STUDY OF SELECTED INTERNATIONAL DISPUTE RESOLUTION REGIMES, WITH AN ANALYSIS OF THE DECISIONS OF THE COURT OF JUSTICE OF THE ANDEAN COMMUNITY

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I. INTRODUCTION

The purpose of this study is to analyze the different dispute resolution methods available to the international trade community under the various trade agreements existing today. The first dispute resolution method analyzed is the Dispute Settlement Understanding of the General Agreement on Tariffs and Trade (GATT). The broad scope of the GATT and the large number of countries party to the World Trade Organization, makes the Dispute Settlement Understanding the most commonly used dispute resolution method worldwide. The rest of the analysis is centered on the dispute resolution mechanisms of the main trade agreements of the Western hemisphere. In effect, I review the provisions of the North American Free Trade Agreement (NAFTA), and various other agreements of South America, Central America, and the Caribbean. Due to the importance of the European Union for international trade, I have also included a study of the European Court of Justice.

As demonstrated below, dispute resolution methods vary immensely in their levels of enforceability, powers of the dispute resolution body, structure and composition of the resolution entity, and effects of the decisions. The main dispute resolution methods studied in this paper can be divided into two categories: supranational courts and arbitral panels. Other methods such as conciliation, mediation, and negotiation are not dispute resolution methods per se because they generally result in mere suggestions which have little or no binding effect upon the parties. These methods are simply preparatory or pervious methods to avoid coming before the dispute resolution entities, whether courts or arbitral panels.

The importance of studying these various dispute resolution methods is evident if one considers the ongoing negotiations to form the Free Trade Area of the Americas (FTAA). It will be interesting to see which dispute resolution method would be selected for the FTAA, provided the proposed treaty is signed.

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II. THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE URUGUAY ROUND

A. General Aspects

The General Agreement on Tariffs and Trade (GATT)[1] is the most important multilateral trade agreement governing international trade.[2] GATT rules have been the moving force behind the evolution of world trade by reducing the uncertainty in connection with commercial transactions across national borders.[3] The strength of GATT lies in the security that it provides that exports from one country will be treated the same as goods produced in the importing country (non-discrimination and national treatment), and that GATT members will accord each other the most advantageous treatment for trade in goods, as that accorded to any nation (most favored nation treatment).[4] GATT is definitively the "dominant multilateral international trade institution,"[5] binding, as of January 1, 2002, on 144 members of theWorld Trade Organization (WTO).[6]

The dispute resolution method of the WTO is generally included in the Dispute Settlement Understanding (DSU).[7] The DSU provides a unified and basic mechanism, common to many nations for resolving trade disputes.[8] The dispute resolution process of the WTO is a revised version of the GATT 1947 dispute resolution method.[9] Created in 1994 as a part of the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes,[10] the Dispute Settlement Body (DSB) adjudicates trade disputes brought to it by WTO Member States.[11]

The WTO dispute resolution method consists of a number of steps. Although it may seem these steps are subsequent and mandatory, their use

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1. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A5, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

2. Gary Carpentier & James R. Holbein, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 534 (1993).

3. *Id*.

4. *Id*.

5. RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 127 (2d ed. 2001).

6. World Trade Organization, *WTO Member's Site: Members*, *at* http://www.wto.org/members (last visited Nov. 23, 2002).

7. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 2, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, 33 I.L.M. 1226 (1994) [hereinafter DSU].

8. Carpentier & Holbein, *supra* note 2, at 532.

9. Lindsey Ensor & Alejandra Tres, *WTO Dispute Resolution Process*, *at* http://www.washington.edu/wto/issues/disputeresolution.html (last visited Nov. 23, 1999).

10. *Id*.

11. DSU, *supra* note 7, art. 2; Ensor & Tres, *supra* note 9, *at* http://www.washington.edu/wto/issues/disputeresolution.html.

depends on the will of the disputing Member States. Initially, parties to disputes are urged to resolve the dispute through consultations.[12] If, after following the strict time lines set by Article 4 of the DSU,[13] consultations fail, the complaining party may request the establishment of a panel.[14]

According to the DSU, the other methods available to the disputing parties to solve their controversies, are good offices, conciliation, and mediation.[15] These methods are available to parties who voluntarily agree to them.[16] They are confidential and can be commenced or terminated at any time by the parties.[17] In addition, these methods may be used simultaneously with the panel process, if the parties have requested the establishment of a panel.[18]

A panel may be established at the request of a complaining party.[19] The panel is composed of three or five panelists at the discretion of the parties,[20] and is selected from a roster of candidates held by the Secretariat of the WTO.[21] The panel cannot consist of panelists from countries of either disputing party, unless otherwise agreed to by the parties.[22] The main purpose of the panel is to prepare a report that will assist the DSB to reach a decision.[23] The report is presented to the disputing parties, and the final panel report is circulated to the DSB.[24] The DSB decides by consensus, which is reached if no member present formally objects to the proposed decision.[25]

Panels determine the facts that are relevant under the applicable law; hence, they must determine the applicable law and relevant facts concurrently.[26] Within the determination of the applicable law, the panel has sub-functions: (a) to determine which law is applicable; (b) to interpret the law where the meaning is disputed; (c) to construe the law where the law does not apply by its specific terms but was intended to address the issue; (d) to interpret available law to determine the solution to the controversy where the law has a *lacuna*; (e) to determine which law takes precedence where two legal rules overlap; and (f) to determine whether the laws are of unequal or equal stature where two legal rules conflict, and when the laws are of equal stature, the panel must determine how to accommodate

12. DSU, *supra* note 7, art. 4.
13. *Id*. art. 4(3), (7)-(8).
14. *Id*. art. 4(7).
15. *Id*. art. 5(1).
16. *Id*.
17. *Id*. art. 5(2)-(3).
18. *Id*. art. 5(5).
19. *Id*. art. 6(1).
20. *Id*. art. 8(5).
21. *Id*. art. 8(4).
22. *Id*. art. 8(3).
23. *Id*. art. 11.
24. The DSB is comprised of the Member States of the WTO. *Id*. art. 2(1).
25. *Id*. art. 2(4).
26. Joel P. Trachtman, *The Domain of WTO Dispute Resolution,* 40 HARV. INT'L L.J. 333, 336 (1999).

both.[27] After the complete determination of the applicable law, the panel applies the law to the facts and then recommends a resolution to be adopted by the DSB.[28]

If the DSB decides to adopt the panel report, it must do so within sixty days of its circulation to the Member States, unless a party to the dispute formally notifies its intention to appeal.[29] If a party appeals, the DSB will not consider the report until the appeal has been completed.[30] The Appellate Body, composed of seven members, shall issue a decision that shall be considered adopted by the DSB, unless there is consensus not to adopt it.[31] Because of a design flaw in the DSU, the Appellate Body has no right of remand.[32] Thus, the Appellate Body is constrained when applying law for which the panel has made no findings of fact.[33]

After a final decision is made, a "reasonable period of time" is then given to the losing party to implement the DSB's decision.[34] The loosing party usually has three choices: (a) change its law to match WTO requirements; (b) pay permanent damages to the winning country; or (c) face non-negotiated trade sanctions.[35] Under Article 21 of the DSU, the losing party must inform the DSB of its intentions with respect to the enforcement of the ruling. In principle, enforcement should be immediate.[36] However, if immediate enforcement is impracticable, such party shall have a "reasonable period of time" to do so.[37] A reasonable period of time is either: (a) a period of time proposed by the concerned party and approved by the DSB; (b) a period of time agreed by the parties; or in absence thereof (c) a period of time set by binding arbitration, where the suggested limit is fifteen months as of the adoption of the panel or appellate report.[38]

If the losing party does not implement a panel recommendation then it must enter into negotiations with the opposing party to determine an acceptable compensation.[39] If the parties fail to reach an agreement, the winning party may request authorization from the DSB to suspend the application of concessions under GATT.[40] The suspension of concessions is usually in the same sector as the

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27. *Id*. at 337.
28. *Id.*
29. DSU, *supra* note 7, art. 16(4).
30. *Id.*
31. *Id*. art. 17(14).
32. Trachtman, *supra* note 26, at 337.
33. *Id.*
34. DSU, *supra* note 7, art. 21(3).
35. Ensor & Tres, *supra* note 9, *at* http://www.washington.edu/wto/issues/disputeresolution.html.
36. DSU, *supra* note 7, art. 21(3).
37. *Id.*
38. *Id.*
39. *Id.* art. 22(1).
40. *Id.* art. 22(2).

originally affected commercial sector.[41] Suspension of trade benefits, however, can affect an alternate sector.[42]

In addition to the dispute resolution method discussed above, Article 25 of the DSU contemplates the possibility of the parties agreeing to "expeditious arbitration."[43] The process for expedited arbitration is not defined. Article 25 of the DSU simply provides that Articles 21 and 22 of the DSU shall apply *mutatis mutandis* to arbitration awards.[44]

B. Dispute Resolution Experience under GATT

Some critics of the WTO dispute resolution method are uncomfortable with the limited degree to which dispute settlement proceedings are open to the public.[45] It has been suggested that opening access to DSB meetings to interested WTO members, intergovernmental organizations, and third parties would yield better results with dispute settlement in the WTO.[46] In addition, other critics have attacked the makeup of the panels and the Appellate Body, arguing that there is little chance to ensure that the parties will have an unbiased hearing.[47] Notwithstanding the critiques and negative aspects of the DSU, it is, in fact, the most widely used forum in the world to resolve disputes among international trading partners.[48] This is true especially after 1995, when the DSU was improved to ensure specific deadlines, the use of "negative" consensus, and the possibility to retaliate in the event of non-compliance.[49]

III. THE CANADA-U.S. FREE TRADE AGREEMENT AND THE NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement (NAFTA) between Canada, Mexico, and the United States is considered the first major step toward a hemispheric system of free trade.[50] NAFTA was a major attempt to remove barriers to free trade and expand the markets of the North American continent.[51]

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41. DSU, *supra* note 7, art. 22(3)(a).
42. *See id.* art. 22(3)(a)(i).
43. *Id.* art. 25.
44. *Id.* art. 25(4).
45. Ensor & Tres, *supra* note 9, *at* http://www.washington.edu/wto/issues/disputeresolution.html.
46. *Id*.
47. BHALA, *supra* note 5, at 215.
48. *Id*.
49. *Id.* at 214-15.
50. Carpentier & Holbein, *supra* note 2, at 533-34.
51. *Id*. at 534.

NAFTA's dispute settlement provisions are modeled on the Canada-United States Free Trade Agreement (CUFTA).[52]

A. The Canada-U.S. Free Trade Agreement

In most instances, dispute resolution under CUFTA is governed by Chapter 18.[53] Article 1802 of CUFTA creates the Canada-United States Trade Commission.[54] The CUFTA Commission, headed by the cabinet officials responsible for international trade, is responsible for the resolution of disputes concerning the interpretation of CUFTA.[55] Article 1802 focuses on dispute avoidance through consultation and negotiation between the parties.[56]

Article 1807 of CUFTA provides that five-member panels may render advisory opinions and recommendations for settlement of disputes referred by the parties.[57] The parties select the bi-national panel and chairperson and agree upon the terms of reference and a timetable to conduct the panel review.[58] The parties follow the deadlines established in article 1807 and the procedures outlined in the Model Rules of Procedure for Chapter 18 Panels.[59] These rules provide for written submissions, oral arguments, initial reports, comments by the parties, and a final report during the course of 120 days following the formation of the panel.[60]

Chapter 19 of CUFTA uses special bi-national panels to resolve anti-dumping and countervailing duty disputes.[61] In effect, article 1909 of CUFTA provides for the creation of the Bi-national Secretariat.[62] This entity administers the system of panel review procedures to settle disputes arising under both Chapters 18 and 19 of the agreement.[63] The Secretariat's initial mandate is for five years.[64] The mandate is extendible by two years, pending the development of a substitute system of rules by a working group on subsidies created by article

52. *Id.*; *see* Canada-United States: Free Trade Agreement, Dec. 22-23, 1987 and Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 [hereinafter CUFTA].

53. RALPH H. FOLSOM, NAFTA IN A NUTSHELL 54 (1999) [hereinafter FOLSOM-NAFTA].

54. *Id.*

55. Carpentier & Holbein, *supra* note 2, at 554.

56. *Id*.

57. *Id*. at 555.

58. *Id*.

59. *Id*.

60. *Id*.

61. FOLSOM-NAFTA, *supra* note 53, at 52.

62. Carpentier & Holbein, *supra* note 2, at 555.

63. *Id*.

64. *Id*.

1907.[65] Both countries are obligated to follow such an alternate system of rules for anti-dumping and countervailing duties as applied to their bilateral trade.[66]

Article 1904 provides for review by five-member panels of experts.[67] The experts are primarily lawyers familiar with international trade law, anti-dumping duties, countervailing duties, and material injury determinations made by one party respecting goods of the other party.[68] The panel looks to the domestic law of the country whose agency made the initial decision now being reviewed.[69] Article 1904 provides a detailed guidance for the conduct of the panel reviews.[70] As a safeguard against impropriety or gross panel error, Article 1904 provides for an "extraordinary challenge procedure."[71]

B. North American Free Trade Agreement

On August 12, 1992, Canada, Mexico, and the U.S. completed negotiations on the proposed NAFTA.[72] All three nations developed implementing legislation and regulations to permit its entry into force on January 1, 1994.[73] The agreement addresses the most important issues of international trade, such as rules of origin[74] and the most favored nation treatment and national treatment.[75] In addition, special rules govern such sectors as agriculture,[76] energy and basic petrochemicals,[77] trade in services,[78] financial services,[79] investment,[80] phytosanitary regulations,[81] telecommunications,[82] intellectual property,[83] and the environment.[84]

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65. *Id.* at 555-56.
66. *Id*.
67. *Id.* at 556.
68. *Id.*
69. *Id*.
70. *Id.*
71. *Id*.; *see* CUFTA, *supra* note 52, art. 1904.
72. North American Free Trade Agreement, Dec. 11-17, 1992, U.S.-Can.-Mex., chs. 1-9, 32 I.L.M. 289; chs. 10-22, 32 I.L.M. 605 [hereinafter NAFTA].
73. Carpentier & Holbein, *supra* note 2, at 559.
74. NAFTA, *supra* note 72, ch. 4.
75. *See id*. art. 301(2).
76. *Id*. ch. 7.
77. *Id*. ch. 6.
78. *Id*. ch. 12.
79. *Id*. ch. 14.
80. *Id*. ch. 11.
81. *Id*. ch. 7.
82. *Id*. ch. 13.
83. *Id*. ch. 17.
84. North American Agreement on Environmental Cooperation, *opened for signature* Sept. 8, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480 [hereinafter the NAAEC].

The relevant NAFTA institutions involved in the dispute settlement process are the Free Trade Commission and the Secretariat.[85] The Free Trade Commission, consisting of cabinet-level officials of the NAFTA parties, is responsible for supervising NAFTA's implementation and for resolving disputes concerning its interpretation or application.[86] The Commission is required to meet at least once a year; all of its decisions shall be taken by consensus, except as the Commission may otherwise agree.[87] The Secretariat[88] has a National Section Office in each country and is responsible for supplying administrative support to the Free Trade Commission and to the dispute resolution panels and committees provided for by NAFTA.[89]

The bi-national panel system established under NAFTA is an innovative system designed to resolve international trade disputes.[90] The NAFTA dispute resolution method grants the disputing parties the option to bypass the national courts.[91] A unique feature of the panel system is that a NAFTA bi-national panel must follow the national trade law that is at issue in the particular case, rather than apply international law.[92] Panel decisions may not be appealed to any court and they are directly enforceable against the national administrative agency that rendered the underlying decision.[93] According to some authors, NAFTA bi-national panels may be characterized as a hybrid between a national court and an international judicial tribunal.[94] Such authors hold that NAFTA panels do not create an "international" law per se, but instead provide disputing countries with a neutral forum in which to conclusively resolve trade disputes.[95] Although not bound to follow panel decisions as precedent, national courts are encouraged by national implementing legislation to view panel decisions as persuasive authority.[96]

NAFTA contains a complex set of dispute resolution structures.[97] These structures include a general dispute settlement scheme for controversies concerning the interpretation, application, or breach of the Agreement, a specific device for resolving anti-dumping and countervailing duty disputes, and special

85. David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 166 (1997).

86. NAFTA, *supra* note 72, art. 2001(1), (2)(a), (2)(c); Lopez, *supra* note 85, at 166.

87. NAFTA, *supra* note 72, art. 2001(4); Lopez, *supra* note 85, at 166.

88. NAFTA, *supra* note 72, art. 2002; Lopez, *supra* note 85, at 166.

89. Lopez, *supra* note 85, at 166.

90. Edward D. Re, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law*, 40 ST. LOUIS U. L.J. 1091, 1091-92 (1996).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. Lopez, *supra* note 85, at 164.

provisions to solve investment-related disputes.[98] In addition, NAFTA's agreements on labor and the environment each contain its own separate dispute resolution mechanism.[99] Finally, dispute settlement provisions can also be found in other chapters such as Chapter 14.[100]

1. Dispute Resolution under NAFTA Chapter 20

The Chapter 20 dispute settlement provisions are the general provisions that apply to disputes when no other more specific NAFTA provisions apply.[101] They govern all disputes between the parties regarding the interpretation or application of NAFTA, and dispute occuring whenever a party considers that an actual or proposed measure of another party is, or would be, inconsistent with its obligations under NAFTA.[102] Private parties do not have a right of action against Member States of NAFTA on the grounds that a measure of a state is inconsistent with NAFTA.[103] However, private parties may file complaints before their trade representatives about Member State measures that adversely affect them.[104]

Chapter 20 dispute settlement provisions were intended to be an alternative to the GATT 1947 dispute settlement provisions.[105] Article 2005 of NAFTA provides that parties may settle disputes arising under NAFTA or GATT under either the forum of Chapter 20 or under the DSU.[106] However, once a dispute settlement procedure has been initiated under either one, the forum selected shall be exclusive and final.[107]

Chapter 20 includes a three-stage dispute resolution process involving: (a) consultations; (b) a meeting of the Commission; and (c) nonbinding arbitration.[108] The first step in resolving a dispute over the interpretation, application, or alleged breach of NAFTA is for the complaining party to formally request consultations with the offending party.[109] If the consulting parties fail to arrive at a mutually satisfactory resolution of the dispute within thirty days after

98. *Id.*

99. *Id*., s*ee* NAAEC, *supra* note 84, Part Five; *see also* North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 Part Five [hereinafter NAALC].

100. Chapter 14 contains the dispute resolution provisions on investment disputes in financial services. NAFTA, *supra* note 72, art. 1415 *et seq*.

101. FOLSOM-NAFTA, *supra* note 53, at 186.

102. NAFTA, *supra* note 72, art. 2004.

103. *Id*. art. 2021.

104. FOLSOM-NAFTA, *supra* note 53, at 200.

105. *Id.*

106. NAFTA, *supra* note 72, art. 2005(1).

107. *Id.* art. 2005(6).

108. *Id.* arts. 2006-2016; Lopez, *supra* note 85, at 167.

109. *Id.* art. 2006; Lopez, *supra* note 85, at 167.

the request, either of the parties may request a meeting of the Free Trade Commission.[110] Although no time period is set for the Commission to issue a decision, article 2007 provides that it "shall endeavor to resolve the dispute promptly."[111] To resolve the dispute, the Commission may use technical advisers, conciliation or mediation, or make recommendations that may assist the parties in reaching a mutually satisfactory resolution to the dispute.[112] If the Free Trade Commission has not resolved a dispute within thirty days after convening any disputant may request that an arbitral panel be formed.[113]

Panels consist of five arbitrators who are drawn from a roster of thirty individuals having expertise in law, international trade, or the resolution of disputes arising under international trade agreements.[114] In controversies involving two parties, the parties are to agree on the chair of the panel within fifteen days of the request for a panel, and within fifteen days thereafter, are each to designate two panelists who are citizens of the other disputing party.[115] Subject to the agreement of the parties, the panel may seek advice from experts or request a formal written report from a scientific review board.[116] Under Article 2015 the parties may provide comments to the panel on the proposed factual issues to be referred to the review board and also on the report of the board of experts to the panel.[117] Chapter 20 guarantees that the panel shall take into account the comments of the parties in the preparation of its report.[118]

Within ninety days after the panel is selected, it shall present to the disputing parties an initial report containing the panel's findings of fact, and its determination as to whether the measure at issue is inconsistent with the obligations under NAFTA.[119] At that time the panel issues its recommendations, if any, for the resolution of the dispute.[120] The parties may submit written comments to the panel on its initial report within fourteen days of the presentation of the report.[121] By no later than thirty days after presentation of the initial report, the panel shall deliver its final report to the disputing parties for transmission to the Free Trade Commission.[122] In general, the final report of the panel shall be published fifteen days after it is transmitted to the Commission.[123]

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110. *Id.* art. 2007(1); Lopez, *supra* note 85, at 167.
111. *Id.* art. 2007(4); Lopez, *supra* note 85, at 167.
112. *Id.* art. 2007(5); Lopez, *supra* note 85, at 167.
113. *Id.* art. 2008(1); Lopez, *supra* note 85, at 167.
114. *Id.* arts. 2009, 2011(a)(1).
115. *Id.* art. 2011(1).
116. *Id.* arts. 2014-2015.
117. *Id.* art. 2015(3).
118. *Id.* art. 2015(4).
119. *Id.* art. 2016(2).
120. *Id*.
121. *Id.* art. 2016(4).
122. *Id.* art. 2017.
123. *Id.* art. 2017(4).

Upon receiving the panel's final report, the disputing parties are required to agree on a resolution to the controversy conforming to the determinations and recommendations of the panel.[124] If possible, the resolution should be the non-implementation or removal of the measure that does not conform to NAFTA provisions. Failing such resolution, the losing party shall be subject to pay compensation.[125] If no mutually satisfactory resolution has been reached between the parties within thirty days after receiving the panel's final report, the complaining party may suspend NAFTA benefits to the offending party until an agreed resolution is reached.[126] The suspended benefits should, in principle, be in the same sector or sectors as that affected by the offending measure. However, benefits in other sectors may also be suspended.[127]

Article 2006 mandates that a country requesting Chapter 20 consultations shall deliver a written request to its own section of the NAFTA Secretariat.[128] Although the NAFTA Secretariat should keep track of each conflict that formally enters the Chapter 20 dispute resolution system, researchers have found that in practice, the Secretariat tends to report to the public only those Chapter 20 disputes that reach the arbitral panel review stage of dispute settlement.[129] Consequently, little is known publicly about dispute settlement experience in the early Chapter 20 stages.[130] In any case, research currently shows that as of June 2002, one arbitral panel report had been issued reviewing Canadian measures,[131] and two from the U.S.[132]

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124. *Id.* art. 2018(1).
125. *Id.* art. 2018(2).
126. *Id.* art. 2019(1).
127. *Id.* art. 2019(2)
128. *Id*. art. 2006(2).
129. Lopez, *supra* note 85, at 167.
130. *Id*.
131. North American Free Trade Agreement: Chapter 20 Arbitral Panel Report, *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01, (Dec. 2, 1996), http://www.nafta-sec-alena.org/english/index.htm (last visited Nov. 23, 2002).
132. North American Free Trade Agreement: Chapter 20 Arbitral Panel Report, *In the Matter of U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico,* USA-97-2008-01 (Jan. 30, 1998), http://www.nafta-sec-alena.org/english/index.htm (last visited Nov. 23, 2002); North American Free Trade Agreement: Chapter 20 Arbitral Panel Report, *In the Matter of Cross-Border Trucking Services and Investment*, USA-MEX-98-2008-01 (Feb. 6, 2001), http://www.nafta-sec-alena.org/english/index.htm (last visited Nov. 23, 2002).

2. Dispute Resolution under NAFTA Chapter 19

The dispute settlement provisions of Chapter 19 apply solely to anti-dumping and countervailing duty controversies between the parties.[133] The essential role of Chapter 19 is to create a means of adjudication, beyond pre-existing means, by which one NAFTA party can challenge another NAFTA party's decision to impose an anti-dumping or countervailing duty.[134] Under Article 1902 of NAFTA, the parties have the right to apply their domestic anti-dumping and countervailing duty laws to goods imported from the territory of another party, and such laws are not in any way replaced by NAFTA.[135] Accordingly, national anti-dumping and countervailing duty laws continue to govern the proceedings, including the decisions of Chapter 19 panels.[136]

Dispute resolution under Chapter 19 begins with a request for an arbitral panel.[137] Chapter 19 explicitly requires that each Party shall replace judicial review of final anti-dumping and countervailing duty determinations with bi-national panel review.[138] Thus, a NAFTA party exporting goods to another NAFTA party may request that an arbitral panel review a final anti-dumping or countervailing duty ruling to determine whether such finding was in accordance with the law of the importing party.[139] Chapter 19 panels consist of five panelists who are drawn from a roster composed of at least seventy-five candidates, determined and established by the parties since NAFTA's entry into force, who shall have general familiarity with international trade law.[140] The candidates of the roster are mostly of judges, former judges, and lawyers.[141] Within thirty days of a panel request, the involved parties each select two panelists and, within twenty-five days thereafter, agree on the selection of the fifth panelist.[142] A majority of the panelists and the chair of the panel must be lawyers in good standing.[143]

Decisions of the panel shall be by majority of vote.[144] The decision may uphold the importing party's final anti-dumping determination, or in the event the determination is not in accordance with the importing party's law, the panel could remand it to the party with recommendations as to the means by which the statute

133. Lopez, *supra* note 85, at 173.
134. *Id*.
135. NAFTA, *supra* note 72, art. 1902(1).
136. FOLSOM-NAFTA, *supra* note 53, at 191.
137. NAFTA, *supra* note 72, art. 1904(2).
138. *Id.* art. 1904(1).
139. *Id.* art. 1904(2).
140. *Id.* annex 1901.2(1).
141. Lopez, *supra* note 85, at 174.
142. NAFTA, *supra* note 72, annex 1901.2(2)-(3).
143. *Id.*
144. *Id.* annex 1901.2(5).

could be brought into conformity with NAFTA.[145] Panel decisions are binding on the involved parties.[146] In effect, a final determination by the panel may not be reviewed under any judicial review procedures of the importing party.[147] Consequently, no party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.[148]

If the importing party denies a Chapter 19 panel's decision binding force and effect, a complaining party may ultimately request that a "special committee" be established within fifteen days of the request.[149] This special committee consists of three persons drawn from a roster of fifteen current or former federal judges from the United States, Canada, and Mexico.[150] If the special committee finds that the party complained against has denied a panel's decision binding force and effect, the involved parties must begin consultations within ten days.[151] If consultations do not produce a mutually satisfactory solution, or the party complained against has not demonstrated to the satisfaction of the special committee that it has corrected the problem, the complaining party has two options.[152] It may suspend either: (1) the bi-national panel review with respect to the offending party under Chapter 19; or (2) NAFTA trade benefits to the offending party "as may be appropriate under the circumstances."[153] Subsequently, at the request of the party complained against, the special committee shall reconvene to determine whether the suspension of benefits by the complaining party is manifestly excessive or the party complained against has corrected the problem that gave rise to the decision.[154] If the special committee finds that the problem has been corrected, any suspended trade benefits shall be reinstated.[155]

From January 1994 through June 2002, Chapter 19 arbitral panels were requested to resolve eighty-two anti-dumping and countervailing duty disputes.[156] These included: steel industry cases; apple grower complaints; Mexican cookware cases; and trade in live swine, leather wearing apparel, polystyrene, twine, cement,

145. *Id.* art. 1904(8), annex 1903.2(3).
146. *Id.* art. 1904(9).
147. *Id.* art. 1904(10).
148. *Id.* art. 1904(11).
149. *Id.* art. 1905(2).
150. *Id.* art. 1905(5), annex 1904.13.
151. *Id.* art. 1905(7).
152. *Id.* art. 1905(8).
153. *Id*.
154. *Id.* art. 1905(10).
155. *Id*.
156. To view decisions of Article 1904 Bi-national Panel Review of the North American Free Trade Agreement, see NAFTA Secretariat, *Decisions and Reports*, http://www.nafta-sec-alena.org/english/index.htm (last visited Nov. 23, 2002).

color picture tubes, flowers, beer, carpeting, refined sugar, and bacteriological culture media.[157]

3. Dispute Resolution under NAFTA Chapter 11

Chapter 11 of NAFTA deals with investment and investment disputes. According to certain authors, the provisions of Chapter 11 represent "great progress toward the creation of a truly open and nondiscriminatory environment for investment in the United States, Canadian, and Mexican economies by investors."[158] Chapter 11 has been regarded as one of the most significant achievements of the governments of Mexico, the United States and Canada in concluding NAFTA.[159] According to certain authors, the importance of Chapter 11 is such that it "may well serve as a model for similar arrangements in other contexts."[160] The importance of Chapter 11 lies on the fact that it constitutes one of the most comprehensive investment accords to which the United States is a party. Chapter 11 is based on recent bilateral investment treaties entered into by the United States with developing countries and on the investment provisions of CUFTA.[161] In general, Chapter 11 applies to investments in all economic sectors and industries, except the financial services industry governed under Chapter 15.[162]

Chapter 11 establishes a dispute settlement framework that allows NAFTA investors to seek monetary damages through international arbitration in lieu of seeking redress through the host country's courts or administrative tribunals.[163] The provisions of Chapter 11 are intended to create "a fairer, more transparent, and more predictable environment in which NAFTA investors may establish a local presence in Mexico, Canada, or the United States."[164] Chapter 11 also establishes a mechanism for the settlement of disputes arising from an alleged breach of the investment provisions of NAFTA.[165] Article 1115 provides that settlement of investment disputes shall be subject to the provisions of Chapter

157. Lopez, *supra* note 85, at 175.

158. Richard C. Levin & Susan Erickson Marin, *NAFTA Chapter 11: Investment and Investment Disputes*, 2 NAFTA L. & BUS. REV. AM. 82, 83 (1996).

159. David A. Gantz, *Resolution of Investment Disputes Under the North American Free Trade Agreement*, 10 ARIZ. J. INT'L & COMP. L. 335, 335 (1993).

160. *Id.*

161. *See* Jose E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 U. MIAMI INTER-AM L. REV. 303, 303-04 (1997). For a detailed explanation on the historical background of NAFTA Chapter 11, see Gantz, *supra* note 159, at 336-37.

162. Levin & Marin, *supra* note 158, at 83.

163. *Id.*

164. *Id.*

165. *Id*. at 89.

11.[166] Such provisions assure equal treatment among investors of the parties, in accordance with the principles of international reciprocity and due process before an impartial tribunal.[167]

Chapter 11 creates private rights that can be invoked by NAFTA investors or enterprises.[168] This varies from the dispute settlement provisions of NAFTA Chapters 19 and 20, under which only a Member State may bring a claim.[169] Thus, an individual investor acting on his or her own behalf or on behalf of an enterprise may submit a claim for dispute settlement under Chapter 11.[170]

Article 1118 proposes that the disputing parties first resort to consultation or negotiation to settle a dispute.[171] Provided six months have passed since the events giving rise to the claim, the disputing party may submit the claim to arbitration under: (a) the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), if both the disputing Party and the Party of the investor are parties thereof; (b) the Additional Facility Rules of ICSID, if either Party, but not both, is a party to the ICSID Convention; or, (c) the UNCITRAL Arbitration Rules.[172] Since only the United States is party to the ICSID Convention, the first option would not be available for an arbitration involving Mexico or Canada.[173]

Article 1121 regulates the conditions precedent to submit a claim to arbitration. Article 1121 provides that an investor of a NAFTA party may submit a claim to arbitration only if (a) the investor consents to arbitration in accordance with Chapter Eleven provisions, and (b) both the investor and an enterprise that is owned or controlled by an investor, waive the right to initiate or continue any proceeding before a judicial or administrative body seeking damages.[174] However, investors may initiate or continue to pursue injunctive, declaratory, or other relief not involving the payment of damages.[175] Both the consent and waiver must be in writing, delivered to the disputing Party, and included in the submission of the claim to arbitration.[176] The NAFTA countries added to the Agreement a prior written consent to arbitration.[177] Under this general consent to arbitration, in the event an investor demands arbitration under Chapter 11, no further consent by the government is required.[178] This broad prior consent also

166. NAFTA, *supra* note 72, art. 1115.
167. *Id*.
168. Levin & Marin, *supra* note 158, at 90.
169. *Id.*
170. NAFTA, *supra* note 72, arts. 1116-1117; Levin & Marin, *supra* note 158, at 90.
171. NAFTA, *supra* note 72, art. 1118.
172. *Id*. art. 1120.
173. Levin & Marin, *supra* note 158, at 90.
174. NAFTA, *supra* note 72, art. 1121(1).
175. *Id*. art. 1121(2).
176. *Id*. art. 1121(3).
177. *See* Gantz, *supra* note 159, at 343-44.
178. *Id*. at 344.

applies to the consent requirements of the ICSID Convention, including consent to the jurisdiction of the Center under the Convention or the Additional Facility Rules, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration.[179]

Investors must submit claims, on behalf of themselves or their enterprise, within three years of the date they first acquired, or should have acquired, knowledge of the alleged breach and resulting loss or damages.[180] The dispute resolution mechanism applies to disputes involving actions taken by political subdivisions of a NAFTA party.[181] In contrast, disputes that an investor from one party may have with private parties in the NAFTA country in which it invests must be adjudicated in local court or administrative proceedings or before such courts or tribunals as agreed upon by the parties.[182]

Access to arbitration under Chapter 11 is prohibited under certain circumstances.[183] For example, investors from the U.S. or Canada may not allege that Mexico has breached its Chapter 11 obligations both in a Chapter 11 arbitration and in proceedings before a Mexican Court or administrative tribunal.[184] In addition, decisions by Canada following a review of a potential acquisition under the Investment Canada Act are not subject to the Chapter 11 or Chapter 20 dispute settlement provisions of NAFTA.[185] Furthermore, decisions by the National Commission on Foreign Investment of Mexico, with respect to potential acquisitions in Mexico, are also excluded from NAFTA's dispute settlement provisions.[186]

a. Structure of the Panel and the Proceedings

The arbitration panels are usually comprised of three arbitrators, unless the dispute is resolved under the UNCITRAL rules or the parties agree otherwise.[187] One arbitrator is appointed by each of the disputing parties, and the third, who will serve as the presiding arbitrator, is appointed by agreement between the disputing parties.[188] With the exception of the provisions for arbitration under UNCITRAL, if the parties fail to appoint the arbitrators ninety days after the claim was submitted to arbitration, the Secretary-General of ICSID

179. *Id*.
180. NAFTA, *supra* note 72, art. 1117(2); Levin & Marin, *supra* note 158, at 90.
181. NAFTA, *supra* note 72, art. 105; Levin & Marin, *supra* note 158, at 90-91.
182. Levin & Marin, *supra* note 158, at 91.
183. *Id*.
184. *Id.*
185. *Id.* at 91-92.
186. NAFTA, *supra* note 72, annex 1138.2; Levin & Marin, *supra* note 158, at 92.
187. NAFTA, *supra* note 72, art. 1123.
188. *Id*.

shall appoint any arbitrators not yet appointed, at his or her discretion.[189] If the presiding arbitrator has not been appointed, the Secretary-General will make his or her appointment from a roster of forty-five persons chosen by consensus of the NAFTA Parties to serve as presiding arbitrators.[190] The presiding arbitrator cannot be a citizen of the disputing parties.[191] If no presiding arbitrator is available from that roster, the Secretary-General will appoint from the ICSID Panel of Arbitrators a presiding arbitrator who is not a national of any of the Parties.[192]

The panel of arbitrators shall decide the issues in dispute in accordance with NAFTA provisions and the applicable rules of international law.[193] The definition of "international law" is not provided for by NAFTA. However, it is generally accepted that international law includes: (a) international conventions and established rules expressly recognized by the contesting parties; (b) international custom; (c) the general principles of laws; and (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations.[194] The arbitral panel may appoint experts and can order interim measures of protection to preserve the rights of a disputing party, or to ensure the effectiveness of the final award.[195]

An arbitration tribunal deciding a Chapter 11 dispute may award monetary damages, including applicable interest, and/or the restitution of property to the prevailing party.[196] For arbitration claims made by an investor on behalf of an enterprise, a final award of restitution of property must provide that restitution be made to the enterprise and that an award of monetary damages be paid to the enterprise.[197] For any type of arbitration, the tribunal may award costs, but it may not order a party to pay punitive damages.[198]

b. Experience under NAFTA Chapter 11

The effectiveness of the provisions of NAFTA Chapter 11 has been the subject of some controversy. Some authors challenge Chapter 11 rhetoric about "fair" contract between "sovereign equals."[199] According to some authors, there is

189. *Id*. art. 1124(2).
190. *Id*. art. 1124(3).
191. *Id*. art. 1124(3)-(4).
192. *Id.* art. 1124(3).
193. *Id*. art. 1131(1).
194. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993 art. 38 [hereinafter ICJ].
195. NAFTA, *supra* note 72, arts. 1133-1134.
196. *Id*. art. 1135.
197. *Id*. art. 1135(2).
198. *Id*. art. 1135(3).
199. Alvarez, *supra* note 161, at 304.

no actual symmetry of direct benefits to the national investors of all three NAFTA parties, since few Mexican investors are likely to be in the position to penetrate the U.S. or Canadian markets.[200] Hence, it is almost exclusively United States and Canadian investors, and not Mexican nationals, that get the benefit of the investment chapter.[201] However, other authors argue that the inclusion of Chapter 11 provisions has actually benefited Mexico, since it has given United States and Canadian investors a secure arena to invest in Mexico.[202]

III. LATIN AMERICAN INTEGRATION ASSOCIATION

The Latin American Integration Association (ALADI) was created in 1980 pursuant to the Treaty of Montevideo.[203] Member States to ALADI include Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.[204] The main purpose of the Treaty of Montevideo was to promote integration among the nations, economic and social development, and ultimately, the creation of a common market.[205] Over 100 subagreements, known as "partial scope agreements" have been signed under ALADI to achieve such ends.[206]

The institutional framework of ALADI is composed of a Council of Foreign Ministers,[207] a Conference of Evaluation and Convergence[208] composed of plenipotentiaries,[209] a Committee of Representatives[210] composed of permanent delegates,[211] and a General Secretariat.[212] ALADI does not include a separate set of rules for dispute resolution. Actually, dispute resolution is referred to only twice in the Treaty of Montevideo. The first reference is with respect to the Council of Foreign Ministers' responsibility to hear and resolve matters referred to it by the other bodies.[213] The second is in the context of one of the functions of the Committee, whereas it shall "propose formulas for resolving matters presented by the member countries, when it is alleged that some of the norms or principles

200. *Id*.
201. *Id*.
202. Gantz, *supra* note 159, at 335.
203. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 [hereinafter Treaty of Montevideo].
204. *Id*. pmbl.
205. *Id*. art. 1; Carpentier & Holbein, *supra* note 2, at 546.
206. Treaty of Montevideo, *supra* note 203, art. 1; Carpentier & Holbein, *supra* note 2, at 546.
207. Treaty of Montevideo, *supra* note 203, arts. 28(a), 31.
208. *Id*. art. 28(b).
209. *Id*. art. 34.
210. *Id*. art. 28(c).
211. *Id*. art. 36.
212. *Id*. art. 29.
213. *Id*. art. 30(g).

of this Treaty are not being observed."[214] Unfortunately, there is little information on the disputes presented before ALADI. Consequently, there is no data available to determine the effectiveness of the dispute resolution provisions of the Treaty of Montevideo.

IV. SOUTHERN COMMON MARKET

Argentina, Brazil, Paraguay, and Uruguay formed the Southern Common Market (MERCOSUR) through the Treaty of Asuncion, signed on March 26, 1991.[215] The goal of MERCOSUR is the establishment of a customs union and a common market.[216] This agreement creates the largest market in Latin America, including approximately one-half of the total economy of South America.[217] MERCOSUR's purpose is the free circulation of goods, services, financial services, and workers among all its Member States.[218] In addition, members will coordinate macroeconomic and sectional policies regarding exchange rates, trade, agriculture, transportation, and communications.[219] The principal commitments concerning the trade in goods undertaken by the MERCOSUR include the elimination of import duties for goods of the other parties by the end of 1994 and the establishment of a common external tariff.[220]

The institutional framework for MERCOSUR is composed of the Council of the Common Market and the Group of the Common Market.[221] The Council of the Common Market is composed of the Ministers of Foreign Affairs and Ministers of Economy of the Member States.[222] It provides political leadership and makes decisions concerning the implementation and evolution of the common market.[223] The Common Market Group monitors the implementation of the accord and enforces the Council's decisions.[224] It is up to the trading partners to coordinate macroeconomic policies regarding exchange rates, trade, agriculture, transportation, and communications.[225]

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214. *Id*. art. 35(m).

215. Treaty of Asuncion Establishing a Common Market Among Argentina, Brazil, Paraguay & Uruguay (MERCOSUR), Mar. 26, 1991, 30 I.L.M. 1041 (hereinafter Treaty of Asuncion).

216. *Id*. art.1.

217. Carpentier & Holbein, *supra* note 2, at 547.

218. *Id.*

219. *Id.*

220. *Id.* at 548.

221. Treaty of Asuncion, *supra* note 215, art. 9.

222. *Id*. art. 11.

223. *Id*. art. 10.

224. Carpentier & Holbein, *supra* note 2, at 548.

225. *Id*.

Upon the signing of the Treaty of Asuncion, the applicable dispute resolution provisions were included in Annex III thereof.[226] This Annex provided for direct negotiations between parties to resolve disputes before they were referred to the Common Market Group, which had to issue a report within sixty days of the referral.[227] If no resolution was made at that level, the issue could be brought before the Council of Ministers.[228] The dispute resolution method under MERCOSUR has been the subject of various other Protocols. The Protocol of Brasilia of 1991 has been the most recent Protocol applicable to controversies.[229] However, on February 18, 2002, the Member States of MERCOSUR signed the Protocol of Olivos for the Solution of Controversies (Protocol of Olivos), which abrogates the Protocol of Brasilia as of its entry into force.[230] Article 52 of the Protocol of Olivos provides that it shall enter into force on the thirtieth day following the deposit of the fourth ratification document.[231]

A. Analysis of the Dispute Resolution Provisions of the Protocol of Olivos

The Protocol of Olivos regulates the solution of controversies among Member States and the causes of action of private parties against Member States.[232] Article 1 of the Protocol of Olivos provides that parties may submit their controversies for resolution under the dispute settlement provisions of the Protocol, the DSU of the WTO, or any other fora.[233] However, the selection of one dispute resolution method excludes the selection of another fora.[234]

Parties are first encouraged to resolve their controversies through direct negotiations.[235] If the parties cannot reach a satisfactory agreement or if an agreement is partial, either of the disputing parties may initiate arbitral proceedings, or alternatively both parties may agree to submit the dispute to the Common Market Group.[236]

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226. Treaty of Asuncion, *supra* note 215, art. 3.

227. Carpentier & Holbein, *supra* note 2, at 548.

228. *Id*.

229. Protocol of Brasilia for the Solution of Controversies, *opened for signature* Dec. 17, 1991, http://www.sice.oas.org/trade/mrcsrs/decisions/AN0191e.asp (last visited Nov. 23, 2002).

230. Protocolo de Olivos para la Solución de Conroversias en el MERCOSUR, Feb. 18. 2002, art. 55, http://www.sice.oas.org/trade/mrcsr/olivos/acta%5F501s2.asp (last visited Nov. 23, 2002) [hereinafter Protocolo de Olivos].

231. *Id*. art. 52.

232. *Id*. art. 1(2).

233. *Id*. art. 1(1).

234. *Id*. art. 1(2).

235. *Id*. art. 4.

236. *Id*. art. 6(1)-(2).

If the controversy has not be resolved by the above-mentioned mechanisms, either of the parties can communicate to the MERCOSUR Administrative Secretariat its decision to submit the controversy to arbitration with a Tribunal.[237] The Tribunals shall apply all MERCOSUR provisions and applicable International Law to resolve the disputes.[238] The Ad Hoc Tribunal shall be composed of three arbitrators.[239] Each of the disputing parties shall designate one arbitrator from a roster, and the third, who shall act as president of the Tribunal, is designated by agreement of the parties.[240] The parties shall also appoint alternate arbitrators.[241] In any case, the president and his or her alternate cannot be a citizen of the disputing parties.[242] If the parties do not designate their arbitrator or the president of the Tribunal, they shall be appointed by the Administrative Secretariat by draw from the roster, excluding arbitrators from the disputing countries.[243]

The Ad Hoc Tribunal may issue provisional measures and shall issue a final decision within a maximum of ninety days from of the incorporation of the Tribunal.[244] The Permanent Revision Tribunal can review decisions by the Ad Hoc Tribunal pursuant to the filing of a recourse for revision.[245] The recourse is limited to questions of law and legal interpretations of the Ad Hoc Tribunal.[246] The Permanent Revision Tribunal is composed of five arbitrators.[247] One is designated by each of the MERCOSUR members and the fifth by unanimous consent of the Member States.[248] If the parties cannot agree on the fifth arbitrator, the Administrative Secretariat will draw from a list of eight candidates (two per country).[249] If the controversy involves two Member States, the Permanent Revision Tribunal shall be composed of three arbitrators, two nationals of the disputing parties, and a third designated by the Administrative Secretariat by draw from the remaining arbitrators.[250] The third arbitrator shall act as president and cannot be a citizen of either of the disputing parties.[251] If the controversy involves more than two Member States, the Tribunal shall be composed of five members.[252]

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237. *Id*. art. 9.
238. *Id*. art. 34.
239. *Id*. art. 10(1).
240. *Id*. art. 10(2)(i).
241. *Id*.
242. *Id*. art. 10(3)(i).
243. *Id*. art. 10(3)(ii).
244. *Id*. arts. 15(1), 16.
245. *Id*. art. 17.
246. *Id*. art. 17(2).
247. *Id*. art. 18(1).
248. *Id*. art. 18(2)-(3).
249. *Id*. art. 18(3).
250. *Id*. art. 20(1).
251. *Id*.
252. *Id*. art. 20(2).

The Permanent Revision Tribunal shall issue a decision after the party has filed an answer to the revision recourse filed by the complaining party.[253] The Tribunal may either confirm, modify, or revoke the decision of the Ad Hoc Tribunal.[254] This decision of the Permanent Revision Tribunal shall be final, and it shall prevail over the decision of the Ad Hoc Tribunal.[255] Alternatively, the parties may submit their controversies directly to the Permanent Revision Tribunal after completing the negotiation process provided for in Articles 4 and 5 of the Protocol.[256] In this case, the decision of the Permanent Revision Tribunal shall be final and binding upon the parties.[257] Under Article 28 of the Protocol, parties may file a recourse requesting that the final arbitral decision be clarified.[258] If a party does not comply with the arbitral decision, the other party may apply temporary compensatory measures, such as the suspension of concessions, preferably in the same sector as the affected sector.[259] The breaching party shall have the right to request the revision of the compensatory measures if it considers them to be excessive.[260]

Chapter 11 of the Protocol of Olivos regulates causes of action of private parties against the Member States for the adoption or application of restrictive trade measures, discriminatory measures, measures against free market, or measures that breach MERCOSUR provisions.[261] Complaints shall be filed before the National Section of the Common Market Group in the country of residence or principal place of business of the claimant.[262] The National Section of the Common Market Group of the claimant's country shall consult with the National Section of the Common Market Group of the alleged infringing country to find a solution.[263] If no solution is reached, the National Section of the Common Market Group of the claimant shall present the claim to the Common Market Group, who shall call upon a group of experts to issue a decision. [264] If the experts find the claim to be valid, any Member States may ask the breaching party to adopt corrective measures.[265] In case a Member States does not change its measures, the petitioning state may proceed with arbitration.[266]

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253. *Id*. art. 21.
254. *Id*. art. 22.
255. *Id*. art. 22(2).
256. *Id*. art. 23.
257. *Id*. art. 23(2).
258. *Id*. art. 28(1).
259. *Id*. art. 31(1).
260. *Id*. art. 32(2).
261. *Id*. art. 39.
262. *Id*. art. 40(1).
263. *Id*.
264. *Id*. arts. 41, 42(2).
265. *Id*. art. 44(1)(i).
266. *Id*.

B. Dispute Resolution Experience under MERCOSUR

As of 2002, eight arbitral decisions have been issued under the MERCOSUR dispute resolution provisions.[267] Three were filed by Argentina against Brazil, two by Brazil against Argentina, two by Uruguay against Argentina and Brazil, and one by Paraguay against Uruguay.[268] The subject matter of the controversies included: subsidies granted by Brazil to the production and export of pork; safeguard measures on textiles; anti-dumping measures for the export of chicken from Brazil into Argentina; restrictions to the Argentinean bicycle market by Uruguayan producers; restrictions to the Brazilian tire market by Uruguayan producers; obstacles to the import of Argentinean phytosanitary products into the Brazilian market; and the controversy between Paraguay and Uruguay on the application of a specific internal tax on the sale of cigarettes.[269] The decisions were issued by the Ad Hoc Tribunal from 1999 to 2002.[270]

V. CARIBBEAN COMMON MARKET

The Caribbean Community and Common Market (CARICOM) was established by the Treaty of Chaguaramas, which was signed on July 4, 1973.[271] The Treaty of Chaguaramas was revised in 2001.[272] CARICOM is composed of Antigua, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Surinam, and Trinidad and Tobago.[273] CARICOM is managed by the Conference of Heads of Government and the Community Council of Ministers.[274] The Conference sets the policies of the community by issuing directives and decisions, entering into treaties for the community, and managing the financial affairs of the organization.[275] CARICOM is also managed by various committees and a

267. MERCOSUR, *Laudos Aribtrales*, http://www.mercosur.org.uy > Normativa > Laudos Arbitrales (last visited Nov. 23, 2002).

268. *Id*.

269. *See id*.

270. *Id*.

271. Treaty Establishing the Caribbean Community, *opened for signature* July 4, 1973, 946 U.N.T.S. 17, 12 I.L.M. 1033 (entered into force Aug. 1, 1973).

272. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, *opened for signature* July 5, 2001, *at* http://www.caricom.org > Information Services > Treaties and Protocols (last visited Nov. 23, 2002).

273. *Id*. art. 3.

274. *Id*. art. 10.

275. *Id*. art. 12.

Secretariat.[276] Currently CARICOM is establishing the Caribbean Court of Justice, which shall resolve disputes arising under the Treaty of Chaguaramas.[277]

VI. CENTRAL AMERICAN COMMON MARKET

The governments of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua are the Member States of the Central American Common Market (CACM), created pursuant to the General Treaty of Central American Economic Integration (General Treaty).[278] The purpose of CACM is to create a common market amongst its Member States and to create a customs union.[279] There is little reference to the resolution of disputes under the General Treaty. Article XXVI provides that the signatory States shall resolve their disputes amicably.[280] Controversies over the interpretation or application of the Treaty shall be resolved by the Executive Council or the Economic Council.[281] Furthermore, if an agreement is not reached, parties may submit their disputes to arbitration.[282] To incorporate the arbitral tribunal, each party shall propose to the General Secretariat of the Organization of Central American States the names of three justices of their respective Supreme Courts of Justice.[283] The Secretary General and the representatives of the Member States before the Secretariat shall elect by draw one arbitrator per each of the contracting parties.[284] The decision shall be adopted by the concurring votes of at least three arbitrators, and it shall be final and binding upon the contracting parties.[285]

There is little information on disputes in CACM. Studies are needed to determine the frequency of disputes and their outcome. Consequently, there is no data available to determine the effectiveness of the dispute resolution method provided by the General Treaty on Central American Economic Integration.

276. *Id*. arts. 18 *et seq.*, 23.

277. The Caribbean Community (CARICOM) Secretariat, *The Caribbean Court of Justice: What it Is, What it Does*, *at* http://www.caricom.org > CCJ.

278. General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3.

279. *Id*. art. I.

280. *Id*. art. XXVI.

281. *Id*.

282. *Id*.

283. *Id*.

284. *Id*.

285. *Id*.

VII. THE EUROPEAN COURT OF JUSTICE

A. Historical Background

The European Court of Justice (ECJ) was first created by the Treaty of Paris, signed on April 18, 1951 in Paris and entered into force on July 23, 1952.[286] The Treaty of Paris established the European Coal and Steel Community (ECSC).[287] On March 25, 1957, Belgium, France, Germany, Italy, Luxembourg, and The Netherlands met in Rome to sign the treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM), collectively referred to as the Treaties of Rome.[288] On April 17 of that same year, the members signed the protocols on the privileges and immunities granted to the European Communities and on the statute of the European Court of Justice.[289] The treaties called for the creation of a Council of Ministers, a Commission, an Assembly (or Parliament) and a Court of Justice.[290] The coexistence of the three treaties lead to an "unnecessary and confusing institutional structure which was remedied in part by merging the Court and the Parliament in 1957."[291] In effect, on October 7, 1958, the ECJ finally replaced the ECSC Court.[292] The ECJ was set up in Luxembourg, acting according to the provisions of all the treaties.[293] Although the institutions were merged, the treaties were not.[294]

The ECJ was maintained as an institution through the provisions of the the Treaty of the European Union (Maastricht Treaty) signed February 7, 1992.[295] The Maastricht Treaty was subject to changes introduced by the Treaty of

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286. Europa: The European Union On-Line, *The History of the European Union*, *at* http://www.europa.eu.int/abc/history/1951/1951_en.htm (last visited Nov. 23, 2002) [hereinafter Europa].

287. TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC TREATY]; Europa, *supra* note 286, at http://www.europa.eu.int/abc/history/1951/1951_en.htm.

288. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY]; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167 [hereinafter EURATOM TREATY]; Europa, *supra* note 286, *at* http://www.europa.eu.int/abc/history/1957/1957_en.htm.

289. Europa, *supra* note 286, *at* http://www.europa.eu.int/abc/history/1957/1957_en.htm.

290. RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 7 (3d ed. 1999) [hereinafter FOLSOM-EU].

291. *Id*. at 7-8.

292. Europa, *supra* note 286, *at* http://www.europa.eu.int/abc/history/1958/1958_en.htm.

293. *Id*.

294. FOLSOM-EU, *supra* note 290, at 8.

295. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C 224) 1 (1992) [hereinafter TREATY OF MAASTRICHT].

Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, signed at Amsterdam on October 2, 1997 and ratified in 1999 (Treaty of Amsterdam).[296] In effect, Article 9 of the Treaty of Amsterdam provides that:

> The powers conferred on the European Parliament, the Council, the Commission, the *Court of Justice* and the Court of Auditors by the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community shall be exercised by the single institutions under the conditions laid down respectively by the said Treaties and this Article.[297]

B. Treaties Regulating the Court of Justice of the European Communities[298]

1. Treaty on the European Union

Article 35 of the Treaty on the European Union (TEU) grants jurisdiction to the Court of Justice of the European Communities (ECJ) to give preliminary rulings on the validity and interpretation of framework decisions, the interpretation of conventions, and the validity and interpretation of the measures implementing them.[299] According to Article 35, the Member States may submit statements of the case or written observations to the ECJ in cases that arise under the preliminary ruling jurisdiction.[300] However, the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of Member States.[301] Nor may the ECJ review the exercise of the responsibilities incumbent upon Member States concerning the maintenance of law and order and the safeguarding of internal security.[302] Article

296. TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2 1997, O.J. (C 340) 1 (1997) [hereinafter TREATY OF AMSTERDAM]; s*ee also*, FOLSOM-EU, *supra* note 290, at 29.

297. TREATY OF AMSTERDAM art. 9(2) (emphasis added).

298. The provisions of EURATOM and ECSC regulating the ECJ are not included herein, however these treaties regulate the ECJ as follows: (i) the Treaty Establishing the European Atomic Energy Community, regulates the ECJ in Articles 3, 12, 18, 21, 38, 81-83, 103-105, 136-160, 164, 188 and 193; and (ii) the Treaty of the European Coal and Steel Community regulates the ECJ in Articles 7, 31-47, 63, 65, 66, 87- 89, 92 and 95.

299. Consolidated version of the TREATY ON EUROPEAN UNION, O.J. (C 340) 2 (1997) art. 35 [hereinafter TEU]. The consolidated version of the TEU contains the renumbered provisions as amended by the Treaty of Amsterdam.

300. TEU art. 35(4).

301. *Id*.

302. TEU art. 35(5).

35 further provides that the ECJ shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by Member States or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EU Treaty, or of any rule of law relating to its application or misuse of powers.[303] Finally, Article 35 provides that the ECJ shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted by the Council, whenever such dispute cannot be settled by the Council within six months of its being referred.[304]

2. Treaty Establishing the European Community

The Treaty Establishing the European Comuntiy (EC Treaty) regulates the ECJ extensively. The EC Treaty commences by providing in Article 7 that the Court of Justice, as one of the institutions of the EC, "shall act within the limits of the powers conferred upon it by this Treaty."[305]

a. Free Movement of Persons

The EC Treaty provides in Article 68 that the ECJ shall have jurisdiction under the following circumstances and conditions:

> [W]here a question on the interpretation of [the free movement of persons] or on the validity or interpretation of acts of the institutions of the Community based on [the free movement of persons] is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.[306]

However, Article 68 also warns that the ECJ shall not have jurisdiction to rule on any domestic measure or decision taken pursuant to the free movement of

303. TEU art. 35(6).

304. TEU art. 35(7).

305. Consolidated version of the TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Nov. 10, 1997, O.J. (C 340) 3 (1997) art. 7 [hereinafter EC TREATY]. The consolidated version of the EC Treaty contains the renumbered provisions as amended by the Treaty of Amsterdam.

306. EC TREATY art. 68.

persons relating to the maintenance of law and order and the safeguarding of internal security.[307]

b. Aid Granted by Member States

With respect to aid granted by the Member States, Article 88(2) of the EC Treaty provides that if the Commission finds that an aid granted by a state or through state resources is not compatible with the common market, or that such aid is being misused, the Commission shall order the state to abolish or alter such aid within a period of time to be determined by the Commission.[308] If the state concerned does not comply with this decision within the prescribed time, the Commission or any interested state may refer the matter to the ECJ directly, in derogation of the provisions of Articles 226 and 227.[309]

c. Harmonization

One of the purposes of the Council is to adopt measures to harmonize laws, regulations, or administrative actions of the Member States that have effects on the internal market.[310] Article 95 provides that a Member State may be authorized to enact norms, different from the harmonized standards, provided the norms do not constitute a means of arbitrary discrimination or a disguised restriction on trade.[311] Article 95(9) further provides that the Commission or any Member State may bring the matter directly before the ECJ if it considers that another Member State is making improper use of the power to deviate from the harmonized standards.[312]

d. Pecuniary Obligations

Article 256 of the EC Treaty provides that the decision by the Council or the Commission to impose a pecuniary obligation on persons other than states shall be enforceable according to the rules of civil procedure in force in the state and territory of which it is carried out.[313] The article further provides that enforcement may be suspended only by a decision of the ECJ.[314] However, the

307. *Id.*
308. EC TREATY art. 88(2).
309. *Id.; see* discussion *infra* Part VII.B.2.g.
310. EC TREATY arts. 94-95.
311. EC TREATY art. 95.
312. *Id*.
313. EC TREATY art. 256.
314. *Id*.

courts of the country concerned shall have jurisdiction over complaints alleging that enforcement is being carried out in an irregular manner.[315]

e. Language

It can be inferred from article 290 of the EC Treaty that the rules governing the languages of ECJ shall be governed by the provisions contained in the rules of procedure of the Court of Justice.[316] The language of procedure of the ECJ may be any one of the languages of the EU. [317] Thus, in preliminary ruling proceedings, the language of procedure will be that of the national Court that referred the case.[318] However, the judgments of the ECJ are available, from the date of delivery, in all the official languages.[319]

f. Exclusivity

Article 292 orders Member States not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein.[320]

g. Extraordinary Measures

Article 296 of the EC Treaty allows Member States to take any measures they consider necessary to protect essential interests of security that are connected with the production of or trade in arms, munitions, and war material.[321] This is only allowed provided such measures do not adversely affect the conditions of competition in the common market.[322] In addition, Article 297 of the EC Treaty provides that Member States shall consult with each other to prevent interference with the functioning of the common market that might result from measures taken during serious internal disturbances and war, or impeding war, and to maintain peace and international security.[323]

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315. *Id*.

316. EC TREATY art. 290.

317. Court of Justice of the European Communities, *Your Questions on the Court of Justice of the European Communities*, *at* http://curia.eu.int/en/pei/faq.pdf (last visited Nov. 23, 2002) [hereinafter Court of Justice, *Your Questions*].

318. *Id*.

319. *Id*.

320. EC TREATY art. 292.

321. EC TREATY art. 296.

322. *Id*.

323. EC TREATY art. 297.

In this sense, Article 298 of the EC Treaty provides that, by way of derogation from the procedure laid down in Articles 226 and 227,[324] the Commission or any Member State may bring a matter concerning Articles 296 and 297 directly before the ECJ.[325] This derogation is permissible if it alleges that another Member State is making improper use of the powers granted therein. In this case, the ECJ shall give its ruling *in camera.*[326]

h. Treaties by the European Community

Article 300 generally regulates the execution of agreements between the European Community and one or more States or international organizations.[327] In particular, Article 300(6) provides that the Council, the Commission or a Member State may obtain the opinion of the ECJ as to whether an agreement envisaged is compatible with the provisions of the EC Treaty.[328]

C. Composition and Organization of the Court, Including a Discussion of the Judges

The ECJ is comprised of fifteen judges and eight advocates general.[329] The judges and advocates general are officially appointed by the Council, which requires common accord of the governments of the Member States.[330] According to the EU, these judges and advocates are chosen from jurists whose "independence is beyond doubt" and who are of "recognized competence."[331] Judges hold office for a renewable term of six years.[332]

The judges select one of their number to be President of the Court.[333] The President, whose primary duties are to direct the work of the Court and preside at hearings and deliberations, serves for a renewable term of three years.[334]

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324. *See* discussion *infra* Parts VII.D.2.a-b.

325. EC TREATY art. 298.

326. *Id*.

327. EC TREATY art. 300.

328. *Id*.

329. EC TREATY art. 221-222; Court of Justice of the European Communities, *Court of Justice: Composition and Organization*, *at* http://curia.eu.int/en/pres/co.htm (last visited Nov. 23, 2002) [hereinafter Court of Justice, *Composition*].

330. Sally J. Kenney, *The Members of the Court of Justice of the European Communities*, 5 COLUM. J. EUR. L. 101, 101-02 (1998-1999).

331. EC TREATY, art. 223; Court of Justice, *Composition*, *supra* note 329, *at* http://curia.eu.int/en/pres/co.htm.

332. Court of Justice, *Composition*, *supra* note 329, *at* http://curia.eu.int/en/pres/co.htm.

333. *Id*.

334. *Id*.

The advocates general assist the Court by delivering, in open court and with impartiality and independence, opinions on the cases brought before the Court.[335] Similar to many European courts, the ECJ issues only one judgment; there are no dissenting or concurring opinions.[336] Although there may be differing views among the judges regarding a specific decision, the judges always support the eventual final collective decision of the ECJ.[337]

French is the primary working language of the ECJ.[338] All written documents are available to members, legal secretaries, and law clerks in the language of the case; however, all documents are also translated into French.[339] Similarly, the Advocate General's opinion is drafted in his or her native language and then translated into French.[340] The deliverer, draft judgments, and correspondence between cabinets are in French. While all members need French to function at the ECJ, the proficiency of the members varies.[341] Judges who are skilled in French generally find it easier to interact with their colleagues.[342] In addition, multilingual members are able to work directly from the pleadings in the language of the case without waiting for translations.[343]

Members of the ECJ are drawn from the judiciaries of Member States, the professorate, and the practicing bar.[344] Thus, knowledge of both the French language and Community law is an important consideration in appointing members to the ECJ.[345] However, verifying these factors of appointment is difficult, in part, because of the disinterest of European social scientists to study courts as political institutions.[346] The ECJ's own extensive database contains little on judicial selection or on whether judges should represent each legal system in the Union rather than each Member State.[347] New members of the EU may have few scholars or lawyers who are well-versed in EU law, fluent in French, and willing to move to Luxembourg.[348] With such a small number of appointments, it is difficult to definitively state, let alone generalize, how each Member State chooses its judges.[349] Nevertheless, Member States may alter their procedures

335. *Id*.
336. Kenney, *supra* note 330, at 102.
337. Mark C, Miller, *A Comparison of Two Evolving Courts. The Canadian Supreme Court and the European Court of Justice*, 5 U.C. DAVIS J. INT'L L. & POL'Y 27, 42 (1999).
338. *Id*.
339. Kenney, *supra* note 330, at 103.
340. *Id*.
341. *Id*.
342. *Id*.
343. *Id*. at 103-04.
344. *Id*. at 104.
345. *Id*.
346. *Id*.
347. *Id*.
348. *Id*. at 105.
349. *Id*.

slightly as they realize what qualifications and characteristics they seek in a judge, or as a larger qualified pool develops from which to draw.[350]

Although there is no published account of the criteria for judicial selection by the ECJ, a biographical overview of former members may provide some insight on judicial selection. Thirty-four members had doctorates in law, and at least eighteen were educated or experienced in economics.[351] Twenty-one were professors; these memebers typically taught Community, comparative, or international law.[352] Forty-one had some judicial experience, including twenty-two members who had served on the bench for more than ten years.[353] At least ten members had argued cases before the ECJ and eight members had helped negotiate the ECJ's founding treaties or their country's accession or rules of procedure.[354] Finally, approximately fifty-six members held executive branch appointments in their own governments, most commonly in the ministry of justice, but also including cabinet positions or legal advisers to the government.[355]

Nine different Presidents have led the ECJ, and they have served, on average, almost two terms each (5.25 years).[356] Although there is no strict rotation, all of the original Member States have provided a President for the ECJ.[357] The President has the power to decide interim measures, assign the *juge-rapporteur* to a case, and oversee the progress of each case.[358] The President chairs the ECJ when he or she sits on a case and during formal sittings.[359] The President chairs the administrative meeting, which determines how many judges will hear and decide the case, and is responsible for the administration of the ECJ.[360]

Sally J. Kenney argues that the literature on courts and the judicialization of politics enables her to predict that Member States will devote more attention to whom they appoint as they become increasingly aware of the ECJ's power to decide against Memeber States' own national interests.[361] She believes that little evidence exists indicating that Member States have sought particular outcomes on cases through their selections, rather than seeking the most competent jurists.[362] However, some anecdotal evidence suggests that Member States have sought candidates who were perhaps less of a "Euro-enthusiast" than their

350. *Id*. at 104.
351. *Id*. at 107.
352. *Id*.
353. *Id*.
354. *Id*.
355. *Id*.
356. *Id*.
357. *Id*. at 108.
358. *Id*.
359. *Id*.
360. *Id*.
361. *Id*. at 128.
362. *Id*.

predecessors.[363] Ms. Kenney further explains that in its report for the 1996 Intergovernmental Conference, the ECJ sought to draw the Council's attention to "the problem of maintaining the link between the number of judges and the number of Member States, even though the Treaties do not provide for any link between nationality and membership of the ECJ."[364] Over fifteen years ago, Advocate General Jacobs questioned whether merely having one judge from each Member State was sufficient to represent the legal diversity of the Community.[365]

Mark C. Miller explains that the judges of the ECJ are chosen for their legal merits and independence, rather than their political beliefs.[366] He quotes from one official publication of the EU that "[m]embers are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence."[367] The Member States have almost always chosen judges who support the ECJ's integrative efforts and goals, and, Mark C. Miller argues that these judges have certainly acted in an independent manner.[368]

D. Jurisdiction over the Various Forms of Action

The ECJ is responsible for ensuring that EC law is observed in the interpretation and application of the Treaties establishing the EC and in the provisions created by the competent Community institutions.[369] To enable it to perform its obligations, the ECJ has wide jurisdiction to preliminarily rule on various types of actions.[370] Cases may be brought to the Court directly by Member States, other institutions of the EU, or on reference from the national courts of the Member States.[371] When the cases come by reference, the ECJ articulates the rule of law for the EU on the issue.[372] However, implementation of the ECJ's decision is left to the judges of the member countries, where the

363. *Id*.
364. *Id*. at 130.
365. *Id*.
366. Miller, *supra* note 337, at 43.
367. *Id*.
368. *Id*.
369. EC TREATY art. 220; Court of Justice of the European Communities, *Jurisdiction*, *at* http://curia.eu.int/en/pres/comp.htm (last visited Nov. 23, 2002) [hereinafter Court of Justice, *Jurisdiction*].
370. Court of Justice, *Jurisdiction*, *supra* note 369, *at* http://curia.eu.int/en/pres/comp.htm.
371. Miller, *supra* note 337, at 43.
372. *Id*.

national courts apply the ECJ decision to the specific facts of the case in question.[373]

1. Forms of Action

The "proceeding for failure to fulfill an obligation" enables the ECJ to determine whether a Member State has fulfilled its obligations under Community law.[374] An action may either be brought by the Commission or by another Member State.[375] If the ECJ finds that the obligation has not been fulfilled, the Member State concerned must comply without delay.[376] In addition, the Court may impose a fixed or a periodic penalty if the ECJ finds that the Member State has not complied with its judgment.[377]

The "proceeding for annulment" allows a Member State, the Council, the Commission, the Parliament, and individuals to apply to the ECJ for the annulment of all or part of an item of Community legislation.[378] Individuals may seek the annulment of a legal measure that is of direct and individual concern to them.[379] The Court may then review the measure and, if the action is well-founded, void the contested measure.[380]

Under the "proceeding for failure to act," the Court of Justice may review the legality of a failure to act by a Community institution. [381] The Court may then penalize silence or inaction and rule on the liability of the Community for damage caused by either its institutions or its servants in the performance of their duties.[382]

Nevertheless, the Court is not the only judicial body empowered to apply Community law. The courts of each Member State are also Community courts because they have jurisdiction to review the administrative implementation of Community law.[383] Furthermore, national courts must uphold provisions of the treaties, regulations, directives, and decisions that directly confer individual rights on nationals of Member States.[384]

Procedures exist to ensure the effective application of Community law. They also prevent discrepancies among the rules of interpretation in national

373. *Id*.
374. Court of Justice, *Jurisdiction*, *supra* note 369, *at* http://curia.eu.int/en/pres/comp.htm.
375. *Id*.
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.*
382. *Id.*
383. *Id.*
384. *Id.*

courts from leading to different interpretations of Community law. The Treaties provide for a system of preliminary rulings that do not create a hierarchical relationship, but institutionalize fruitful cooperation between the Court of Justice and the national courts.[385] In cases involving Community law, national courts may, and in some cases must, seek a preliminary ruling from the Court of Justice on the relevant questions concerning the interpretation and validity of the law.[386] This system ensures that Community law is interpreted and applied uniformly throughout the Community.[387]

A preliminary ruling is also the procedure by which an individual may seek clarification of the Community rules.[388] Only a national court has the power to seek a preliminary ruling, but all the parties may take part in proceedings before the Court of Justice.[389] Several important principles of Community law have been established in preliminary rulings, including questions referred by courts of first instance against whose decisions could be appealed under national law.[390]

2. Claimants

a. Actions by the Commission Against a Member State

Article 226 of the EC Treaty provides that the Commission may commence an action against a Member State if that state has not fulfilled an obligation under the EC Treaty.[391] For this purpose, the Commission shall give the State an opportunity to submit its observations and then it shall deliver a reasonable opinion.[392] If the State does not comply with the opinion within the period established by the Commission, the latter may bring the matter before the ECJ.[393]

b. Actions by a Member State against another Member State

Article 227 of the EC Treaty allows a Member State to bring a claim before the ECJ against another Member State that has failed to fulfill an obligation under the EC Treaty.[394] For a Member State to initiate an action, it must first

385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.*
391. EC TREATY art. 226.
392. *Id.*
393. *Id.*
394. EC TREATY art. 227.

bring the matter before the Commission.[395] The Commission shall deliver a reasoned opinion after each of the States concerned has the opportunity to submit its case and to submit its observations on the other party's case both orally and in writing.[396] If the Commission has not delivered an opinion within three months of the date on which the matter was brought, the matter can be taken to the ECJ.[397]

c. Actions Against EC Institutions

Article 230 of the EC Treaty defines when the ECJ has jurisdiction.[398] The ECJ has jusrisdiction in actions brought by a Member State, the Council, or the Commission on the following grounds: lack of competence, infringement of an essential procedural requirement, infringement of the EC Treaty, infringement of any rule of law relating to its application, or misuse of powers.[399] Accordingly, the ECJ must review the legality of acts adopted jointly by the European Parliament and the Council.[400] The Court must also review acts of the Council, the Commission, and the European Central Bank (ECB); the ECJ does not review the recommendations and opinions of these institutions.[401] Additionally, the ECJ reviews acts of the European Parliament intended to produce legal effects through the actions of third parties.[402] The ECJ has jurisdiction in actions brought by the European Parliament, the Court of Auditors, and the ECB for the purpose of protecting their prerogatives.[403] It also has juridiction in actions brought by any natural or legal person who wishes to challenge a decision addressed directly to that person or a decision addressed to a third party when the decision is of the original person's direct and individual concern.[404]

Under Article 232 of the EC Treaty, the Member States and the institutions of the EC may bring an action before the ECJ when they believe the European Parliament, the Council, or the Commission has infringed on the EC Treaty and to have such infringement established.[405] The action shall be admissible only if the institution concerned has first been called upon to act.[406] In addition, any natural or legal person may file a complaint with the ECJ alleging that an institution of the EC has failed to address any act other than a

395. *Id.*
396. *Id.*
397. *Id.*
398. EC TREATY art. 230.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.*
405. EC TREATY art. 232.
406. *Id.*

recommendation or an opinion.[407] Finally, the ECJ shall have jurisdiction, under the same conditions, over actions or proceedings brought by or against the ECB.[408]

Under Article 231 of the EC Treaty, if the action is well founded, the ECJ shall declare the concerned act void.[409] In the case of a regulation, however, the ECJ shall state which of the effects of the regulation declared void shall be considered definitive.[410]

3. Jurisdiction

Jurisdiction of the ECJ is very broad. Preliminary rulings are an example of this broad jurisdiction. Article 234 provides that the ECJ shall have jurisdiction to issue preliminary rulings concerning: (a) the interpretation of the EC Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; and (c) the interpretation of the statutes of bodies established by an act of the Council.[411] In some instances, the jurisdiction for preliminary ruling is discretionary. For example, if a question concerning the above matters is raised before a court or tribunal of a Member State, such court or tribunal may request the ECJ to give a ruling.[412] In contrast, ECJ jurisdiction is mandatory where any such question is raised in a case before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law.[413]

Article 235 of the EC Treaty provides that the ECJ shall have jurisdiction in disputes relating to compensation for damages provided for in the second paragraph of Article 288.[414] With respect to employment, Article 236 of the EC Treaty provides that the ECJ shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions established by the Staff Regulations or the Conditions of Employment.[415]

The ECJ also has jurisdiction concerning the European Investment Bank and the European System of Central Banks. Article 237 provides that in certain cases the ECJ shall have jurisdiction in disputes concerning: (a) the fulfillment by Member States of obligations under the Statute of the European Investment Bank; (b) measures adopted by the Board of Governors of the European Investment

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407. *Id.*
408. *Id.*
409. EC TREATY art. 231.
410. *Id.*
411. EC TREATY art. 234
412. *Id.*
413. *Id.*
414. EC TREATY art. 235. Article 288 regulates the contractual liability and non-contractual liability of the Community and the ECB and its institutions or servants in the performance of their duties for any damages caused. EC TREATY art. 288.
415. EC TREATY art. 236.

Bank; (c) measures adopted by the Board of Directors of the European Investment Bank; and (d) the fulfillment by national central banks of obligations under the EC Treaty and the Statute of the European System of Central Banks (ESCB).[416]

Finally, pursuant to Article 238 of the EC Treaty, the ECJ shall have jurisdiction to render judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the EC.[417] In addition, the ECJ shall have jurisdiction in any dispute between Member States concerning the EC Treaty when the dispute is submitted to the ECJ under a special agreement between the parties.[418]

4. Enforceability

Article 228 of the EC Treaty provides that if the ECJ discovers that a Member State has not fulfilled an obligation under the Treaty, it may require the State to take necessary measures to comply with the Court's judgment.[419] If the Commission finds that the Member State has not taken such measures, it shall give that State the opportunity to submit its observations.[420] Then, the Commission issues an opinion specifying how the Member State has failed to comply with the judgment.[421] If the Member State fails to take measures to comply with the judgment within the time limit established by the Commission, the Commission may bring the case before the ECJ.[422] In its action, the Commission shall specify the amount of the lump sum or a penalty payment to be paid by the Member State, which can be imposed as penalty by the ECJ.[423]

Concerning enforcement against EC Institutions and the ECB, Article 233 of the EC Treaty[424] provides that such institutions shall be required to take the necessary measures to comply with the judgment of the ECJ when any of their acts have been declared void.[425] Actions brought before the ECJ do not suspend the execution of the act.[426] Accordingly, the disputed act is applicable until it is held otherwise by the ECJ.[427] However, the ECJ may, at its discretion, suspend

416. EC TREATY art. 237.
417. EC TREATY art. 238.
418. EC TREATY art. 239.
419. EC TREATY art. 228.
420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. EC TREATY art. 233.
425. *Id.*
426. *Id.*
427. *Id.*

application of the contested act.[428] In addition, the ECJ may issue any necessary interim measures.[429]

Article 244 of the EC Treaty provides that the judgments of the ECJ shall be enforceable under the conditions of Article 256.[430] Article 256 provides that the decisions of the Council or Commission that impose a pecuniary obligation on entities other than States shall be enforceable.[431] Such enforcement shall be governed by the rules of civil procedure of the State where it is carried out.[432] The order for its enforcement shall be attached to the decision, without any other formality than verification of the authenticity.[433] The government of each Member State shall designate the national authority for this purpose.[434] When these formalities have been completed, the party may proceed to enforce the decision in accordance with the national law by bringing the matter directly before the competent authority.[435] Finally, enforcement may be suspended only by a decision of the ECJ.[436] However, the courts of the country concerned shall have jurisdiction over complaints of irregular enforcement.[437]

5. Judicial Review

Decisions of the ECJ have binding force and are applicable in all courts of the Member States.[438] Thus, national courts, as well as public authorities, are bound by the Court's interpretation.[439] The Court is guided in its express powers of judicial review by its recognition of supremacy and direct effect, general principles of law, and certain fundamental rights, including basic human rights, that the Court requires all Community institutions to respect.[440] The general principles that govern judicial decision-making include proportionality, equal treatment, legal certainty, non-retroactivity, and legitimate expectations.[441] The ECJ considers Community norms as authority in its decision-making efforts.[442]

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428. EC TREATY art. 242.
429. EC TREATY art. 243.
430. EC TREATY art. 244.
431. EC TREATY art. 256.
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.*
436. *Id.*
437. *Id.*
438. Court of Justice, *Your Questions*, *supra* note 317, *at* http://curia.eu.int/en/pei/faq.pdf.
439. *Id.*
440. *Id.* Hon. John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where is it Now?* 34 DUQ. L. REV. 923, 969 (1996).
441. *Id.* at 970.
442. *Id.*

Supremacy and direct effect are part of the Community's legal system that influences the relationship between the law of the Community and Member States.[443] Although the treaties that created Community law contain no express supremacy clause, the ECJ has developed the doctrine of supremacy that Community law should take precedence.[444] National authorities must comply with the ECJ's rulings and national courts must apply Community law.[445] Thus, when the ECJ declares a national law incompatible with Community law, all competent national authorities are automatically prohibited from applying the national law; the national courts are not to wait for a repeal by a constitutionally appropriate process.[446] The most important cases concerning supremacy and direct effect include *Van Gend en Loos*,[447] *Costa v. ENEL*[448] and *Simmenthal v. Commission.*[449] Based on these decisions, the citizens of Europe may now rely on the provisions of the Treaties and Community regulations and directives in proceedings before their national courts.[450]

XI. THE COURT OF JUSTICE OF THE ANDEAN COMMUNITY

A. Background

On May 26, 1969, Bolivia, Chile, Colombia, Ecuador, and Peru signed the Agreement on Andean Subregional Integration (Cartagena Agreement) that formally created the Andean Pact.[451] Venezuela later joined the Andean Pact in 1973.[452] The Andean Pact was a direct response to the frustration felt regarding the shortcomings of the Latin American Free Trade Area (ALALC).[453] ALALC was an economic integration program that began in 1960 and included all of the Spanish-speaking republics of South America plus Brazil and Mexico.[454] Many countries felt that ALALC was benefiting only the bigger and more industrialized

443. *Id.*
444. *Id.* at 969.
445. *Id*. at 970.
446. *Id.*
447. Case 26/62, NV Algemene Transp. van Gend & Loos v. Neth. Inland Revenue Admin., 1963 E.C.R. 1, [1964] C.M.L.R. 423.
448. Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, [1968] C.M.L.R. 267.
449. Case 243/78, Simmenthal v. Commission, 1980 E.C.R. 593.
450. Court of Justice of the European Communities, *The Court of Justice and the Life of European Citizens*, *at* http://curia.eu.int/en/pres/cijeu.htm (last visited Nov. 23, 2002).
451. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910 [hereinafter Cartagena Agreement]; Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L L. 811, 812 (1996).
452. O'Keefe, *supra* note 451, at 812.
453. *Id*.
454. *Id*.

Member States such as Argentina, Brazil, and Mexico to the detriment of the smaller, less-industrialized members.[455]

When Andean Pact countries signed the Cartagena Agreement in 1969, the primary goal was to establish a customs union.[456] To achieve this goal, the Cartagena Agreement provided for the gradual elimination of all tariff barriers and quantitative restrictions on goods native to and traded within the Andean region.[457] In recognition of their lesser-developed status, Bolivia and Ecuador were given more time to eliminate their import restrictions.[458] In addition, special lists of goods exempt from the general tariff reduction schedule were also permitted for all five countries, but only until 1985.[459] The Cartagena Agreement further called for the establishment of a Common External Tariff on all goods imported from all non-Andean countries that did not enjoy a pre-existing preferential tariff treatment under ALALC.[460] Articles 32 and 33 of the Cartagena Agreement called for the establishment of sectional industrial development programs.[461] Under these programs, various member countries of the Andean Pact would be involved in the production of a component of a manufactured good not already produced within the Andean countries.[462] When fully completed, these manufactured goods would then be traded among the Andean Pact states free of tariffs and import restrictions.[463] Products not manufactured within the sub-region nor reserved for the sectional industrial development programs were to be produced in new factories to be set up in Bolivia and Ecuador and traded within the Andean Pact free of tariffs and import quotas.[464] Both of these industrial development programs had the overtly political aim of garnering more support for the integration process among the various Andean states.[465] The programs accomplished this by promoting balanced regional growth, rather than permitting market forces to decide where the new industries would be located, as had been the case with ALALC.[466]

The Cartagena Agreement called for the creation of a common Andean Pact policy through foreign investment, trademarks, patents, and licenses in an attempt to control the perceived pernicious effects of foreign investment.[467] The

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455. *Id.*
456. *Id*. at 812-13.
457. Cartagena Agreement, *supra* note 451, art. 45; O'Keefe, *supra* note 451, at 813.
458. Cartagena Agreement, *supra* note 451, art. 46; O'Keefe, *supra* note 451, at 813.
459. Cartagena Agreement, *supra* note 451, art. 55; O'Keefe, *supra* note 451, at 813.
460. Cartagena Agreement, *supra* note 451, art. 61; O'Keefe, *supra* note 451, at 813.
461. Cartagena Agreement, *supra* note 451, arts. 32-33; O'Keefe, *supra* note 451, at 813.
462. O'Keefe, *supra* note 451, at 813.
463. *Id*.
464. *Id*.
465. *Id*.
466. *Id*.
467. Cartagena Agreement, *supra* note 451, art. 27; O'Keefe, *supra* note 451, at 813.

relevant Andean Pact institutional body responded by adopting Decision No. 24 in 1976.[468] Currently, Decisions 291 and 292 regulate foreign investment in the Andean nations.[469] Decision 291 provides that foreign investors shall have equal treatment as national investors, except as provided in the domestic legislation of the Member States.[470] Additionally, Decision 291 provides that owners of foreign investments have the right to repatriate the revenues obtained from their investments in freely convertible currency.[471] Finally, Decision 291 provides that controversies derived from direct foreign investments, sub-regional investments, or transference of technology in the Member States, shall be resolved according to the provisions of their domestic legislation.[472]

B. The Institutions of the Andean Community

The Andean Community was created pursuant to Article 5 of the Codification of the Andean Subregional Integration Agreement (Codified Cartagena Agreement).[473] The most relevant entities of the Andean Community are: (a) the Andean Presidential Council; (b) the Andean Council of Ministers of Foreign Affairs; (c) the Commission of the Andean Community; (d) the General Secretariat of the Andean Community; (e) the Court of Justice of the Andean Community; and (f) the Andean Parliament.[474] The Codified Cartagena Agreement and the respective treaties of creation regulate these entities.[475]

468. Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses, and Royalties, Nov. 30, 1976, 16 I.L.M. 138; O'Keefe, *supra* note 451, at 813.

469. Andean Group: Commission Decision 291, Common Code for the Treatment of Foreign Capital and on Trademarks, Patents, Licenses and Royalties, Mar. 21, 1991, 30 I.L.M. 1283 [hereinafter Decision 291]; Andean Group: Commission Decision 292, Uniform Code on Andean Multinational Enterprises, Mar. 21, 1991, 30 I.L.M. 1295 [hereinafter Decision 292].

470. Decision 291, *supra* note 469, art. 2.

471. *Id*. art. 4.

472. *Id*. art. 10.

473. Andean Group, Commission Decision 406, Codification of the Andean Subregional Integration Agreement, Jun. 25, 1997, art. 5, http://www.comunidadandina.org/ingles/treaties/trea/ande_trie1.htm [hereinafter Codified Cartagena Agreement].

474. *Id*. art. 6.

475. *Id*. art. 8.

C. Legal Framework of the Court of Justice of the Andean Community

1. Codification of the Andean Subregional Integration Agreement

Chapter II, Section E of the Codified Cartagena Agreement regulates the Court of Justice of the Andean Community (CJAC).[476] The Codified Cartagena Agreement only provides for the general framework of the CJAC. It establishes in Article 40 that the CJAC is the jurisdictional entity of the Andean Community.[477] Article 41 states that its treaty of creation, its protocols, and the Codified Cartagena Agreement shall govern the CJAC.[478] Finally, it provides that the CJAC shall have its seat in Quito, Ecuador.[479] With respect to resolution of disputes concerning the application of the legal provisions of the Andean Community, the Codified Cartagena Agreement provides that they shall be subject to the norms of the treaty that created the CJAC.[480]

2. Treaty of Creation of the Court of Justice of the Andean Community

The Court of Justice of the Andean Community is regulated by the Treaty Creating the Court of Justice of the Cartagena Agreement as modified by the Protocol of Cochabamba, (CJAC Treaty).[481] The CJAC Treaty regulates the legal system of the Andean Community (*ordenamiento jurídico*),[482] the creation and organization of the Court,[483] and its subject matter jurisdiction.[484] It is worth noting that the decisions of the CJAC, acting as a Court or as an arbitrator,as well as the decisions of the General Secretariat acting as an arbitrator, are directly applicable in the Member States.[485] Due to direct applicability, there is no need to follow a procedure of *exequatur*, homologation, or any other domestic procedure to enforce foreign awards.[486]

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476. *Id*. arts. 40-41.
477. *Id*. art. 40.
478. *Id*. art. 41.
479. *Id*.
480. *Id*. art. 47.
481. Treaty Creating the Court of Justice of the Cartagena Agreement, *opened for signature* May 28, 1996, http://www.comunidadandina.org/ingles/treaties/trea/ande_trie2.htm (lasted visited Nov. 23, 2002) [hereinafter CJAC Treaty].
482. *Id*. arts. 1-4.
483. *Id*. arts. 5-16.
484. *Id*. arts. 17-40.
485 *Id*. art. 3.
485. *Id*. art. 1.
486. *Id*. art. 41.

a. The Legal System of the Andean Community

The legal system of the Andean Community is composed of: (a) the Cartagena Agreement, its Protocols and Additional Instruments; (b) the CJAC Treaty and its Protocols; (c) the Decisions of the Andean Council of Ministers of Foreign Affairs and the Commission of the Andean Community; and (d) the Resolutions of the General Secretariat of the Andean Community, among others.[487] A unique aspect of the Andean Community is that, according to Article 2 of the CJAC Treaty, the decisions issued by the Council of Ministers of Foreign Affairs or the Commission are obligatory for the Member States as of the date they are approved by either of these entities. Article 3 further provides that such decisions and the resolutions of the General Secretariat are directly applicable to the Member States when published in the Official Gazette of the Agreement, unless they indicate another date.[488] In theory, no further domestic adoption or approval is necessary for the decisions to be binding upon the Member States. Article 3 provides that the decisions will require adoption by national legislation only when the decision requires it in its text.[489] Member States must adopt the measures necessary to ensure the compliance with the legal provisions of the Andean Community.[490]

b. Organization of the CJAC

The Court is composed of five justices and their alternates, who must be nationals of the Member States.[491] The justices must meet the conditions required in their corresponding country of origin to become justice of its high Court (i.e. Supreme Courts).[492] They are appointed unanimously by the Plenipotentiaries of the states and remain in office for six years.[493] The Justices can be removed if so

487. *Id*. art. 1.

488. *Id*. art. 3.

488. *Id*. art. 1.

489. However, some authors have said that the concept of direct applicability is similar to the situation that exists with respect to regulations issued by the Council of the European Union. In their opinion, erroneous according to the point of view of both Thomas O'Keefe and this author, the major difference between the European Union and the Andean Pact is, however, that direct applicability has been widely accepted in the European Union while it has historically been honored more in the breach than in practice in the Andean context. *See, e.g*., J.G. Andueza, *La Aplicación Directa del Ordenamiento Jurídico del Acuerdo de Cartagena, in* EL TRIBUNAL DE JUSTICIA DEL ACUERDO DE CARTAGENA (1985) (cited by Thomas O'Keefe, *supra* note 451, at 814 n.18).

490. CJAC Treaty, *supra* note 481, art. 4.

491. *Id*. art. 6.

491. *Id*. art. 1.

492. *Id*. art. 6.

493. *Id*. arts. 7-8.

required by a Member State, according to the procedure set forth in the statute of the CJAC.[494] Finally, the CJAC functions with one Secretary and any other necessary personnel appointed by the Court.[495] The Commission of the Andean Community approves CJAC's budget.[496]

c. Subject Matter Jurisdiction

1. Petitions for Annulment

The CJAC can annul the Decisions of the Andean Council of Ministers, the Commission of the Andean Community, and the Resolutions of the General Secretariat when they contravene the norms that compose the legal system of the Andean Community.[497] The petition for annulment can be filed by Member States, the Council of Ministers of Foreign Affairs, the Commission of the Andean Community, the General Secretariat, or private parties.[498] Member States can only file petitions for annulment when they have not given an affirmative vote to approve the relevant decision or agreement.[499] Private parties, whether individuals or legal entities, can file petitions for annulment only if the relevant document "affects their subjective rights or their legitimate interests."[500]

The petition for annulment must be filed within the two years following the entry into force of the relevant document.[501] However, even after the ending of this term, interested parties may request through their domestic courts not to apply the breaching Andean document to a specific case before them, if the case is related to such document and its validity is questioned according to Article 17 of the CJAC Treaty.[502] In this case, the domestic court shall consult with the CJAC on the validity of the questioned document and will suspend the domestic procedure until there is a decision from the CJAC.[503] Any such decision of the CJAC will only be applicable to the relevant party.[504] The filing of a petition for

494. *Id*. art. 10.
495. *Id*. art. 14.
496. *Id*. art. 16.
497. *Id*. art. 17.
498. *Id*.
499. *Id*. art. 18.
500. The CJAG Treaty reads in Spanish, "*Las personas naturales y jurídicas podrán intentar la acción de nulidad contra las Decisiones del Consejo Andino de Ministros de Relaciones Exteriores, de la Comisión de la Comunidad Andina, de las Resoluciones de la Secretaría General o de los Convenios que* afecten sus derechos subjetivos o sus intereses legítimos" (emphasis added). *Id*. art. 19.
501. *Id*. art. 20.
502. *Id*.
503. *Id*.
504. *Id*.

annulment does not suspend the disputed act, unless the petitioner requests its suspension.[505] The court may require the filing of a bond, and may order the suspension of the relevant document, or other provisional measure, if it considers that its application can cause the party irreparable harm.[506] Once the CJAC has declared an act null and void, the entity that issued such act must adopt the decision of the Court and modify the document accordingly, within the terms provided by the Court in its decision.[507]

2. Petitions to Declare a Party in Breach of its Obligations

If the General Secretariat believes that a Member State has breached any of its obligations under the legal system of the Andean Community, it shall inform such state, in writing, of its opinion.[508] The Member State shall answer the notice in a term not to exceed sixty days.[509] After receiving the answer, the General Secretariat must issue a decision on the status of compliance of the relevant norm by the Member State.[510] If the General Secretariat finds that the state has breached any of its obligations under the legal system of the Andean Community, and the Member State insists on its conduct, the General Secretariat shall request the decision of the CJAC on the relevant matter.[511]

In addition, a Member State can also commence procedures if it believes another Member State is breaching its obligations.[512] In this case, the state may file a petition before the General Secretariat to issue a decision.[513] If the Secretariat finds the state to be in breach of its obligations, it shall request a decision from the CJAC.[514] In addition, the claiming Member State can request a decision directly from the CJAC.[515] The state makes the request if the Secretariat fails to file a petition before the CJAC in a timely manner or if the Secretariat's decision is that the relevant Member State has not breached.[516]

Individuals or legal entities whose rights are affected by a Member State breaching its obligations under the provisions of the Andean Community, may file a petition before either the CJAC or the General Secretariat. [517] It can be inferred

505. *Id*. art. 21.
506. *Id*.
507. *Id*. art. 22.
508. *Id*. art. 23.
509. *Id*.
510. *Id*.
511. *Id*.
512. *Id*. art. 24.
513. *Id*.
514. *Id*.
515. *Id*.
516. *Id*.
517. *Id*. art. 25.

that the petition is to request that the Secretariat or the CJAC commence the procedures for a declaration of breach by a Member State according to the provisions described above. Once the party has filed an action before either the Court or the Secretariat, it is precluded from simultaneously filing a similar action before domestic courts.[518] In this case, the decision issued by the CJAC under Article 25, shall serve as sufficient legal title for the private party to request an award of damages from its domestic courts.[519]

Concerning sanctions, if the CJAC finds that a Member State has breached any of its obligations under the Community provisions, the Member State shall adopt any necessary measures to come into compliance with the breached norm.[520] However, if the Member State has not complied with the decision in ninety days after notification, the CJAC shall determine the limits within which the claimant or any other Member State may restrict or suspend, totally or partially, the benefits granted to the breaching state under the Cartagena Agreement.[521]

All of the decisions issued by the CJAC are subject to revision.[522] The interested party may file a recourse requesting the revision of the decision.[523] CJAC will grant a revision of its prior decision only on the basis of a new fact, unknown to the parties on the date of the decision, which can decisively influence the outcome of the case.[524]

3. Pre-Judicial Interpretation

Domestic judges are required to consult the opinion of the CJAC on specific issues relating to the norms of the Andean Community, when the issue is addressed in cases before their courts.[525] The consultation with the CJAC is mandatory when the decision of the relevant procedure in the domestic court will be a final decision that is not subject to recourse under the domestic laws.[526] If, however, the decision of the domestic court where the Andean provision is being reviewed is subject to recourse, the consultation with the CJAC is only discretionary.[527] This is because it is understood that if the Andean issue is raised and there is no further recourse under the domestic system, a higher domestic court will have to consult with the CJAC. In cases of discretionary consultation, if

518. *Id*. arts. 25, 31.
519. *Id*. art. 30.
520. *Id*. art. 27.
521. *Id.*
522. *Id*. art. 29.
523. *Id*.
524. *Id*.
525. *See id*. art. 32.
526. *See id*. art. 33.
527. *See id*.

the CJAC has not answered the consultation by the time the domestic court must issue a decision, the domestic court may do so without the opinion of the CJAC.[528] The scope of review of the CJAC is limited to the content of the relevant Andean provision.[529] The CJAC cannot interpret domestic laws, nor can it issue an opinion on the facts, except as required to interpret the application of the Andean provision.[530] In any case, the opinion of the CJAC is binding upon the domestic judges.

4. Recourse for Omission or Inactivity

The entities of the Andean Community, Member States, or private parties affected in their rights may request the CJAC order the Andean Council of Foreign Ministers, the Andean Community Commission, or the General Secretariat to perform any obligation to which they are bound under the norms of the Andean Community.[531] If the entity does not comply with its obligations within thirty days, the petitioner may request a pronouncement on the matter from the CJAC.[532] The CJAC must issue a decision, based on the technical documents available, the history of the case, and the explanations of the entity subject to recourse.[533] The decision of the CJAC shall be published in the Official Gazette of the Cartagena Agreement, and it shall express the form and time granted to the entity to comply with its obligations.[534]

5. Arbitral Function

The CJAC may act as arbitrator in the controversies derived from the application or interpretation of contracts, accords or agreements executed between the entities of the Andean Community, or between these and third parties.[535] Article 38 provides that the CJAC shall act as arbitrator when it is so agreed to by the parties.[536] However, it is not clear if the agreement is required in the case of controversies between the entities of the Community and/or in controversies between Community entities and third parties. If it were applicable to the controversies between the entities of the Community, it would seem that such

528. *Id*.
529. *Id*. art. 34.
530. *Id*.
531. *Id*. art. 37.
532. *Id*.
533. *Id*.
534. *Id*.
535. *Id*. art. 38.
536. *Id*.

entities can either file the petitions for annulment, breach, or inactivity against each other, or they can alternatively request that the CJAC act as arbitrator.[537]

Private parties can also request that the CJAC act as arbitrator in the controversies derived from their private contracts governed by provisions of the legal system of the Andean Community.[538] At the request of the parties, the arbitration can be of law or equity.[539] The arbitral decision shall be binding, not subject to recourse, and sufficient to be executed under the domestic laws of the relevant parties, according to the provisions of the applicable domestic laws.[540] In addition, the General Secretariat can also act as arbitrator for the controversies between private parties derived from their private contracts and governed by norms of the Andean Community.[541] In this case, the General Secretariat shall issue its decision based on equity and such decision shall be binding and not subject to appeal, unless the parties agree otherwise.[542]

6. Labor Jurisdiction

Article 40 of the CJAC Treaty provides that the CJAC is competent to decide labor controversies originating within the entities and institutions of the Andean Community.[543] Yet, there has been little or no activity on the part of the CJAC on labor matters.

3. Statute of the Court of Justice of the Andean Community

The Statute of the Court of Justice of the Andean Community (Statute), was signed on June 22, 2001.[544] The Statute contains in greater detail the same provisions of the CJAC Treaty. In some cases, it repeats the provisions of the CJAC Treaty and in others it includes more detail on the institutions and procedures set forth in the same. Article 14 of the Statute establishes that the

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537. Article 38 provides in Spanish: "*El Tribunal es competente para dirimir mediante arbitraje las controversias que se susciten por la aplicación o interpretación de contratos, convenios o acuerdos, suscritos entre órganos e instituciones del Sistema Andino de Integración o entre éstos y terceros,* cuando las partes así lo acuerden" (emphasis added). *Id*.

538. *Id*.

539. *Id*.

540. *Id*.

541. *Id*. art. 39.

542. *Id*.

543. *Id*. art. 40.

544. Andean Group: Commission Decision 500, Estatuto del Tribunal de Justicia de la Comunidad Andina, Jun. 22, 2001, G.O.A.C. No. 680 [hereinafter Statute] http://www.comunidadandina.org/normativa/dec/d500.HTM.

CJAC shall have a President, who shall be appointed by the Court for a period of one year, to be succeeded by each of the Justices appointed by the other Member States.[545] The President shall represent the Court, direct its activities, and call and preside over the sessions.[546] The Statute regulates the removal of the Justices for notorious bad conduct, carrying out any actions incompatible with the nature of their office, constant breach of their official duties, performance of professional activities (with the exception of academic activities), or breach of their oath.[547]

The Court shall function in administrative and judicial sessions.[548] The quorum for administrative sessions is three Justices, and decisions must be adopted with the favorable vote of at least three of them.[549] The quorum for interlocutory acts is three Justices, and the vote of all three is required to adopt an interlocutory decision.[550] Interlocutory decisions that terminate the procedure, as well as final decisions, shall require a quorum of five Justices and the favorable vote of at least three of them.[551] In the case of pre-judicial interpretations and processes on labor issues, the Court must session with at least three Justices, and the Court shall decide with the affirmative vote of three.[552] Finally, the Court shall be conducted in Spanish.[553] However, other languages and dialects may be used before the CJAC, provided they are translated into Spanish.[554]

4. Procedures Before the Court

Article 39 of the Statute provides that only an individual authorized by their country can represent a Member State.[555] In addition, individuals bearing powers granted by the President or General Secretary of the Andean Community shall represent the entities of the Andean Community.[556] Parties shall act before the CJAC in their own name or as representatives, in accordance with powers of attorney issued pursuant to the laws of the corresponding Member State.[557] Parties acting before the CJAC must be either attorneys or must be assisted by an attorney authorized under the laws of one of the Member States.[558]

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545. *Id*. art. 14.
546. *Id*. art. 15.
547. *Id*. art. 11.
548. *Id*. art. 29.
549. *Id*. art. 31.
550. *Id*. art. 32.
551. *Id*.
552. *Id*.
553. *Id*. art. 34.
554. *Id*.
555. *Id*. art. 39.
556. *Id*.
557. *Id*.
558. *Id*.

Articles 45 to 55 of the Statute contain a detailed list of the requirements to file a complaint before the CJAC, of the mandatory annexes to the complaint, and other special requirements depending on the type of petition filed.[559] Articles 54 and 55 of the Statute regulate the admission of the complaint and norms for reform.[560] In addition, as is the case with the complaint, Articles 56 to 61 of the Statute regulate the answer to the complaint.[561] The defendant has forty days after notice of the complaint to file an answer.[562] The answer must comply with the requirements of Article 56 of the Statute and shall have certain annexes defined in Article 57 thereof.[563] The defendant may also file a counter-petition.[564] If a party fails to answer a complaint within the legal period, it is assumed that the defendant has denied all the points raised in the complaint.[565]

Third parties can become parties to a procedure as assistants to either of the named parties, provided they have substantial legal interest in the process and could eventually be affected unfavorably if the named party loses.[566] The assisting third party may perform acts that do not contravene the position of the named party being assisted.[567] Its petition to assist must comply with the same requirements for filing a complaint.[568]

Article 76 of the Statute lists the evidence admissible before the CJAC.[569] It includes declarations of the parties, documents, testimonies, experts, judicial inspections, and any other ideal to assist the Court in reaching a decision.[570] In addition to the evidence brought by the parties, the Court may order the presentation of any other evidence it deems necessary to reach a decision.[571]

Once the CJAC reaches a decision, it shall have binding effect upon the Member States without need for an *exequatur* procedure or homologation by domestic courts.[572] The court may amend or clarify the decision if it contains writing or calculation mistakes, or if it has decided on an issue that was not contained in the complaint.[573] It may also add to the decision when the CJAC has failed to decide on some point of the complaint.[574] The Statute provides for summary judgment where a party has failed to comply with a decision of the

559. *Id*. arts. 44-55.
560. *Id*. arts. 54-55.
561. *Id*. arts. 56-61.
562. *Id*. art. 56.
563. *Id*. arts. 56-57.
564. *Id*. art. 59.
565. *Id*. art. 60.
566. *Id*. art. 71.
567. *Id*. art. 72.
568. *Id*.
569. *Id*. art. 76.
570. *Id*.
571. *Id*. art. 77.
572. *Id*. art. 91.
573. *Id*. art. 93.
574. *Id*. art. 92.

CJAC.[575] This summary procedure can be commenced by the Court itself or by the petition of an interested party.[576] Furthermore, the CJAC can allow the benefited party to impose sanctions in the form of suspension of the benefits granted to the losing party under the Cartagena Agreement.[577]

D. Dispute Resolution Experience under CJAC

As of June 2002, the CJAC had decided twenty-three petitions for annulment.[578] In addition, the CJAG has decided seventy-two petitions for breach of obligations.[579] Moreover, CJAC has issued 395 pre-judicial interpretations from 1987 to July 1, 2002.[580] The following section is a summary of certain important decisions of the CJAC.

1. Special treatment of Bolivian and Ecuadorian exports to other Member States, where goods are included in the list of exceptions of the importing states as not benefited goods

The CJAC decided *Colombia v. Resolution 237 of the Board of the Cartagena Agreement* (process: 1-AN-85) on October 10, 1985.[581] In this case, the CJAC held that Resolution 237 of the Board of the Cartagena Agreement, dated August 8, 1984, to be null and void.[582] The CJAC exonerated the Board from payment of fees and ordered the Board to adopt the provisions necessary to comply with the decision.[583] The following is the CJAC's rationale for its

575. *Id*. art. 112.

576. *Id*. art. 113.

577. *Id*. art. 119.

578. *See* Comunidad Andina Secretaría, *General Sentencias del Tribunal Andino de Justicia: Acciones de Nulidad*, *at* http://www.comunidadandina.org/normativa/sent/sentencias_2.htm (last visited Nov. 23, 2002).

579. *See* Comunidad Andina Secretaría, *General Sentencias del Tribunal Andino de Justicia: Acciones de Incumplimiento*, *at* http://www.comunidadandina.org/normativa/sent/sentencias_3.htm (last visited Nov. 23, 2002).

580. Thirty-seven from 1987 to 1994; 14 during 1995; 23 during 1996; 26 during 1997; 71 during 1998; 41 during 1999; 59 during 2000; 79 during 2001; 45 from January to July 1, 2002. *See* Comunidad Andina Secretaría, *General Sentencias del Tribunal Andino de Justicia*: *Interpretaciones Pre-Judiciales*, *at* http://www.comunidadandina.org/normativa/sent/sentencias_2.htm.

581. Proceso No. 1-N-85, Rep. de Colombia v. Resolución 237 de la Junta, *at* http://www.comunidadandina.org/normativa/sent/1-AN-85.HTM.

582. *Id*.

583. *Id*.

decision. One of the objectives of the Cartagena Agreement is the program of liberation, which has the purpose of eliminating duties and barriers of any type that impact the import of products originating in the Member States.[584] However, the Agreement allows Member States to exempt certain products from the program to protect selected domestic industries.[585] Notwithstanding that provision, Article 58 of the Agreement provides that, under certain circumstances, the lists of exempted products of the Member States are not applicable to Bolivia and Ecuador.[586] Hence, the lists of duty free exemptions of Colombia, Peru, and Venezuela are not applicable to Bolivia and Ecuador, provided the relevant goods have been significantly traded between the corresponding country and Bolivia or Ecuador during the previous three years, or have true possibilities of significant commerce.[587]

Although there are no specific rules for the Board to make findings of fact, the Board cannot act capriciously.[588] The Board must have proof of the significant trade or the prospects of significant trade to grant Bolivia or Ecuador the benefit.[589] When the Board has insufficient evidence, the resolution is null.[590] To determine if there has been significant trade, the Board must review individual products that have been traded between the relevant countries.[591] Article 58 refers to products and not tariff classifications; identifying a product with a tariff classification generates confusion because various products can be included under one tariff classification.[592] To make these determinations the Board does not require the opinion of the relevant parties, nor is it obligated to notify them of the investigations.[593] The Board was imprecise when it established Resolution 237 determined the existence of significant trade of aluminum tubes and bars originating in Ecuador and classified under 76.06.00.00 of the NABANDINA.[594] The Board should have specified the particular product within the products of the relevant tariff classification that would benefit from the Resolution.[595]

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584. Cartagena Agreement, *supra* note 451, art. 41.

585. *Id*. art. 46.

586. *Id*. art. 58.

587. *Id*.

588. Proceso No. 1-N-85, *at* http://www.comunidadandina.org/normativa/sent/1-AN-85.HTM.

589. *Id*.

590. *Id*.

591. *Id*.

592. *Id*.

593. *Id*.

594. *Id*. NABANDINA is the Harmonized Tariff Classification System of the Andean Community, as of the date of the Court decision.

595. *Id*.

2. Nature of the Safeguard Measure in Cases of Currency Devaluation

The CJAC decided *Colombia v. Resolution 252 of the Board of the Cartagena Agreement* (process: 1-AN-86) on June 10, 1987.[596] The CJAC held that Section (b) of Article 1, and the final section of Article 4 of Resolution 252 of April 16, 1986 of the Board of Cartagena Agreement to be null and void.[597] The CJAC used the following analysis to decide *Colombia v. Resolution 252*: Colombia alleges that the devaluations of the Venezuelan Bolivar have substantially altered the conditions of market competition.[598] Colombia further allegeed that this situation has not been corrected in various months and instead had worsened.[599] Hence, Colombia was obligated to invoke the safeguard clause for monetary devaluation.[600] The limited term set by the Board for the application of the safeguard measure is inconsistent with the effects of the devaluation, and the impact of the exchange measures adopted by Venezuela; the Board was not empowered to fix the term of duration of a safeguard measure.[601] The Board sustained that safeguard measures must be transitory and necessarily authorized by the Board.[602] The Board cited to resolutions of the Council of Ministers of the ALALC[603] as precedents for its interpretation:

> Any integration process consists . . . in overcoming the national limits of the countries that attempt to integrate to achieve the birth of a greater unity that functions as such. . . . Concretely, within the Cartagena Agreement it is sought, in the first instance, the liberation of commercial interchange, that is, the free circulation of goods, which supposes the elimination of duties and restrictions of any type that hinder or obstruct commerce in the subregion of products originating within it.[604]

596. Proceso No. 1-N-86, República de Colombia v. Resolución 252 de la Junta, Jun. 10, 1987, *at* http://www.comunidadandina.org/normativa/sent/1-AN-86.HTM.

597. *Id*.

598. *Id*.

599. *Id*.

600. *Id*.

601. *Id*.

602. *Id*.

603. Latin American Free Trade Association (ALALC) was later replaced by the current Latin American Integration Association (ALADI). O'Keefe, *supra* note 451, at 812 n.5.

604. Proceso No. 1-N-86, *at* http://www.comunidadandina.org/normativa/sent/1-AN-86.HTM (translation by author); *see* Cartagena Agreement, *supra* note 451, art. 41.

In the future, this process of internal free market will protect the products of the sub-region through a common external tariff.[605] Although the tariff is universal, automatic, and irrevocable, it must admit exceptions such as those authorized by Chapter IX of the Agreement.[606] It is convenient to recognize that such clauses are an extreme remedy only acceptable as an exception, as a transitory and necessary defense.[607] The Court further held that:

> If [we] want the integration process to be realistic and objective, [we] cannot forget the general principles of public law that authorize the state, in cases of urgency, to take the necessary measures to affront serious disturbances. . . . [H]owever, it is necessary to realize that these exceptional measures make the process of integration impossible. The due conciliation of these interests, those of the affected country, and those of the integration shall be the basic criteria to interpret and apply the norms of the Agreement. . . . [Hence] while the process of liberation is automatic and irrevocable, the exemption defense . . . cannot be unilateral, automatic or irrevocable.[608]

The Cartagena Agreement allows the application of safeguard measures as a defense in cases of serious injury that affect the Member States' economies,[609] when the Member States have problems with their balances of payment,[610] or in cases of problems derived from monetary devaluation.[611] In the first two cases, Member State must have the prior authorization of the Board.[612] However, in the case of currency devaluation, the Board is limited to verifying the injury that the devaluation is causing in the affected states.[613] Once it is verified, the Board is limited to issuing "recommendations," which, it should be noted, does not affect its general powers of control to avoid abuses of the clause.[614]

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605. Proceso No. 1-N-86, *at* http://www.comunidadandina.org/normativa/sent/1-AN-86.HTM

606. *Id*.

607. *Id*.

608. *Id*. (translation by author).

609. S*ee* Cartagena Agreement, *supra* note 451, art. 79; Treaty of Montevideo Establishing the Latin Free Trade Association, Feb. 18, 1960, 2 M.I.G.O. 1575, art. 23 [hereinafter Montevideo Agreement].

610. Montevideo Agreement, *supra* note 609, art. 24.

611. Cartagena Agreement, *supra* note 451, art. 80.

612. Proceso No. 1-N-86, *at* http://www.comunidadandina.org/normativa/sent/1-AN-86.HTM.

613. *Id*.

614. *Id*.

3. National Treatment, Most Favored Nation Treatment and International Cooperation in Intellectual Property

The CJAC decided *César Moyano Bonilla v. Articles 1, 2 and 279 of Decision 486 of September 14, 2000 of the Commission of the Cartagena Agreement* (process: 14-AN-2001) on February 1, 2002. [615] The petition in this case challenged articles 1, 2 and 279 of Decision 486. Article 1 provides that Member States shall not give their own nationals more favorable treatment.[616] With respect to the protection of intellectual property, each Member State shall grant the nationals of the other Member States of the Andean Community, the World Trade Organization, and the Treaty of Paris for the Protection of Industrial Property treatment no less favorable than that granted to its own nationals.[617] Exceptions to this rule are provided in Articles 3 and 5 of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement and Article 2 of the Paris Convention for the Protection of Industrial Property.[618] Likewise, they may grant such national treatment to the nationals of a third country under the conditions set forth in the national legislation of the corresponding Member State.[619]

Article 2 of Decision 486 addresses most favored nation status.[620] With respect to the protection of intellectual property, all advantages, favors, privileges or immunities granted by a Member State to the nationals of another Member State of the Andean Community will be extended to the nationals of any member of the World Trade Organization or of the Treaty of Paris for the Protection of Industrial Property.[621] These provisions shall apply without prejudice to the exceptions set forth in articles Four and Five of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement.[622]

Article 279 of Decision 486 provides that Member States may sign cooperation agreements on industrial property cooperation that do not violate this Decision, such as the Treaty on Cooperation on Patents.[623] The claimant argues that the Commission has exceeded its powers granted under the Cartagena

615. Proceso No. 14-AN 2001, Acción de Nulidad Interpuesta por el Abogado César Moyano Bonilla v. Los Artículos 1, 2 y 279 de la Decisión 486 Expedida por la Comisión de la Comunidad Andina, el 14 de Septiembre del 2000, Mar. 18, 2002, G.O.A.C. No. 773, http://www.comunidadandina.org/normativa/sent/14-AN-2001.htm.

616. Andean Group: Commission Decision 486, Common Intellectual Property Regime, art 1. [hereinafter Decision 486].

617. *Id*.

618. *Id*.

619. *Id*.

620. *Id*. art. 2.

621. *Id*.

622. *Id*.

623. *Id.* art. 279.

Agreement and the Codified Cartagena Agreement.[624] The claimant alleges that with respect to Article 1 and 2 of Decision 486, the benefits granted under the Cartagena Agreement are applicable to the Member States and not third countries, and that is the limit of the scope of the Cartagena Agreement under its Treaty of Creation.[625] Consequently, the claimant asserted that the Commission has no power to extend the benefits granted to the Member States under the Andean System to any third parties. Decision 486 does not specify the measures to which national treatment applies. The same is the case for national treatment on intellectual property matters, which is defined in Article 3 of the TRIPs.

Regarding the standing of individuals before the CJAC, the CJAC held that individuals acting before it must prove that the disputed norms affect their subjective rights or legitimate interests.[626] This is evidenced first by the fact that the individual directly benefits from the Andean legal system.[627] Second, "as an attorney, he has interest in ensuring the maintenance, respect and compliance of the legal system of the Andean Community."[628] This reasoning is enough for the CJAC to consider that the claimant has standing before the Court in this matter.

The CJAC then considered whether broadening the scope of most favored nation and national treatment was a breach of its powers. The Codified Cartagena Agreement regulates National Treatment and Most Favored Nation treatment in Articles 74 and 155, respectively.[629] The regulation of these issues in the Treaty makes it impossible to modify or alter them without an amendment to the Treaty.[630] Extending the National Treatment or Most Favored Nation benefits to states outside the Community can only be done through an amendment of the Treaty.[631] The Commission has no powers to amend the Treaty by issuing a Decision such as Decision 486.[632] Hence, the Commission breached its powers by broadening the scope of Most Favored Nation and National Treatment in intellectual property matters to non-Member States.[633] Accordingly, the CJAC declared Article 1 of Decision 486 partially null and void, and declared Article 2 entirely null and void.[634]

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624. Proceso No. 14-AN 2001, Acción de Nulidad Interpuesta por el Abogado César Moyano Bonilla v. Los Artículos 1, 2 y 279 de la Decisión 486 Expedida por la Comisión de la Comunidad Andina, el 14 de Septiembre del 2000, Mar. 18, 2002, G.O.A.C. No. 773, http://www.comunidadandina.org/normativa/sent/14-AN-2001.htm.

625. *Id*.

626. *Id*.

627. *Id*.

628. *Id*.

629. Codified Cartagena Agreement, *supra* note 473, arts. 74, 155.

630. Proceso No. 14-AN-2001, *at* http://www.comunidadandina.org/normativa/sent/14-AN-2001.htm.

631. *Id*.

632. *Id*.

633 *Id*.

634. *Id*.

4. National Treatment

The CJAC decided *Colombia v. Resolution 311 of November 3, 1999 of the General Secretariat of the Cartagena Agreement* (process 79-AN-2000) on October 19, 2001.[635] Resolution 311 of the General Secretariat provided that the levying of the implicit VAT by the Government of Colombia, through Decree 1344 of 1999, on the imports originating in the sub-region is a contribution,[636] and hence, grants Colombia a period of no more than one month to declare without effect the mentioned contribution for the Member States of the Andean Community.[637] On August 2, 1999, the *Corporación Cámara Colombo Ecuatoriana de Industria y Comercio* filed a claim before the General Secretariat alleging the application by Colombia of a tax on the import of products included in 381 customs classifications.[638]

The CJAC analyzed the meaning of National Treatment in its decision. Article 74 of the Cartagena Agreement regulates National Treatment.[639] The principle supposes that the products imported to a Member State from other Member States, benefited under the program of liberation, shall receive internally the same treatment given to the goods of national production.[640] Contrary to the claimant's assumptions, it does not mean that the imported products cannot have better internal treatment than that granted to national products.[641] In this case, the National Treatment principle allowed the application of contributions to imported products to make them equivalent to the similar national product.[642]

635. Proceso No. 79-AN-2000, La República de Colombia v. Resolución 311 Expedida por la Secretaría General de la Comunidad Andina el 3 de Noviembre de 1999, Oct. 19, 2001, G.O.A.C. No. 730, http://www.comunidadandina.org/normativa/sent/79-AN-2000.HTM.

636. The exact Spanish word is "*gravamen,*" which refers to any type of tribute.

637. Andean Group: Commission Resolución 311, Calificación de la Medida Adoptada por el Gobierno de Colombia Referida al Cobro del IVA Implícito a las Importaciones Subregionales Adoptada Mediante Decreto 1344, como Gravamen al Comercio, Nov. 3, 1999, G.O.A.C. No. 503, http://www.comunidadandina.org/normativa/res/R311SG.HTM.

638. Proceso No. 79-AN 2000, http://www.comunidadandina.org/normativa/sent/79-AN-2000.HTM.

639. *Id*.

640. *Id*.

641. *Id*.

642. *Id*.

5. Rules of Origin

The CJAC decided *BOPP DEL ECUADOR CIA. LTDA, v. Resolution 410 of the General Secretariat* (process 65-AN-2000) on July 14, 2000.[643] Bopp del Ecuador Cia. Ltda., requested the annulment of Resolution 410 because this Resolution did not comply with the specific rules of origin established in Resolution 306 of the General Secretariat.[644] The Resolution suspended the certificates of origin of the sub-regional exports of polypropylene of BOPP of Ecuador (tariff classification 3920.20.00) for a term of six months as of the publication of the Resolution.[645] This rule of origin requires the use of propylene (tariff classification 2711.14.00) produced in the sub-region as a component of bioriented polypropylene.[646] Article 2 of the disputed Resolution provides that polypropylene imported from a country outside the sub-region may qualify under the rules of origin if the corresponding Common External tariff is paid.[647] The claimant alleges that the Secretariat made a mistake in considering propylene as a component of bioriented polypropylene when in reality, the product used is polypropylene corresponding to the tariff classification of Article 2.[648]

On the issue of rules of origin applicable to raw materials, the Board of the Cartagena Agreement has established a very clear and specific exception to the rule of origin.[649] This exception allows raw materials produced outside the sub-region to qualify under the rules of origin, provided the Common External tariff is paid.[650] Therefore, the final product made of such raw materials may be benefited under the duty free program of the Cartagena Agreement.[651]

However, the court found that the Resolution was not clear.[652] It confused the use of propylene in Article One and polypropylene in Article 2 as raw material for the manufacture of films of bioriented polypropylene.[653] This imprecision of the norm makes it impossible to determine the type of raw material, whether propylene or polypropylene, benefited by the rule of origin

643. Proceso No. 65-AN-2000, Aclaración de Sentencia, Feb. 15, 2002, G.O.A.C. No. 762, http://www.comunidadandina.org/normativa/sent/65-AN-2000.HTM.

644. *Id*.

645. Andean Group: Commissión Resolución 410, Recurso de Reconsideración presentado por el Gobierno de Colombia contra la Resolución 381 de la Secretaría General que Resolvió Sobre el Supuesto Incumplimiento por Parte de Ecuador de Requisitos Específicos de Origen de la Película de Polipropileno, July 12, 2000, G.O.A.C. 582, http://www.comunidadandina.org/normativa/res/R410SG.HTM.

646. *Id*. art. 1.

647. *Id*. art. 2.

648. Proceso No. 65-AN-2000, http://www.comunidadandina.org/normativa/sent/65-AN-2000.HTM.

649. *Id.*

650. *Id.*

651. *Id.*

652. *Id.*

653. *Id.*

exception.[654] Such imprecision makes the norm inapplicable because it establishes a different raw material for the rule of origin when it is imported from third countries.[655] Accordingly, the Court held the Resolution to be null and void.[656]

6. Barriers to Trade-Textiles

The CJAC decided *Colombia v. Resolutions 019 of October 29, 1997 and 047 of January 23, 1998 issued by the General Secretariat* (process 02-AN-98) on June 2, 2000.[657] With Resolutions 019 and 047, the Secretariat declared the requirement of detailed descriptions required by the Government of Colombia, as well as the application of a fine of 200% of the value of the goods for not declaring one or more of the required details, as barriers to trade.[658]

On June 4, 1997, the National Tax and Customs Office (DIAN) of Colombia established that Sudamtex de Colombia S.A. introduced merchandise in the national territory without presenting it or declaring it before the customs authority; when it was detected, Sudamtex did not put the goods to the order of the DIAN.[659] Consequently, the government proposed the imposition of a fine of 200% on the value of the goods imported by Sudamtex de Colombia.[660] On September 16, 1997, the Venezuelan company Sudamtex C.A. filed a claim before the General Secretariat alleging the existence of barriers to trade, in the form of a requirement by Colombia of detailed descriptions on textiles and apparel from Venezuela.[661] The company requested the opinion of the Secretariat on the logic

654. *Id.*

655. *Id.*

656. *Id.*

657. Proceso No. 02-AN-98, Acción de Nulidad Interpuesta por la República de Colombia v. las Resoluciones 019 del 29 de Octubre de 1997 y 047 del 23 de Enero de 1998 Emanadas de la Secretaría General de la Comunidad Andina, Jun. 12, 2000, G.O.A.C. No. 588, http://www.comunidadandina.org/normativa/sent/2-AN-98.HTM.

658. Andean Group: Resolución 047 de la Secretaría General de la Comunidad Andina, Recurso de Reconsideración Presentado por el Gobierno de Colombia Contra la Resolución 019 de la Secretaría General de la Comunidad Andina, Jan. 23, 1998, art. 1, *at* http://www.comunidadandina.org/normativa/res/R047SG.HTM; Andean Group: Resolución 019 de la Secretaría General de la Comunidad Andina, Calificación de las Medidas Impuestas por el Gobierno de Colombia a las Importaciones Procedentes de Venezuela, como Restricción al Comercio, a los Efectos del Artículo 73 del Acuerdo de Cartagena, Oct. 27, 1997, art. 1,
at http://www.comunidadandina.org/normativa/res/R019SG.HTM.

659. Proceso No. 02-AN-98, http://www.comunidadandina.org/normativa/sent/2-AN-98.HTM.

660. *Id*.

661. *Id*.

of a fine of 200% of the total value of the imported goods.[662] On October 27, 1997 the General Secretariat issued Resolution 019, published in the Official Gazette 301 of October 29, 1997.[663] The Resolution determined that the requirement of detailed descriptions, as well as the amount of the fine, was a barrier to trade.[664] Additionally, it determined that Colombia cannot require the inclusion of elements in the descriptions that are not necessary to determine the correct tariff classification, and consequently, the determination of the value of the goods.[665]

CJAC used the following analysis in deciding the case. As of the signing of the Cartagena Agreement and its protocols, the Member States agreed to eliminate all obstacles to trade in the Community.[666] These obstacles encompass "restrictions of any type," which include not only quantitative restrictions but also any administrative, financial, or monetary exchange measure capable of impeding or hindering free trade of goods.[667] The Court held that restrictive measures are any act attributable to a public authority that has restrictive effects on imports.[668] Such effect may consist of restricting imports or making them harder or more expensive than national goods.[669] Administrative measures may range from the imposition of a process less favorable than that applied to domestic products in a manner in which they will create obstacles to the flux of imports to the direct limitation of imports.[670] To classify a measure as restrictive to trade, it must come from an entity in the use of a public function whether governmental, legislative, administrative, or judicial.[671] These measures may be either in the form of: (a) a norm of general effects affecting one or more sectors; (b) a decision or resolution with effects *inter partes*[672] or *erga omnes*;[673] or (c) material, physical operations, or omissions of any positive or negative attitude, including the administrative practices.[674] In addition, they must be capable of "impeding or hindering" imports regardless of whether this was the purpose of the measure.[675] The Court believed that one of the measures that can restrict commerce between Member States is the requirement of excessive and disproportionate formalities and procedures that

662. *Id*.
663. *Id*.
664. *Id*.
665. *Id*.
666. *Id*.
667. *Id*.
668. *Id*.
669. *Id*.
670. *Id*.
671. *Id*.
672. Binding upon the parties.
673. General effects, not limited to the parties of the dispute.
674. Proceso No. 02-AN-98, http://www.comunidadandina.org/normativa/sent/2-AN-98.HTM.
675. *Id*.

must be met during the importation process.[676] These formalities start from the moment the goods enter the corresponding country during the process, and even after the goods have been introduced.[677]

In this sense, the requirement of formalities in the trade between Member States is only justified on two occasions. First, it is justified when it is necessary to determine if the imported goods are included in any of the non-economic exceptions such as morality, public safety and order, the life and health of people, animals or plants, national patrimonies with artistic, history or archeological value, nuclear materials. Second, it is permissible to determine the application of safeguard measures. The need for statistics or the collection of state taxes are not sufficient reasons to justify systematic controls and excessive formalities imposed by a Member State to imports. In effect, Member States are obligated to simplify their procedures and formalities for goods imported from the sub-region, minimizing the restrictive effects on trade.

7. Barriers to Trade-Taxes

The CJAC decided *Corporación de Promoción de Exportaciones e Inversiones (CORPEI) v. Resolutions 139 of October 14, 1998 and 179 of January 14, 1999, of the General Secretariat* (process 12-AN-99) on September 24, 1999.[678] "Previously, the law had provided that part of the funds for CORPEI[679] shall come from a redeemable quota of 1.5 per thousand on the FOB value of exports of petroleum and its by-products; and of 1.25 (sic) per thousand of the FOB value of all imports."[680] The General Secretariat opened an investigation *ex oficio* and issued Resolution 139.[681] The Resolution determined that the charge of the redeemable quota is a contribution to the effects of Chapter V of the program

676. *Id*.

677. *Id*.

678. Proceso No. 12-AN-99, En la Acción de Nulidad Interpuesta por la Corporación de Promoción de Exportaciones e Inversiones (CORPEI) v. las Resoluciones Nos. 139 del 14 de Octubre de 1998 y 179 del 14 de Enero de 1999, Expedidas por la Secretaría General de la Comunidad Andina, Sept. 24, 1999, G.O.A.C. No. 520, http://www.comunidadandina.org/normativa/sent/12-AN-99.HTM.

679. CORPEI is a corporation created under the Foreign Commerce and Investments Law (*Ley de Comercio Exterior e Inversiones LEXI*). *Id*.

680. *Id.*

681. Andean Group: Resolución 139 de la Secretaría General de la Comunidad Andina, Calificación de la Cuota Redimible para la Provisión de Recursos Destinados a la Corporación de Promoción de Exportaciones e Inversiones, CORPEI, Aplicada por el Gobierno del Ecuador, como Gravamen para Efectos del Programa de Liberación, Oct. 14, 1998, *at* http://www.comunidadandina.org/normativa/res/R139SG.HTM**.**

of Liberation of the Cartagena Agreement.[682] Resolution 179 confirmed Resolution 139.[683]

On the concept of contribution or restriction, Article 72 of the Codified Cartagena Agreement provides that the "objective of the Tariff Reduction Program is to eliminate the levies and restrictions of all kinds that affect the importation of products originating in the territory of any Member Country."[684] With respect to the concept of contributions (*gravámenes*), Article 72 of the Cartagena Agreement provides that "*gravámenes*" are customs duties and any other charges with equivalent effect, whether fiscal, monetary or exchange, that affect imports.[685] Dues[686] and analogous surcharges are not to be considered contributions (*gravámenes*) when they correspond to the approximate cost of services rendered.[687]

Concerning the concept of contribution, the Court clarified that the definition is not limited to the technical tributary concept of taxes.[688] On the contrary, the term here referred to a generality of situations that extends beyond the tributary concept, to apply to all situations intending to surcharge the value of imports.[689] The norm does not limit contributions solely to duties; on the contrary, it enlarges it to apply to "any other surcharges with equivalent effect."[690] The Court understands that any amount unilaterally charged by a Member State, on imports from other Member States that cannot be included under the concept of "dues" or "analogous surcharges," will probably be qualified as a contribution in the terms of Article 72.[691] This is provided they correspond to the approximate value of the services rendered to the importer with relation to the import process itself.[692] Considering the claimant has not evidenced that the redeemable quota is either a "due" or an "analogous surcharge," the Court found that the qualification

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682. *Id.* art. 1.

683. Andean Group: Resolución 179 de la Secretaría General de la Comunidad Andina, Por la cual se Resuelve el Recurso de Reconsideración Presentado por el Gobierno del Ecuador contra la Resolución 139 de la Secretaría General de la Comunidad Andina que Calificó como Gravamen a la Importación a la Cuota Redimible para la Provisión de Recursos Destinados a la Corporación de Promoción de Exportaciones e Inversiones, CORPEI, del Ecuador, Jan. 14, 1999, art. 1*, at* http://www.comunidadandina.org/normativa/res/R179SG.HTM.

684. Codified Cartagena Agreement, *supra* note 473, art. 71.

685. *Id*. art 72.

686. The Spanish word is "tasa," which refers to a fee levied on the rendering of a service by the State or any of its entities.

687. Proceso No. 12-AN-99, http://www.comunidadandina.org/normativa/sent/12-AN-99.HTM.

688. *Id.*

689. *Id.*

690. *Id.*

691. *Id.*

692. *Id.*

given by the Secretariat to the redeemable quota as a contribution is correct and hence finds for the General Secretariat.[693]

8. Intellectual Property and Patents of Second Use

On June 27, 2002, the CJAC ruled on a petition filed by the General Secretariat against Venezuela (process: 01-AI-2001) for the breach of Article 4 of the Treaty of Creation of the CJAC and Article 16 of Decision 344 of the Commission, as well as Resolution 424 and 457 of the General Secretariat.[694] The General Secretariat requested a decision of the CJAC declaring that Venezuela has breached Article 4 of the CJAC Treaty and Article 16 of Decision 344.[695] According to the General Secretariat, Venezuela breached these articles by granting a patent of second use to the product pirazolopirimidinonas for the treatment of impotence, when such second patenting is prohibited under Article 16 of Decision 344.[696] On June 7, 1994 Pfizer required from the SAPI[697] the patent for "pirazolopirimidinonas for the treatment of impotence;" SAPI granted the patent.[698] According to the Secretariat, such patent is prohibited because it is a patent for the second use of a product that has already been patented.[699]

The CJAC had already decided on this issue in Process 89-AI-2000, and confirmed that position.[700] At the time, the CJAC held that only that which is new can be protected by a patent; thus, the granting of protection by the State to products or procedures that are not new would breach the purpose and the social function assigned to Industrial Property Law.[701] The Court concluded that Article

693. *Id.*

694. Proceso No. 1-AI-2001, Acción de Incumplimiento Interpuesta por la Secretaría General de la Comunidad Andina v. la República Bolivariana de Venezuela, Alegando Incumplimiento de los Artículos 4 del Tratado de Creación del Tribunal y 16 de la Decisión 344 de la Comisión; así como de las Resoluciones Nos. 424 y 457 de la Secretaría General, Jun. 27, 2002, G.O.A.C. No. 818, http://www.comunidadandina.org/normativa/sent/1-ai-2001.HTM.

695. *Id.*

696. *Id.*

697. Spanish acronym for the Venezuelan Intellectual Property Service.

698. Proceso No. 1-AI-2001, http://www.comunidadandina.org/normativa/sent/1-ai-2001.HTM.

699. *Id.*

700. Process No. 89-AI-2000, Acción de Incumplimiento Interpuesta por la Secretaría General de la Comunidad Andina v. la República del Perú, Alegando Incumplimiento de los Artículos 4 del Tratado de Creación del Tribunal y 16 de la Decisión 344 de la Comisión; así como de la Resolución 406 de la Secretaría General, Sept. 28, 2001, G.O.A.C. No. 727, http://www.comunidadandina.org/normativa/sent/89-AI-2000.HTM.

701. Regarding the Common Regime on Industrial Property, the Court reasoned that industrial property is governed by Decision 344 of the Commission dated October 21, 1993, and published in the Official Gazette 142, of October 29, 1993. This Decision was

16 prohibits Member States from granting patents on products or procedures included in a technical state and that have hence lost their novelty, which, is one of the basic requirements for the granting of a patent under Decision 344.[702] Accordingly, the Court held that Venezuela breached Article 16 of Decision 344 when it granted, through the SAPI, the patent for invention "pirazolopirimidinonas for the treatment of impotence."[703]

In effect, the Court found that in granting a patent for invention, SAPI actually issued a patent over a second use, which was contrary to Decision 344. It is worth noting that Decision 486 reiterates the provisions of Article 16 of Decision 344, which established that there could be no patents for second use in the Andean Community.

9. Breach of a CJAC Decision

On June 12, 2002, the CJAC decided the process initiated against Peru for the breach of CJAC Decision 09-AI-98 dated March 29, 2000.[704] On October 31, 2001, the CJAC established the limits for the Member States to suspend the trade benefits of the Cartagena Agreement that benefited Peru.[705] The CJAC authorized the governments of the Member States to impose an additional duty of up to five percent on the import of any five products that each of the Member States determined had the greatest volume of export to the sub-region and were originally from Peru.[706] Peru notified the Andean Community that it had complied with the decision of the CJAC.[707] However, the Secretariat determined that although Peru had indeed complied with the provisions of the Court decision by complying with Decision 378,[708] Peru still remained in breach of Decision

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substituted as of December 1, 2000 by Decision 486 on the Common Regime on Industrial Property, published in the Official Gazette 600 of December 19, 2000. However, Decision 344 is still applicable to this case. Proceso No. 1-AI-2001, http://www.comunidadandina.org/normativa/sent/1-ai-2001.HTM.

702. *Id*.

703. *Id.*

704. Proceso No. 09-AI-98, En la Acción de Incumplimiento Interpuesta por la Secretaría General esa Comunidad v. El Gobierno de la República del Perú, por la Falta de Aplicación de las Decisiones 378 y 379, Contraviniendo el Artículo 5º (actual 4º) del Tratado de Creación del Tribunal de Justicia del Acuerdo de Cartagena, las Decisiones antes Referidas y, la Resolución 122 de la Secretaría General, Mar. 29, 2000, G.O.A.C. No. 565, http://www.comunidadandina.org/normativa/sent/9-ai-98.HTM.

705. *Id.*

706. *Id.*

707. *Id.*

708. Decision 378 on Customs Valuation was one of the Decisions originally breached by Peru. *Id.*

379.[709] Nevertheless, the Court found that Peru had completely complied with its decision, and therefore decided to lift the sanctions imposed upon Peru.[710]

X. CONCLUSION

From the study of the dispute resolution methods included within the scope of this research, it is clear that there exist two primary types of effective dispute resolution methods in the trade agreements analyzed. The main dispute resolution methods are supranational courts, as is the case of the European Court of Justice, the Court of Justice of the Andean Community, and arbitral panels. The composition, functions, powers and scope of revision of these supranational courts and arbitral panels vary in each of the trade agreements analyzed.

Arbitration is used in a pure form in NAFTA, MERCOSUR, and the CACM. Supranational courts are used in the EU and the Andean Community. On the other hand, the DSU is a hybrid between an arbitration system and a supranational entity. It is the panel or the Appellate Body, if applicable, that prepares the report to be reviewed by the DSB, but it is definitively the DSB who will decide whether to adopt the findings of the panel or the Appellate Body.

It is difficult to reach a conclusion about which of these methods is more effective. This is based on the amount of the decisions issued. For example, the number of members of the trade agreement and the implementation of the trade provisions of the agreements impact how many decisions these dispute resolution bodies make. In addition, the level of trust that the members of the relevant trade community have in the dispute resolution body, its members, procedures, and the enforceability of its decisions may also impact on the number of decisions issued by a dispute resolution body.

It seems apparent that the dispute resolution method provided for in GATT generates a sufficient level of trust in the Member States that rely on it to resolve their controversies. One reason for this trust is the fact that the decisions of the DSB are enforceable, to a large extent, in matters relating to Member States breaching their obligations under the treaty. In effect, the use of retaliatory measures such as elimination of trade benefits against breaching parties is an effective method to ensure the compliance of Member States with their obligations under GATT. This is also true of NAFTA, the CJAC, MERCOSUR, and ECJ.

However, it is not true that the possibility of losing trade benefits ensures one hundred percent compliance with the decisions of the dispute resolution entities. In effect, it is true that when countries feel strongly about certain trade issues or sectors of their domestic production, they might apply any measures

709. Decision 379 on the Andean Declaration of value was the second Decision originally breached by Peru. *Id*.

710. *Id*.

necessary to safeguard their domestic industries. A country in such a position would apply these restrictionist measures even though they may breach a DSB decision, an ECJ decision, a panel decision under NAFTA, or a provision of either of the trade agreements. It is sufficient to recall the trade disputes between the EU and the U.S. concerning beef grown with beef hormone. Another example is the measures recently adopted by Uruguay to safeguard its producers from the Argentinean crisis by imposing certain requirements on Uruguayan nationals trading with Argentina. These requirements are discriminatory because they do not apply to Uruguayan commerce with any other country.

With respect to arbitral panels such as those of NAFTA, there is a higher probability that the panels may be biased, than if a controversy were decided by a court. Or alternatively, if an Appellate Body reviewed the decision, as is the case with the DSU, there might be less bias than exists under the current system.

In addition, the impossibility of ensuring a real review of the decision by an Appellate Body under NAFTA, makes NAFTA panel decisions even more arbitrary. In effect, the national court in the designated place of arbitration may review a decision under Chapter 11. In addition, decisions of the arbitral panel are not actually appealed but merely reviewed. In many cases, the scope of review of these courts is very limited. Generally, a decision would be overturned in cases of gross violation of basic due process, improper exercise of jurisdiction,[711] or if there is a violation of the "*orden público*" or the so-called public policy defense. These situations are not common and, hence, there is little room to review panel decisions under NAFTA.

With respect to the supranational courts, one problem lies with the issue of sovereignty. Many countries are reticent to have a court superior to their domestic courts overrule the powers of their domestic jurisdiction. In many cases, the fear lies in the fact that the disputing parties have little control over the selection of the members of the body that will decide the issue. Also, processes before supranational courts can be tedious and slow, which result from excessive formalities and multiple levels of review.

Conclusively, the importance of the study of these dispute resolution methods is not so much in their past, but in the implications for their future. In order to find a just dispute resolution method for future trade agreements, such as the FTAA, parties are going to have to study and adapt the existing dispute resolution methods to reflect the tendencies and idiosyncrasies of all the members concerned. Dispute resolution methods vary greatly throughout the world. There must be concessions on the part of all the members of a future FTAA to reach a just dispute resolution method adapted to all of their realities.

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711. An example of this excess of jurisdiction is if the panel erred and applied a completely different treaty.