexico is a party to UNCITRAL leaving Brunei as the only TPP member to not cede to enforcement of foreign arbitral awards. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 12, 2017).

206. TPP, *supra* note 175, art. 9.19, ¶ 4(d).

207. *Id.* arts. 9.21–9.27.

208. *Id.* art. 9.29.

209. Alter, Helfer, & Saldias, *supra* note 12, at 631–32.

capital.[210] While Europe was expanding the scope of competition, it appears that NAFTA weakened its commitment. The NAFTA Working Group on Trade and Competition served to further the development of anti-competition rules but was disbanded.[211]

Though this paper avoided an in-depth discussion of institutions beyond dispute resolution, suffice it to say, the lack of clear institutional norms is mirrored in executive and legislative functions in NAFTA and Mercosur. Meanwhile, a complex and functioning body has arisen. The coordination among such bodies is necessary for effective dispute resolution.[212] In all three branches of administration there must be certainty, reliance, and consistency.[213]

The lack of political will to build a strong judiciary is perhaps dispositive of what will come of the organizations. Consider the remarks of U.S. Deputy Trade Representative Charlene Barshefsky in 1993: "The United States is not interested in a customs union . . . . [Nor seeking] harmonization of social or political systems or even legal regimes."[214] As if exchanging notecards with Ms. Barshefsky, Marcos Castrioto de Azambuja, while considering Mercosur, stated that "Mercosur [did] not have the luxury to develop its architecture" and that the political will of setting up a bureaucracy simply did not exist.[215] Castrioto de Azambuja concluded, "The environment is contradictory to the 1950's institutionalism of Europe."[216]: The lack of functioning legal regimes within most attempts at coordination means that the organizations languish before fading into dysfunction. Integration should be tailored to local needs because a top down approach without local backing is unlikely to succeed.[217]

In considering the TPP, one wonders if it is merely hiding behind the more robust and arguably effective regime of the WTO.[218] While acknowledging the efficiency of Article 28 and the necessity of Article 9, there is little accomplished by the TPP that was not already in place under the WTO. In creating yet another

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210. Treaty Establishing the European Economic Community art. 106, Mar. 25, 1957, 1377 U.N.T.S. 12.

211. Jones, *supra* note 101, at 8.

212. Christian Leathley, *The Mercosur Dispute Resolution System*, 4 J. WORLD INV. GROUP 787, 787 (2002).

213. *Id.*

214. Taylor, *supra* note 105, at 850.

215. Tobias Lenz, The EU's Inescapable Influence on Global Regionalism (Trinity Term, 2011) (unpublished PhD thesis, Oxford University).

216. *Id.*

217. Alter, Helfer, & Saldias, *supra* note 12, at 634–35.

218. Simon Lester, *The WTO vs. the TPP*, HUFFINGTON POST (July 2, 2014), http://www.huffingtonpost.com/simon-lester/the-wto-versus-the-tpp_b_5252810.html.

WTO compliant trade agreement, the TPP will face the same fate as NAFTA and fail as a long-term organization. Such pessimism is forgivable, because the TPP was not established as some sort of new world order, but such cynicism is required in consideration of the TPP. Its goals are unclear, and its future is rocky at best.