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Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations

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GETTING ALONG: THE EVOLUTION OF DISPUTE RESOLUTION REGIMES IN INTERNATIONAL TRADE ORGANIZATIONS

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In the face of the remarkable growth of international organizations in the last fifty years, scholars in multiple disciplines have sought to explain why and how states cooperate. Dispute resolution is one of the most crucial components of international cooperation. Examining the dispute resolution regimes of international organizations in light of these theories can inform and help reform these evolving regimes.[1]

1. With this article, I hope to answer the continuing call to integrate law with other disciplines, including political science, international relations theory, and economics. *See, e.g.*, Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) [hereinafter *A Dual Agenda*]; Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM.

I. IMPORTANCE OF STUDYING INTERNATIONAL DISPUTE RESOLUTION REGIMES

The creation of the North American Free Trade Agreement ("NAFTA")[2] and the World Trade Organization ("WTO")[3] in this decade has clearly shifted the focus on international trade from bilateral agreements to multilateral and global agreements. This historic trend towards the growth of international trade organizations was accelerated by the apparent success of the European Union's efforts in the 1990's to revitalize the European economy and create the internal market of 1992.[4] The drive to mimic the European Union ("EU")[5] (and combat its strength) was then seen in the proliferation of regional organizations such as NAFTA, MERCOSUR,[6] Association of Southeast Asian Nations ("ASEAN"),[7] and the proposed Free Trade of the Americas.[8]

J. INT'L L. 367 (1998) (noting the increasing number of times that international lawyers and political scientists have drawn on each other's work).

2. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA].

3. Agreement Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO].

4. There is no question that trying to imitate the European Community ("EC") during the 1970s or 80s hardly seemed attractive. The paralysis of the European Commission and the member states is well-documented and the lack of progress in breaking down barriers led to accusations of "Euroscleroris." *See, e.g.*, JOHN MCCORMICK, THE EUROPEAN UNION 183–84 (1996). The focus on Europe 1992 and renewed agenda coming from the Single European Act in 1986 finally broke the EC from this pattern. *See* George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529 (1989); Andrew Moravscik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 INT'L ORG. 19 (1991) [hereinafter *Negotiating the Single European Act*].

5. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C224) 1. The EU was built on the original European Economic Community. Treaty Establishing the European Economic Community Mar. 25, 1957, 298 U.N.T.S. 11, [hereinafter Treaty of Rome].

6. MERCOSUR stands for Common Market of the South. It entered into force in 1992 following the adoption of the Treaty of Asunción in 1991. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.–Braz.–Para.–Uru., 30 I.L.M. 1041 [hereinafter Treaty of Asuncion]. The common market envisioned by MERCOSUR has not yet been established. *See* Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850 (1996–97) [hereinafter *Dispute Resolution as a Catalyst*].

7. *See* Chad Bowman, *Southeast Asia Leaders Adopt 'Hanoi Plan' That Speeds Trade, Investment Liberalization*, 15 INT'L TRADE REP. 2122 (1998); Jason Gutierrez, *ASEAN Members Decide to Keep Free-Trade Target Despite Crisis*, 15 INT'L TRADE REP. 1299 (1998); *see also* Nobuo Kiriyama, *Institutional Evolution In Economic Integration: A Contribution To Comparative Institutional Analysis For International Economic Organization*, 19 U. PA. J. INT'L ECON. L. 53 (1998) (applying economic analysis to ASEAN).

8. *See* Rossella Brevetti, *FTAA Negotiating Groups Converge on Miami for Official Talks*, 15 INT'L TRADE REP. 1510 (1998); Frank J. Garcia, *"Americas Agreement"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63 (1996); Frank J. Garcia, *Decisionmaking and Dispute Resolution in the Free Trade Area*

At the same time, and no doubt in conjunction with the growth of trade organizations, international trade has become increasingly important both economically and politically. With each year, states find that an increasing part of their economy is dependent upon international trade, and the ripple effect of economic troubles has become more and more apparent even in the last year.[9] With the growing importance of international trade and investment, these issues have taken a front row seat in domestic politics. The debate over Fast Track authority in the United States,[10] the battle over International Monetary Fund ("IMF") programs in Asia,[11] the French agricultural strikes,[12] the uproar over mad cow disease,[13] and domestic support for defiance vis-a-vis the international economic community[14] are but a few examples of the passion international trade can evoke on the domestic political scene.

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of the Americas: An Essay in Trade Governance, 18 MICH J. INT'L L. 357 (1997) [hereinafter *Essay in Trade Governance*].

9. *See* David Barboza, *Dow Up 23.17 As Late Rally Salvages Prices*, N.Y. TIMES, June 13, 1998, at D1; Federal News Service, *Hearing of the House Banking and Financial Services Committee Subject: Global Economic Problems Chaired By Representative Jim Leach*, September 14, 1998; Nicholas D. Kristof, *World Ills Are Obvious, the Cures Much Less So*, N.Y. TIMES, Feb. 18, 1999, at A1 (discussing how economic problems in the Far East impact the U.S. economy); Seth Mydans, *Crisis Aside, What Pains Indonesia is the Humiliation*, N.Y. TIMES, Mar. 10, 1998, at A9; Seth Mydans, *The Thai Gamble: Devaluing Currency to Revive Economy*, N.Y. TIMES, July 3, 1997, at D1; Alessandra Stanley, *In Dark Times, Russia's Economic Chief Looks on Bright Side*, N.Y. TIMES, Dec. 3, 1997, at A13; *The World Economy: Could It Happen Again?*, ECONOMIST, Feb. 20, 1999, at 19.

10. Fast Track authority grants the President the ability to negotiate trade agreements without any amendments by the Senate during ratification. On the Fast Track battle see Michael Carrier, *All Aboard the Congressional Fast Track: From Trade to Beyond*, 29 GEO. WASH. J. INT'L. L. & ECON. 687 (1996); Cherie O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INTL. L. & ECON. 1 (1994); Charles Tiefer, *"Alongside" the Fast Track: Environmental and Labor Issues in FTAA*, 7 MINN. J. GLOBAL TRADE 329 (1998); Jill Abramson with Steven Greenhouse, *Labor Victory on Trade Bill Reveals Power*, N.Y. TIMES, Nov. 12, 1997, at A1; Peter Baker & Paul Blustein, *Clinton Searches for Middle on 'Fast Track'*, WASH. POST, Sept. 11, 1997, at A8; *'Fast Track' is Derailed*, N.Y. TIMES, Nov. 11, 1997, at A26; and *The Fast-Track Fight*, WASH. POST, Sept. 12, 1997, at A24.

11. *See* Nicholas D. Kristof, *Has the I.M.F. Cured or Harmed Asia? Dispute Rages After Months of Crisis*, N.Y. TIMES, Apr. 23, 1998, at D3; John W. Head, *Lessons From the Asian Financial Crisis: The Role of the IMF and the United States*, 7 KAN. J.L. & PUB. POL'Y., Spring 1998, at 70; *see generally* Rumu Sarkar, *The Legal Implications of Financial Sector Reform in Emerging Capital Markets*, 13 AM. U. INT'L. L. REV. 705 (1998).

12. *See* Maggie Urry, *Farmers Hope for a Richer Harvest*, FIN. TIMES (LONDON), Apr. 30, 1998, at 7; Craig A. Whitney, *World Briefing: France: Farmers Protest in Paris*, N.Y. TIMES, Feb. 9, 1999, at A8; *World News Briefs: Belgium: Farmers Protest*, N.Y. TIMES, Feb. 23, 1999, at A6.

13. *See* John Darnton, *Europe Orders Ban on Exports of British Beef*, N.Y. TIMES, Mar. 28, 1996, at A1; Alan Cowell, *Disease Tests European Cooperation*, N.Y. TIMES, Mar. 28, 1996, at A8.

14. *See* Mark Landler, *Malaysia Says Its Much-Criticized Finance Strategy Has Worked*, N.Y. TIMES, Feb. 14, 1999, at A10.

These events have spurred and accompanied the evolution of a variety of different dispute resolution regimes. These regimes evolved from differences in the international organizations themselves, their members and their goals. As the number of international organizations continues to grow, it has become increasingly important to categorize and analyze these dispute resolution regimes. While it sometimes appears as if each new international organization is reinventing the wheel in trying to figure out the balance between negotiation and adjudication, between supremacy over domestic laws and sovereignty of member states, some guidelines and general rules can be detected. Systematizing the regimes of dispute resolution and understanding their differences and unique balances will assist in both advising new organizations in setting up their dispute resolution systems and advising existing organizations on improving their dispute resolution mechanisms.

Furthermore, as more international trade organizations establish dispute resolution regimes that move away from negotiation, international law is being created in a way wholly different from the traditional model of international law. International treaties and customary law[15] are the two primary sources of international law.[16] Yet today, decisions handed down by international courts such as the European Court of Justice ("ECJ"), or other adjudicatory bodies, such as the WTO, are increasingly prominent on the international landscape and in relations between countries. These decisions, however, are ranked as the fourth source in international law[17] and have not been traditionally considered as binding as treaties or customary law.[18] One could argue that decisions issued by organizations created by treaties (i.e., the EU, WTO, NAFTA) are law under the original treaty, but the scope and breadth of these decisions seem to stretch this argument to the limit. We are faced with a pattern of extensive judicial lawmaking, yet an international consensus on the force of this law is lacking.

It is crucial that we examine the methods used to make these international decisions. While much focus has been given to the legislative processes in international organizations,[19] much more attention is

15. Customary law is created by state practice and *opinio juris*, the legal belief that such state action is legally required. Prior to their codification in treaties, laws concerning such diverse subjects as maritime boundaries, diplomatic immunities and actions for treaty breach were all customary laws.

16. U.N. Charter, Statute of the International Court of Justice, Chapter II, Article 38.

17. *Id.*

18. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 141 (1993).

19. *See, e.g., Negotiating the Single European Act, supra* note 4, at 7 (focusing on how states negotiated qualified majority voting rules of the Single European Act); Joel Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J.INT'L L. & BUS. 470, 543–549 (1996–

needed at this stage of lawmaking. Increasingly, treaties have left their interpretation to some form of adjudicatory body rather than resorting to amending the treaty or creating new law legislatively. Thus, studying dispute resolution regimes and the variations that exist is a necessary first step in assessing how this new type of international law is being created.[20]

This article first explores five legal factors that differentiate between the types of dispute resolution regimes. These five factors—direct effect, standing, supremacy, transparency and enforcement—are not exhaustive. However, it is the differences in each of these factors and the combination of these factors that have dictated the form and function of the four current dispute resolution regimes currently in use by international trade organizations. Direct effect, standing, and supremacy are derived from legal theories of integration. When legal scholars have examined the development of international organizations, these factors have been isolated as determining the level of "constitutionalization" of the organization[21] and the extent to which dispute resolution is integrated into the domestic legal fabric. Direct effect measures the scope of rights granted to private actors. Standing, the opposite side of the same coin, determines whether rights under the agreement can be asserted by private actors. Supremacy reflects member states' willingness to relinquish sovereignty. Transparency refers to the clarity of procedures and decisions, and the extent to which they are made public. It has become an important factor in assessing the legitimacy of international organizations and clearly contributes independently to a regime's effectiveness.[22] Finally, enforcement measures the effectiveness of any international organization by focusing upon its compliance record.

Next, this article introduces a four-part clarification of dispute resolution regimes. I call these four regimes "Negotiation," "Investment Arbitration," "International Court," and "Supranational Adjudication." The Negotiation Regime is the place to start in analyzing dispute resolution. On the continuum of each of the legal factors outlined, it is

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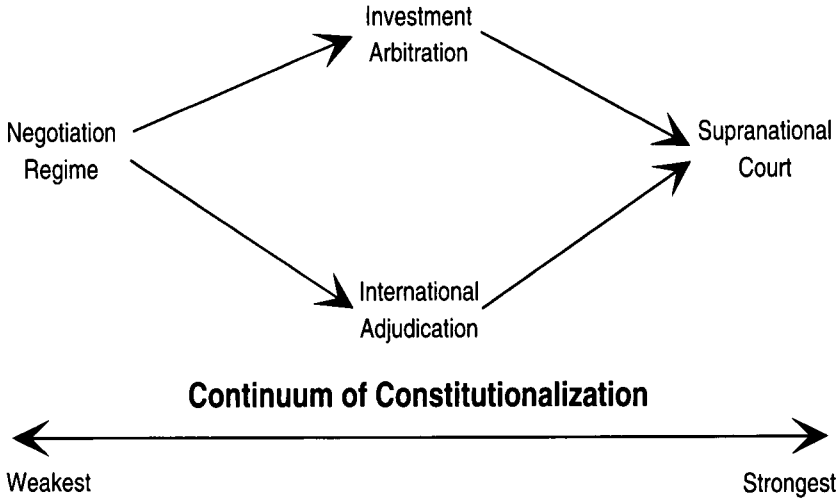
97) [hereinafter *Theory of the Firm*] (discussing the economic impact of voting rules changes in the Single European Act); Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566 (1980).

20. For additional literature on judicial versus legislative lawmaking, *see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

21. *See Dispute Resolution as a Catalyst*, *supra* note 6; Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) [hereinafter *The Transformation of Europe*]. For a slightly different approach to constitutionalization, *see* Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1996–97).

22. *See, e.g.*, Juliet Lodge, *Transparency and Democratic Legitimacy*, 32 J. COMM. MKT. STUD. 343 (1994).

clearly the weakest in all of the factors.[23] Other regimes have evolved depending on how the organization has moved along the range on each of these variables. In the Investment Arbitration Regime, direct effect and standing for private actors is provided. In addition, enforcement is through domestic courts and remains relatively easy compared to other adjudication options. In Investment Arbitration, however, supremacy is limited to a single decision, transparency is optional, and remedies are limited. In the International Adjudication Regime, there is supremacy under international law, transparency of decisions, and, increasingly, a wider range of remedies. Again, however, this regime provides no direct effect, no standing for private actors, and enforcement that is limited to international law. The Supranational Court Regime moves along the continuum in all of these factors, providing direct effect, standing for private actors, supremacy, transparency, and enforcement with strong remedies. The choice of regimes could look like this:



After reviewing the types of regimes, the next two sections in the article attempt to assess the effectiveness of current dispute settlement regimes. These sections turn first to variables from several disciplines, including law, political science and economics. After these theories and the variables that are most important to them have been identified, section four of this article then takes the dispute resolution regimes and studies them in light of the theoretical variables. This examination pro-

23. Many would argue that negotiation is the most effective way to resolve disputes because it relies on the relative power of states. The legal factors discussed in this article, however, measure the level of constitutionalization or judicialization of the regime. By this measure, the Negotiation Regime is the weakest.

vides an assessment of which regimes will be more effective given certain combinations of these variables and offers an analysis of which theory seems to best explain the current combination of dispute resolution regimes.

In section five of the article, I look at directions for future work in this area. I first look at problems and weaknesses with this regime analysis. For one, this study uses only one type of organization, which may make the lessons less applicable to other international organizations. Second, some of these regimes are based on emerging organizations so that there are very few cases available for testing and assessing. Third, this study assumes that the legal factors of each dispute resolution regime are each of equal value and also does not distinguish in importance between the theoretical variables listed in part three. Finally, this study assumes that the legal factors by which each regime is established are in fact the product of rational negotiation. In fact, as the EU demonstrates, the dispute resolution system could evolve differently and beyond the point where the original drafters of the organization intended.

The final component of section five suggests additional areas of research and study that would be useful in further developing this regime analysis. The lessons from having performed the regime analysis, even with its weaknesses, ultimately lead to questions about where we go from here. What can we learn about the evolution of dispute resolution systems? What advice can we provide to emerging international trade organizations? What further research should be done in order to draw lessons across legal disciplines from human rights, the environment, and other areas?

II. Differentiating Between Dispute Resolution Regimes

After reaching an understanding as to why the study of dispute resolution regimes is necessary and timely, we now turn to an examination of the legal factors that differentiate between these regimes. I have previously used these legal factors in an analysis of private involvement in international trade dispute resolution.[24] Here we use these factors in order to categorize existing dispute resolution regimes.[25]

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24. *See* Andrea K. Schneider, *Democracy in Dispute Resolution: Individual Rights in International Trade Organizations,* 19 U. Pa. J. Int'l. Econ. L. 587 (1998).

25. The factors listed in this section are no doubt incomplete. Other factors of inquiry could include whether the decisions have precedential value, whether the decision is subject to review or appeal, and whether the panel is rotating or standing. *See e.g.,* Laurence R.

A. *Legal Factors Differentiating Between Dispute Resolution Regimes*

1. Direct Effect of Rights

In looking at the four dispute resolution regimes, one of the legal factors that differs among the regimes is whether or not private actors have rights under the treaty establishing the trade agreement. The phrases "self-executing" and "direct effect" are used synonymously and indicate those dispute resolution regimes where private actors do have rights granted under the treaty.[26] When private actors are granted direct effect of rights under the dispute resolution regimes, these actors can then protect their trade rights in their own domestic courts or in multinational fora.[27]

Most current trade agreements do not provide for direct effect of rights. Historically, Friendship, Commerce and Navigation Treaties ("FCN Treaties") were considered self-executing in the United States.[28] Ironically, although trade agreements have become more important—covering and affecting more sectors of the economy—recent trade agreements have not provided for direct effect.[29] As discussed below,

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Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

26. *See* Schneider, *supra* note 24, at 595–96; *see also* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW, 183–218 (1988); Ronald A Brand, *Direct Effects of International Economic Law in the United States and the European Union*, 17 NW. J. INT'L L. & BUS. 556 (1996–97); Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 EUR. L. REV. 155 (1983).

27. *See, e.g.*, Matt Schaefer, *Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 NW. J. INT'L L. & BUS. 609 (1996–97).

28. Asakura v. City of Seattle, 265 U.S. 332, 44 S.Ct. 515 (1924) (Japanese national sued the City of Seattle for the ability to open a pawn shop). The Court, quoting language from the treaty: "[t]he citizens. . . of each of the High Contracting Parties shall have the liberty to . . . reside in the territories of the other to carry on trade. . .[,]" held in favor of the Japanese national. For more on self-executing treaties, see Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); and Charles D. Siegal, *Individual Rights Under Self-Executing Extradition Treaties—Dr. Alvarez-Machain's Case*, 13 LOY. L.A. INT'L & COMP. L.J. 765 (1991).

29. In fact, these treaties have explicitly stated that there is no direct effect. *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." *Id.* at § 102(a)(1). See JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 79–105 (2nd ed. 1997) (discussing broadly U.S. law and the application of international trade treaties); John H. Jackson, *U.S. Constitutional Law Principles and Foreign Trade Law and Policy*, *in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW 65 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993) (reviewing the history of the application of trade treaties in U.S. law). *See also* Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the*

the Negotiation Regime and International Adjudication Regime have no direct effect. The Investor Arbitration Regime provides direct effect for only a narrow range of trade rights typically under bilateral investment treaties ("BIT's"). Only in the Supranational Court Regime do private actors have direct effect of a broad array of trade rights.

What we have witnessed in the last fifty years is an increased number of trade agreements with increased importance to domestic economies. These trade treaties have been designed to influence private actors—to invest, to import, and to export—and to encourage this behavior by promising governmental restraint from inequitable treatment. Nonetheless, although private actors make decisions based on the rights provided in these treaties, trade treaties have moved away from providing direct effect of rights.[30]

2. Standing before the Dispute Resolution Body

Closely linked to direct effect of rights are the fora available for private actors to protect these rights. Dispute resolution regimes differ in the identity of the parties entitled to bring cases and complaints to any dispute resolution body. Traditionally, under international law, only recognized states participated in dispute resolution, either through negotiations or in international courts.[31] Both the Negotiation Regime and the International Adjudication Regime reflect this traditional approach to standing. In the last fifty years, however, regimes have evolved that also provide standing to other entities. For example, in the Investor Arbitration Regime, private actors have standing to bring limited actions against states. In the Supranational Court Regime, private actors also have standing. In addition, an oversight body has standing to bring a case in the Supranational Court Regime.

Much has been written about the importance of standing because it affects the ability of parties to enforce a trade agreement. The advantages of private actor standing seem to fall into two major categories. First, when a private actor or an oversight body has the ability to

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Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court, 11 AM. U.J. INT'L L. & POL'Y 559 (1996).

30. I am grateful to Steve Charnovitz for an interesting discussion on the anomaly of increasing importance of trade treaties and decreasing rights from these treaties, particularly when compared with human rights treaties that have moved more consistently to provide increased rights and direct effect of these rights. *See* Schneider, *supra* note 24, at 598–600. *See also* Thomas Cottier and Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83 (1998) (outlining the advantages and disadvantages of direct effect of WTO law).

31. *See* Schneider, *supra* note 24, at 627.

enforce a trade agreement, more cases will be brought.[32] While states (and oversight bodies) face political obstacles to bringing cases against other states, private actors do not share this concern. Therefore, more suits are apt to be brought. Further, private actors are better able to police the agreement because they are directly affected by any violation and make an economic assessment based on that injury.

The second advantage of private actor standing is that citizens police their own government's compliance with the agreement.[33] If that task were left to states alone, no state would bring a case against itself. The best evidence of the significance of standing in terms of an international organization's development is the number of important EU cases brought by a private actor.[34]

3. Supremacy over Domestic Law

The third legal factor differentiating between dispute resolution regimes is whether the dispute resolution regimes create binding law for their member states. Under international law, any international agreement appropriately created is supreme to domestic law. (Of course, the supremacy of international law in the domestic arena is left to each state to determine.) However, states vary widely in terms of how and when

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32. "By refusing to permit private parties to appear before the Court, the founders of the International Court foreclosed, as it turns out, the most fertile source of international litigation." JANIS, *supra* note 18, at 122; *see also* Schneider, *supra* note 24, at 629–30 & nn. 126–30.

33. *See* Robert Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, in* NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 51–93 (Martha Minow et al. eds., 1992) (arguing that jurisdictional redundancy, as exists between the federal and state system in the U.S. and also between the domestic systems and the EU, can effectively deal with the problems of the elite in a political system and is an appropriate method of dealing with conflicting values in a society). *But see* Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The Hartford Fire Case*, 1993 SUP. CT. REV. 289, 320–22 (1994) (arguing that, in the application of extraterritorial securities laws, the existence of private plaintiffs improperly moves the locus of foreign policy decision-making from the executive branch to the judicial branch).

34. *See* Case 26/62, N.V. Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen 1963 E.C.R. 1 [hereinafter Van Gend en Loos] (establishing direct effect of the Treaty of Rome); Case 6/64, Costa v. Ente Nazionale per L'Energia Elettrica 1964 E.C.R. 585 [hereinafter Costa v. ENEL] (establishing supremacy of the Treaty of Rome); Case 41/75, Van Duyn v. Home Office 1974 E.C.R. 1337 [hereinafter Van Duyn] (establishing direct effect of directives); Case 43/75, Defrenne v. Societe Anonyme Belge De Navigation Aerienna Sabena 1976 E.C.R. 455 [hereinafter Defrenne] (recognizing horizontal direct effect [direct effect vis-à-vis private actors] from the Treaty of Rome); Case 106/89, Marleasing SA v. La Commercial International De Alimentacion SA 1990 E.C.R. I-4135 [hereinafter Marleasing] (finding no horizontal direct effect in the case of directives); Cases 6/90 and 9/90, Francovich and Others v. Italian Republic 1991 E.C.R. 5357 [hereinafter Francovich] (awarding damages stemming from non-implementation of a directive).

international law is incorporated into domestic law. [35] Furthermore, while many states are clear on the role of international treaties in their domestic legal system[36] few states have clearly set forth how international decisions arising from dispute resolution regimes should be treated. Therefore, we must look to each dispute resolution regime to see how decisions affect the member states and whether those decisions are considered supreme to domestic law.

The importance of supremacy in international organizations cannot be doubted. In the end, it is up to each state to comply with and enforce international law. If a domestic dispute resolution empowers the domestic judiciary to enforce an international decision, it is wholly different in scope and effectiveness than a dispute resolution regime in which doubt exists whether there is supremacy over domestic law.[37]

4. Transparency

The transparency of a dispute resolution regimes directly affects how it is used and perceived by the member states involved in each of the dispute resolution regimes. In examining the transparency of a dispute resolution regimes, we should examine both the rules of the dispute resolution regimes as well as the decisions resulting from the dispute resolution regimes. The procedures for the dispute resolution regimes set forth below vary from ad hoc and informal to published, clear and strict procedures. Similarly, results of using the dispute resolution regimes vary from confidential negotiated agreements or arbitration awards to regularly published tribunal decisions.

The level of transparency of the dispute resolution regimes is important in three ways that I have set forth previously:[38] publicity, precedent, and predictability. Publicity describes the level of public knowledge about the dispute resolution regimes. For example, when

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35. Schneider, *supra* note 24, at 609–13. *See also* Symposium, *The Interaction Between National Courts and International Tribunals*, 28 N.Y.U. J. INT'L L. & POL'Y (1995–96).

36. *See, e.g.*, U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . .") This interpretation of treaties is similar to the one in the United Kingdom and other Commonwealth states in which courts have found international treaties to be equal to national law. In these latter states, however, separate implementing legislation beyond ratification is needed to provide direct effect under these treaties. This has also been the case in the United States in more recent treaty implementation where treaties are not given direct effect unless expressly provided for in separate implementation legislation.

37. See for example Gabriel Albarracín et al., *The Relationship Between the Laws Derived From the Organs of MERCOSUR and the Legal Systems of the Countries That Comprise MERCOSUR*, 4 J. INT'L & COMP. L., 897 (1998) for a discussion on the confusion within the MERCOSUR as to how MERCOSUR laws should be applied.

38. *See* Schneider, *supra* note 24, at 613–14.

results are published, the process is clear, and decisions are explained, member states are more likely to comply with those rulings.[39] Precedent refers to the ability of dispute resolution regimes to provide persuasive or binding authority. While the doctrine of stare decisis is not used in international tribunals, these tribunals clearly cite previous decisions as persuasive.[40] Likewise, predictability of a dispute resolution regime is very important to its users because it creates confidence in the system.[41] Transparent rules and clear decisions are more likely to encourage states or private actors to become involved in a dispute resolution regime. Overall, transparency increases the legitimacy of the regime.[42]

5. Enforcement & Punishment

The final factor differentiating between dispute resolution regimes is the type of enforcement each regime provides. Unfortunately, the lack of compliance with international law and global enforcement mecha-

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39. *See generally*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 22 (1995).

40. See for example, the WTO Shrimp-Turtle case, which makes reference to earlier GATT and WTO decisions. United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998). For a critique of the current analysis on precedent, see Raj Bhala, *The Myth About Stare Decisis and International Trade Law* (Part One of a Trilogy), 14 AM. U. INT'L L. REV. 845 (1999).

41. The argument has also been made that permanent tribunals versus ad hoc panels add to predictability of a regime. *See, e.g., Dispute Resolution as a Catalyst*, *supra* note 6, at 890–899. Lack of regular use can also hurt predictability. *See, e.g.*, Helfer & Slaughter, *supra* note 25 at 301–03. For example, the lack of case law precedent as well as the review process make the arbitral facility under the International Centre for the Settlement of Investment Disputes (ICSID) less appealing to investors. Difficulty with interference by national courts has made ICSID even more unreliable. *See* Maritimes Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982) (ICSID, Case No. ARB/84/4) (refusing to enforce the ICSID arbitral award); Monroe Leigh, *Judicial Decisions*, 81 AM. J. INT'L L. 206, 222–25 (1987) (detailing AMCO Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, 25 I.L.M. 1439 (1986), where the Indonesian government annulled the ICSID decision on the grounds that ICSID "manifestly exceeded its powers.")

42. *See* Pub. Citizen v. Office of the U.S. Trade Rep., 804 F. Supp. 385 (D.D.C. 1992); *see, e.g.*, Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT'L L. J. 631 (1994) (arguing that the secrecy and lack of public input in U.S. trade policy results in a policy that is biased toward trade liberalization at the expense of other values); Robert F. Housman, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994) (discussing the undemocratic nature of international trade decision-making); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996–97). There has even been litigation over this subject. In response to complaints about lack of transparency, a U.S. District Court ordered the United States Trade Representative to grant public access to submissions to GATT dispute resolution panels. *See* 804 F. Supp. 385 *supra*. The U.S. government is currently trying to increase transparency in the WTO. *See, e.g.*, Peter Menyasz, *U.S. Transparency Goals Seen Unlikely Focus of 1998 Review*, 15 INT'L TRADE REP. 1609 (1998).

nisms is a typical and somewhat tired critique of the field.[43] If one stops there, it would cripple further analysis of why international law is actually followed most of the time. That is why a focus on improving compliance with international law is necessary as we continue to create new institutions and new rules that provide us with the opportunity to increase enforcement and compliance.[44] Furthermore, particularly in the area of trade, it has been long argued that having a system of enforcement is important to promote trade.[45]

The existing dispute resolution regimes discussed below provide opportunities for enforcement at three different levels. The first level is when the trade agreement includes no formal adjudicatory procedure to remedy non-compliance. Any dispute about compliance would require additional negotiations or a new trade agreement. The second level is when the trade agreement has created some body to hear disputes over non-compliance. Depending on standing, states or private actors may have the ability to bring cases under the trade agreement in order to enforce the agreement. A third level of enforcement is when states or private actors can bring a case for non-compliance with a *decision* of the dispute resolution body. My prior analogy to traffic laws provides a helpful example here.[46] Creating a speed limit with no police enforcement is the first level of enforcement. The second level is where a police officer is able to write a traffic ticket in order to enforce the speed limit. The third level of enforcement is when an arrest warrant is issued in order to enforce payment of the ticket. Each of the dispute resolution regimes discussed in the article operate at different levels of enforcement.

Dispute resolution regimes also differ in the type of punishment provided to enforce the trade agreement. As dispute resolution regimes have evolved to provide for better enforcement, the punishment options have also improved. Under the Vienna Convention on Treaties, breach of a treaty meant that the non-breaching party may suspend the treaty.[47]

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43. *See, e.g.*, Abbott, *Modern International Relations Theory, supra* note 1, at 336–8; G. Richard Shell, *Trade Legalism and Internationa l Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 855–56 (1995).

44. *See* CHAYES & CHAYES, *supra* note 39.

45. Private actors will be more likely to trade if they know the rules will be enforced. *See, e.g.* Paul R. Milgrom et al., *The Role Of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990). Institutions are able to deal with the problem of defection and improve the likelihood of governmental compliance as well. *See* George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319 (1998).

46. *See* Schneider, *supra* note 24, at 620.

47. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 60, U.N. Doc. A/Conf. 39/27 (1969) [hereinafter Vienna Convention]. As a last resort, a

Dispute resolution regimes today provide for retaliation under the treaty, fines, and damages to harmed parties. This latter punishment is particularly noteworthy in that it mimics a domestic court's ability to remedy harm and is also narrowly tailored to punish each particular violation. The threat of real economic punishment judicially imposed is a relatively new one for international trade organizations. And although treaty-sanctified retaliation remains a blunt instrument of policy, it is definitely an improvement.[48] The shift in the relative seriousness of these remedies is already evident.[49]

The factors discussed in the previous section outline the variable ranges that dispute resolution systems can take. The following table sets forth the factors above as applied to the four regimes discussed more fully below.

Regimes/ *Factors*	Negotiation	Investment Arbitration	International Adjudication	Supranational Court
Direct Effect	No	Yes	No	Yes
Standing for Private Actors	No	Yes	No	Yes, directly and indirectly
Supremacy	None	Only as to that award	Supreme, but not integrated into domestic law	Supreme and Integrated
Transparency	Optional	Optional	Yes	Yes
Enforcement	Negotiation	Likely	Varying—None (NAFTA) to Retaliation (WTO)	Fines & Damages; Domestic Remedies also

party to a treaty may terminate its obligation by breach but must confront the consequences addressed by Article 60.

48. *See* Kishore Gawande & Wendy L. Hansen, *Retaliation, Bargaining, and the Pursuit of "Free and Fair" Trade*, 53 INT'L ORG. 117 (1999). Based on empirical work, the authors argue that retaliation and the threat of retaliation can be very effective. They also argue that the WTO will make threats even more powerful.

49. The U.S.-E.U. disputes over beef hormones and bananas demonstrate the gravity and impact of the new punishments provided under the WTO. *See, e.g., U.S. Threatens Europe With Duties in Beef Dispute*, N.Y. TIMES, May 15, 1999, at C2; Elizabeth Olson, *Latest Banana Squabble: Retroactivity of Sanctions*, N.Y. TIMES, Apr. 20, 1999, at C5; David E. Sanger, *Ruling Allows Tariffs by U.S. Over Bananas*, N.Y. TIMES, Apr. 7, 1999, at C1; Elizabeth Olson, *New Flare-Up in U.S.-European Banana Fight*, N.Y. TIMES, Mar. 3, 1999, at A4.

B. *Negotiation Regime*

1. Individual Rights & Standing[50]

The first type of regime of an international dispute resolution system is the Negotiation Regime. The Negotiation Regime is exemplified by the dispute settlement system of the General Agreement on Trade and Tariffs ("GATT")[51] as it existed prior to the creation of the WTO as well as the current form of Chapter 20 of the NAFTA.[52] In this regime, most of the factors we have discussed are on the lower end of the range. Typically, individuals are not granted rights under the organizations that use negotiation as their regime nor are individuals involved in the negotiation process. Disputes under this system are resolved informally using diplomacy between states. For example, in a disagreement over alleged dumping, two states might make an ad hoc agreement to change the particular system discussed.[53] Historically, most disputes regarding trade, or anything else, have been resolved in this way.

2. Supremacy

Disputes under this regime are resolved by a negotiated agreement between states. This dispute resolution may result in changes to some law or practice in one or both states. More often, however, this type of dispute resolution agreement will not result in an amendment to an existing treaty or a new treaty itself, but rather will be a lesser type of commitment from the governments. Therefore, this dispute resolution will not be granted supremacy over domestic laws unless it, too, is considered international law under the respective domestic systems.[54]

3. Transparency

In terms of transparency, a negotiated agreement may be publicized, particularly when governments are trying to please a domestic constituency.[55] It may also provide an example for other negotiations over

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50. For the purposes of this article, I use individuals and private actors interchangeably.

51. General Agreement on Trade and Tariffs, *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

52. NAFTA, *supra* note 2, Chapter 20.

53. *See, e.g., Japan to Extend Voluntary Export Restraints on Automobiles at Current 2.3 Million Units*, 7 INT'L TRADE REP. 115 (1990).

54. Unless this agreement resulted in a new treaty or executive agreement, this agreement would not be considered supreme to U.S. law. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

55. For example, U.S. Ambassador to Japan Mike Mansfield announced the voluntary export restraint on Japanese cars in advance of the agreement. *See* Mike Tharp, *Car Pledge by Japanese is Predicted*, N.Y. TIMES, Mar. 26, 1981, at D5. *See also* Clyde H. Farnsworth

similar disputes, although this type of dispute resolution is clearly not precedent for any court.[56] Nor do negotiated agreements create predictability for individuals or other states. Unlike a court case, where previous cases can be analyzed and decisions examined, an upcoming negotiation cannot be easily predicted based on previously negotiated agreements.

4. Enforcement

Enforcement under a negotiation regime of dispute resolution is left to the respective states. There is no oversight institution. Any noncompliance with the underlying trade agreement would put the parties back at the negotiation table in order to work out the dispute. In other words, a negotiation regime relies on "first-order" compliance at all times.[57] States either follow the agreement or renegotiate a new agreement.[58]

C. *Investor Arbitration Regime*

The Investor Arbitration Regime was specifically created to give private actors both rights and remedies under the relevant international treaty. The move toward investment arbitration began with the creation of the International Centre for the Settlement of Investment Disputes ("ICSID") under the aegis of the World Bank.[59] A decade later, the UN Commission for International Trade Law ("UNCITRAL") drafted rules

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& Daniel F. Cuff, *"Voluntary" Import Restraint*, N.Y. TIMES, Sept. 20, 1984, at D1. Publication of a draft agreement can also help move the negotiation process along. For example, the Dunkel Draft in the negotiating of the WTO and the White Paper prior to the Single European Act were both publicized. *See* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 233–39 (1993) [hereinafter ENFORCING INTERNATIONAL TRADE LAW] (discussing the Dunkel Draft of the WTO); Bermann, *supra* note 4, at 530–35 (discussing the political background and negotiating history up to the SEA). There is also the issue of strategic leaks where the information is leaked although not officially made public.

56. *But see*, Paul Lewis, *Europeans Welcome Auto Pact*, N.Y. TIMES, May 4, 1981, at D1 (noting that the Europeans would be requesting a voluntary export restraint similar to the one agreed to between Japan and the United States).

57. Schneider, *supra* note 24, at 617. First order compliance means that there is no enforcement power beyond the establishment of the rule itself.

58. For example, Japan and the U.S. have had to renegotiate their agreement on the auto parts market several times. *See, e.g., High Level Talks Slated With Japan on Auto Agreement*, 14 INT'L TRADE REP. 1714 (1997); *U.S. Frustrated by Japan's Progress on Car Sales, Dealerships in Auto Talks*, 14 INT'L TRADE REP. 1759 (1997); David Sanger, *Bottom Line: Business Over Politics*, N.Y. TIMES, July 30, 1995, at D5.

59. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, art. 5, 17 U.S.T. 1270, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965) [hereinafter ICSID Convention]. *See also* Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 655–56 (1995).

for adhoc arbitration.[60] This concept of permitting individuals to bring cases against states has since been copied in bilateral investment treaties[61] in order to encourage foreign direct investment[62] and outlined in NAFTA for investor disputes under Chapter 11B.[63]

1. Individual Rights

Under the treaties that establish investment arbitration, private actors are granted such rights as national treatment[64] or a minimum standard of treatment[65] in the host state. These rights are directly effective. In other

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60. UNCITRAL Arbitration Rules, U.N. Doc. A/31/17, para. 57, 15 I.L.M. 701 (1976). *See also* ISAAK I. DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE (1993).

61. *See, e.g.*, Argentina-United States: Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, art. IV, 31 I.L.M. 124, 131 (1992) [hereinafter Argentina-U.S. BIT].

62. *See* Kenneth Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 COLUM. J. TRANSNAT'L. L. 501 (1998). The author notes that more than 160 countries have concluded at least one BIT and more than 1300 BIT's have been signed. *Id.* at 503. More than two-thirds of these have been signed since 1990. *Id.* at 503 n.8. *See also* Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L. L. 563 (1998).

63. NAFTA, *supra* note 2, Chapter 11B, at 642–646. A regime similar to investor arbitration is also established in the Environmental Side Accord to NAFTA. North American Agreement on Environmental Cooperation, art. 14(1) *supra* note 2. *See* Rex J. Zedalis, *Claims by Individuals in International Economic Law: NAFTA Developments*, 7 AM. REV. INT'L ARB. 115 (1996); Kal Raustiala, *International "Enforcement of Enforcement" Under the North American Agreement on Environmental Cooperation*, 36 VA. J. INT'L L. 721 (1996); David Lopez, *Dispute Resolution under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L. J. 163, 184–192 (1997). A quasi-arbitral system is established under Chapter 19 of NAFTA for antidumping and countervailing duties cases. I do not discuss that process in this article because the panels under Chapter 19 apply national law rather than international law. For more information, see David A. Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297 (1998).

64. Individuals granted rights under national treatment will receive the same treatment as the state's nationals. This is also referred to as the Equality of Treatment Doctrine. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, U.S.-Japan, art. IV (1), 4 U.S.T. 2063, 2067.

> Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights.

Id.

65. According to the Minimum Standard of International Justice, a state must grant an alien at least a minimum standard of treatment, even if this means an alien would receive better treatment than the state's own nationals. Interestingly, more recent U.S. treaties combine both the national treatment and minimum standard. *See, e.g.*, Argentina-U.S. BIT, *supra* note 61.

cases, domestic implementing legislation will provide for the rights to become directly effective.[66] This makes sense because these types of treaties are specifically designed to encourage individual investment.

While an Investment Arbitration regime provides rights against the host government, none of these underlying treaties provide direct effect of rights against another individual. In other words, a private actor has no recourse against another private actor under this regime. Investment arbitration is established solely as a right and remedy between a private investor and the host state.[67] Further, because investment arbitration is only available against a host state, nationals have no recourse against their own government. Finally, rights under this regime have limited scope. Investment Arbitration is provided for only the narrow right of national treatment in most regimes. Any state action falling outside those parameters is unreachable.[68]

2. Individual Standing

In investment arbitration, private actors have the ability to bring cases directly against a state. This is quite an historic development in this century. First, individuals were historically seen as nationals of their state and, on the international plane, could only be represented by their government. Second, private suits against a government in domestic courts were also foreclosed due to laws that limited the grounds upon which states could be sued. This meant that foreign investors had little recourse to the host domestic legal system.[69] Third, even if a private ac-

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> Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies . . . . Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

Id., at art. II, at 129–30.

66. *See, e.g.*, North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103–182, §§ 101–109, 107 Stat. 2057, 2061–68 (codified as amended at 19 U.S.C. § 3311 (1998)).

67. *See* Vandevelde, *supra* note 62, at 510.

68. Compare this to the rights of action under the EU. *See infra* note 98 and accompanying discussion.

69. In fact, in most states the government has full sovereign immunity both in law and in practice. *See* Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963). *See also* United States v. Lee, 106 U.S. 196, 204–223 (1882) (stating that the United States may only be sued by its own consent except where Congress has provided).

tor wanted to bring a suit in his own home court against the foreign state, most states had laws that provided foreign sovereign immunity.[70]

In the meantime, international commercial arbitration had become a popular method for resolving commercial disputes between private disputants because it provided a more neutral, fairer, and potentially faster way of resolving disputes.[71] This regime appealed to investors who were concerned with the potential bias, inefficiency, or unfamiliarity of foreign courts. By creating an international arbitration option between individuals and states, creators of this regime hoped that investors would be more willing to bring their business to these states because disputes could be resolved through this international neutral body.

ICSID has jurisdiction over any legal dispute arising out of an investment between a Contracting State and a national of any other Contracting State.[72] For a national of a Contracting State or a Contracting State to initiate proceeding under the ICSID, that party must submit a written request to the Secretary-General of ICSID detailing the issues in dispute, the parties, and consent to arbitration. After the dispute is certified by the Secretary-General of ICSID, an individual can have the case heard by an arbitral panel established by ICSID.[73]

3. Supremacy & Transparency

Arbitration decisions generally provide for damages and not a change in domestic laws.[74] Therefore, the issue of supremacy does not

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70. *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604 (1994) ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States. . ."); State Immunity Act, 1978, ch.33, part I (U.K.) (granting foreign sovereign immunity in the United Kingdom).

71. The International Chambers of Commerce (ICC), created in 1923, has been frequently used as a means for arbitration. In 1998, parties from over one hundred states filed a record 466 new requests for arbitration. *See* ICC World Business Organization (last visited Sep. 9, 1999) <http://www.iccwbo.org/court/front_topics/stat.asp>. For a very user-friendly guide to commercial arbitration, see MARTIN HUNTER ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR (1993).

72. ICSID Convention, *supra* note 59, art. 25. The parties must, however, consent to the use of the arbitration facility. *See id.* The use of ICSID has not been initiated by a Contracting State in complaint of an individual of another Contracting State even though the potential exists under the Convention provisions. *See generally* David A. Soley, *ICSID Implementation: An Effective Alternative to International Conflict*, 19 INT'L L. 521 (1985) (discussing the ICSID framework for dispute resolution).

73. ICSID Convention, *supra* note 59, art. 36. Unless the Secretary-General finds that the dispute falls outside the jurisdiction of the Centre, he will register the request and notify the parties. *See id.* at art. 36(3).

74. Neither the ICSID or UNCITRAL rules explicitly deny the panel the ability to proscribe a change in the law. However, arbitral panels have thus far only issued monetary awards. See *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID ABR/93/1

really arise because there is no new law created. An arbitration decision can also be kept confidential if requested by the parties.[75] This means that the decision cannot provide precedent or predictability in the system because outside lawyers cannot analyze the panel's thinking.

4. Enforcement

In terms of enforcement, an investment arbitration system does provide for relatively effective enforcement. The Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention") provides that all signatory states shall enforce arbitral awards in their domestic courts.[76] As a result, if a state refuses to pay the arbitral award, the investor can go to the domestic court in that state or in any state where there are commercial assets[77] in order to enforce the judgment. Although the investor still must go to the domestic court, the New York Convention provides for straightforward enforcement.[78] In fact, many states that once ignored court orders from other states now will-

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(1997) and *The Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICSID ABR/84/3 (1992) for examples of monetary awards.

75. The ICSID Convention explicitly prohibits the publishing of awards without the consent of the parties. ICSID Convention, *supra* note 59, art. 48(5). Thus, the transparency of such a system remains questionable. *See* John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1 (1995–96) (addressing the factors that make the ICSID less credible than ICJ judgments). *But see*, J.A. Freedberg, *The Role of the International Council for Commercial Arbitration in Providing Source Material in International Commercial Arbitration*, 23 INT'L J. LEGAL INFO. 272, 279 (1995) (stating that even though the Convention requires consent to publish, many awards do get published).

76. Article III of the New York Convention states that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 3, 21 U.S.T. 2517 [hereinafter New York Convention].

77. Any non-commercial asset would not be available for attachment pursuant to foreign sovereign immunities legislation. *See, e.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604–06 (1994).

78. A party seeking enforcement must merely present an authenticated original award or certified copy of an award to the domestic court in which state recognition is sought with the original agreement to which the dispute has arisen. If requested, the documents must be translated in the official language in which the domestic court is situated by the party seeking enforcement. The domestic court can only refuse recognition for seven reasons: (1) incapacity of the parties or invalidity of the agreement to which the parties have subjected themselves, (2) lack of proper notice given to the defending party, (3) the award is outside the jurisdiction of the arbitration, (4) the arbitral authority was outside its jurisdiction, (5) the award is not binding on the parties, (6) the matter is unlawfully arbitrated under the domestic court's laws, or (7) the enforcement of the award would be against public policy. *See* Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 INT'L LAW. 487 (1990).

ingly comply with arbitral awards.[79] This method of enforcement, however, is limited to those states that have signed the New York Convention. While most developed states have signed it, there are a significant number of developing states that have not.[80]

D. *International Adjudication Regime*

The regime of international adjudication is the one that we are most familiar with under international law as the structure for resolving disputes between states. Evolving from the Permanent Court of Arbitration,[81] and the Permanent Court of International Justice,[82] the International Court of Justice ("ICJ") is the most recognized international court. In the trade arena, the WTO Dispute Settlement Understanding is closest to international adjudication.[83]

1. Individual Rights & Standing

Under the International Adjudication Regime, private actors are neither granted rights directly by the treaty establishing the international

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79. Judgment of Oct. 21, 1987, Corte Superior de Justicia, *translated in* XVI YEARBOOK COM. ARB. 594 (1991); Judgment of Feb. 24, 1997, Tribunal Superior de Justicia, *translated in* IV YEARBOOK COM. ARB. 301 (1979); and Judgment of Aug. 1, 1977, Tribunal Superior de Justicia, *translated in* IV YEARBOOK COM. ARB. 302 (1979). *See also* Carl A. Valenstein et al., *Investor Dispute Resolution Under NAFTA*, 2 LATIN AMERICA LAW AND BUSINESS REPORT 15, 16 (March 1994); *Carl A. Valenstein & Andrea Kupfer Schneider, NAFTA's Arbitration Provisions Facilitate Resolution of Investor-Government Disputes*, US-MEX. FREE TRADE REP. (Feb. 18, 1994); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgment and Arbitral Awards*, 24 SYRACUSE J. INT'L L. AND COM. 1, 17–28 (1997).

80. Approximately 110 states have signed the New York Convention. Significant absentees include Brazil, Nicaragua, Honduras, Pakistan and many of the Central Asian former Soviet states. The membership of ICSID is larger with current membership at 131. *Membership*, NEWS FROM ICSID (ICSID, Washington, D.C.), Sum. 1998, at 1.

81. On July 29, 1899, the Permanent Court of Arbitration was established at the first Hague Peace Conference. The Convention for the Pacific Settlement of International Disputes detailed the PCA, which was to become the first dispute settlement mechanism between sovereign states. *See generally* Bette E. Shifman, *The Revitalization of the Permanent Court of Arbitration*, 23 INT'L J. LEGAL INFO. 284 (1995).

82. The Permanent Court of International Justice was established in 1921 by the League of Nations. The Court, as the first world's court, heard thirty-one cases and issued twenty-seven advisory opinions to international organizations. At the end of World War II, the establishment of the United Nations sparked the need for a new world court in consideration of concerns by the parties who were not signatories to the League of Nations. The International Court of Justice was formed in 1945. JANIS, *supra* note 18, at 118–21.

83. Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, app. 1, *in The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 I.L.M. 1226, 1244 [hereinafter WTO Dispute Settlement Understanding].

court nor have any right of standing to bring cases before the court.[84] This regime exists to resolve disputes between states—inter-national disputes—and therefore individuals have not had recourse to this regime.[85] In some states, private actors may have the ability to petition their government to take action on their behalf.[86] In the United States, the US Trade Representative makes the final decision whether or not to bring the case and there is no judicial review of this action.[87]

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84. Historically, individuals could request their government espouse their claims before the ICJ or other international court. *See* Lotus Case, P.C.I.J., Ser. A, No. 9 (1927). *See also* David M. Reilly and Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435 (1995–96) (analyzing *U.S. Citizens Living in Nicaragua v. Reagan* and the denial of individuals to bring a case in front of the ICJ).

85. There is already a debate as to whether private parties should be given standing in the WTO. *See, e.g.*, Daniel C. Esty, *Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion*, 1 J. INT'L ECON. L. 123 (1998). *But see* Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433 (1998) (arguing that private actors are already involved significantly).

86. Section 301 allows an individual to petition the United States government to initiate trade dispute resolutions. 19 U.S.C. § 2411 (1994). Under section 302 a party can petition the United States Trade Representative (USTR) to investigate a foreign government's policies or practices that are suspected to be hindering trade. *See id.* at § 2412. The USTR, under section 304, must investigate and determine if the foreign government has violated a trade agreement, benefits of any trade agreement are unreasonably being denied to the individual, or the foreign government is unjustifiably burdening or restricting U.S. commerce. *Id.* at § 2414. If the dispute involves a trade agreement, the USTR is obligated under section 303(a)(2) to first use the dispute settlement procedures provided under that agreement. *Id.* § 2413. For example, if a dispute involves infringements based on one of the Uruguay Round Agreements, the USTR must utilize the dispute resolution system of the WTO. If the USTR finds that a trade infringement is occurring and is convinced that the dispute should involve action by the United States it will pursue resolution of the dispute. *See* A. Lynne Puckett & William L. Reynolds, *Rules, Sanctions and Enforcement under Section 301: At Odds with the WTO?*, 90 AM. J. INT'L L. 675 (1996) (detailing conflicts between Section 301 and WTO policy); Jared R. Silverman, *Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO*, 17 U. PA. J. INT'L ECON. L. 233 (1996). The EU also has a procedure whereby private actors can request the EU take action against those governments violating free trade agreements. *See* Council Regulation 3286/94, 1994 O.J. (L 349) 71 [the Trade Barriers Regulation] (laying down EU procedures in the field of common commercial policy); Petros C. Mavroidis and Werner Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barriers Regulation*, 1 J. INT'L ECON. L. 407 (1998).

87. The USTR has discretion in determining whether to initiate investigations from the petitions filed by interested individuals. *See* 19 U.S.C. § 2412(a)(2) (1994). If the USTR decides not to investigate, notice of such a determination with an explanation of reasons must be published in the Federal Register. *See id.* § 2412(a)(3); Erwin Eichman & Gary N. Horlick, *Political Questions in International Trade: Judicial Review of Section 301?*, 10 MICH. J. INT'L L. 735 (1989) (arguing that a denial by the USTR to pursue investigations of an individual's petition should be reviewed by the judiciary).

2. Supremacy & Transparency

Under international law, the decisions of the international court are supreme to the domestic law and the relevant state must change its behavior or laws to comply.[88] But the court's decision is not integrated into domestic law.

The decision is published and, thus, can provide persuasive precedent for similar disputes.[89] The procedure of an international court is usually transparent and well understood by international lawyers in the field as well as by national governments. The transparency of the system provides the opportunity for both practitioners and academics to analyze, improve, and comprehend this particular international dispute resolution system.[90]

3. Enforcement

Perhaps the most controversial part of international adjudication is the question of compliance and enforcement. Because international courts have not thus far had armies to forcibly carry out their decisions, many critics of the international system focus on those cases where states have chosen to ignore the international court. Similarly under GATT, states could delay the appointments of panels, effectively block adoption of panel reports and, on occasion, ignore panel decisions. For instance, after the U.S. asserted a complaint in 1981 under GATT against the European Community ("EC") concerning pasta export subsidies, the EC effectively blocked adoption of the panel report in favor of the United States. The United States resorted to indirect retaliation efforts that sparked countermeasures by the EC.[91] Without arguing as to

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88. Of course, whether a state will follow that international decision is the subject of domestic law. In a monist system of international law, the decision would automatically become part of the domestic legal fabric. Under a dualist system, the international law must be incorporated into the domestic law according to the procedures established under domestic law. *See* JANIS, *supra* note 18, at 83–84.

89. *See* North Seas Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3; Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116. For a further discussion on precedent in the ICJ, *see* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996).

90. For example, in the past five years, there have been well over 2000 law review articles written on the International Court of Justice. Likewise, there have been over 1500 articles published about the World Trade Organization since its creation in 1994.

91. *See* ENFORCING INTERNATIONAL TRADE LAW, *supra* note 55, at 151–54 (citing Subsidies on Exports of Pasta Products, SCM/43, May 19, 1983, an unadopted decision, and other cases detailing GATT's ineffectiveness); *see also* Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1203–04 (1994) (enumerating some further problem areas of the GATT dispute settlement system).

whether an international court can ever truly "work," it is important to assess the level of enforcement a court can have.

Both GATT and the ICJ are examples of court systems that provide for no enforcement beyond censure of the international community.[92] These systems stop at second-order compliance—states should obey the law and, if held to be violating the law, should pay the fine (or change their law). The WTO outlines more stringent enforcement measures by providing a menu of enforcement options.[93] First, a state has the opportunity to follow the ruling and, usually, change the offending practice. Second, the state can continue the practice and pay damages to the harmed state.[94] If neither of these options are taken, the harmed state can retaliate.[95] The WTO provides that the harmed state must first retaliate

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92. However, the enforcement of decisions in international law through voluntary compliance should not be underestimated. States regularly abide by unfavorable rulings in order to remain a law abiding member of the international community. Many penalties for non-compliance exist outside the agreement. *See* Downs, *supra* note 45, at 321. Furthermore, direct foreign aid, foreign investment, and World Bank projects are often linked to compliance under international law. For example, the World Bank has played a major role in the compliance of environmental laws in Mexico. *See Mexico's Environmental Controls for New Companies*, 2 No. 9 MEX. TRADE & L. REP. 15 (1992); David Barrans, Note, *Promoting International Environmental Protections Through Foreign Debt Exchange Transactions*, 24 CORNELL INT'L L.J. 65 (1991). *But see* Stephanie Guyett, Note, *Environment and Lending: Lessons of the World Bank, Hope for the European Bank for Reconstruction and Development*, 24 N.Y.U. J. INT'L L. & POL. 889 (1992) (for a criticism of the shortcomings of such an enforcement mechanism).

93. *See* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade*, 16 MICH. J. INT'L L. 349 (1995) (discussing the effectiveness of the WTO with a comparison of the lack of enforcement under compliance mechanisms of the IMF or the World Bank). *See also* Matthew Schaefer, *National Review of WTO Dispute Settlement Report's: In the Name of Sovereignty or Enhanced WTO Rule Compliance*, 11 ST. JOHN'S J. LEGAL COMMENT. 307 (1996).

94. Under Article 21 and 22 of the WTO Dispute Settlement Understanding, if the party does not, within thirty days, state intentions for implementing recommendations of the adopted panel report and set a time period for compliance, the parties must commence negotiations for mutually accepted compensation. WTO Dispute Settlement Understanding, *supra* note 83, art. 21, at 1238–39. An economist might explain this provision as permitting "efficient breaches" of the WTO. Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 33 (1999). Compensation is regarded as a temporary stop gap measure until compliance in most cases. Only in cases of non-violation is compensation a long-term solution. *See* C. O'Neal Taylor, *The Limits of Economic Power: Section 301 and The World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 287 [hereinafter *The Limits of Economic Power*] ("The DSU expressly states that in response to a non-violation finding by a panel, there is no obligation incurred by the offending party to withdraw the measure. Instead, the panel or Appellate Body can only recommend that the offending Member State make a 'mutually satisfactory adjustment.'"). *See also* Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R at 27 (March 31, 1998).

95. Article 22 of the WTO Dispute Settlement Understanding allows the complaining party to request authorization from the Dispute Settlement Body (DSB) to retaliate. The DSB must grant authorization within thirty days unless there is a consensus against such

in the same sector of trade. However, if this is not effective, the WTO provides that cross-sector retaliation is permitted.[96] This newer evolution of the international adjudication regime has more teeth than its predecessors and attempts to correct some of the problems of the past.[97]

E. *Supranational Court Regime*

1. Individual Rights & Standing

A Supranational Court Regime of international dispute resolution is different from the International Adjudication Regime in a number of ways. First, private actors are granted rights under the constituent treaty and have the ability to bring their complaints to the supranational court. The clearest example of this type of individual involvement occurs in the European Union. Under the Treaty of Rome and pursuant to caselaw from the European Court of Justice, citizens of member states of the EU are granted rights directly from the treaty and

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retaliation. Of course retaliation is only as strong as the state that is retaliating. WTO Dispute Settlement Understanding, *supra* note 83, art. 22. In the 50 years of GATT, retaliation has only been authorized once. The Netherlands retaliated against the United States for dairy quotas in 1953. ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 181–200 (1990) [hereinafter THE GATT LEGAL SYSTEM] (covering the entire history of the "dairy quotas" case).

96. Article 22 of the WTO Dispute Settlement Understanding permits cross-sector retaliation if the previous retaliation, within the sector, is not deemed practical or effective. The determination of whether retaliation is "practical" or "effective" will be made by the complaining party, rather than the WTO Dispute Settlement Understanding. However, paragraph 4 limits the retaliation a government can impose to the equivalent of benefits that the defending state was impairing. WTO Dispute Settlement Understanding, *supra* note 83, art. 21. *See also* 19 U.S.C. 2411(a)(3) (imposing the same limitations).

97. *See* Mary E. Footer, *The Role of Consensus in GATT/WTO Decision-Making*, 17 NW. J. INT'L L. & BUS. 653 (1996–97); Curtis Reitz, *Enforcement of the General Agreement on Tariffs and Trade*, 17 U. PA. J. INT'L ECON. L. 555, 580 (1996); Paul Demaret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 COLUM. J. TRANSNAT'L L. 123 (1995).

legislation passed thereunder.[98] This direct effect under the EU is already quite revolutionary in comparison to most international treaties.[99]

The EU also provides private actors the opportunity to bring cases before the ECJ—directly to the ECJ or indirectly through their domestic courts. The impact of individual involvement in international dispute resolution cannot be underestimated.[100] Individuals play the important function of private enforcement agents.[101] As such, individuals can themselves ensure that the law is being followed rather than relying on states or an oversight body (such as the Commission in the case of the EU) to bring a case. States may feel reluctant to bring cases against other states for somewhat minor infractions. Furthermore, it may be in many states interests not to follow the letter of the law exactly or delay compliance with the numerous laws set out under the EU. If states permit this behavior between themselves, it becomes collusion to ignore the law at the expense of their citizens.[102]

While the oversight body is more likely to bring cases than a state, it, too, has the problem of a vast number of potential cases while maintaining its political agenda. The oversight body rarely has sufficient resources to check compliance with all laws or to bring all cases of noncompliance to the court. Individuals do not have the political baggage of

98. The ECJ has interpreted the language of Article 189 as conferring rights upon the nationals of Member States in certain circumstances. The Court has distinguished vertical direct effect, the rights of an individual to sue a governmental entity, from horizontal direct effect, the right of an individual to sue another individual. The Court has acknowledged vertical direct effect involving disputes arising from treaty articles, regulations, and directives. *See* Van Gend en Loos, *supra* note 34; Costa v. ENEL, *supra* note 34; Van Duyn v. Home Office, *supra* note 34; Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority, 1986 E.C.R. 723 [hereinafter Marshall]. However, the Court has not been so lenient on the rights of individuals established by horizontal direct effect. Although the Courts have recognized horizontal direct effect in disputes arising from treaty articles and regulations, the Court refuses to acknowledge horizontal direct effect in disputes arising from directives. *See* Defrenne *supra* note 34; Marleasing, *supra* note 34.

99. *See* Brand, *supra* note 26; David O'Keefe, *Judicial Protection of the Individual by the European Court of Justice*, 19 FORDHAM INT'L L.J. 901 (1996); Louis F. De Duca, *Teaching of the European Community Experience for Developing Regional Organizations*, 11 DICK. J. INT'L L. 485 (1993). In fact, the EU does not provide direct effect for other international treaties including the GATT. *See* Brand, *supra* note 26, at 572–79.

100. *See* Schneider, *supra* note 24.

101. *See The Transformation of Europe*, *supra* note 21, at 2421 (noting the importance of citizens to the EU judicial system); P.P. Craig, *Once upon a Time in the West: Direct Effect and the Federalization of EEC Law*, 12 OXFORD J. LEG. STUD. 453 (1992) (arguing that private enforcement agents are critical to the success of the EU system of direct effect). *See generally* Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L. L. 611 (1994) (arguing that nongovernmental organizations should be able to act as amici curiae in international courts).

102. *See generally* Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Communities Legal Order*, 37 HARV. INT'L L.J. 307 (1996).

bringing a case against another state. Further, individuals can make a direct economic assessment about whether it is worth it to them to spend the time and money on litigation. For these reasons, where individuals are granted rights and where the benefits of the treaty are supposed to accrue directly to individuals, it makes sense to give individuals a remedy for violation of those rights.[103]

2. Supremacy

The name "supranational" in this regime comes from the fact that the court and its rulings are clearly supreme in all ways to domestic law. The rulings from the supranational court must be followed by domestic courts, legislatures, and the executive branch. That is in contrast, for example, to rulings under the International Adjudication Regime above, which are usually only directed to the executive branch.

Supremacy of a supranational court is also promoted when the decisions themselves are integrated into the domestic legal fabric as has been done with the referral system under the ECJ.[104] Because the ECJ makes the ruling on the law alone, the domestic court then renders the final decision applying the EU law to the facts at hand. In this way, the decision is one from a domestic court. As many commentators have noted, states are far less likely to ignore the decisions of their own court than they are of an international court.[105] One final element of supremacy is that domestic judges, under a supranational regime, are given the power of judicial review. Judges at any level may strike down domestic law as incompatible with EU law.[106]

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103. In fact, this avenue to the court provided some of the most important cases in the judicial history of the ECJ. *See, supra* note 34. Furthermore, the ECJ hears more cases as preliminary references under Article 177 than directly. In the early years of the EEC, from 1958–1973, nearly two-third of all cases in front of the ECJ came through preliminary rulings. See the Commission's annual General Report on the Activities of the Communities *cited in* Stefan A. Riesenfeld, *Legal Systems of Regional Economic Integration*, 22 AM. J. COMP. L. 415, 426 (1974). This use of Article 177 references continues to increase. In 1993, the ECJ received 203 references which more than doubled the number of cases in 1980. *See* Sarah E. Strasser, *Evolution & Effort: The Development of a Strategy of Docket Control for the European Court of Justice & the Question of Preliminary References*, JEAN MONNET PAPERS (Harvard Law School, 1995). For a review of the most recent literature assessing the impact of individual litigants and EU law, see Walter Mattli & Anne-Marie Slaughter, *Revisiting the European Court of Justice*, 52 INT'L ORG. 177 (1998). The push to give private actors rights in the World Trade Organization is based on the strengths of the European Union. *See, e.g.* Schneider, *supra* note 24; Shell *supra* note 43, at 917–25.

104. *See* Attanasio, *supra* note 75, at 10–14; Lenore Jones, *Opinions of the Court of the European Union in National Courts*, 28 N.Y.U. J. INT'L L. & POL. 275 (1996).

105. *See* J.H.H. Weiler & Ulrich Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L. J. 411 (1996) (commenting on the well-established supremacy doctrine of the ECJ and its limitations).

106. *See, e.g.*, Mattli & Slaughter, *supra* note 103, at 200–04.

3. Transparency

Under this regime, the supranational court works hard at maintaining its transparency to its users. The procedures and membership of the court are well-known. The decisions are published rapidly (and in the ECJ's situation, also include the Advocate-General's opinion) in order to provide clear reasoning of the outcome. This helps ensure the predictability of the court and continually increases the comfort level of private attorneys practicing before the court.

4. Enforcement

The supranational court has a strong enforcement mechanism. First, cases can be brought for noncompliance with earlier court decisions—yet another level of enforcement in this system.[107] Second, the supranational court acts more like a domestic court in that it ensures damages are directly awarded to aggrieved individuals.[108] This power makes the national government more likely to comply with an international law in that it puts a price tag on noncompliance. Indeed, the costs of noncompliance can be severe and direct.[109] And in some ways, it makes

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107. For example, see Case 169/87, Commission v. France, 1988 E.C.R. 4093 (in which the Commission was forced to bring France in front of the ECJ for the second time for noncompliance with an earlier court ruling on tobacco pricing) and Case 69/86, Commission v. Italy, 1987 E.C.R. 773 (enforcing a previous judgement against Italy for the quality control of produce).

108. *See* Case 14/83, Von Colson v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891 (allowing individual workers to enforce their rights under a Community Directive on equal employment); Case 33/76, Rewe-Zentralfinanz eG v. Landwirtschafts-Kammer Für Das Saarland, 1976 E.C.R. 1989 (forcing Germany officials to refund illegal money charged to individuals for the inspection of imported apples even though the German statute of frauds had run on the claim). *See generally* O'Keefe, *supra* note 99; April Philippa Tash, Note, *Remedies for European Community Law Claims in Member State Courts: Toward a European Standard*, 31 COLUM. J. TRANSNAT'L L. 377 (1993).

109. *See* Francovich, *supra* note 34 (forcing Italy to compensate workers for damages suffered by non-implementation of a Community Directive dealing with workers' protection against bankrupt employers); Marshall, *supra* note 98 (imposing damages that exceeded the United Kingdom's statutory limitations); Case 70/72 Commission v. Germany, 1973 E.C.R. 813 (forcing Germany to not only cease the illegal payments of state aid but also to recover any aid already granted to its nationals). Remarkably, the ECJ has not imposed any fine thus far in a case brought by the Commission. Article 171 specifically states that the ECJ may, by the request of the Commission, impose a lump sum or penalty payments upon a Member State that refuses compliance. This Article was added to the Treaty on European Union by the request of Parliament concerned with the enforcement of Community law. *See* Treaty on European Union, *supra* note 5, Article 171(1) (stating that necessary measures shall be taken for enforcement of compliance, has been used by the ECJ); Lisa Borgfeld White, Comment, *The Enforcement of European Union Law: The Role of the European Court of Justice and the Courts Latest Challenge*, 18 HOUS. J. INT'L L. 833, 857 n.207 (1996) (listing the fifteen cases in violation of Article 171). However, the imposition of a fine, under Article 171(2), has yet to be employed. *See* Kenneth M. Lord, Note, *Bootstrapping an Environmental Policy*

compliance in the first place easier since a government can demonstrate how noncompliance will directly hurt the national treasury. Moreover, the enforcement power of the court helps the governments protect themselves against strong domestic lobbies.

These remedies are in addition to a requirement to change the law (as opposed to the choice granted in the WTO).[110] Furthermore, by replacing the traditional international law remedy of retaliation, the system is closer to a domestic court system. Violations of international law are treated like any other violation of the law. By eliminating retaliation, the supranational court system avoids escalation between states retaliating and cross-retaliating. It also avoids linkage between different trade issues: each problem is treated separately and judged on its own merits.

III. Political & Economic Variables for Deciding Which Regime is Appropriate

Now that we have outlined the four regimes of international dispute resolution, the next step is to outline the variables that help us determine the most appropriate regime for any given trade organization. These variables differ from the factors outlined in the previous section in that these variables are the political and economic factors behind the creation of international organizations. The first set of variables outlined the legal structures (or lack thereof) in the international dispute resolution system. This second set of variables applies a series of multidisciplinary integration theories to the dispute resolution regimes.

Several of these variables derive from responses to the realist theory of political science. Realism argued that states act only in their best interests in a system of anarchy. Yet realist theory was not able to explain why states would then form international organizations.[111] Regime theory, created as a response to realist theory, argued that states are rational

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from an Economic Convent: The Teleogical Approach of the European Court of Justice, 29 Cornell Int'l L.J. 571, 604 n.325 (1996) (commenting on the lack of enforcement through use of fines); *see also* Michael J. McGuinness, *Recent Development*, 30 Stan. J. Int'l L. 579, 594 n.81 (1994) (reasoning the lack of enforcement by use of Article 171).

110. *See supra* note 94 and accompanying discussion.

111. *See* Abbott, *supra* note 1 at 336–38; *see also A Dual Agenda*, *supra* note 1 at 214–18 (discussing realism theory). For more on applying realism to international trade, see generally Robert Gilpin, U.S. Power and the Multinational Corporation: The Political Economy of Foreign Direct Investment (1975) and Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (5th ed. 1973).

actors and would cooperate when it was in their best interests.[112] From regime theory came a theory of "mesoinstitutions"—a theory by Kenneth Abbott and Duncan Snidal that attempts to explain the presence of formal international organizations.[113] Moving away from both realist and regime theory, liberal international relations theory explains state cooperation by examining the impact of private actors on state choices and arguing that states will act based on the preferences of their populations.[114]

From economics, we have several different theories that have been identified as applying to international organizations and how they operate. The first is the theory of economic integration outlined by Bela Balassa explaining organizations that are created in order to facilitate economic cooperation.[115] The second is Ronald Coase's theory of the firm and a cost-benefit analysis as applied by Joel Trachtman to international organizations.[116] Finally, Joseph Weiler has applied Albert Hirschman's political and economic theory of exit, voice and loyalty to the EU to explain the EU's historical development.[117] Each of these

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112. *See, e.g.*, INTERNATIONAL REGIMES (1983) (Stephen D. Krasner ed., 1983); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986).

113. Kenneth W. Abbott and Duncan Snidal, Mesoinstitutions: The Role of Formal Organizations in International Politics, (1995) [hereinafter Mesoinstitutions] (unpublished manuscript on file with the author). Abbott and Snidal have published a revised version of this paper in the J. OF CONFLICT RESOLUTION. See *infra* note 155. Where possible, I have cited to the published article, however, the concept of Mesoinstitutions is only used in the unpublished manuscript. Additionally, the original concepts of facilitating versus producing organizations have been eliminated from the published article. The published article uses the concepts of centralization and independence to outline the range of potential activities. *See also Essay in Trade Governance, supra* note 8 (applying mesoinstitutional theory to the FTAA).

114. *See* Andrew Moravscik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); *see also* Shell, supra note 43 (applying regime theory and liberal theory to propose reforms for the WTO).

115. BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION (1961). Balassa's theory has been widely applied by legal scholars in analyzing organizations. *See, e.g.*, Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127 (1995) (discussing importance of NAFTA to the establishment of the free trade zone in the Western Hemisphere); *Essay in Trade Governance, supra* note 8; *Dispute Resolution as a Catalyst, supra* note 6.

116. *The Theory of the Firm, supra* note 19. Also, see Dunoff & Trachtman, *supra* note 94 for an exhortation to apply law and economics to international law and Ronald S. Cass, *Economics and International Law*, 29 N.Y.U. INT'L L. & POL. 473 (1997) for encouragement of the application of economic theory of international law.

117. *The Transformation of Europe, supra* note 21, at 2411, citing A. HIRSCHMAN, EXIT, VOICE AND LOYALTY—RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

theories offer compelling explanations as to why states cooperate and what forms this cooperation can take.[118]

Albert Hirschman's political economic theory of exit, voice, and loyalty when applied to international organizations turns on the issue of sovereignty.[119] Therefore, this article examines the potential levels of retained sovereignty under international organizations. The next part turns to variables derived from the theory of mesoinsitutions—the potential functions of the international organization. These functions have been divided into facilitating international organizations and producing international organizations. Facilitating international organizations have decentralized cooperation through normative, consultative, supportive, and initiative functions. Producing international organizations, on the other hand, rely on centralized cooperation and a cession of some sovereignty in order to produce rules, assistance, and information.[120] Levels of economic integration are examined next derived from Balassa's theory of economic integration.[121] These first three sets of variables—concerns over sovereignty and goals and functions of the organization—reflect each state's national and political interests in joining international organizations.[122]

Analysis of the remaining variables—number of member states, level of economic, social and legal development, and type of government—are an attempt to look inside each state for how the state can function within each type of dispute resolution regime. These variables are suggested by a number of theories. First, economic analysis of international organizations focuses on the costs and benefits of such organizations. These costs can neatly be summarized as sovereignty costs—loss of autonomy, loss of future flexibility, potential loss of office—versus economic gains from liberalization, stability, and security.[123] This calculus is easy to understand and useful to apply at the outset for understanding states' motivations in signing trade

118. For an earlier examination of the variables leading to integration, *see* Ernst B. Haas, *The Study of Regional Integration: Reflections On the Joy and Anguish of Pretheorizing*, 24 INT'L ORG. 607 (1970).

119. HIRSCHMAN, *supra* note 117.

120. *See* Mesoinstitutions, *supra* note 113.

121. BALASSA, *supra* note 115, at 2.

122. *See also* Shell, *supra* note 43, at 834–39. Shell uses a variety of international relations theories to categorize models of dispute resolution. His Regime Management Model is based on regime theory where states balance free trade interests with autonomy interests. The Efficient Market Model is based on free trade theory and liberalism. Finally, the Trade Stakeholders Model is based on theories of liberalism and civic republicanism.

123. For more on balancing sovereignty and economic integration, see Joel P. Trachtman, *L'Etat, C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L L. J. 459 (1992) and Susan Hainsworth, *Sovereignty, Economic Integration, and the World Trade Organization*, 33 OSGOODE HALL L. J. 583 (1995).

agreements.[124] Economic variables should also matter in the choice of dispute resolution regime. Trachtman's adoption of the theory of the firm relies on power differentials and cost-benefit analysis to explain cooperation.[125] This cost-benefit analysis must examine the economic and social levels of each state and is also affected by the number of states participating in the international organization. Second, liberal international relations theory, coming from the Kantian tradition, would argue that the type of government and legal culture is important in terms of recognizing which private actors are actually represented by the government.[126] Finally, political bargaining theories also examine the number of states and the type of government of these states involved in international negotiations. Clearly, some of these variables are dependent on one another and perhaps repetitive. All of these variables cannot be equal in terms of determining state action. However, I believe for clarity, it is preferable to look first at each set of variables independently and then to evaluate their relative impact. This next section reviews each theory briefly and identifies the political or economic variable coming from the theory.

A. *Concerns Over Sovereignty—Exit, Voice & Loyalty*

When any state joins an international organization, there is, by definition, some relinquishment of sovereign power to the organization.[127] Some restriction is placed on the state (i.e., limits on tariff changes[128]), some procedure for grievances is designated (i.e., use of the ICJ for territorial disputes versus use of force[129]), or some organization is created for monitoring and coordinating state behavior (i.e., the Organization of American States[130]). In all of these cases, the sovereignty of a state, as it is classically defined,[131] is limited. Thus, the issue for a state joining any

124. *See* Jay Smith, Policing International Trade (1998) (unpublished Ph.D. dissertation, Stanford University) (on file with author); *see also* Guzman, *supra* note 62 (explaining why the economic gains from treaties cause less developed countries to sign investment treaties that overly limit their sovereignty).

125. *Theory of the Firm*, *supra* note 19, at 543–49.

126. *See* Moravscik *supra* note 114, at 513.

127. "To varying extents, organizations have developed legislative or quasi-legislative powers and dispute-settlement mechanisms raising common problems relating to relinquishment of sovereign prerogatives by members. . . ." FREDERIC L. KIRGIS, JR., INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING v-vi (1993).

128. *See* GATT, *supra* note 51.

129. *See* UN Charter, Statute of the International Court of Justice, *supra* note 16.

130. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

131. "Sovereignty is supreme authority, an authority which is independent of any other earthly authority." LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 101 (1st ed. 1905). Sovereignty is defined in Black's Law Dictionary as "the supreme, absolute, and

international organization is to what extent it is willing to limit its sovereignty. More collectively, the issue is what type of structure are member states willing to create in order to assuage their concerns about sovereignty.

Joseph Weiler answered these questions with regard to the creation of the European Union[132] by using the Exit and Voice regime established by Albert Hirschman in *Exit, Voice and Loyalty.*[133] Hirschman originally applied these concepts in the framework of political economy to study the behavior of individuals in companies, organizations and, at the broadest level, states. He used the idea of voice to determine the ability of the individual to have influence on the behavior of the organization and to 'voice' their opinion.[134] Exit is the concept of leaving the organization, switching brands, or changing political parties when an individual is not happy with the behavior of the larger entity.[135] Loyalty, as used by Hirschman, is the dynamic by which individuals stay in organizations longer than they would otherwise and turn to the voice mechanism to effect change rather than exit.[136]

In his article, Weiler applied this construct to the history of the European Union, examining the trade-off between political representation in decision-making and the ability of member states to selectively exit, or ignore certain laws. He argued that as exit declines, the need for voice increases. In the case of the European Union, as the European Court of Justice ruled that EU rules have direct effect[137] and have supremacy[138] in the early 1960's, member states felt that more political representation was necessary. This need for voice precipitated the Empty Chair Crisis in 1965 and the Luxembourg Compromise in 1966 which permitted member states to veto any legislation directly affecting their national security. These actions delayed the intent of the Treaty of Rome to move to majority voting and kept the veto until the Single European Act of 1986. This analysis of the trade-off between voice and exit is an important one for any international organization and can be directly applied to dispute resolution mechanisms.

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uncontrollable power by which any independent state is governed; supreme political authority. . ." BLACK'S LAW DICTIONARY 971 (6th ed. 1991). *See also* Louis W. Goodman, *Democracy, Sovereignty, and Intervention*, 9 AM. INT'L L. & POL'Y 27, 27–29 (1993) (giving historical analysis of sovereignty).

132. *The Transformation of Europe, supra* note 21.
133. HIRSCHMAN, *supra* note 117.
134. *Id.* at 4.
135. *Id.* at 4.
136. *Id.* at 77.
137. Van Gend en Loos, *supra* note 34.
138. Costa v. ENEL, *supra* note 34.

1. The Need for Exit

The evolution of the European Union has severely limited the ability of member states to ignore both legislation passed and court decisions. Court decisions have required timely implementation of legislation,[139] action in the face of non-implementation,[140] compliance with previous court decisions,[141] and, more recently, damages to individuals harmed by non-implementation.[142] Unless a member is totally going to exit the European Union, blatant violation of the dispute resolution mechanism is minimal.[143]

To carry Hirschman's theory into other trade agreements, the ability to selectively exit—to ignore particular rulings—is a distinct possibility. For example, one of the primary reasons that GATT was finally reformed into the WTO was because of the increasing use of selective exit by certain powerful member states (the United States, Canada, and Europe included.)[144] Clearly, one of the factors for any state to consider in deciding which type of dispute resolution regime it would like to join is the ability to selectively ignore decisions under the regime. That determination is made by the agreement establishing the regime, which will set forth whether decisions are binding and have supremacy.

A type of exit is the ability of states to prevent the regime from making decisions about certain issues. Again, GATT provides a helpful

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139. *See, e.g.*, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, and C-190/94, Dillenkofer and Others v. Federal Republic of Germany, 1996 E.C.R. I-4845, [1996] 3 C.M.L.R. 469 (holding that Member State is responsible for damage suffered as result of failure to transpose directive in good time).

140. *See*, Frankovich, *supra* note 34; Case 70/72 Commission v. Germany, *supra* note 109.

141. *See, supra* note 107 and accompanying discussion.

142. In 1991, the ECJ instituted remarkable advancement for the enforcement of community law through the preliminary reference ruling in Francovich, *supra* note 34. *See* Rene Valladares, *Francovich: Light at the End of the Marshall Tunnel*, 3 U. MIAMI Y. B. INT'L L. 1 (1995). The ruling conferred liability upon a Member-State to an individual for damages incurred by nonimplementation of a directive. Thus, because Italy failed to implement a directive concerning the coverage of employees under insolvent employers, Italy was liable for the damages the employees suffered.

143. Of course, there are many violations still not brought to court and members have been able to find ways to avoid complete implementation. In addition, the idea that no member would ever exit the EU has been proven to be false as the EU evolves. For example, selective exit from the Maastricht Treaty was used by Denmark and the United Kingdom regarding the monetary union. *See* Christos Hadjiemmanuil, *European Monetary Union, the European System of Central Banks, and Banking Supervision: A Neglected Aspect of the Maastricht Treaty*, 5 TUL. J. INT'L & COMP. L. 105, 107–110 (1997).

144. *See* ENFORCING INTERNATIONAL TRADE LAW, *supra* note 55, at 352–355 (summarizing the increasing legal failures of the GATT in the 1980's and noting that GATT was clearly more responsive to the powerful states). This type of selective exit could also be considered voice because states had used selective exit to express their displeasure with GATT.

example. While some states ignored GATT panel rulings,[145] other states used the tactic of preventing a neutral GATT panel from even hearing the dispute.[146]

A final type of selective exit from a dispute resolution regime is to limit the neutrality of the decisionmakers. In dispute resolution regimes, the decisionmakers could range from a standing court,[147] to rotating panels appointed from experts,[148] to ad hoc appointees from the government.[149] The ability of member states to influence the decision politically is another way of permitting selective exit from those decisions which would be too controversial domestically.

2. The Need for Voice

Weiler showed that as the ability to exit decreases, the need for voice increases.[150] In an international organization, this can be reflected in a number of ways. First, member states might choose to narrowly limit the ability of the dispute resolution regime to hear disputes. For example, states might be able to claim national security exceptions, as in NAFTA,[151]

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145. *See* ENFORCING INTERNATIONAL TRADE LAW, *supra* note 55 at 151–54 (discussing on the US-EC Pasta Subsidies case).

146. *See* ENFORCING INTERNATIONAL TRADE LAW, *supra* note 55, at 33–34, 54, and 68–69.

147. For example, the ECJ is a standing court. *See* L. NEVILLE BROWN & FRANCIS G. JACOBS, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES 1-2 (3rd ed. 1989).

148. The WTO and ICSID arbitral panels are appointed as needed from a list of approved experts. ICSID Convention, *supra* note 59; WTO Dispute Settlement Understanding, *supra* note 83, at art. 8.

149. *See* NAFTA, *supra* note 2, art. 2001(3)(a), at 693.

150. *The Transformation of Europe*, *supra* note 21, at 2410–2412.

151. *See, e.g.*, NAFTA Article 2102 on exceptions for national security:

> . . . [N]othing in this Agreement shall be construed:
>
> (a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential interests;
>
> (b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests
>
> (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
>
> (ii) taken in time of war or other emergency in international relations, or
>
> (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
>
> (c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

or structure the dispute so that only certain questions are raised in front of the regime, as in arbitration.[152]

The second way to increase voice is in the scope and content of the rules that are created under the treaty.[153] At the outset of the treaty, the entire organization can be limited as to the rules it covers. For example, concerns about giving up sovereignty can be met by restricting the treaty to the more narrow aim of free trade rather than pursuing a goal of broader integration. The question of voice continues to be relevant during the implementation of the treaty. If some organization exists it will, at a minimum, monitor and report the behavior of its members.[154] At a maximum, the organization will create rules to carry out the goals of the organization.[155] States concerned with maintaining voice will limit the types of cases permitted under the dispute resolution regime, limit standing to states, and create voting procedures that ensure continued voice in rule creation, such as vetoes or qualified majority voting.

3. The Existence of Loyalty

The concept of loyalty to international organizations is an interesting one and deserves more than the brief examination given here. The theory of loyalty, as Hirchmann uses it, suggests that members will choose to utilize their "voice" to change an organization, rather than "exit." The war between voice and exit is one that is continually fought on the battleground of the EU[156] and can also be found on a smaller scale

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NAFTA, *supra* note 2, at art. 2102 at 669–700.

152. This is similar to the point discussed *supra* notes 161–63 and accompanying text about the limited scope of arbitrations under the Investment Arbitration Regime.

153. The Luxembourg Compromise is an example of maintaining voice as exit decreases by maintaining a veto over the rules created under the Treaty of Rome. *See The Transformation of Europe*, *supra* note 21, at 2423.

154. *See, e.g.*, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 3, (1994) WTO website, (last visited Oct. 16, 1999) <www.wto.org/wto/legal/finalact.htm> [hereinafter Trade Policy Review Mechanism]; *see also* NAFTA *supra* note 2, art. 513 at 363; *see also* John P. Fitzpatrick, *The Future of The North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North American and Western Europe*, 19 HOUS. J. INT'L L. 1, 60–61 (1996).

155. *See* Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONF. RES. 3, 15 (1998) [hereinafter *Why States Act*].

156. For example, the Luxembourg Compromise discussed *supra* note 153 is an example of maintaining loyalty and voice. Only the Single European Act, passed 10 years later, resolved this conflict between voice and exit by providing for qualified majority voting. Similarly, the decision by Denmark and the United Kingdom to stay out of the monetary union demonstrates loyalty and exit. The United Kingdom continues to debate the advantages of joining. *See* Alan Cowell, *Britain Gets Rough Agenda For Euro*, N.Y. TIMES, Feb. 24, 1999, at C1.

in other organizations.[157] What is interesting is that the balance between voice and exit is more clear when member states feel loyal to the international organization. This loyalty can stem from a variety of sources including a political belief in the overall goals of the organization or the conviction that the organization will benefit the domestic economy.

B. *Function of the Organization—Mesoinstitution Theory*

The second variable is the function of the organization stemming from mesoinstitutional theory. Kenneth Abbott and Duncan Snidal created the theories of mesoinstitutions in order to better understand formal international organizations.[158] They argue that regime theory[159] is incomplete without a more detailed understanding of why states cooperate. The term "meso" stems from the concept that international organizations are somewhere between the centralized state and decentralized anarchy written about so frequently in international relations theory.[160] Furthermore, international organizations exist in order to perform functions for states. Mesoinstitutional theory divides these functions primarily into two categories—facilitating and producing. Abbott and Snidal recognize, however, that many organizations lie somewhere along a spectrum of cooperation.[161] For the purposes of this article, I will briefly describe each category and then discuss how each would structure its dispute resolution regime.

1. Facilitating Organizations

Facilitating organizations operate by promoting state cooperation through four separate functions. By setting forth principles, norms or rules, the facilitating organization has a normative function. This function can be performed without any structure at all.[162] The second function—the consultative function—also requires very little structure in that organizations can provide for state interaction through meetings, conferences, and similar gatherings. The supportive function is the third function of a facilitating organization. Through this function, the inter-

157. For example, the US withdrew from UNESCO in protest over its policies and funding. *See U.S. Parts Ways with UNESCO*, N.Y. TIMES, Dec. 23, 1984, at A1. The US has also withheld funding from the United Nations in an effort to promote reform. *See* DAVID P. FORSYTHE, THE POLITICS OF INTERNATIONAL LAW: U.S. FOREIGN POLICY, 117–140 (1990) (explaining the battle over UN assessments during the Reagan administration).

158. Mesoinstitutions, *supra* note 113.

159. *See supra* note 112 and accompanying text.

160. *See, e.g.*, COOPERATION UNDER ANARCHY (Kenneth A. Oye ed., Princeton University Press 1986).

161. Mesoinsitutions, *supra* note 113.

162. *See id.* at 13.

national organization provides research, information, tracking, and possibly agendas for future meetings.[163] Abbott and Snidal note that the WTO Secretariat would be an example of an international organization performing this type of supportive function in two ways. First the WTO Secretariat researches state practices under the existing rules. Second, it assists with dispute settlement by helping to form ad hoc panels under the WTO Dispute Settlement Understanding and by assisting the panel itself.

A possible fourth function for the facilitating organization is the initiative function. The secretariat of an international organization may call members together on its own initiative and draft an agenda. Again, Abbott and Snidal use the WTO as an example of this, citing a negotiating text put forth by GATT Director-General Dunkel, the Dunkel draft, as a catalyst in moving the Uruguay Round negotiations forward. The Trade Policy Review Mechanism, under which member state trade policies are monitored, is also given as an example of the initiative function.[164] It is clear that even without more formal dispute resolution structures, the facilitating organization can encourage compliance with the underlying trade norms.

2. Producing Organizations

Producing organizations are considered the more classic international organizations with substantial bureaucracies and budgets and concurrent losses in state independence. Abbott and Snidal analogize these organizations to corporations where states are the owners but not the managers.[165] In exchange for both the monetary and sovereignty costs, these producing organizations produce various benefits: rules, technical assistance, information, legitimacy, and financial support. These benefits can be grouped under two categories—efficiency and legitimacy. Producing organizations provide gains in efficiency by pooling risks or assets, managing joint production between member states, and reducing transaction costs through the creation of coordination points—rules, standards and specifications. These organizations also enhance legitimacy through their perceived neutrality and independence. For example, actions that a state might not undertake independently are laundered when these actions occur through an or-

163. *See id.* at 13–17; *Why States Act*, *supra* note 155, at 12.

164. Mesoinsitutions, *supra* note 113, at 17–18. *See* Trade Policy Review Mechanism, *supra* note 154.

165. Mesoinsitutions, *supra* note 113, at 20–21.

ganization.[166] Other functions performed by a neutral international organization include trustee,[167] allocator,[168] information source,[169] or community representative.[170] Also, under the heading of legitimacy is the concept that an international organization can act as a neutral arbiter when disputes arise.

Abbott and Snidal analyze this neutral function in terms of dispute resolution by dividing the potential roles between facilitative intervention versus binding intervention. Facilitative intervention—through good offices, mediation, inquiry, or fact-finding—reduces the transaction costs of diplomacy by helping states overcome bargaining deadlocks and generating possible solutions.[171] Binding intervention can clarify rights and duties and interpret the underlying treaty.[172] The threat of binding intervention is also, in and of itself, an important promoter of compliance.[173]

Thus, the variable coming from mesoinstitution theory is the function of the international organization. In terms of looking at the dispute

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166. This function is called laundering. *See id.* at 28–30. One example would be the reallocation of EU dues to certain sectors of the economy. The traditional underwriting of agriculture would probably not be acceptable in a state-to-state form but are laundered through the EU. Similarly, support to less economically developed regions—southern Italy, Greece, etc—would probably not be as effective state-to-state. *See also Why States Act, supra* note 155, at 18–19.

167. *See* Mesoinstitutions, *supra* note 113, at 31–34. Abbott and Snidal use the example of the UN Compensation Fund after the Gulf War as one example. *Why States Act, supra* note 155, at 20–21.

168. *See* Mesoinstitutions, *supra* note 113, at 34–35. The international organization is relied upon to allocate scarce resources such as radio frequencies or financial resources. *See Why States Act, supra* note 155, at 21–22.

169. *See* Mesoinstitutions, *supra* note 113, at 35–36. The international organization can create data directly, collect national data, and create standards for reporting. Even when information is reported nationally, a neutral agency provides more legitimacy for this information.

170. *See* Mesoinstitutions, *supra* note 113, at 40–43. The international organization can act as the representative of the community be it global like the UN or regional. *See Why States Act, supra* note 155, at 24–26.

171. Mesoinstitutions, *supra* note 113, at 37. *See also* ROGER FISHER ET AL., BEYOND MACHIAVELLI 123–32 (outlining how third party roles could be designed to better facilitate international negotiations).

172. *See* Mesoinstitutions, *supra* note 113, at 37.

173. *See* Mesoinstitutions, *supra* note 113, at 37; Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG 533, 555 (1992) (discussing the case where the threat of Commission action against Denmark caused the Danish government to pay damages without any case being brought). Denmark awarded a contract to build the Great Belt Eastern Bridge to a domestic company after receiving foreign bids. A British-French consortium threatened to bring a complaint to the Commission. The Commission threatened to bring a case against Denmark and the Danish government paid damages to the consortium rather than proceed with the case. *See id.*; *see also* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) (describing this negotiating phenomenon).

resolution regime outlined in this article, it is clear that the Negotiation Regime fits under a facilitative organization and the concept of facilitative intervention. Binding intervention—through arbitration or a court—is used in producing organizations and under the latter three dispute resolution regimes. Therefore, if states prefer to utilize a facilitative organization, a Negotiation Regime is logical. However, if states plan to create a producing organization—with the costs and benefits outlined above—some binding intervention is part of that system.

C. *Level of Economic Integration*

The third variable is the level of economic integration planned for the member states. The goals of economic integration clearly impact the type of organization desired and the best regime for dispute resolution. In the field of international trade, the goals of the organization can be neatly divided into the level of integration desired by the member states.[174] While the level of economic integration desired depends on a variety of factors, the primary factor is clearly the desire for economic growth and stability.[175]

1. General Tariff Reduction

A significant proportion of trade agreements avoids economic integration of any kind and focuses primarily on tariff reduction. The GATT is a global example of an agreement to further tariff reduction without promoting economic integration.[176] The purpose of these agreements is

174. *See* BALASSA, *supra* note 115. Balassa categorizes the levels of economic integration as follows: free trade area, customs union, common market, economic union and complete economic integration. Each of these levels will be explained further below. *But see* Jacques Pelkmans, *The Institutional Economics of European Integration*, in 1 INTEGRATION THROUGH LAW: EUROPEAN AND THE AMERICAN FEDERAL EXPERIENCE 318, 321, 324–25 (Mauro Cappelletti, et al. eds., 1986) (arguing that the five stages outlined by Balassa miss the important distinction between negative integration—the removal of barriers—and positive integration—the transfer of economic decision-making to the union level).

175. *See* BALASSA, *supra* note 115, at 6. Balassa also notes that integration could help counteract increased state intervention in the economy and help mitigate cyclical fluctuations. *See id.* The belief that economic integration also leads to political stability is also important. *See, e.g.*, Robert Schuman, *The Schuman Declaration* (1950) *reprinted in* BRENT F. NELSEN & ALEXANDER C-G. STUBB, THE EUROPEAN UNION 11 (1994).

176. *See* GATT, *supra* note 51. Note, however, that the WTO would probably be considered some form of economic integration because of the inclusion of GATS and TRIPS. GATS and TRIPS are a widening, versus a deepening, of the traditional trade agreement by including services and intellectual property. *See* John M. Fontecchio, *The General Agreement on Trade Services: Is It the Answer to Creating a Harmonized Global Securities System?*, 20 N.C. J. INT'L L. & COM. REG. 115 (1994); *see also* Symposium, *Intellectual Property Law in the International Marketplace: Trade Related Aspects of Intellectual Property Rights: Enforcement and Dispute Resolution*, 37 VA. J. INT'L L. 275 (1997); Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal*

not to coordinate policies, but rather to trade off economic benefits between members.[177] These basic reciprocal rights, such as most-favored-nation status and national treatment rights, are the relatively uncontroversial backbone of these agreements.[178]

2. Free Trade Agreement

The second level of a trade agreement is a free trade agreement. A free trade agreement entails the reduction and eventual elimination of tariffs between the member states on the goods covered by the agreement.[179] The typical free trade agreement also proposes the elimination of other quantitative restrictions on trade including quotas and bans. Finally, a free trade agreement permits the member states to maintain their respective tariffs with regard to the remainder of the trading community. Most agreements still exempt certain strategic or otherwise important goods from the free trade agreement.

3. Customs Union

The next level of integration is the customs union in which the member states eliminate tariffs between themselves, and unify their tariff levels with respect to the rest of the trading community.[180] A customs union increases the integration between the member states and, arguably, creates a more powerful trading bloc. Outside states must now negotiate tariffs and other trade barriers with several states rather than just the single state. Some examples of customs unions include the Benelux customs union prior to its becoming part of the EU and the

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for an Annex on Legal Services Under the General Agreement on Trade in Services, 16 MICH. J. INT'L L. 941 (1995).

177. *See* GATT, *supra* note 51 (noting in the Preamble that the method of achieving GATT's goals was "[b]y entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs. . ."). Similar purposes also exist in bilateral or other multilateral tariff reduction agreements. *See, e.g.*, African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes, and Fourth ACP-EEC Convention of Lome, Dec. 15, 1989, 29 I.L.M. 783 (1990) [hereinafter Lome Convention] (providing preferential access to the EEC market). Ironically, it is this convention which is now under attack at the WTO level for providing unfair benefits in the Banana War between the U.S. and EU. *See* sources cited *supra* note 49.

178. *See* THE GATT LEGAL SYSTEM, *supra* note 95, at 20.

179. *See* BALASSA, *supra* note 115, at 2; *see* NAFTA, *supra* note 2, art. 302(2); U.S.-Israel Free Trade Agreement, Apr. 22, 1985, U.S.-Isr., 24 I.L.M. 657 [hereinafter U.S.-Israel FTA]; Central European Free Trade Agreement, Dec. 21, 1992, 34 I.L.M. 3.

180. *See* BALASSA, *supra* note 115, at 2; *see also* GATT, *supra* note 51, article XXIV, sec 8 (discussing the definition of a customs union in GATT).

relatively recent customs union between the Czech Republic and the Slovak Republic.[181]

4. Common Market

The fourth level of integration is the common market. For many years, this was the appellation used to refer to the European Economic Community.[182] The common market is a customs union that moves beyond free trade in goods, eliminating barriers to the free movement of the "factors" affecting the free movement of goods. This includes the free movement of services, capital and labor.[183] By eliminating barriers to free movement of services, including banking, insurance, travel agencies, health care, and other professions, the common market promotes a more integrated and open trade between the member states.[184] The free movement of capital between the states permits the true establishment of cross-border enterprises and facilitates the free movement of goods and services. Finally, the free movement of labor (often the most controversial part of the common market) permits the workers in each of the member states to go where the jobs are. The free movement of goods and services will be facilitated by the ability of the citizens of this common market to work in any of the member states.

5. Economic Union

The fifth level of integration is the economic union. The economic union builds on the common market structure by beginning the harmonization of national economic policies.[185] Those policies could

181. Czech Republic-Slovak Republic Customs Union Agreement between the Czech Republic and the Slovak Republic dated October 28, 1992, entered into force January 1, 1993. *See* World Trade Organization, TRADE POLICY REVIEW: CZECH REPUBLIC 23–24 (Geneva, June 1996); *Czechs, Slovaks To Form Customs Union, But Policies Seen Diverging After Time*, 44 Int'l Trade Rep. 1885 (Nov. 4, 1992); *Czech Parliament Starts to Discuss Agreements with Slovakia,* CTK NEWS WIRE, Nov. 24, 1992.

182. See, for example, the Journal of Common Market Studies and the Common Market Law Reports. There are also common markets in other regions. In Latin America, there is the Andean Common Market (ANCOM) between Columbia, Venezuela, Bolivia, Ecuador and Peru in the Agreement on Andean Subregional Integration, May 26, 1969 28 I.L.M. 1165 [Treaty of Cartagena]; the Caribbean Common Market (CARICOM), created through an Annex to the Treaty Establishing the Caribbean Community, July 4, 1973, 946 U.N.T.S. 17; the Central American Common Market (CACM), General Treaty on Central American Economic Integration, Dec. 13, 1960 455 U.N.T.S. 3 [Treaty of Managua], between El Salvador, Honduras, Nicaragua, Costa Rica and Guatemala; and MERCOSUR, *supra* note 6. There is also the African Common Market between Algeria, Egypt, Ghana, Guinea, Mali and Morocco, dated April 1, 1962.

183. *See* BALASSA, *supra* note 115, at 2; Treaty of Rome, *supra* note 5, article 3.

184. *See* BALASSA, *supra* note 115, at 80–98.

185. The EU would be considered well on its way to full economic union. *See* Treaty on European Union, *supra* note 5.

include fiscal (i.e., inflation and interest rates), taxation, monetary (i.e., exchange rates), and social (i.e., employment policies and welfare). Clearly, this level of integration requires more than coordination between the commerce departments because it involves regular executive consultations about economic planning. This planning would most likely be done through a separate organizational body with its own bureaucracy to coordinate the myriad policies of the states.[186]

6. Economic Integration

The final level of integration is full economic integration between the member states.[187] All of the economic policies—fiscal, monetary and social—would be coordinated. This level of integration would also require a supranational authority to oversee implementation and compliance with the rules, regulations, and decisions pertaining to economic integration.[188] At this level of integration, there would no doubt be additional laws to the constituent treaty with which compliance would be necessary. Whereas the lower levels of integration usually only require government action, integration at this level would also impose restrictions and guidelines on private citizens to eliminate all economic barriers between the member states. Foreign and security policy could remain outside the realm of full economic integration but almost every other type of policy could be affected.[189]

The level of economic integration desired is the third variable—along with sovereignty concerns and function of the international organization—which is decided by member states based on their national interests when creating an international trade organization. These first three variables are dependant upon the goals of the member states. The next three variables discussed look at the realities of the member states in the organization. Each of these variables—number of members, economic development, and political and legal structure—clearly affect the potential goals of any trade organization and impact on what type of dispute resolution regime is most appropriate.

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186. See, for example, Mesoinstitutions, *supra* note 113, at 21–27 on efficiency gains from producing organizations. An economic union would have to be considered under this category of organizations.

187. Examples of complete economic integration of constituent states include the United States, Canada and Brazil.

188. *See* BALASSA, *supra* note 115, at 2.

189. For example, EU expansion into the subject areas of education, environment, immigration, abortion, and human rights could all be used as signs of progress toward complete economic integration.

D. *Number of Member States*

The importance of the number of member states to an international trade treaty comes from two different disciplines. First, negotiation theorists have determined that multiparty negotiations are clearly more complex than bilateral negotiations.[190] Understandably, the structure created in an international organization must take account of the negotiating complexities. An increased number of member states will affect how decisions are made both in the creation of rules and in the resolution of disputes.

Second, the economic gains of state cooperation are also affected by the number of states involved. As Joel Trachtman writes, "we assume that states enter the market of international relations in order to obtain gains from exchange."[191] Two of the potential sources of economic gain from trade are economies of scale and economies of scope.[192] Economies of scale come from global business, global regulation or technological economies of scale.[193] Economies of scope come from centralized production and regulatory economies of scope.[194] Both the benefits of economies of scale and scope increase over time and with increased frequency of transactions. And all of these benefits depend on the size of the potential economy concerned.[195]

1. Bilateral Treaty

A bilateral treaty is often the simplest to understand and interpret. Rarely will the states involved feel the need to create an additional body under the treaty to interpret or monitor the treaty. The rules of the treaty are relatively straightforward, as in a free trade agreement[196] or in a bilateral investment treaty.[197] The treaty might also deal with specific

190. *See, e.g.*, HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION, 251–355 (1982); *see also* INTERNATIONAL MULTILATERAL NEGOTIATION (I. William Zartman ed., 1994); DOUBLE-EDGED DIPLOMACY (Peter B. Evans, et al. eds., 1993) (focusing on the problems of international bargaining and domestic politics as two-level games).

191. *The Theory of the Firm*, *supra* note 19, at 489. See Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L., 49 (1998) for an excellent primer on the economics of trade.

192. *See The Theory of the Firm*, *supra* note 19, at 493.

193. *See The Theory of the Firm*, *supra* note 19, at 494. Global regulation decreases inefficient regulatory disharmony or evasion and encourages global business.

194. *See The Theory of the Firm*, *supra* note 19, at 494–95. Economies of scope occur through "spillover" of international regulation. "Once several areas of international regulation are established, economies of scope may be realized by regulating other areas." *Id.*

195. *See*, BALASSA, *supra* note 115, at 35–39 (discussing the impact of the size of the union on economic gains).

196. *See, e.g.*, U.S.-Israel FTA, *supra* note 179.

197. *See, e.g.*, Argentina-U.S. BIT, *supra* note 61.

sectors of the economy.[198] Usually the aims of the treaty will be limited vis-a-vis integration[199] to narrow trade goals. As in non-trade bilateral agreements, if compliance does not occur, the states would renegotiate the agreement on an ad hoc basis, rather than submit the dispute to any oversight body.

2. Several States

More recently, agreements among several states have proliferated as neighboring states draft and join smaller international trade organizations in order to boost their own economies.[200] Again, the goals of these agreements can vary from simple investment treaties to new organizations, as in the case of MERCOSUR. The structure of these agreements starts to become more complex. The concern with monitoring, harmonization, and compliance will lead certain of these organizations to create oversight bodies, and even judicial bodies.[201]

3. Regional Agreements

At the next level up, trade agreements become even larger by attracting members from the entire region. The clearest examples of this level agreement are the European Union and the proposed Free Trade Agreement of the Americas. With membership above 15 to 20 states, a separate institution is a necessary to at least coordinate meetings of the states if not to monitor compliance with the laws.[202]

4. Global Treaties

The largest type of trade organization is the World Trade Organization with the implicit goal of global membership.[203] The type of dispute resolution mechanism required at this level is the subject of ongoing

198. *See, e.g.,* Agreement Between the Government of United States of America and the Government of Ghana for Sales of Agricultural Commodities, Feb. 8, 1990, U.S.-Ghana, 90 U.S.T. 77, KAV No. 2905; Statement Regarding the Agreement Between the United States and Morocco Relating to the Agreement of June 25, 1987 for Sale of Agricultural Commodities, October 20, 1988, U.S.-Morocco, 88 U.S.T. 355; KAV No. 1417.

199. *But see* Treaty Regarding the Inclusion of the Principality of Liechtenstein in the Swiss Customs-Area, Mar. 29, 1923, Liech.-Switz., 2 L.T.S. 231. Liechtenstein is now considered part of Switzerland for economic purposes.

200. *See, e.g.,* Treaty of Cartagena and Treaty of Managua, *supra* note 182.

201. *See, e.g.,* MERCOSUR, *supra* note 6.

202. This would be consistent with the role of a facilitating organization as described above.

203. In fact, current membership of the WTO is 134. WTO home page, (last visited Sep. 20, 1999) <http://www.wto.org>.

discussion.[204] Again, as the number of states grow, the need for oversight, information exchange, and general organization has also multiplied. There is also no doubt that the number of potential disputes is increased.

The number of member clearly impacts other variables. For example, exit—the ability to either leave the organization or ignore decisions from the dispute resolution mechanism—is clearly more difficult at the extremes in the range of member states. In a bilateral agreement, exit could result in the collapse of the underlying agreement. A blatant breach of a bilateral treaty legally suspends the other state's duties under the treaty.[205] At the other extreme, few states could afford to completely withdraw from (or never join) a global organization. The jockeying over China's accession to the WTO is only one example of this concern.[206] The number of member states will also determine the necessity for additional organizational structures. Again, a global organization, even if it is facilitative, will most likely set up a secretariat. The number of member states also affects the level of economic of integration possible. Finally, in terms of legal factors discussed in the first part of this article, standing is the factor most affected by the number of member states. The argument has already been made that expanding standing under the WTO would overwhelm the system.[207]

E. *Similarity in Economic and Social Levels*

Economic theories and cost-benefit analysis of international organization also require an examination of the economic and social development of the member states.[208] In a cost-benefit analysis, states enter organizations in order to reap an advantage.[209] The international

204. *See, e.g.*, Special Issue, *WTO Dispute Settlement System*, 1 J. INT'L ECON. L. 175 (1998); *Symposium on the First Three Years of the WTO Dispute Settlement System*, 32 INT'L LAW. 609 (1998); John H. Jackson, *Dispute Settlement and the WTO: Emerging Problems*, 1 J. INT'L ECON. L. 329 (1998).

205. *See* Vienna Convention, *supra* note 47, art. 60.

206. *See, e.g.*, Erik Eckholm, *U.S. and China Trying Hard for Breakthrough on Trade*, N.Y. TIMES, Feb. 24, 1999, at A8; Erik Eckholm, *China's Entry into World Trade Organization Is Called Unlikely*, N.Y. TIMES, June 21, 1998, at A10.

207. *See* Philip M. Nichols, *Participation of Nongovernmental Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 295, 318–19 (1996) (arguing that providing standing to private actors in the WTO would create significant logistical problems).

208. *The Theory of the Firm*, *supra* note 19, at 495–98 (compares economic theories in explaining why international organizations are created); *see also* Richard A. Posner, *The New Institutional Economics Meets Law and Economics*, 149 J. INST'L THEOR'L ECON 73 (1993) (compares two economic theories and notes that there is significant overlap).

209. Jay Smith uses the relative economic power of member states vis-à-vis one another as a determining factor in how dispute resolution will be structured. Smith argues that treaty value is determined by potential economic gain and increased by the security that the

system is like a market and states can choose whether to engage in transactions. The comparative economic levels between member states impacts the evaluation of these costs and benefits to be gained by trading.[210] Although all states are ostensibly equal under international law,[211] it would be naïve to think that economic power and social development can be ignored.

1. Approximately the Same

Some trade treaties are signed among states with similar economic development. Examples of this type of treaty could include the original Treaty of Rome, creating the European Economic Community[212] and the US-Canada Free Trade Agreement.[213] While differences clearly existed between these states at the time of signing,[214] these differences are small compared to the rest of the global economy. If the economic strength of the states is relatively similar, the goals of the treaty are also more likely to be similar.[215] Creating economies of scale and eliminating tariff barriers

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agreement will be followed. The more binding the dispute resolution, the more trade benefits will be realized. Treaty value must be balanced against the loss of policy discretion which occurs as organizations are made more binding. Thus, he argues, the more trade-dependent the economy is of a member state, the more binding the dispute resolution mechanism that this state will favor. He also examines the states' relative global economic power. Smith, *supra* note 124.

210. *But see* Joel Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EUR. J. INT'L. L. 32 (1998) (discussing the limitations of cost-benefit analysis when applied to the conflict between trade values and other values).

211. *See* JANIS, *supra* note 18, at 179; *see also* UN Charter, *supra* note 16, art. 2(1) ("The [U.N.] is based on the principle of the sovereign equality of all its members.")

212. Treaty of Rome, *supra* note 5.

213. Canada-United States: Free-Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281.

214. For example, in 1988 the per capita gross domestic product was $19,488 in the United States and $18,058 in Canada. *See* 42 STAT. Y.B. 161, 175, U.N. Sales No. E/F. 97.XVII.1.

215. For example, the Preamble to the United States-Canada Free Trade Agreement resolves: " . . . .To STRENGTHEN the unique and enduring friendship between their two nations; To PROMOTE productivity, full employment, and a steady improvement of living standards in their respective countries" U.S.-Canada FTA, *supra* note 213.

Accompanying legislative history also shows the goals of the agreement:

> Mr. President, I would like to express my strong support for the United States-Canada Free-Trade Agreement [FTA] which will not only serve to strengthen our important economic and political ties with our great ally, Canada, but it will also serve as an important model for our trading relations with the rest of the world.

134 CONG. REC. 24422 (Sep. 19, 1988) (statement of Mr. Bumpers).

> . . .The United States-Canadian Free Trade Agreement or [FTA] which we have before use today is, in short, a comprehensive plan to pull down most of the existing barriers to trade between our two countries. If the FTA is approved, it will truly be a watershed event in modern economic history.

are primary goals; opening new markets, tapping cheap labor, or benefiting from less expensive consumer goods are less likely to be goals for one or the other state. Furthermore, similar economic power affects the willingness of each government to leave differences open for further negotiation. Negotiating from equal power is more comfortable for member states; judicial decisions are not viewed as necessary.

2. Clear Imbalance of Economic & Social Development

The alternative situation occurs when a treaty is concluded between states that differ quite significantly in their level of development. NAFTA could be considered one example, since the Mexican economy is clearly weaker than its partners[216]as could treaties between the European Union and Caribbean or South American states.[217] The goals of these treaties will differ from those among states at similar economic levels. Furthermore, the type of dispute resolution mechanism may be subject to more debate. While more powerful states may wish to retain their political clout through a Negotiation Regime, less powerful states would prefer a regime that is more politically neutral.[218]

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134 CONG. REC. 24421 (Sep. 19, 1988) (statement of Mr. Glenn).
Compare this with the Preamble to the Treaty of Rome:

> DETERMINED to establish the foundations of an ever closer union among the European peoples,
>
> DECIDED to ensure the economic and social progress to their countries by common action in eliminating the barriers which divide Europe.
>
> DIRECTING their efforts to the essential purpose of constantly improving the living and working conditions of their peoples,
>
> RECOGNIZING that the removal of existing obstacles calls for concerted action in order to guarantee a steady expansion, a balanced trade and fair competition,
>
> ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and by mitigating the backwardness of the less favoured. . . .

Treaty of Rome, *supra* note 5, at Preamble.

216. *See* Budgetary and Economic Analysis of the North American Free Trade Agreement, CIS-NO:93-J932-30 (reporting at the time of the NAFTA negotiations, the per capita GDP for the U.S. and Canada were between U.S.$20,000 to $25,000, while Mexico was at $5,000); *see also Dispute Resolution as a Catalyst*, *supra* note 6, at 852–53; Smith, *supra* note 124, at ch. 3.

217. *See, e.g.*, Fourth ACP-EEC Lome Convention, *supra* note 177 (providing preferential access to the EEC market). For a US example, see Gary G. Yerkey, *U.S., Laos Conclude Bilateral Trade, Investment Agreements, USTR Announces*, 14 INT'L TRADE REP. 1420 (Aug. 20, 1997).

218. *See* Smith, *supra* note 124, at 28 (arguing that dispute resolution mechanism in Chapter 20 of NAFTA [close to a facilitated Negotiation Regime] is a direct result of the US's relative power vis-à-vis Mexico and Canada).

3. Assorted Levels of Development

As the number of member states increase, the likelihood is that a simple division between developed and undeveloped economies is not applicable. In the case of the larger regional or global organizations, the member states will be at different stages of development. Even the North-South division or First World-Third World division is too simple a distinction to make since it glosses over many of the differences between states within these groups. Furthermore, simple tracking of the recent WTO cases demonstrates that the disputes do not regularly fall along economic divides.[219]

F. *Government Type and Legal Culture of Member States*

The last pair of variables to examine in determining regimes of dispute resolution is the type of government and concurrent legal culture in a member state. The importance of these variables comes from several different political theories. First, bargaining theory notes that the type of government in a member state affects the government's ability to negotiate and the government's negotiation strategy.[220] Second, the type of government, and particularly the impact of a democracy, has been examined by theorists from Kant to liberal international relations theory. Kant argued that international peace and domestic justice were intertwined.[221] Logically, international organizations would be more stable if comprised of democratic states.[222] The explosion of democracies around the world, may, in time, make the question of treaties among states with

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219. *See* WTO Website (last visited Sep. 23, 1999) <www.wto.org/wto /dispute/bulletin.htm>. Overview of the State-of-Play of WTO Disputes reporting to date that complaints filed by developed country Members is 93 matters/120 requests, complaints by developing country Members is 29 matters/31 requests, and complaints by both developed and developing country Members is 4 matters/10 requests. *Id.*

220. *See* Evans, et al., *supra* note 190; *see also* Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988) (noting that the transparency of a democracy requires different behavior when negotiating between states than does totalitarian states).

221. "[T]he mutual self-interest in international commerce 'sooner or later takes hold of every people, and it cannot exist side by side with war.'" Ernst-Ulrich Petersmann, *How to Reform the United Nations: Lessons from the International Economic Law Revolution*, 2 UCLA J. INT'L & FOR. AFF. 185, 186 (1997) (citing IMMANUEL KANT, POLITICAL WRITINGS 114 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge University Press, 2d ed. (1991)) [hereinafter *How to Reform the United Nations*]; *see also* Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

222. *See* DEBATING THE DEMOCRATIC PEACE (Michael E. Brown et al. eds., 1996); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 PHIL. & PUB. AFF. 205 (1983); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); R. J. Rummel, *Libertarianism and International Violence*, 27 J. CONFLICT RESOL. 27 (1983) (demonstrating that liberal democracies have not engaged in war with one another).

different types of governments moot.[223] In the meantime, differences among states pertaining to the role of domestic political interests, the power of domestic lobbies, and the independence of the judiciary will continue to affect their involvement in the international economy.[224] Furthermore, the differences between democracies and non-democratic states will be highlighted as free trade is promoted.

Finally, recent literature has addressed the impact of lawyers and litigation strategy in international organizations.[225] It is clear that growth in international trade agreements has boosted the practice of many Washington, D.C. lawyers.[226] Questions, however, are already arising about appropriate representation before international tribunals and the ability of small states as well as individual plaintiffs to find adequate representation.

The recent Banana case in front of the WTO is a classic example of this issue. The WTO panel held that the small Caribbean state of St. Lucia was not entitled to hire private counsel if other states objected.[227] In a landmark decision, the Appellate Body of the WTO held that a state could hire whomever they pleased.[228] Therefore, to ignore the impact of lawyers on the implementation of these agreements would be naïve.

1. Democracies, Open Economies and Strong Legal Cultures

On the one hand, if all member states in an international organization are democracies, the task is made easier. Under the circumstances, states have similar assumptions about the rule of law, the separation of judicial decisions from executive decisions, and underlying beliefs

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223. *See How to Reform the United Nations,* supra note 221 (explaining how international economic integration and increased constitutionalization of the United Nations would help encourage the transition to democracy).

224. *See* Goodman, *supra* note 131, at 30 (arguing that democratic government should be preferred globally for the functional reasons of open communication between states and reduced transaction costs).

225. *See* Catherine Barnard, *A European Litigation Strategy: The Case of the Equal Opportunities Commission, in* NEW LEGAL DYNAMICS OF EU 253 (Jo Shaw & Gillian More eds., 1995); *see also* Peter Menyasz, *Attorney Urges Private Party Participation to Protect Commercial Interests at WTO,* 15 INT'L TRADE REP. 1612 (Sep. 23, 1998).

226. For articles on the general growth of trade lawyers in the 1980s, see Alexander Stille & John C. Metaxas, *Trade Lawyers,* NAT'L L. J., Nov. 11, 1985, at 2. *See also* Marcia Coyle, *Once Tranquil Trade Law Hit By New Frenzy,* NAT'L L. J., Apr. 20, 1987, at 1.

227. European Communities—Regime for the Importation, Sale and Distribution of Bananas, May 22, 1997, WT/DS27/R/USA at 7.10–7.12 (1997) (holding that private lawyers would not be admitted to GATT and WTO Dispute Settlement proceedings). Interestingly, it was the United States and Canada who objected.

228. Appellate Body, European Communities—Regime for the Importation, Sale and Distribution of Bananas, Sep. 9, 1997 WT/DS27/AB/R at 5–12(1997) (holding WTO members are entitled to be represented by private counsel and that this allows developing country members to "participate fully in dispute settlement proceedings.")

about the power of the market.[229] Both the EU and MERCOSUR have drafted the requirement of democracy into their membership standards.[230] The disadvantage of a democracy is that domestic interest groups, such as labor, or certain sectors, such as agriculture or the garment industry, may block or change a proposed treaty because of potential economic losses from open markets.[231] Instead of examining the overall economic benefit for the state, each interest group may look at past experience and narrowly focus the debate on whether or not it will help them. Arguably, this type of public debate is skewed in favor of well-organized groups, be it labor or a business association, rather than consumers, the perennially unheard voice of the majority.[232]

Though states that host large numbers of lawyers may well curse their fate,[233] the presence of lawyers is reflective of a state with healthy

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229. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); *see also* Frederick M. Abbott, *Trade and Democratic Values*, 1 MINN. J. GLOBAL TRADE 9, 17–18 (1992) (explaining Adam Smith's and David Ricardo's economic theories in favor of a liberal trading system).

230. The Treaty of Rome, *supra* note 5, at Preamble; MERCOSUR: Protocol of Brasilia for the Settlement of Disputes, Dec. 17, 1991, 36 I.L.M. 691. In fact, the threatened coup in Paraguay in 1996 was avoided, in part, because of Paraguay's membership in MERCOSUR. *See* Kevin G. Hall, *Failed Coup Made Bloc Stronger*, J. COM., May 1, 1996, at 1A. "Member countries [of MERCOSUR] and the US exerted strong pressure for Paraguay to stick with democracy during the April 1996 stand-off between then- president Juan Carlos Wasmosy and then-general Oviedo. . .". Ken Warn, *Paraguay Rift Set to Mar Trade Summit*, FIN. TIMES, Dec. 8, 1998, at 6.

231. *See* DANIEL VERDIER, DEMOCRACY AND INTERNATIONAL TRADE 275 (1994); BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE: THE STRATEGIC ORGANIZATIONAL APPROACH 11 (1992). The debate about fast track authority to negotiate free trade agreements is one example of this split in the U.S. The debate seems to focus on who was helped or hurt by NAFTA with statistics showing both job loss and job gain from the treaty. Furthermore, the divide between business, which is in favor of more free trade, and labor, which fears the further erosion of jobs, can focus the public debate away from the legislative procedures of fast track authority and, instead, on the fear of what fast track authority will bring to each group. *See* Taylor, *supra* note 10; Helen Dewar, *Florida Torn Over 'Fast Track' Trade-Offs: Agricultural and Political Pressures Keep State Straddling the Fence on Global Commerce*, WASH. POST, Nov. 29, 1997, at A1; David R. Francis, *How NAFTA Impacts Flow of US Jobs South of Border*, THE CHRISTIAN SCIENCE MONITOR, Mar. 24, 1997, at 1; James Sterngold, *NAFTA Trade-Off: Some Jobs Lost, Others Gained*, N.Y. TIMES, Oct. 9, 1995, at A1.

232. Public choice theory is helpful in understanding the impact of interest groups in trade. For more general information on public choice theory, *see* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); Charles K. Rowley & William Thorbecke, *The Role of the Congress and The Executive in U.S. Trade Policy Determination: A Public Choice Analysis in* NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW *supra* note 29, at 347; KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 339–46 (1986); Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U.J. INT'L L. & POL'Y 745 (1995); Symposium, *The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

233. *See, e.g.*, Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

respect for the rule of law. A flourishing international practice bar can be useful in a variety of ways. First, this bar will probably lobby for new trade agreements in their own self-interest.[234] Second, the bar will be important to implementing the agreement. In any type of structure, the lawyers will be advising their clients on the rights and remedies provided by the agreement. Even with no international dispute resolution structure, the bar may need to provide advice about domestic remedies and lobbying. The plethora of new dispute resolution mechanisms has created a need for legal assistance to wade through the rules and procedures.[235] Therefore, the number of sophisticated lawyers in a state does and should impact the willingness of that state to join trade organizations with more sophisticated dispute resolution regimes.

2. Emerging Democracies with Controlled Economies

For emerging democracies, an international trade agreement will pose other problems. First, it is more likely that the agreement may require change within the economy beyond a tariff reduction. Laws regulating treatment of international companies, the protection of intellectual property, and taxation will probably also need to be changed. This agreement may be part of a larger plan to privatize industries, eliminate wage and price supports, and encourage more free market investment. Second, because of the overall economic change, the potential for severe economic dislocation is greater in the implementation of these trade agreements. If this occurs, the democratic institutions themselves may be at risk as citizens look to renew the stability by returning to the rule of previous governments.[236]

A situation of either limited numbers of lawyers or few lawyers who are actually trained in international trade lead to different problems for those states. First, a much larger burden will fall on the government counsel to explain and implement any trade agreement. In all circum-

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234. In fact, the American Bar Association (ABA) supported expanding the right of private parties to bring cases under NAFTA. *See* American Bar Association Section on International Law and Practice, *Reports to the House of Delegates: Dispute Settlement Under a North American Free Trade Agreement*, 26 INT'L LAW. 855, 859 (1992). *See also*, American and Canadian Bar Associations Joint Working Group on the Settlement of International Disputes, *Settlement of Disputes Under the Proposed Free Trade Area Agreement*, 22 INT'L LAW. 879 (1988) (proposing a reference procedure from national courts in which individuals could bring cases to a Joint Canada-United States Free Trade Tribunal).

235. "Not only the size, but also the emphasis of trade law practice has undergone a dramatic shift, lawyers say. Once focused on tariff and quota disputes, lawyers today often are concerned with the complex interplay of rules set by nations and by the WTO." Josh Karlan, *Fifty Years of WTO—and Legal Work*, NAT'L L. J., June 1, 1998, at A14.

236. The threat to democracy in the Russian Federation because of economic instability is a prime example.

stances, private actors are likely to be unfamiliar with a new dispute resolution system. The problem in a state with few lawyers is that the learning curve will be much longer. Informing clients about the new law and training lawyers in the procedures will fall more directly to government counsel or to hired foreign counsel. Companies may move more slowly in adjusting to the new rules or may not take advantage of new rights provided under the agreement.

Moreover, governments of smaller states may feel that it is necessary to hire foreign counsel to represent them in these new global mechanisms.[237] Over time, this situation may both harm the international organization and the state. Countries may not feel so invested in a process which requires them to use foreign counsel. They may also be less comfortable revealing state practices to someone who is not part of the government. Their citizens and their own domestic attorneys may feel cut out of this new dispute resolution process and withdraw in fear, resentment or suspicion rather than learn and actively participate. In the end, this phenomenon can only harm the credibility and integrity of the dispute resolution mechanism. The suspicion that many Europeans have for the European Union would no doubt be magnified if their own domestic attorneys and judges were not involved in the decisions that affected their lives so directly. Therefore, when creating these international dispute resolution mechanisms, member states and the organization itself should think about what type of structure they are creating and the education they will need to provide to their own citizenry in order to truly understand and support the new organization.

3. Totalitarian Governments

The irony is that negotiating with a dictatorship is, in some ways, very simple. If the leader signs the agreement, it is unlikely that any domestic pressure will prevent ratification or implementation. The problem rests more with the type of economy that exists in the state and that state's ability to provide national treatment to foreign companies. When things go wrong, foreign companies will expect remedies at the domestic level that may not be available.[238] In this case, appropriate and effective remedies at the international level are necessary to truly encourage the economic rights and benefits provided for by the international agreement.

In addition, a totalitarian government will address the costs and benefits of trade agreements differently. In a nutshell, states trade off

237. *See supra* notes 227–28 (the Banana case) and accompanying discussion.

238. *See, e.g.*, MASHAALAH RAHNAMA-MOGHADAM ET AL., DOING BUSINESS IN LESS DEVELOPED COUNTRIES: FINANCIAL OPPORTUNITIES AND RISKS (1995).

sovereignty costs for economic gains in these organizations. This calculus for democracies has been well explained by Trachtman, Smith, and others.[239] For totalitarian governments, the trade-off must be calculated differently. First, the economic gains to consumers would arguably be less important to these governments. Without a voting public, leaders will clearly be less inclined to value that impact. Secondly, binding dispute resolution regimes often give more power to the judiciary vis-à-vis the executive branch.[240] The strengthening and increased independence of the judiciary, both domestic and international, is clearly alien and perhaps risky to a totalitarian government. Furthermore, the totalitarian government would find this particular sovereignty cost more expensive and more threatening than a democracy.

IV. WHICH REGIME WHEN?

This article first outlined the four current dispute resolution regimes. Next, the article examined political and economic factors based on a variety of interdisciplinary theories relating to international organizations. The next task is to bring these two segments together and make some conclusions about which dispute resolution regime will be most appropriate given a set of political and economic factors.

A. *Negotiation Regime*

The Negotiation Regime relies on ad hoc rule-making and diplomacy between the states in order to resolve disputes. This regime is used only between states; individuals usually are not granted rights under the trade treaty. Neither supremacy nor transparency are goals of this type of regime. Furthermore, states enforce compliance with the outcomes of negotiation through renewed negotiation, rather than any structural penalties.

1. Concerns with Sovereignty

The Negotiation Regime of dispute resolution makes most sense to those states concerned with their sovereignty. Negotiation provides "voice" directly by ensuring that states are only bound by those interpretations of law to which they expressly agree. Negotiation is the ultimate dispute resolution mechanism for giving parties control over

239. *Essay in Trade Governance*, *supra* note 8; Hainsworth, *supra* note 123; *Theory of the Firm*, *supra* note 19; Smith, *supra* note 124.

240. *See Transformation of Europe*, *supra* note 21, at 2426 (noting why domestic judges were so willing to use the article 177 procedure in the European Union).

the outcome.[241] Negotiation also provides parties with "exit" from the original trade agreement since the negotiation can modify the rules with which the states choose not to comply. A desire to renegotiate could arise because certain trade concessions granted in the agreement are no longer palatable or because one of the economic and social factors discussed below—inter alia, domestic political pressure or fear of a judicial process which does not exist domestically—has become an issue.

2. Type of Organization

A Negotiation Regime is at the heart of a facilitating organization. The dispute resolution described in Abbott and Snidal for facilitating organizations discusses good offices and mediation.[242] Even the functions of convening meetings and providing information would not require any type of dispute resolution beyond a Negotiation Regime.

3. Goals of Economic Integration

This regime would work best when states are not interested in harmonizing their laws and the goals of integration are limited to lowering tariffs and increasing trade. When states have a goal of further integration such as a common market or economic union, the number of rules to be interpreted and applied could overwhelm any ad hoc system. For example, the informal and provisional system at MERCOSUR could clearly be at odds with its goals of integration.[243] At the very least, some oversight body is necessary in order to truly track implementation of the trade agreement and, if desired, to provide interpretations of the rules. The importance of consistent interpretation and efficient dispute resolution is increased exponentially as the trade agreement moves further toward integration. In a case where the rule changes apply simply to tariffs and some non-tariff barriers, ad hoc dispute resolution may be possible.

4. Number of Member States

In a trade agreement with many states, an ad hoc system of negotiation may become unworkable. That is because either the states must negotiate one-on-one sequentially to deal with noncompliance or all the states must convene in order to jointly modify the treaty. Both of these options are time-consuming and inefficient in an agreement with nu-

241. *See, e.g.*, STEPHEN B. GOLDBERG, ET AL., DISPUTE RESOLUTION 3–6 (1992); Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49, 50–51 (1994).

242. *Why States Act*, *supra* note 155, at 22.

243. *See Dispute Resolution as a Catalyst*, *supra* note 6.

merous members.[244] Therefore, a Negotiation Regime works best with a limited number of states.

5. Similarity in Economic and Social Levels

Relying on negotiation for dispute resolution favors those states who are more economically powerful. Because powerful states can link any particular trade dispute to trade in general, economic aid and other economic incentives, weaker states are less likely to prevail in a dispute over trade compliance even when legally their position may be correct. It is, therefore, understandable that when agreements are made between states at different economic levels, the more powerful states will push for a system that relies more on diplomacy.[245] The weaker state may argue strenuously for a more neutral regime of dispute resolution without success. When evenly balanced states are signing a trade agreement, a Negotiation Regime may be less attractive.[246] Once states have agreed on a set of trade rules, having a neutral regime to implement those rules has the advantage of shielding the system from domestic pressure (somewhat)[247] and of being much more efficient than the alternative of requiring the states to sit down and renegotiate each trade dispute.

6. Government Type and Legal Culture

As discussed above, a Negotiation Regime does not shield a government from domestic political interest groups. In a democracy, there will be continuing pressure on the government to protect that industry,[248] continue those subsidies,[249] retaliate

244. *See, e.g.*, RAIFFA, *supra* note 190. The problems with GATT prior to the WTO demonstrate the difficulty of negotiating dispute resolution in a regime with global membership.

245. See for example Smith, *supra* note 124, ch. 3, at 19–23 (discussing Chapter 20 of NAFTA). *See also* James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531 (1993).

246. *See* Smith, *supra* note 124, at 27–28 (explaining the more adjudicatory regime in the WTO).

247. *See* JANIS, *supra* note 18, at 125 (pointing out that a decision from an international tribunal can be more palatable domestically than negotiating rights away where a government could be held directly responsible).

248. *See* I. M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 69–73 (1986). As a result of the "second oil shock of 1979" the Japanese automobile industry exported a significant number of fuel efficient vehicles into the United States. *Id.* at 69–70. American sales significantly dropped, threatening a "symbol of U.S. economic supremacy." *Id.* at 70. Not only did the Chrysler Corporation, the Ford Motor Company, and the UAW lobby for protection, but so did American politicians and legislatures. *See id.* at 70.

249. *See* JOHN MCCORMICK, THE EUROPEAN UNION: POLITICS AND POLICIES 240–249 (1996) (discussing the problems of trying to reform the common agricultural policy of the

unilaterally,[250] and to link trade policy with foreign policy.[251] While special interests will be in favor of a system that protects their ability to influence their government, the government itself might be more comfortable with a system that could provide cover for politically unpopular decisions.

On the other hand, democracies will also be more comfortable with a judicial system that mirrors their own. The respect for the rule of law and independent judiciary is likely to be far more ingrained in states that already have that system domestically. Non-democratic states are more likely to be suspicious of any judicial system utilizing a "Western" or "foreign" idea.[252] These states may prefer a Negotiation Regime that protects the decision-making power of the national leader. In addition, these states, which almost always have controlled economies, may fear a foreign body imposing change on the domestic economy too quickly.

To the extent that any state feels that it does not yet have a sufficient number of lawyers trained in international trade, this Negotiation Regime will clearly be preferred. The responsibility for knowledge of the law will be limited to the government. The need for additional education and awareness about the legal procedures of the new trade agreement will be nonexistant. Therefore, for developing states, this regime may be the easiest to implement in the short term.

B. *Investor Arbitration*

The second regime for dispute resolution is investment arbitration. Under this regime, individuals have some rights under the trade treaty and have the ability to bring an arbitration case against the state violating the rules under the treaty. These arbitration decisions are binding as to the damages awarded but do not provide for changing the law of the violating state. These decisions have no supremacy over domestic law.

EU); *see also* Chad Bowman, *Agriculture Lags in World Trade Reform, A Priority in '99, U.S. Trade Official Says*, 15 INT'L TRADE REP. 2025 (Dec. 2, 1998).

250. *See, e.g., The Limits of Economic Power, supra* note 94.

251. *See, e.g.*, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act), 104 Pub. L. No. 114, 110 Stat. 785; Iran and Libya Oil Sanctions Act of 1996, 104 Pub. L. No. 104-172, 110 Stat. 1541; MASS. GEN. LAWS ch. 7, § 22G (1997) (the "Massachussetts Burma Law" which prohibited procurement from any business doing business with Myanmar). This law was held to be an unconstitutional violation of the federal government's prerogatives in foreign policy. *See* National Foreign Trade Council v. Baker, 26 F. Supp. 2d 287 (D. Mass. 1998).

252. For example, see discussion *supra* note 206 on China's accession to the WTO. Only the more Western Arab countries such as Bahrain, Egypt, Kuwait, Qatar, and the United Arab Emirates are members of the WTO. Oman and Saudi Arabia are observer states that have applied to officially join the WTO. *See* Members of the WTO, WTO Website (last visited October 20, 1999) <www.wto.org>.

Arbitration decisions, depending on the procedure chosen, may have some transparency in terms of rule publication but may not provide for publication of the decision and the legal reasoning. Enforcement of arbitration decisions depends on whether the violating state provides for judicial enforcement of arbitration decisions.

1. Concerns with Sovereignty

Admittedly, being subject to arbitration is a novel step for many states. Even if states were willing to enforce arbitration awards in their own courts, states rarely waived their sovereign immunity to any type of case against them. Only with the creation of ICSID and the evolution of the restrictive immunity theory, did states begin to accept arbitration against them.[253] Even then, the waiver of immunity occurred on case-by-case basis.[254] In the 1990's, the United States began to use ICSID as the dispute resolution mechanism of choice in many of its bilateral investment treaties (BIT's).[255] These agreements, and NAFTA, now provide a blanket waiver of immunity for any case arising under the relevant treaty.[256]

The sovereignty given up in Investor Arbitration Regime is minimal. "Exit" in terms of selective non-compliance does become more and more difficult (and would result in an economic backlash on the part of investors). On the other hand, "voice" is maximized in that the state has the ability to frame the questions open to arbitration and certain remedies are completely precluded. Arbitration panels do not order a state to change its laws. By virtue of the extremely low level of integration that usually applies in this regime, the limited remedies, and possible prob-

253. Under the traditional theory of immunity, states had absolute immunity for all acts. Under the restrictive theory of immunity, only public acts of the state are immune. When the state acts as a trader in the market, those private commercial acts are not immune. *See, e.g.*, the Foreign Sovereign Immunities Act, *supra* note 77.

254. See the discussion of the SOABI case in front of the French Court of Cassation for an example of the pitfalls of immunity rules that may interfere with the execution of ICSID awards. Parties should address the issue of immunity directly by means of appropriate waivers of immunity. *See* George R. Delaume, *Decisions of Regional and Foreign Courts*, 86 AM J. INT'L L. 138, 142 (1992).

255. *See, e.g.*, Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment, Jan. 11, 1995, U.S.-Alb., S. TREATY DOC. No. 104-19 (1995), art. IX, §§ 4, 6. "Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration . . . ." Id. at § 4. "Any arbitral award rendered pursuant to this Article shall be final and binding on the parties due to the dispute. Each Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award." *Id.* at § 6.

256. *See* NAFTA, *supra* note 2, art. 1122 (Consent to Arbitration).

lems of enforcement in the courts, this regime of dispute resolution has the most "voice" of the adjudicatory methods.

2. Type of International Organization

As states determine that they desire an organization that produces law, the dispute resolution regime must also move along that continuum. Investor arbitration is the first step in terms of providing "binding intervention."[257] This function ensures that the rules and norms as outlined by the underlying treaty will be enforced.

3. Goals of Economic Integration

Where the goals of integration are minimal, investor arbitration provides a remedy for aggrieved individuals. This remedy is provided by forfeiting the ability of the arbitration panel to further push integration. In arbitration, the questions for dispute will be narrowly construed to deal with only the dispute at hand. When the level of integration is minimal, a consistent body of law that provides precedent and transparency is not as important as when the level of integration is higher.

4. Number of Member States

Because arbitration is done on a case-by-case basis, this system could work well regardless of the number of states involved. Furthermore, if decisions are publicized between the member states, some transparency is provided in the system in order to help states and investors understand the interpretation of the law. However, the ad hoc nature of arbitration panels and their rotating personnel have the potential for creating confusion for investors, thus diminishing predictability and increasing investor insecurity. The greater the number of member states, the greater number of disputes that may arise over interpreting the same rules. The greater number of disputes, the greater number of potential arbitration decisions that may or may not build upon one another. The danger of inconsistent application of the treaty increases exponentially with each new member to the treaty. Therefore, this system would work best in bilateral or small multilateral arrangements.

5. Similarity in Economic and Social Levels

One of the great advantages of this regime is that differences between economic levels is minimized. Clearly these differences will manifest themselves in the content of the treaty itself and may also

257. *Why States Act*, *supra* note 155, at 15.

manifest themselves in terms of historic aversion to arbitration. For example, the Calvo Doctrine in Latin America emerged as a response to power imbalances.[258]

Investor arbitration has several elements that prove interesting in terms of state power. First, because each case is brought by an individual investor against another government, a government does not have to make the highly politicized choice of bringing a case. Instead, this is a choice left to the investor who will decide based on his own economic loss and chance of success in arbitration. Second, the domestic courts are left out of the equation until the enforcement stage—again insulating this decision from domestic politics. Third, like any other international adjudication, the decision is from a neutral party and may even provide political cover for the violator. Of course, like any other type of adjudication, those with more resources and more lawyers will have an advantage in the process,[259] but this process is clearly better for the less powerful states than the Negotiation Regime.

6. Government Type and Legal Culture

Under this regime of dispute resolution, the type of government of the member state is also relatively unimportant. As long as each state provides for enforcement of arbitration awards (and really does enforce awards) and has waived its immunity under the treaty, other member states and their investors need not concern themselves with the domestic structure, stability or rule of law (other than how these factors would affect their investment.) In terms of the adjudicatory dispute resolution regimes discussed, this regime relies the least on the existence of a democratic model of government. In a treaty between states with vastly different government types, this regime may well provide the most feasible option. International arbitration is the oldest form of adjudication between states[260] and will probably be most acceptable to those governments which have little experience with an independent judiciary.

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258. The "Calvo Clauses" were developed in the mid-1800's in response to European diplomatic intervention in Latin American countries. The doctrine's two basic principles of "national treatment", which provides that foreign nationals will not be accorded greater privileges than citizens, and "no diplomatic intervention", which provides that claims of foreign nationals cannot be pursued through either diplomatic or forceful intervention, are embodied in the constitutions and statutes of Latin American states. These clauses also traditionally prevented a state from submitting to arbitration claims by foreign nationals. *See* Christopher K. Dalrymple, *Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause*, 29 CORNELL INT'L L. J. 161 (1996).

259. There have been many articles written about the advantages of litigation for those with money, and the clear disadvantages for those with limited financial resources. *See, e.g.*, Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983).

260. *See* JANIS, *supra* note 18, at 109–117.

Lawyers, of course, are happy with any procedure that requires their help. As we move from regime to regime, arbitration is preferred by lawyers over negotiation between states. Furthermore, a growing number of lawyers have experience with arbitration and are more than happy to sell this to both investors and states. Because many lawyers have had experience with domestic arbitration, there is likely to be a sufficient number of trained lawyers in most developed states. Unlike the unfamiliar procedures of an international panel, far less additional training of the bar is necessary to successfully implement this regime of dispute resolution. Therefore, out of the adjudicatory regimes, the Investor Arbitration Regime is best when there are concerns about the experience and training of the lawyers in the member states.

C. *International Adjudication*

Under the International Adjudication Regime, private actors are not granted rights directly. Rights under this regime accrue to states that are also the only ones granted standing before the dispute resolution body. Under this regime, decisions are supreme to domestic law but are not integrated further into domestic law, unless states take steps to give them effect. Transparency in the International Adjudication Regime can be very good. Rules and decisions are published, with decisions providing persuasive authority for future cases. Increasingly, this regime provides for enforcement as well.

1. Concerns with Sovereignty

While the International Adjudication Regime has limited supremacy in that decisions are not integrated into domestic law, there is still clearly the intent that decisions emanating from this regime are supreme and should be followed. The question of sovereignty arises since states are relinquishing their ability to "exit" from the regime. Even with only five years of cases from the WTO, it is apparent that domestic concerns over some of the decisions raise important sovereignty issues and legitimate questions of national interests versus global goals.[261] This

261. *See* Canada—Certain Measures Concerning Periodicals, WT/DS31 (June 30, 1997); European Communities—Measures Concerning Meat and Meat Products (Hormones), United States, WT/DS26/R (June 30, 1997); European Communities—Measures Concerning Meat and Meat Producers (Hormones), Canada, WT/DS48/R (June 30, 1997); United States—Import Prohibition of Certain Shrimp and Shrimp Products, *supra* note 40. The above cases are all clear examples of cultural, social, or environmental issues in which the states have invested a great deal of identity or political commitment. By comparison, NAFTA has a specific cultural industries exception. *See* NAFTA, *supra* note 2, art. 2106; Jeffery Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice, and International Trade*, 19 U. PA. J. INT'L ECON. L. 229 (1998) (noting the self-sacrificing

regime balances the limited "exit" ability with increased "voice" by granting each state membership in the dispute resolution body. For instance, the WTO agreement demonstrates "voice" by allowing each member state to limit the extent of the tariffs covered under the agreement. The ongoing debates about investment laws and financial services[262] exemplifies the concern with relinquishing yet more sovereignty to a regime that provides for little "exit" once a complaint is lodged.[263]

One last interesting note about this regime is the concept of "loyalty" that Hirschman also uses to explain behavior. Once states have invested in creating an international adjudication regime, the continuation and success of it relies on the states' "loyalty" to the regime. Again, the responses to unpopular decisions of the WTO demonstrates the tug-of-war between following current national sentiment and upholding the integrity of the institution.[264]

2. Type of International Organization

This type of dispute resolution regime is also consistent with the producing organization as outlined by Abbott and Snidal. The organization will use its neutrality and independence in order to bind states and ensure compliance. In terms of enforcement, an International Adjudication Regime has important benefits for strengthening norms and

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behavior in which states engage in order to protect certain interests). The battle over certain cultural values continues. *See* Anthony DePalma, *19 Nations See U.S. as Threat to Cultures*, N.Y. TIMES, Jul. 1, 1998, at E1 (discussing the perceived negative impact of U.S. free trade on foreign cultures); *Canada, U.S. Exchange Proposals in Start of Talks Over Magazine Advertising Dispute*, 16 INT'L TRADE REP. 208 (Feb. 3, 1999) (discussing threatened U.S. retaliation for a proposed Canadian law, written in response to the above WTO ruling, which prohibits foreign magazine publishers from selling advertising aimed primarily at the Canadian market).

262. *See* Louis Uchitelle, *Global Tug, National Tether; As Companies Look Overseas, Governments Hold Strings*, N.Y. TIMES, Apr. 30, 1998, at D1 (noting the debate over the Multilateral Agreement on Investments (MAI)); *see, e.g., WTO Financial Services Pact to Enter Into Force March 1*, 16 INT'L TRADE REP. 265 (Feb. 17, 1999).

263. *But see* R.W. Apple, Jr., *Split Over Cuba Is Eased By U.S. and Europeans*, N.Y. TIMES, Apr. 12, 1997, § 1, at 1 (showing the ability of the U.S. to prevent the Helms-Burton act from reaching the WTO Dispute Settlement Body by claiming there was no jurisdiction). *Cf.* David E. Sanger, *Europeans Drop Lawsuit Contesting Cuba Trade Act*, N.Y. TIMES, Apr. 21, 1998, at A8.

264. *See, e.g.*, David E. Sanger, *U.S. Won't Offer Trade Testimony on Cuba Embargo*, N.Y. TIMES, Feb. 21, 1998, at A1 (discussing the impact of bringing the Helms-Burton to the WTO); Thomas E. Skilton, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L. J. 455 (1993) (reacting to the GATT decision against the United States' law banning the import of tuna caught with non-dolphin friendly nets). On the other hand, states want to preserve their right of access to the WTO. The U.S., with all of its complaints about the WTO, has already been the plaintiff in 50 cases at the WTO.

encouraging compliance.[265] Furthermore, as a "manager of enforcement", International Adjudication Regimes can ensure that enforcement and retaliation are not disruptive to the larger international community.[266] Because the international organization can clarify, legitimize, and launder retaliation, it strengthens the underlying regime compared to the risks of unilateral and unlimited retaliation under a decentralized system of enforcement.[267]

3. Goals of the Economic Organization

This regime is best used when the goals of integration are limited. Because of the limited standing and supremacy of the regime, real change in the domestic economies is going to be more difficult to achieve. As the EU has demonstrated, it takes numerous domestic cases, an active oversight body in the Commission, and true supremacy in order to accomplish the higher levels of integration. Therefore, tariff reduction and some selective harmonization of non-tariff barriers is probably most realistic for this type of regime where states may bring cases dealing with issues at the federal or national level. While states could attempt to use this regime if a higher level of integration were desired, such as a common market, the restrictions on standing and limited impact of decisions would require active state support and continued intervention in order to accomplish that level of integration. The convergence of these factors is unlikely.

4. Number of States

One of the benefits of an International Adjudication Regime is its ability to handle a large number of states. Once an agreement is negotiated (clearly a more arduous task with more states), the regime itself is relatively easy to operate regardless of the number of states involved. The limited standing afforded by this regime actually helps in this regard in that the docket is much smaller than if standing were permitted for private actors.[268] The clear rules of the regime also make it easy for states to use it simultaneously. Cases can proceed along separate schedules and on timelines established by the regime rather than requiring the maneuvering and coordination that is necessary under, for example, the Negotiation Regime. States are not dependent upon the domestic political cycles or national negotiations of every member state but are able to

265. *See Why States Act*, *supra* note 155, at 26–27.
266. *See id.* at 27.
267. *See id.* at 27.
268. *See*, Nichols, *supra* note 207.

pursue complaints between themselves on a one-on-one basis by using the International Adjudication Regime.

5. Similarity in Economic and Social Levels

The similarity in economic levels—if the states are approximately the same, imbalanced, or mixed—is only an indirect variable for this regime. The economic level matters more regarding the goals of the trade agreement that typically choose an International Adjudication Regime rather than the operation itself. In other words, if the goals of integration are more limited (i.e., selected tariff reduction) a mixture of economic levels may well be the catalyst that promotes such an agreement.[269] States may desire this type of agreement expressly because their economic levels differ and there could be joint benefits to opening their respective economies to each other.

On the other hand, states may desire further integration at the free trade level or a customs union, in which case the number of states involved begins to exponentially make the initial trade agreement much more difficult to attain. This does not directly affect the type of dispute resolution regime chosen but does make it more likely that an International Adjudication Regime, if established globally, would be used at a lower level of integration.

6. Government Type and Legal Culture

The International Adjudication Regime is based on the concept of an independent judiciary and a respect for the rule of law. Therefore, it will probably work better with states that include these concepts in their own domestic system. While we have seen a wide variety of government types in the membership of the WTO,[270] it is unclear how much these states really agree with the use of this type of adjudication. Of course, the point could be that it is irrelevant—states make a determination to join based on economic needs and a cost-benefit analysis and are forced to accept the type of dispute resolution regime. Furthermore, while it might be incongruous or inconsistent for a state to accept independent adjudication at the international level and resist it domestically, there is nothing that says it cannot be done.[271] In the end, however, I be-

269. In other words, industrialized states would benefit from new markets while less advanced states would benefit from cheap exports. *See, e.g.*, Smith, *supra* note 124; *A Theory of the Firm*, *supra* note 19; BALASSA, *supra* note 115.

270. For example, WTO members include non-democracies such as Bahrain, the Democratic Republic of the Congo, Kenya, Kuwait, Malaysia, Myanmar, and Nigeria.

271. *See, e.g.*, Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12, 1996); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.) 1991

lieve that it is more likely that the International Adjudication Regime will work better with democratic states committed to upholding the rule of law. This impacts other factors including concerns with sovereignty—a democratic state will have more "loyalty" to this type of regime—and with the ability of its lawyers to operate in the regime, as discussed below.

Because the International Adjudication Regime is only open to states, government lawyers will be the most involved in this regime. Skilled lawyers who understand the international trade system will be needed in order for states to successfully pursue their cases in front of international tribunals. Concern with lack of training has already led some states to hire private lawyers in order to represent them.[272] Clearly, this type of dispute resolution regime places a burden on states in which the government lawyers have not been adequately exposed to trade law. Unlike the Negotiation Regime where governments can rely on the traditional diplomatic corps, this regime shifts the responsibility to those with legal training and expertise. This type of shift could also raise additional sovereignty concerns, in particular with governments that have been more comfortable using diplomats rather than lawyers to resolve disputes. Furthermore, if the lawyers are hired from other states, the sovereignty concerns could increase. Under that scenario, cases of national importance would be handled by non-nationals and, arguably, with less supervision than in the Negotiation Regime. Clearly, this could make states more uncomfortable with the International Adjudication Regime.

D. *Supranational Court Regime*

The final regime currently used in the international trading system is the Supranational Court Regime best exemplified by the European Union. Under this regime, individuals are directly granted rights under the trade agreement (and EU legislation) and have standing to bring cases to protect these rights in their domestic courts, if not the European Court of Justice. The rulings of the ECJ have supremacy over national law and are often integrated into the domestic law by the use of national court references. The procedures of the Supranational Court Regime are well-understood and its decisions are regularly published providing excellent transparency. Finally, enforcement under this regime is the most stringent of all types of regimes since domestic courts are used to

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I.C.J. 50 (Oct. 11, 1991) (examples of two current ICJ cases where non-democratic states have brought cases).

272. *See supra* notes 227–28 and accompanying discussion.

enforce the law. Additionally, the use of damages has provided real punishment for states not adhering to the law.

1. Concerns Over Sovereignty

The Supranational Court Regime asks member states for the greatest relinquishment of sovereignty in a number of ways. First, the member state gives up sovereignty to the supranational court, which has supremacy over domestic courts. Second, the member state gives up sovereignty from the executive branch, which previously controlled trade policy, to the judiciary—both domestic and international. Third, the member state relinquishes its centralized power to its citizens by granting private actors rights and remedies under this regime. When trying to craft a new international trade regime, each of these forfeitures of sovereignty can be nerve-wracking at best and deal-breaking at worst.

Under the Supranational Court Regime, unlike under other regimes, the state loses virtually all power to "exit"—not comply with a rule. In exchange, it retains "voice" because it can influence what laws are passed under the trade agreement. Yet even here, the extent of the economic integration promoted by the regime works to erode the separate "voice" of the member state. Under this regime, the best explanation of state behavior relies on Hirschman's definition of "loyalty" where states find that the general advantages of the organization are worth the loss of voice and exit. One only has to look at the history of the EU and the goals of economic integration to understand the impact that "loyalty" may have. The visionaries of the Treaty of Rome sought to prevent another Franco-German war, to tie Germany into Europe, and to bolster the Western European economy in the face of communism.

Furthermore, where "loyalty" exists, states choose to remain in the organization and change it from within rather than leave. The history of change in the EU demonstrates this hypothesis since it is the member states that have worked in the last fifteen years to change the focus and dynamics of the EU. Furthermore, the example of the United Kingdom and Denmark's opting out of some of these changes demonstrates both the sovereignty concerns of losing "voice" and "exit."

2. Type of International Organization

A Supranational Court Regime is part of an international organization that is at the far end of the range from facilitation to producing. An organization that is highly producing—high levels of norm coordination, centralization, and independence—will prefer a dispute resolution regime that complements these intentions. A Supranational Court Regime has the ability to provide the highest level of rule centralization

and coordination through its oversight and enforcement of the trade rules. This regime centralizes the interpretation and application of the underlying treaty rules. Rather than leaving each state to interpret the law or leaving interpretation to ad hoc panels, the supranational court is the central and supreme interpreter of the law. Furthermore, the enforcement through the domestic system under a Supranational Court Regime ensures an even higher level of compliance.

A supranational court also maintains a high level of legitimacy. In its role as arbiter, the supranational court is respected for its high levels of autonomy and independence.[273] A court can act as an enforcer in addition to the monitoring role it plays through its case load. Instead of acting solely as a manager of state-to-state enforcement, it has an additional level of enforcement—the ability to provide punishments on its own.

3. Goals of the Economic Organization

A Supranational Court Regime only becomes necessary when a high level of economic integration is desired. While we could argue that the Supranational Court Regime would be useful even at lower levels of economic integration, it is clearly necessary when issues beyond simple tariff relief are involved. When the member states choose to coordinate their economies to the extent that the EU has and create a common market, it is apparent that some federal structures must be created. As the goals of integration begin to include movement of people, capital, and services, in addition to the free movement of goods, the importance of integrating this law into the domestic fabric with supremacy becomes more pressing. Similarly, it is equally important to involve individuals in protecting the array of rights and concerns covered by an agreement establishing such a high level of integration.

4. Number of States

As the EU continues to expand, the question of the optimal number of states under this regime becomes of current, not just hypothetical, importance. The structures required for a Supranational Court Regime could be overburdened by a global membership. The ECJ would no doubt need further screening mechanisms for cases or additional lower

273. "Courts as independent institutions also formulate and express community policy. By enunciating, elaborating, and applying rules publicly, they educate the community and strengthen underlying norms." *Why States Act*, *supra* note 155, at 25 (citing Kenneth Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 31 BROOKLYN J. OF INT'L L. 31 (1992)).

courts. At the other extreme, such an elaborate structure would be unnecessary for a bilateral or trilateral agreement.

5. Similarity of Economic and Social Levels

Because of the level of harmonization required under this regime, it is probably better if the member states have somewhat similar economic levels. And while it is clear that the states in the EU vary significantly,[274] these states are all considered to be of the First World rather than the Third World. Even the requirements for new members coming from Eastern Europe set certain standards of economic and social development before integration in the EU is possible. Arguably, the areas in which the EU is having the most trouble (i.e. free movement of labor and open borders) are the areas where the member states differ most from one another in terms of levels of employment, wages and benefits.[275]

6. Government Type and Legal Culture

Again, we can look to the EU to provide a current example of what is required under this regime. New members in the EU must have a democratic form of government. Not only does this advance the overall goals of the EU in securing a democratic continent and peaceable neighbors, this also makes sense in terms of the structure of the EU. A regime which provides individual rights, standing for private actors, and relies on respect of the judiciary must be comprised of states which hold those values in high regard at the domestic level. The structures and procedures of a Supranational Court Regime would clearly be frustrated by member states which did not permit their citizens such powers vis-à-vis domestic structures and were not willing to relinquish their sovereignty to their citizens.

The Supranational Court Regime relies the most of any of the regimes on the skill and involvement of private lawyers. The involvement of domestic lawyers in strengthening the EU system is obvious to most EU observers. Again, the provision of rights and standing to private ac-

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274. For example the gross domestic product per inhabitant in 1997 ranged from 33,035 ECU in Luxembourg to 8,919 ECU in Portugal. The average was 18,983 ECU. European Union web server (last visited Oct. 16, 1999) <http://europa.eu.int/ en/ comm/ eurostat/ indic/indic16.htm>.

275. *See* Kimberly Green, *Labor Standards in the European Union: The Effects on Multinationals*, 18 HOUS. J. INT'L L. 497, 498–518 (1996) (discussing the harmonization of standards under the EU's Social Charter and Protocol on Social Policy). Unemployment rates as of August 1998 averaged 10 percent in the EU ranging from 18.7% in Spain to 2.2% in Luxembourg and 4.5% in Austria. European Union web server (last visited Oct. 16, 1999) <http://europa.eu.int/en/comm/eurostat/indic/indic14.htm>.

tors can only be utilized with the cooperation of lawyers in each of the member states who are adept at bringing cases to both the domestic and supranational courts.[276] The right of representation in the Supranational Court Regime is of paramount importance in assuring that legitimate cases are pursued regardless of a state's interest in bringing the case. As new states join the EU, it is important that their domestic lawyers are trained sufficiently in order to take full advantage of this regime. Without a core of lawyers who understand the procedures of the Supranational Court Regime, this regime would not be as effective in promoting the harmonization goals of the organization.

V. DIRECTIONS FOR FUTURE WORK

An analysis of the four types of regimes of dispute resolution would not be complete without recognizing some of the weaknesses of this type of organization and the methodology chosen. There are at least four flaws with discussing dispute resolution regimes in this way. First, these regimes are only based on international trade organizations. Second, the evolution of these international trade organizations is an ongoing process. In particularly examining the WTO and NAFTA at this stage of development may be premature. Third, the political and economic variables are all treated equally in the analysis to help determine an appropriate regime. Finally, the analysis of the legal factors and political variables assumes that these factors are taken into account at the time of negotiating the original trade agreement. In fact, the legal factors such as supremacy or direct effect may evolve over time and well beyond the original intention as we have seen, for example, in the EU.

A. *Only International Trade Agreements Used*

While this study has limited itself to trade agreements for simplicity and cohesiveness, one could clearly argue that not including human rights organizations or other types of international organizations makes the analysis somewhat problematic. After all, human rights regimes such as the European Convention on Human Rights,[277] the Inter-American

276. *See, e.g.*, Louise L. Hill, *Lawyer Publicity in the European Union: Bans are Removed But Barriers Remain*, 29 GEO. WASH. J. INT'L L. & ECON. 381 (1995) (discussing the practice of lawyers in each member state).

277. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 234–48 (entered into force Sept. 3, 1953); *see generally* J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (2d ed. 1993).

Convention on Human Rights,[278] the African Charter of Human Rights,[279] and the International Labor Organization[280] all deal with the legal factors set forth in section II. Each of these regimes has debated and decided issues of direct effect, standing, supremacy, transparency, and enforcement. It would clearly be revealing to study the differences between these human rights regimes and to reflect upon the political and economic variables of their respective memberships.[281] Arguably, the lessons from these regimes would be helpful for international trade and should not be overlooked. A full study of regimes would also include the new Law of the Sea regime,[282] environmental treaties,[283] and perhaps look at security or general regional organizations as well.

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278. *See* American Convention on Human Rights, Nov. 22, 1969, arts. 52–73, 1144 U.N.T.S. 123, 157–61 (discussing the Inter-American Court of Human Rights in Chapter 8 of the Convention). *See* Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U.J. INT'L L. & POL'Y 333 (1994).

279. African Commission on Human and Peoples' Rights, Articles 47–54 of the African Charter on Human and Peoples' Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 21 I.L.M. 58, 65–66 (1981) (entered into force Oct 21, 1986). *See* Rose M. D'Sa, *Human and Peoples' Rights: Distinctive Features of the African Charter*, 29 J. AFR. L. 72 (1985).

280. The International Labor Organization (ILO) utilizes a tripartite system divided into government, employment, and labor to promote the global recognition of human and labor rights. The governing body consists of 28 government members, 14 employer members, and 14 worker members. Committees and delegations for annual conferences are similarly structured. The ILO is unique in allowing organizations of employers or workers to allege non-compliance complaints against the contracting states. Although private individuals are not allowed direct access without the backing of an established organization, the democratic process is strengthened by the employers' and workers' involvement. *See How to Reform the UN, supra* note 221, at 433–34 (commenting that the increase of private individual participation "reflect[s] the democratic functions of international liberal rules and organizations for the participation of individual rights"). *See generally* HECTOR BARTOLOMEI DE LA CRUZ, ET AL., THE INTERNATIONAL LABOR ORGANIZATION 3 (1996) (providing an overview of the ILO procedures).

281. *See, e.g.*, Helfer and Slaughter, *supra* note 25, (drawing lessons from Europe for the UN).

282. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf.62/122, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992), 21 I.L.M. 1261. As a guiding principle, the parties to a dispute can agree to select any dispute settlement method they wish. If the parties cannot agree to a method of settlement, then more complex provisions of the Convention apply. *See, e.g.*, Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 MINN. J. GLOBAL TRADE 287 (1998); Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69 (1996).

283. *See* Janet McDonald, *Trade and the Environment: Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 457 (1993); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?* 26 ENVTL. L. 841, 858 (1996); Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 484 (1995).

Moreover, focusing only on international trade casts the political and economic variables through an economic interest prism. Arguably, states would be willing to give up some sovereignty for security, as in NATO, but they may not be willing to relinquish sovereignty for economic reasons. Then again, states might be willing to trade some sovereignty for clear economic benefit and might not be willing to give up sovereignty in the human rights arena. We must recognize that these regimes and the choices behind them are merely snapshots and may not be characteristic of all decisions or all organizations.

B. *International Trade Organizations are New Organizations*

Another problem with the regime analysis set forth is that it is based on some organizations that have existed for less than a decade. While we could write about the Negotiation Regime and the Supranational Court Regime ten years ago, the International Adjudication Regime really did not exist prior to the WTO and the Investment Arbitration Regime was rarely used. Therefore, we are relying on relatively few years and few cases in order to make determinations about these regimes, describe how they operate, and explore the motivations of the member states participating in them. The WTO is already debating changes to its dispute resolution system.[284] NAFTA may well be subsumed in the FTAA, if it ever comes to fruition.[285]

On the other hand, this remarkable evolution is exactly what makes this study so interesting. We are witnessing a dramatic change in how disputes are resolved. There is no doubt that the WTO and NAFTA will continue to evolve as will the EU, MERCOSUR, and other new organizations. Therefore, we must again recognize that this study is a snapshot of international dispute resolution regimes today. We should expect continued change and growth in international trade.

C. *All Factors Have Equal Weight*

This analysis of the dispute resolution regimes has treated both the legal factors and the political variables as equally important within each group. This equal treatment is probably problematic in three ways. First, in selecting the type of dispute resolution regime, some of the legal factors are more important than others. For example, direct effect

284. *See e.g.* Menyasz, *supra* note 225; *WTO Begins Contentious Talks on Reform of Dispute Resolution Rules; Delays Expected*, 15 INT'L TRADE REP. 1788 (Oct. 28, 1998); Daniel Pruzin, *Four Nations Submit Proposals to Reform WTO Dispute Settlement Process*, 15 INT'L TRADE REP. 2024 (Dec. 2, 1998); *USTR Will Seek to Clarify WTO Rules on Dispute Settlement at Ministerial Meeting*, 16 INT'L TRADE REP. 137 (Jan. 27, 1999).

285. *See* O'Hop, *supra* note 115; *Essay in Trade Governance*, *supra* note 8.

distinguishes the Supranational Court Regime more than any of the other legal factors and may influence its choice of that regime. The lack of enforcement distinguishes the Negotiation Regime from the other three. And, while transparency is important, it is probably not as important as the other factors when determining which regime to choose.

Second, certain political and economic variables are probably more important than others for states that are negotiating over a dispute resolution regime. A concern over sovereignty may result in a Negotiation Regime despite the existence of other factors that would point to the selection of other types of regimes. States with a limited economic agenda may choose an Investor Arbitration Regime regardless of the number of states or the type of government involved.

Third, some of the factors are linked. Standing for private actors presupposes that private actors are granted rights. Similarly, we can only discuss effective enforcement once we have assumed supremacy and compliance. This linkage of variables also occurs in the political and economic arena. It is clearly more likely that democratic states will have lawyers better trained in using an independent court system. Similarly, states with free market economies are more likely to have a higher economic and social development level. Thus, treating the legal factors or the political variables separately may grant them too much independence and importance.

D. *Assume Factors Evaluated During Original Negotiations*

The final flaw in this analysis may well be that this study assumes that states know in advance how far their regimes will evolve. We can clearly learn from the history of the EU that states may not, and probably cannot, evaluate fully their dispute resolution options because these regimes will change over time. For instance, only after the Van Gend en Loos decision in 1963, was it clear that the EU was going to provide direct effect of treaty rights. Supremacy was not confirmed until a year later in the Costa v. ENEL decision. These decisions occurred five and six years respectively after the creation of the EEC and began the constitutionalization of the EU. We may or may not see that type of evolution in MERCOSUR, NAFTA, and the WTO. Furthermore, NAFTA and the WTO may also play off one another in that there is interaction between the two systems.[286] Parties have a choice of the forum in which to bring a claim. Instead of stronger enforcement guidelines under NAFTA between the states, the parties left open the option of

286. *See, e.g.*, Michael S. Valihora, *NAFTA Chapter 19 or the WTO's Dispute Settlement Body: Hobson's Choice For Canada?* 30 CASE W. RES. J. INT'L L., 447 (1998).

going to the WTO, except in cases where the NAFTA standards are stronger (i.e. environmental) or controversial (the 3rd party to NAFTA would prefer the case under NAFTA).[287]

Of course, we could assume that states that wish to limit the direct effect or supremacy of their dispute resolution regime can do so. On the other hand, as we compare the EU and the Supranational Court Regime with the Investment Arbitration Regime and the International Adjudication Regime, we should recognize that those regimes are in their comparative infancy. Arguably, if we compared the EU in 1963 with NAFTA and the WTO today, that would be a more valid comparison of the states' intentions in creating a dispute resolution regime.

CONCLUSION

Now that the analysis of the dispute resolution regimes has been started, the question remains what do we do with the information gathered. One step is to complete further analysis dealing with some of the weaknesses outlined above in this initial study. For example, we could weigh factors differently and spend time specifically analyzing which factors are important to which states during the negotiation of the dispute resolution regime. We should continue to analyze the EU and how its evolution reflects the weight of the legal factors involved in selecting a regime and the importance of each of the political variables to that selection as well. This in-depth study could shed more practical light on some of the theoretical assumptions concerning the relationship of the political variables to the appropriate dispute resolution regime. Furthermore, this kind of examination of the evolution of the EU might help shed additional light on how the WTO, NAFTA, or MERCOSUR might evolve in the future.

We should continue to compare dispute resolution regimes across subject matter. As discussed above, the variety of regimes and the varying levels of effectiveness of human rights organizations could provide additional insight into the political and economic variables at stake when creating dispute resolution regimes, as well as the relative importance of the legal factors to choosing these regimes.

Finally any of the factors or variables could be studied more closely. Additional legal factors could also be added to flesh out further differences (i.e. whether the dispute resolution body was rotating or standing) or additional political variables could be examined, such as the power of certain domestic interest groups. My hope in presenting

287. *See* NAFTA, *supra* note 2.

this analysis is to create an initial template of different types of dispute resolution regimes from which we can start to better understand the similarities and differences, as well as the advantages and disadvantages of each regime.

This article does not conclude by exalting one of the theories discussed over the others; the value of an analysis using each of them should be clear. An economic analysis as to why states join international organizations and how dispute resolution may be based upon those desires is crucial, yet insufficient. The level of economic integration and the structure of the organization are affected by other factors such as domestic concerns with sovereignty, history, type of government, relations between the member states and the goals of improving foreign policy, and the desire to stabilize one's own or neighboring governments and economies. All of these variables should enter into any calculation of organizations and dispute resolution. An appropriate review of these variables is necessary before either undertaking the design of a new dispute resolution mechanism or the reform of an existing one. One theory, from political science, economics or traditional legal analysis, is only one side of a multifaceted decision.

It is also too simplistic to expect just one theory to explain the existence of any given regime. For example, a Negotiation Regime could be established due to any one of several variables. A more powerful state might refuse to yield its advantages. In a treaty between only two or three states, member states might decide a more complicated dispute resolution mechanism is not necessary. Finally, there could be domestic concerns with sovereignty which prevent involvement in a more constitutional regime, something that happens in the United States. In terms of explaining the Supranational Court Regime at the other end of the continuum, it is not a story of one theory triumphing over the others. To reach this level of constitutionalization, all of the variables from each of the multidisciplinary theories must be present. In the EU, there was a desire for significant economic integration—for economic gains, political stability and foreign policy goals. There was a desire for a highly producing organization which, at the time, was not as concerned with the loss in sovereignty as it was with reigning in the excesses of sovereignty. All of these variables need to be present in order to arrive at a Supranational Court Regime.

By examining organizations in this way, it becomes easy to see which variables are then missing in other organizations and why other regimes evolve. For example, MERCOSUR ostensibly establishes an organization pursuing a high level of economic integration, desiring political stability, and having the potential for economic gain. We can

see, however, the missing variables. The problem in MERCOSUR is clearly on the domestic level of each member state, with the type of each government, the legal and political culture, and each state's concerns with sovereignty. These variables, based on the history and politics of the states, are weighted more than economic goals at this point. Lack of one or two of these variables then explains why states choose not to move along the continuum of constitutionalization. In order to move along in terms of legal factors, states need the coalescing of all of the political, economic and social variables that are brought forth by the multidisciplinary theories explained in this article.

As more and more regional organizations are created, this analysis of dispute resolution regimes could provide useful guidelines, if not answers, about how the states might choose to set up a dispute resolution regime. Recognizing some of the legal differences between the dispute resolution regimes might encourage clearer debate about the advantages and disadvantages of each of the regimes. Similarly, candid review of the political and economic variables between the member states could encourage states to evaluate the weight of each of the variables and to make clearer decisions about their priorities in setting up a dispute resolution regime.