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Decisionmaking and Dispute Resolution in the Free Trade Area of the Americas: An Essay in Trade Governance

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DECISIONMAKING AND DISPUTE RESOLUTION IN THE FREE TRADE AREA OF THE AMERICAS: AN ESSAY IN TRADE GOVERNANCE†

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INTRODUCTION

In the two years since the Free Trade Area of the Americas (FTAA) was proposed as part of the Miami Summit of the Americas,[1] the 34 Summit countries[2] have only slowly begun to tackle the difficult issues attendant to creating an integration system of such a scale in this

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1. *See generally* Andres Oppenheimer & Christopher Marquis, *Free Trade Giant Set in Motion*, MIAMI HERALD, Dec. 11, 1994, at A34; John M. Goshko & Peter Behr, *Leaders of Western Hemisphere Agree to Form Free Trade Zone*, WASH. POST, Dec. 11, 1994, at A1; David E. Sanger, *Chile is Admitted as North American Free Trade Partner*, N.Y. TIMES, Dec. 12, 1994, at A4.

2. All the countries of the Western Hemisphere save Cuba were represented.

hemisphere by the year 2005.[3] One of the most challenging issues will be the development of institutions capable of effectively making decisions and resolving disputes concerning the implementation and interpretation of the future FTAA agreement.[4] This issue is complicated by the existence of numerous regional and subregional trade agreements (collectively "RTAs") throughout the hemisphere,[5] each with a different

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3. *See Ministers Leave Aside Key Details in Denver But Approve Main Blueprint*, INSIDE NAFTA SPECIAL REPORT, July 4, 1995, at 4 (review of results of first Post-Summit ministerial meeting). At this stage some analysts are even questioning whether the US will move ahead at all. *Analysts Split Over Likely Role of Latin Trade in Second Clinton Term*, INSIDE NAFTA, Nov. 13, 1996, at 1, 19 (former commerce undersecretary Garten pessimistic that US will move ahead with FTAA during next four years).

4. Another critical foundational issue is the selection of the route or pathway to the FTAA, especially in regards to the role that existing hemispheric trade agreements will have in the FTAA process and the FTAA itself. *See FTAA Working Groups Prepare for Vice-Ministerial in Bogota*, 12 Int'l Trade Rep. (BNA) 2011 (Dec. 6, 1995) (OAS President Gaviria describes the problem of choosing a path to the FTAA as the biggest challenge facing Summit countries.). There are three primary options: NAFTA accession, convergence of NAFTA and an expanded MERCOSUR, or negotiation of a new multilateral agreement. *See also* Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 67–68 & nn.16–22 (1996) (overview of options) [hereinafter Garcia, *Americas Agreements*]; Frank J. Garcia, *NAFTA and the Creation of the FTAA*, 35 VA. J. INT'L L. 539 (1995) (regarding certain issues attendant to the NAFTA accession route). No one path has been widely acclaimed, and the issue is still under active debate. *Senior U.S. Official Warns 1997 is Critical Year for U.S. on Latin Trade*, INSIDE NAFTA, Nov. 13, 1996, at 1, 21 (Assistant Secretary for Inter-American Affairs Jeffrey Davidow cites United States as undecided on whether to favor multilateral negotiations or instead, to favor bloc to bloc negotiations); *Senior Officials: U.S., Brazil At Odds On Post-Florianopolis FTAA Path*, INSIDE NAFTA, Oct. 20, 1996, at 1, 2 (United States favors multilateral approach while Brazil favors building block approach uniting existing blocs). It may be that an interim stage in building the FTAA, similar to the European Union's association agreements program, could make the negotiation process more manageable. *See* Garcia, *Americas Agreements*, *supra* at 69. In the meantime, absent a comprehensive FTAA plan, countries are creating new bilateral and regional links. *See Chile-Canada FTA Differs From NAFTA, but Could Aid Chilean Accession*, INSIDE NAFTA, Nov. 27, 1996, at 1,21 (bilateral Chile-Canada FTA could speed Chile's NAFTA accession); *MERCOSUR, Andean Group Make Little Headway Towards South American FTA*, INSIDE NAFTA, Nov. 27, 1996, at 1 (negotiations towards a South American FTA); *Chile, MERCOSUR Miss Deadline*, INSIDE NAFTA, Dec. 13, 1995, at 1 (MERCOSUR-Chile negotiating FTA).

5. Chief among the active RTAs include the Andean Common Market (ANCOM), Agreement on Andean Subregional Integration, May 26, 1969, Basic Documents of International Economic Law 597 [hereinafter "B.D.I.E.L."] (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter The Treaty of Cartagena], consisting of Colombia, Venezuela, Bolivia, Ecuador and Peru; the Caribbean Common Market (CARICOM), created through an Annex to the Treaty Establishing the Caribbean Community, July 4, 1973, B.D.I.E.L. 660 [hereinafter CARICOM Treaty], consisting of the English speaking countries of the Caribbean, and itself part of the larger Caribbean Community created by the Treaty Establishing the Caribbean Community, July 4, 1973, B.D.I.E.L. 647 [hereinafter Caribbean Community Treaty]; the Central American Common Market (CACM), General Treaty on Central American Economic Integration, Dec. 13, 1960, B.D.I.E.L. 529 [hereinafter Treaty of Managua], consisting of El Salvador, Honduras, Nicaragua, Costa Rica and Guatemala; the Common Market of the Southern Cone (MERCOSUR), Treaty Establishing A Common Market, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asunción], consisting of Argentina, Brazil, Paraguay and Uruguay; the North American Free Trade Area (NAFTA), The North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA], consisting

governance mechanism,[6] and collectively representing a broad range of views among the Summit countries as to the proper structure of trade institutions.

While creation of a governing institutional mechanism for the FTAA is clearly a legal task, the design and operation of trade governance institutions raises a host of issues which can also be usefully studied from the perspectives of the various other disciplines concerned with international organizations (IOs) and international relations (IR). State power must be transferred to, or at a minimum restrained in the face of, treaty-based institutions; decision-making procedures involving some form of voting or other indication of interest by states-parties must be arranged; disputes among the states-parties must be resolved; and decisions must be implemented through national law or otherwise. These functions involve the manipulation and exercise of state power in the pursuit of state interest, and thus can be analyzed from the vantage point of institutional economics[7] and political science,[8] as well as law.[9]

This Article examines certain theoretical and structural issues to be resolved in creation of the FTAA's governing institutions, and proposes an outline for these institutions, drawing upon regime theory's analysis of international organizations, the range of existing trade institutions found among the hemisphere's RTAs, and indications of the Summit countries' present goals and interests. The Article begins by summarizing Kenneth Abbott and Duncan Snidal's concept of "mesoinstitutions," a new regime theory tool for identifying the roles played and benefits conferred by IOs in international relations. Parts I.B and I.C then apply mesoinstitutions theory to the primary governance mechanisms of the hemisphere's chief existing RTAs.[10] Part II then relies on the analysis of

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of the United States, Canada and Mexico; and the "Group of Three" (G-3), G-3 Treaty, June 13, 1994, <http://www.sice.oas.org/trade/G3_E/G3E_TOC.stm>, *excerpted in* 205 INTEGRACION LATINO-AMERICANA 41 (1994), consisting of Mexico, Venezuela and Colombia. *See also* Garcia, *Americas Agreements*, *supra* note 4, at 71–78 & nn.31–80.

6. *See infra* notes 84–151 and accompanying text.

7. *See, e.g., infra* note 92; *see generally* Joel P. 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. (No. 2/3, forthcoming 1997).

8. *See, e.g., infra* notes 15–25 and accompanying text.

9. In addition to its traditional legal-descriptive positivist approach, legal analysis of institutions includes comparative approaches, *see, e.g.*, Garcia, *Americas Agreements*, *supra* note 4, as well as analogies drawn from other aspects of law, in particular domestic law. *See, e.g.*, Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996) (U.S. administrative law analysis of standard of review for WTO dispute resolution panels).

10. This Article relies throughout for comparisons and illustrations on the structure of existing RTA institutions in the hemisphere. As will be seen below, there is a considerable range among these RTAs concerning the goals of the participant states, and the resulting

mesoinstitutions theory in Parts I.B and I.C to propose an institutional framework for decisionmaking and dispute resolution in the FTAA.

From this analysis it appears that the primary theoretical issue to be considered in structuring the FTAA's institutions is whether the FTAA will be created merely to *facilitate* the parties' integration goals, or actually empowered to *produce* substantive integration results in forms such as new norms, dispute resolution decisions, and harmonization legislation.[11] This distinction is significant in particular because the latter type of institution generally involves the transfer of state power to the resulting institution, a significant "cost" to the states involved.[12] The Summit countries' stated goals for the FTAA suggest that they intend to form a facilitative IO,[13] which has several implications for FTAA institutional design.[14] However, as their effort is subject to the overriding aim that the resulting agreement be effective in accomplishing the parties' goals, negotiation of the FTAA could involve creating certain producing capabilities for FTAA institutions, despite the Summit countries' stated preference for facilitative trade agreements.

I. INTERNATIONAL RELATIONS THEORY AND THE STUDY OF INTERNATIONAL ECONOMIC INSTITUTIONS

International relations theory has been dominated in the post-war era by political realism. Realist theory explains international relations solely in terms of the individual power calculations of states operating in an

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governance mechanisms, in particular with regard to their structure and the degree of transferred state power. Moreover, there is a clear disparity in terms of ambition between the goals for the FTAA and the goals of several of the hemisphere's RTAs. Nevertheless, the disparity in goals is not so great as to render comparative analysis impossible. *See* 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 9 (Mauro Cappelletti et al. eds., 1986) [hereinafter "INTEGRATION THROUGH LAW"] (the comparative enterprise inevitably involves a dialectical tension between similarity and difference, and total identity renders comparative analysis meaningless). Since the Summit countries are all members of one or more hemispheric RTAs, a comparative study of existing trade governance mechanisms is quite relevant to the FTAA analysis. Moreover, if the FTAA is built out of some form of convergence or linkage among existing RTAs, then the FTAA governance mechanism will have to explicitly function in tandem with RTA governance mechanisms. If a separate multilateral agreement is negotiated, then the FTAA governance mechanism will at least need to take into account existing RTA governance mechanisms in terms of consistency and with regard to the relationship or hierarchy among resulting hemispheric and regional norms, systems, and decisions.

11. This distinction between organizations that facilitate and organizations that produce is central to mesoinstitutions theory. *See infra* notes 31–76 and accompanying text.

12. *See infra* notes 50–51 and accompanying text.

13. *See infra* Section II.A.3.

14. *See infra* Section II.B (regarding the FTAA design).

anarchic system.[15] On this view, international law serves only to justify actions taken by nations in individual pursuit of national interest, or to object to such actions on the part of other states.[16]

However, the realist account of international relations fails to explain both the persistence of law in post-war international relations and the reality of cooperation among states through international institutions.[17] Put simply, states have been creating new international law in record amounts, and entering into new institutional relationships at a similar pace.[18] This apparent paradox is especially obvious in the area of international economic law, where realism cannot explain the existence and function of the international economic system, whose *sine qua non* is cooperation.[19]

Regime theory arose as a response to these perceived inadequacies in the realist theory of international relations.[20] In the later post-war era, Keohane and others developed regime theory to explain state cooperation and law creation.[21] Starting from an assumption of rationality among state actors,[22] regime theorists posited that states recognized that

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15. *See* Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 347 (anarchy, as view that power and authority are decentralized, as basic ordering principle of realist view of international relations).

16. "The [Realist] challenge struck at the heart of the discipline, claiming that international law was but a collection of evanescent maxims or a 'repository of legal rationalizations'," Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM.J. INT'L L. 205, 208 (citing Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, *in* THE RELEVANCE OF INTERNATIONAL LAW 133, 142 (Karl W. Deutsch & Stanley Hoffmann eds., 1968)).

17. Slaughter Burley, *supra* note 16, at 218 (regime theorists' challenge to Realists was to explain the continued existence and strength of international institutions despite decline in American hegemony, which had been employed by Realists as such a justification.).

18. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993) (international community of states is increasingly interdependent and increasingly manages itself through law); David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275, 275–76 (1996) (noting proliferation of international organizations).

19. G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L. J. 829, 856 (1995).

20. Shell, *supra* note 19, at 859. *See* Slaughter Burley, *supra* note 16, at 209–20 (providing an overview of the history of the regime theory response).

21. Some of the major works in the field include: ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185 (1982); Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25 (1985). *See generally* Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986).

22. *See* Abbott, *supra* note 15, at 350 (discussing states' rationality as the assumption that states "have consistently ordered preferences and choose among alternative courses of

certain gains could be had from organizing their cooperative activity,[23] and developed systems of norms, called regimes, through which to structure their cooperative activities and realize these gains.[24] Thus the reality of cooperation could be explained as a rational strategy to maximize gains, and the persistence of international law could be explained as expressing, indeed embodying, the set of norms, or rules, which made cooperation manageable.[25]

But, as Kenneth Abbott puts it, "a funny thing happened on the way to regime theory: formal international organizations came to be largely neglected."[26] While regime theory has been significantly articulated on the abstract "deductive" level,[27] regime theory analysis has not focused extensively on the structure of actual international institutions and the link between elements of structure and the function of regimes.[28] Much of the work done on actual institutions has been a continuation of the legal descriptive tradition, reaching "inductive" conclusions about international organizations without the benefit of theory.[29]

Kenneth Abbott and Duncan Snidal are currently addressing this gap in regime theory analysis by examining what they have provisionally termed "mesoinstitutions"—institutions positioned midway between fully

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action so as to further those preferences"). In addition to rationality, IR theorists assume the continued importance of anarchy, and the importance of the distribution of power among state actors, in their analysis of state behavior, factors shared with Realism. Abbott, *supra* note 15, at 344.

23. These gains include reduced transaction costs, creating conditions for orderly negotiations, and improving the quality of information. *See generally* Slaughter Burley, *supra* note 16, at 220 (chart summarizing functions and benefits of international regimes).

24. Stephen Krasner defines regimes as "sets of 'implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Krasner, *supra* note 21, at 186. It has been noted, however, that this definition, while widely accepted, is not completely precise nor uniformly accepted. *See* Abbott, *supra* note 15, at 338–39.

25. "[Regime theory] view[s] international norms as products of sophisticated self-interest, the rational choices of states in a decentralized world." Abbott, *supra* note 15, at 340. Cooperation is, of course, also possible even without formal rules, but formal rules have certain advantages. *See* Slaughter Burley, *supra* note 16, at 220–21. Shell's Regime Management Model reflects Realist assumptions about power and self interest, and regime theory analysis of problems of and gains from cooperation, and the role of IOs in securing cooperation gains. Shell, *supra* note 19, at 864–65.

26. Kenneth W. Abbott and Duncan Snidal, Mesoinstitutions: The Role of Formal Organizations in International Politics 1 (July, 1995) (unpublished manuscript on file with the authors: k-abbott@nwu.edu and snidal@chicago.edu) [hereinafter "*Mesoinstitutions*"].

27. For an introduction to the distinction between deductive versus inductive methodologies, see *Mesoinstitutions*, *supra* note 26, at 5–7.

28. On the need for further work in this aspect of regime theory, see Peter Mayer et al., *Regime Theory: State of the Art and Perspectives*, in REGIME THEORY AND INTERNATIONAL RELATIONS 417–18 (Volker Rittberger ed., 1993).

29. *See Mesoinstitutions*, *supra* note 26, at 6–7.

decentralized anarchy and fully centralized statism—as an attempt to identify the features of international institutions which enable them to promote cooperative activity.[30] As this essay will utilize mesoinstitutions theory in its exploration of FTAA institution-building, the theory is introduced below.

A. *"Mesoinstitutions:" Regime Theory and Institutional Analysis*

Abbott and Snidal attempt to explain why states rely on formal IOs to enhance international cooperation.[31] In other words, they seek to explain why states establish regimes through, or incorporating, formal international organizations. In order to do so, Abbott and Snidal set out a theory of IOs as mesoinstitutions, or structures which facilitate "moderately" centralized cooperation through a variety of roles and functions.

Accepting the rationalist assumptions of regime theory,[32] Abbott and Snidal situate mesoinstitutions as midway between the poles of decentralized anarchy and fully centralized statism which have dominated the rhetoric of international relations.[33] This central dichotomy in IR analysis between anarchy and centralized order obscures the role and persistence of IOs.[34] Although mesoinstitutions engage in activities that are also performed under conditions of anarchy or statism, mesoinstitutions are distinguishable from actors at either end of the spectrum.[35]

Mesoinstitutions embrace a range of intermediate activities between decentralized cooperation and the centralized state model that states find useful in achieving their goals. Abbott and Snidal distinguish activities

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30. *See Mesoinstitutions*, *supra* note 26. The manuscript has been submitted for review by INTERNATIONAL ORGANIZATION, and will undergo further revisions as part of that process. Current information about the article can be obtained through e-mail addressed to: kabbot@nwu.edu.

31. *See Mesoinstitutions*, *supra* note 26, at 2. This question is thus a restatement of the primary regime theory question, expressed in terms of organizations rather than "regimes." *See* Slaughter Burley, *supra* note 16, at 218.

32. Thus distinguishing their effort from a parallel critique by the reflectivist school of regime theory's failure to incorporate IOs, *see generally* Kratchowil & Ruggie, *supra* note 21, and echoing the work of Yarbrough and Yarbrough on trade institutions structure. BETH V. YARBROUGH & ROBERT M. YARBROUGH, COOPERATION AND GOVERNANCE IN INTERNATIONAL TRADE: THE STRATEGIC ORGANIZATIONAL APPROACH ix (1992) (explaining that variety in international trade institutions reflects alternate governance structures employed to organize and enforce agreements).

33. *See* Abbott, *supra* note 15, at 346–347; *Mesoinstitutions*, *supra* note 26, at 7–8.

34. *See Mesoinstitutions*, *supra* note 26, at 8.

35. *See Mesoinstitutions*, *supra* note 26, at 3. Abbott and Snidal point out that IOs are neither "stalking horses for centralized cooperation" nor "ciphers for decentralized cooperation." *Id.*

in this middle ground into two broad categories: facilitation and production.[36] Through performing these two categories of activities, formal IOs assume their unique operational and, to a lesser extent, enforcement roles in international regimes.[37]

Facilitative activities, and the facilitative organizations that emphasize these activities, promote decentralized cooperation and render it more effective.[38] Facilitative organizations reduce the transaction costs[39] of concluding mutually beneficial agreements, primarily through improving information and communication, and facilitate the self-enforcement of these agreements in view of changing circumstances.[40]

Facilitative organizations promote decentralized cooperation principally through four related functions: the *normative*, the *consultative*, the *supportive*, and the *initiative* functions. IOs can perform a passive normative function simply by embodying the rules which organize cooperative behavior.[41] The consultative function involves providing a regular forum for state communication and interaction.[42] Many IOs also take a more active supportive function, involving themselves in the negotiation of agreements,[43] independently developing relevant information,[44] and staffing specialized committees and governing bodies to advance the work of cooperation between major meetings of the membership.[45] Finally, some facilitative IOs play an even more active role in

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36. *See Mesoinstitutions*, *supra* note 26, at 10–11 and *infra* notes 38–75 and accompanying text.

37. While IOs usually lack extensive coercive powers, nevertheless as will be seen below IOs can play important enforcement roles. *See infra* notes 64–75 and accompanying text.

38. *See Mesoinstitutions*, *supra* note 26, at 10. Facilitative organizations are distinguishable from the decentralized cooperation model in that these institutions play a tangible role in promoting cooperation. *See id.*

39. *See* Abbott, *supra* note 15 at 398–99 (discussing the incorporation of the transaction cost concept into international relations theory to articulate the benefits conferred by regimes).

40. *See Mesoinstitutions*, *supra* note 26, at 10. This type of IO has been the traditional focus of regime theory. *See id.* at 12.

41. According to regime theory, norms are of value to states in that they clarify state expectations, facilitate bargains through the linkage of issues, provide "rules of thumb" to simplifying decision-making, and increase the political costs of certain behavior through delegitimization. *See id.* at 13.

42. IOs as fora can reduce the transaction costs of state communication by creating state expectations regarding regular opportunities for communication, offering a neutral or less political locus for consultation and negotiation, focusing the agenda, and reducing uncertainty and asymmetry of information. *See id.* at 14.

43. This may involve assistance in preparing the agenda, monitoring the status of negotiations, and offering alternatives. *See id.* at 15. Abbott and Snidal offer the GATT Secretariat during the Uruguay Round to illustrate this aspect of the supportive function. *See id.*

44. Abbott and Snidal cite the OECD, for example, insofar as it actively seeks, compiles and publishes information on issues relevant to the membership. *See id.* at 15–16.

45. *Id.*

promoting cooperation by exercising a power of initiative—for example, by calling a meeting of the membership, speaking publicly for the membership on relevant issues in the international forum, or independently monitoring state compliance.[46]

Productive organizations, which emphasize the second category of mesoinstitution activity, typically will perform a range of facilitating functions as well.[47] However, their distinctive nature lies in the fact that they carry out substantive activities themselves, thus "producing" work of importance to the regime: rules, technical assistance, information, resolutions to disputes, legitimacy, and financial support, for example.[48]

As a function of this substantive role, producing organizations generally enjoy a significant degree of independence from member states,[49] and possess significant budgets, bureaucracies and expertise.[50] In addition to its financial requirements, the "costs" of such an organization include the degree of state power which must be ceded to a supranational entity in order for the organization to perform its producing functions effectively.[51]

Assuming the rationality of regime formation, the benefits of such producing organizations must outweigh these considerable costs. Just as private individuals form business firms, Abbott and Snidal assert that states form producing IOs when they find that the transaction costs of direct state-to-state cooperation, even with the help of facilitative IOs, outweigh the costs of cooperating through a producing IO.[52]

Abbott and Snidal analyze the benefits of a producing organization under two headings: efficiency and legitimacy. Producing IOs enhance the efficiency of state cooperation through a variety of techniques, including the pooling of information, resources, operations or risks;[53] the

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46. *See id.* at 17.

47. *See id.* at 12.

48. *See Mesoinstitutions*, *supra* note 26, at 20. Abbott and Snidal cite the World Bank as a prototypical producing organization, in that the Bank carries out an extensive range of financial and development activities as an international financial institution with considerable independence. *See id.*

49. *See id.*

50. *See id.* at 21.

51. *See id.* This aspect of mesoinstitutional analysis overlaps the institutional economics analysis of the transfer of state power to institutions. *See infra* note 92. As power is arguably the most valuable commodity in international political transactions, it is the single most expensive, and hence most contentious and carefully scrutinized, aspect of regime formation through mesoinstitutions. *See* Trachtman, *supra* note 7, at 27–29.

52. *See Mesoinstitutions*, *supra* note 26, at 21.

53. Participating states obtain efficiencies by "pooling" information, operations, assets, or risks in an IO towards a substantive activity of interest. *See id.* For example, through the World Bank, participating states are able to pool financial resources and risk, and achieve

management of activities involving "joint production;"[54] and the production of "coordination points" in the form of rules, standards, and specifications which reduce the transaction costs of bargaining and joint activity through coordination efficiencies.[55]

In addition to these efficiency advantages, producing IOs enhance cooperation through the legitimacy which their independence and neutrality can lend to international outcomes, and this makes IO action more effective than action taken directly by states.[56] Abbott and Snidal develop a list of IO activities which enhance the legitimacy of outcomes, including "laundering," through which activities that might not be acceptable on an interstate level become more acceptable when performed through an independent IO.[57] Other such activities turn on the IO's neutrality,[58] such as when the IO performs the roles of trustee,[59]

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economies of scale and scope, resulting in more efficient and effective international lending than any participating state could achieve on its own. *See id.* at 22–23.

54. As is the case with firms, producing IOs can be formed in order for participating states to manage certain activities involving team work or "joint production." *Mesoinstitutions*, *supra* note 26, at 24 (citing Armen Alchian and Harold Demsetz, *Production, Information Costs and Economic Organization*, AM. ECON. REV. 62 (1972)). Joint production processes can involve in the business setting the team effort of workers, managers, and other groups, and internationally can involve efforts such as collective security (NATO) and cooperative research (CERN). *See id.* at 25. Joint production presents special management problems in monitoring, rewarding and disciplining individual members of the team, which IOs, like firms, solve through hierarchical structure of bureaucrats as managers and states as residual claimants. *See id.* at 24–25.

55. Citing the work of Thomas Schelling, Abbott and Snidal note that, while coordination points can be achieved through wholly decentralized cooperation, many problems in international relations are of such complexity that the transactions costs of direct bargaining are high. *See Mesoinstitutions*, *supra* note 26, at 26. Where that is the case, IOs can produce coordination points at lower cost, in part through their pooling function. *See id.*

56. *See Mesoinstitutions*, *supra* note 26, at 27. Slaughter Burley discusses regimes' capacity to "legitimate and delegitimate different types of state action." Slaughter Burley, *supra* note 16, at 219 (citing KEOHANE, *supra* note 21, at 244). The concept of legitimacy in connection with governance is certainly not new, but it has only recently received attention in connection with international institutions. *See generally* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

57. *See Mesoinstitutions*, *supra* note 26, at 28. Of course, IO action may not in fact be purely independent, but laundering the activity nevertheless remains effective up to a point. If the IO's policies come to be seen as responding to a particular state's interests, however, the laundering benefit is compromised, a situation which Abbott and Snidal term "dirty laundering." *Id.* at 29.

58. While independence and neutrality are clearly linked, Abbott and Snidal suggest that neutrality can be distinguished from independence, in that neutrality turns on the IO's position as among individual member states (e.g., in disputes between them), while independence turns on the IO's position vis-à-vis the member states as a whole. *See id.* at 32. "Neutrality adds impartiality to independence." Correspondence from Kenneth Abbott (May 6, 1997).

59. Although rare, IOs can play a role similar to that of trustee or escrow agent in domestic private law, holding assets on behalf of another or as an intermediary in specialized situations. *See Mesoinstitutions*, *supra* note 26, at 31. For example, Abbott and Snidal cite the role of the UN Compensation Commission created by the UN Security Council at the end of

allocator[60] and information source.[61] Finally, IOs can occasionally serve as "community representatives" to advance fundamental community interests with a unique degree of legitimacy.[62]

One of the most important legitimacy functions that turns on an IO's neutrality is its role as arbiter in the resolution of international disputes.[63] Facilitative organizations can play a dispute resolution role through their consultative, supportive and initiative roles, reducing the transactions costs of inter-state negotiation and improving the quality and availability of information.[64] Producing organizations, in addition to performing these roles, can go farther and provide authoritative dispute resolution services, typically through binding arbitration.[65] Such intervention assists the IO participants through interpretation of treaty commitments and the clarification of rights and obligations.[66]

Besides increasing the legitimacy of outcomes, the role of arbiter is one way that IOs play a key role in the enforcement of international agreements, despite their lack of any formal coercive capability. Abbott and Snidal cite the emphasis on coercion as one of the factors in IR analysis which masks the contributions which IOs make to international cooperation.[67] A mesoinstitutions analysis reveals that both facilitative and producing IOs play a substantial role in enforcement through their facilitative and producing capabilities, and in certain cases have a direct enforcement role as well.

Facilitative IOs contribute to the decentralized enforcement of agreements by generating information, providing a forum which supports continued communication through disputes and generalizes the

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the Gulf War to act as trustee for claimants against Iraq's assets in the Compensation Fund. *See id.*

60. Many IOs are relied upon to allocate scarce resources among several claimants, as is the case with the World Bank's allocation of financial resources. *See id.* at 34.

61. IOs go beyond the facilitative pooling of information when they independently confirm state information, enhancing its credibility according to their own perceived neutrality. *See Mesoinstitutions*, *supra* note 26, at 35.

62. Abbott and Snidal cite the UN as a classic example of a community representative institution, with its broad representation, its lofty goals on behalf of the "United Nations," its mandate to consider almost any aspect of international relations, and its power to formulate and express the norms and aspirations of its community. *See id.* at 40–43.

63. *See Mesoinstitutions*, *supra* note 26, at 36–40.

64. *See Mesoinstitutions*, *supra* note 26, at 37; *see supra* notes 38–46 and accompanying text; *see also* Abbott, *supra* note 15, at 367 (regime contributions to cooperation and problem solving). Such activities can include traditional dispute resolution mechanisms of good offices, mediation, conciliation and fact-finding. *See Mesoinstitutions*, *supra* note 26, at 37.

65. *See Mesoinstitutions*, *supra* note 26, at 37; Shell, *supra* note 19, at 865 (binding enforcement necessary for regime management).

66. *See Mesoinstitutions*, *supra* note 26, at 37.

67. *See Mesoinstitutions*, *supra* note 26, at 46.

reputation effects of noncompliance, offering limited dispute resolution services,[68] and serving as a setting for modification of existing agreements in response to compliance issues.[69]

Producing IOs can take a more active role than facilitating IOs, providing indirect enforcement not only by producing neutral findings of fact and law as arbiters, but also by legitimating retaliation by participants, directly monitoring state behavior, and mobilizing their base of support within the polities of the participant states to ensure state compliance.[70] Finally, certain producing IOs have limited direct enforcement powers, such as the requirement of national reporting, which may involve the power to issue resolutions criticizing participant behavior;[71] the withholding of IO benefits,[72] including membership in the IO itself;[73] and in a very few cases, the power to directly sanction a state economically or militarily.[74]

In summary, Abbott and Snidal suggest that a mesoinstitutions perspective on IOs can improve regime theory's analysis of IOs in two ways: first, by demonstrating that IOs often play a more active and independent role in international cooperation than regime theory has suggested to date; and second, that these roles generally require higher levels of centralization and organization than regime theory by itself accounts for.[75] Mesoinstitutions analysis suggests how, in particular, IOs repay states for the costs of organization through the benefits which facilitating and producing activities contribute to states' efforts at international cooperation.

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68. Facilitative IOs can offer fact-finding, mediation, and good offices services through their supportive and initiative functions. *See Mesoinstitutions*, *supra* note 26, at 47. *See infra* notes 128–31 and accompanying text.

69. *See Mesoinstitutions*, *supra* note 26, at 47.

70. *See id.* Mobilization by environmental and human rights IOs of their domestic constituencies are examples of the latter function. *See id.* at 47–48.

71. *See Mesoinstitutions*, *supra* note 26, at 48–49. Abbott and Snidal cite the ILO's findings regarding labor practices of participant states as an example of this type of direct enforcement. *See id.*

72. Abbott and Snidal cite IMF conditionality as a classic example of this type of direct enforcement. *Id.* at 49. Such "tit-for-tat" conditional cooperation can be a key to decentralized cooperative activity. *See* Abbott, *supra* note 15, at 365–66.

73. This technique is as powerful as its exercise is rare. *See Mesoinstitutions*, *supra* note 26, at 49.

74. Abbott and Snidal refer to the UN Security Council's authority to directly impose sanctions and, in principle, directly deploy troops through Chapter VII of the UN Charter. *See id.* at 50. As the latter has not occurred, Abbott and Snidal characterize the UN as shifting to indirect enforcement through the authorization of participant action in appropriate cases. *See id.* at 51.

75. *See Mesoinstitutions*, *supra* note 26, at 18.

Mesoinstitutions analysis may also aid in identifying the key operating characteristics of IOs and why particular IOs take the form they do. The following subsection attempts to draw some implications of mesoinstitutions analysis for one particular feature of trade institutions, their governance mechanisms.

B. *Mesoinstitutions and Trade Governance*

The rationality assumption underlying regime theory dictates that states will, when acting rationally in a functioning information market, design the IO that best suits their goals and needs with regard to a particular issue area. This perspective precludes any normative argument that a certain type or level of IO is "better" than any other.[76] One is limited to a more functionalist analysis, identifying which type of IO or aspect of an IO's structure may be best suited to a specific goal.

This Article focuses on one particular feature of international organization design, the IO's governance mechanisms or institutions. "Governance" is here understood to mean that critical subcategory of IO activity involving the making of decisions and the resolution of disputes.[77] The governance corollary of IR theory's rationality assumption is that, all other things being equal,[78] states will establish governance mechanisms best suited to the goals and functions envisioned for the IO in general. Analysis of governance design from a regime theory perspective therefore involves an investigation into both the pertinent goals of the participating states for the IO in question and the range of governance mechanisms available from which to draw. Such analysis aims to identify the extent to which a particular governance mechanism is or may be suitable to accomplish the governance and substantive tasks of a particular IO.

The mesoinstitutions theory of IOs suggests several pertinent questions to guide the analysis of IO governance mechanisms. First, it must be determined whether, broadly speaking, the institution is intended to

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76. *See* Abbott, *supra* note 15, at 338 n.17 ("Neither 'principles' nor 'norms' necessarily implies a moral element; the principles of a regime can simply be taken to define its purposes. [citation omitted]. Regimes, then, are not necessarily 'good', though they are often discussed as if they were."). This approach, and the approach taken in this Article, may be distinguished from other analyses of trade governance, such as that by Robert Housmann which is critical of contemporary trade governance models from a participatory democracy perspective. *See generally* Robert F. Housmann, *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699 (1994).

77. Thus distinguishing this range of activities from other IO activities such as the creation of relevant information or the provision of technical assistance.

78. For example, assuming the negotiation process has been effective in reaching consensus on key points and the states' parties have adequate information and are effectively advised by their legal, political and economic experts.

play a facilitative or producing role. These two roles presage very different expectations on the part of states-parties with regard to the sorts of decisions and disputes the IO will involve itself in and the level to which it will be involved. Second, if the IO is to be facilitative, then it must be determined which of the facilitative roles the IO will be constituted to play, as this will determine the range of issues and depth of involvement with which the governance mechanisms must contend. Third, if the IO is intended to be a producing one, then beyond the facilitation questions the states will need to determine the extent of state power to be transferred and the distribution of this power into effective governance mechanisms.

The following section will develop these issues with reference to existing hemispheric RTAs, as an application and elaboration of mesoinstitutions theory and as a prelude to an examination of these issues in the context of future FTAA institutions. The section proceeds in two sub-sections: decision-making mechanisms and dispute resolution mechanisms. The attempt is made to discuss first facilitative, then producing institutions, although since actual IOs often perform both facilitating and producing roles, it is difficult to segregate IOs themselves neatly into producing versus facilitative categories.[79]

1. Decisionmaking

If an IO is intended to be facilitative, then the main question in designing a governance mechanism involves which of the range of facilitative functions the participants intend the IO to serve.[80] A simple IO largely serving a passive normative role may have very little in the way of decision-making or dispute resolution mechanisms.[81] However, to the extent such an IO makes any attempt to facilitate decisions by the participants over basic questions of regime direction and maintenance, such as providing for occasional "joint action," such an IO has established a governance mechanism.[82]

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79. *See Mesoinstitutions*, *supra* note 26, at 10.

80. Facilitation can involve normative, consultative, supportive and initiative roles. *See supra* notes 41–46 and accompanying text.

81. Abbott and Snidal recognize that the states which are parties to a simple normative regime may not have created an international organization at all, but simply concluded an international agreement. *See Mesoinstitutions*, *supra* note 26, at 13 ("At the extreme, however, [the normative] function can be performed without any organizational structure at all, by a treaty or even a less formally expressed set of norms."). In that case, "governance" issues would be resolved according to treaty provisions on amendment, modification, renegotiation, etc., or by the Vienna Convention on the Law of Treaties. Vienna Convention, *infra* note 216.

82. The pre-WTO GATT is a good example of such an IO. Stripped of all its institutional trappings by the unique politics of its birth, the GATT nevertheless provided in Article XXV

Consultative and supportive IOs will need a mechanism through which the participants can, among other things, call and support meetings, develop information, and manage any secretariat or other institutional apparatus needed to perform their functions. For example, NAFTA and the G-3,[83] both arguably drafted along facilitative lines,[84] have decision-making mechanisms that consist principally of one governing body—the Commission—composed of cabinet-level ministers from the governments of each party.[85] Each Commission in both systems is charged with rather general duties: to supervise the treaty's implementation, oversee its further elaboration, resolve disputes in its interpretation or application, supervise the work of committees and working groups, and consider any other matter relevant to operation of the treaty.[86] In carrying out these duties, the NAFTA and G-3 Commissions are relatively weak, functioning principally in a consultative role as a forum for regular ministerial meetings, with representatives under instruction from their home governments. Each Commission is also empowered to play a supportive role, consisting chiefly of the power to establish and oversee a Secretariat[87] and

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a minimalist mechanism for "joint" action of by the Contracting Parties for necessary regime maintenance activities. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 126–28 (1969). In the case of GATT, supportive services were provided through the arrangement to "rent" a Secretariat from the Interim Commission for the International Trade Organization, or ICITO. *See id.* at 49–50, 145–46.

83. The G-3 FTA agreement strongly resembles NAFTA. 10 BNA-ITR 2053, Dec. 8, 1993 (Anticipating that the Treaty could serve as the basis for accession to NAFTA as a bloc in the near future, the G-3 nations quite self-consciously drew on NAFTA as a model.).

84. The limited market-access goals of the NAFTA countries and the structure of NAFTA institutions suggest that NAFTA is intended principally to be a facilitative organization. Its primary goal appears to be normative, to embody tariff-reduction and other substantive trade commitments of the parties. Its institutions are not empowered to independently produce new norms or binding decisions, or produce new standards or "coordination points" in harmonization areas, nor even to have a power of initiative. *See infra* notes 86–91 and accompanying text. Rather, the Commission is constituted to play a simple consultative role, and with the Secretariat offering modest support to the participants. As with the NAFTA, the G-3 Treaty's stated objectives and decision-making structure suggest that the G-3 was intended to serve a facilitative role. Like NAFTA, it embodies normative commitments but does not establish an institutional capacity to produce new norms. *See id.*

85. NAFTA, *supra* note 5, art. 2001. The NAFTA side agreements create their own Commissions as well, consisting of a Secretariat and a Council composed of the relevant cabinet-level ministers. Their role is strictly limited by the scope of the side agreements, but within their competence they function very much like the NAFTA Commission. The primary governance body of the G-3 Treaty is also called the Commission, consisting of representatives of the Parties' trade or economic ministries. G-3 Treaty, *supra* note 5, art. 2001.

86. NAFTA, *supra* note 5, art. 2001.2. G-3 Treaty, *supra* note 5, art. 2001.2.

87. The NAFTA Secretariat is charged with the duty to "provide assistance to the Commission," as well as to chapter 19 and 20 dispute resolution panels and to other groups under the Treaty as directed by the Commission. NAFTA, *supra* note 5, art. 2002.3. Instead of a Secretariat, the G-3 treaty directs that each Party designate within their trade or economic ministries a section which, in concert with other designated sections, will function much as a secretariat under the oversight of the Commission. G-3 Treaty, *supra* note 5, art. 2002.

ad hoc committees or working groups, to seek the advice of NGOs or individuals, and to take any other action agreed to by the parties.[88]

If the participants intend their IO to have a power of initiative, then the demands on decision-making mechanisms will be correspondingly higher. The G-3 parties gave its Commission a power of initiative, thus distinguishing it from the more passive NAFTA Commission. The G-3 Commission is not only authorized to oversee the Treaty's elaboration, but is also specifically charged with: evaluating the results achieved under the Treaty and recommending to the Parties any modifications it deems advisable; suggesting to the Parties the measures necessary to implement the decisions of the Parties; and establishing policies regarding sectoral prices.[89]

As both NAFTA and the G-3 are principally facilitative IOs, mesoinstitutions theory suggests that one would not expect to find appreciable degrees of state power transferred to the NAFTA and G-3 decision-making organs, and indeed that is the case. Neither the NAFTA nor the G-3 Commissions are expressly authorized to establish new norms for their respective treaties through their decisions. Moreover, the independent authority of both Commissions is quite limited, as decisions are to be taken only by the consensus of the Parties.[90]

In contrast, if states intend to create an IO that can play a producing role, then the fundamental question becomes the degree of state power which the participants are willing to transfer to the IO to enable it to carry out its producing roles, which will have a critical impact on the nature of the governance mechanism. Students of integration institutions distinguish among institutions on a continuum according to the degree to which they are "positive," transferring state power to a central authority, or "negative," committing member states merely to refrain from certain actions.[91] In this sense, the decision to create a producing IO involves, at some level, a commitment to positive integration.

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88. NAFTA, *supra* note 5, art. 2001.3; G-3 Treaty, *supra* note 5, arts. 20-01.3.

89. G-3 Treaty, *supra* note 5, art. 20-01.2. Since the G-3 Commission must still function by consensus and has the power merely to recommend, this power of initiative is not really a producing capacity and, as an enforcement mechanism, is not likely to reach any results or make recommendations against the substantive interests of any of the G-3 parties. There may, however, be a certain "laundering" value akin to that of producing organizations in having the Commission make these reports and recommendations rather than the G-3 parties directly. *See supra* note 57 and accompanying text.

90. NAFTA, *supra* note 5, art. 2001.4. G-3 Treaty, *supra* note 5, art. 20-01.4. It is not even clearly stated that the decisions of the NAFTA Commission are to be binding on the Parties, as is made clear in other treaties. For example, the G-3 Treaty states explicitly that Commission decisions are binding. *Id.*

91. *See, e.g.*, Jacques Pelkmans, *The Institutional Economics of European Integration*, *in* INTEGRATION THROUGH LAW, *supra* note 10, at 318, 321. The mesoinstitutional analysis of producing IOs thus intersects with this institutional economics perspective.

If participants creating a producing IO have accepted in principle that some state power will be transferred, then subsequent questions involve how much power will be transferred and how this transfer will be embodied in the structure of the institution. It is here that many of the issues raised in the legal descriptive tradition of IO analysis find their place, such as the issues of state representation and voting procedures in decision-making processes,[92] whether the IO is empowered to create new norms for the regime,[93] and, if so, how such norms will be implemented within the regime and within the law of the participants.[94] Much of this analysis consists of describing the range of options for achieving an optimum or desired balance between IO effectiveness and state authority.[95]

In the Western hemisphere, the four remaining principal RTAs (MERCOSUR, CACM, ANCOM and CARICOM) present significantly different approaches to decisionmaking within a producing trade organization.[96] All four have in common that, in contrast to NAFTA and the G-3, they establish or intend to establish deeper levels of integration in the form of a customs union or common market rather than an FTA.[97] All four also

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92. Options include consensus, majority or supermajority voting, and representatives acting independently or under instruction. *See, e.g., infra* notes 100–01 and 107 (regarding MERCOSUR representation and voting). See generally Stephen Zamora, *Voting in International Economic Organizations*, 74 AM. J. INT'L L. 566 (1980) for an excellent analysis of voting in international organizations from a strictly functionalist viewpoint.

93. *See, e.g., infra* notes 117–20 (regarding ANCOM organs and norm-creation).

94. *See, e.g., infra* note 120 (regarding the direct effect of ANCOM norms).

95. *See, e.g.*, Shell, *supra* note 19; Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

96. CARICOM presents a special case, in that it appears to function in a facilitating role despite its structural similarities to its producing CM and CU brethren. *See infra* notes 121–26 and accompanying text.

97. The MERCOSUR Treaty is a comprehensive agreement providing for the free movement of goods, services, labor and capital. Treaty of Asunción, *supra* note 5, arts. 1,5. The Treaty of Managua requires elimination of internal tariffs on the vast majority of goods and commodities. Treaty of Managua, *supra* note 5, art. 3. The CET establishing the customs union set high external tariffs, in line with the import substitution philosophy underlying this and other RTAs of the first generation. *See* JOSEPH GRUNWALD ET AL., LATIN AMERICAN ECONOMIC INTEGRATION AND US POLICY 47 (1972). The Treaty of Cartagena aimed to establish both an FTA and a CU. The Treaty of Cartagena, *supra* note 5, art. 3. The Treaty originally established a system of automatic, irrevocable tariff reductions, reminiscent of the ill-fated LAFTA scheme, aimed at the creation of an FTA by 1980, which also failed. *See* G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 186 (3d ed. 1995). The Treaty's plan to establish a CET also failed. 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, 142 (1995). ANCOM members agreed in 1990 to make a final push to eliminate internal tariffs by 1992. GARY C. HUFBAUER AND JEFFREY J. SCHOTT, WESTERN HEMISPHERE ECONOMIC INTEGRATION 113 (1994). One result from that agreement was the 1992 FTA between Colombia and Venezuela, which may in turn serve as a contact point for further regional expansion. *See* Dr. Richard Bernal, *Regional Trade Arrangements in the Western*

establish some form of two-tier decision-making mechanism[98] empowered to produce rules of varying authority for their systems, but here the similarities end.

The decision-making mechanism established by the MERCOSUR Treaty plays the facilitative roles of consultation, support and initiation. In MERCOSUR, the principal organs fulfilling the governance role played in NAFTA and the G-3 by the Commission are the Council[99] and the Common Market Group.[100] Under Article 9 of the MERCOSUR Treaty, the Council and the Common Market Group are jointly charged with administering and interpreting the Treaty of Asunción. The Council is the primary consultative body of the MERCOSUR system.[101] The Common Market Group, designated in Article 13 as the executive organ of the Treaty, plays a supportive role in tandem with the MERCOSUR Secretariat,[102] and has been granted a power of initiative regarding measures to be debated and decided by the Council, as well as for monitoring compliance, enforcing decisions, and drawing up work programs and working groups regarding Treaty goals.[103] However, the Council and Common Market Group are empowered to go beyond facilitation and produce decisions on new norms for the Treaty that are

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Hemisphere, 8 AM. U.J. INT'L L. & POL'Y 683, 704 (1993); *Negotiating an FTA with Chile*, 11 BNA-ITR 111, Jan. 19, 1994. Late in 1994 the ANCOM countries also agreed to establish a CET, which went into effect February 1, 1995. *Andean Pact Nations and Mercosur to Begin Free Trade Negotiations*, 121 BNA-ITR 269, Feb. 8, 1995.

98. Decision-making mechanisms fall into two broad categories: single-tier systems, and two-tier systems. A single tier system establishes a single organ in which decisions are made and, if appropriate, from which norms issue. A two-tier system consists of two interrelated organs which together take decisions and issue norms or legislation.

99. The Council consists of the Ministers for Foreign Affairs and the Ministers for the Economy of each MERCOSUR state. Treaty of Asunción, *supra* note 5, art. 11.

100. The Common Market Group consists of four members from each State, representing the ministries of foreign affairs and the economy, and the Central Bank, and is coordinated by the Ministries of Foreign Affairs. *See id.* arts. 13, 14. In addition to the Council and the CMG, the Treaty of Asunción also established a Joint Parliamentary Commission to facilitate implementation of MERCOSUR norms in national law. *Id.* art. 24. The basic institutional structure that established the Treaty of Asunción was confirmed and elaborated, pursuant to Article 18 of the Treaty of Asunción, by the Protocol of Ouro Preto, signed on December 17, 1994. Protocolo Adicional al Tratado de Asunción sobre la Estructura Institucional del Mercosur—Protocolo de Ouro Preto [Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur—The Protocol of Ouro Preto] Dec. 17, 1994 [hereinafter Protocol of Ouro Preto](on file with author). The Protocol of Ouro Preto created a new body, the Trade Commission, which assists the Common Market Group in implementing and developing MERCOSUR's common trade policy. Protocol of Ouro Preto, *supra*, arts. 16–21.

101. Protocol of Ouro Preto, *supra* note 100, art. 3.

102. Under Article 14.XIII of the Protocol of Ouro Preto, the Common Market Group supervises the work of the Secretariat, established by Articles 33 et seq. of the Protocol of Ouro Preto to support the work of the MERCOSUR organs. *See id.* arts. 14,33.

103. Treaty of Asunción, *supra* note 5, art. 13.

binding on the parties.[104] The Council in particular is uniquely charged with political leadership and decision-making power to ensure the establishment of a Common Market.[105] However, while designing these organs to play a producing role, the parties have carefully limited the amount of state power transferred, and have established a requirement that decisions be made by consensus.[106]

As with MERCOSUR, CACM participants have established an institution which plays both facilitative and producing roles. The CACM treaty establishes a relatively lean institutional arrangement, consisting of the Central American Economic Council (CAEC)[107] and the Executive Council (EC).[108] The CAEC is charged with directing integration and coordinating the economic policies of the member states, and is the treaty's primary consultative forum.[109] The Executive Council (EC) actually applies and administers the Treaty and has a power of initiation,[110] although its executive duties are to a certain extent shared by the Permanent Secretariat, which has responsibilities exceeding a strictly supportive role.[111] Although the EC and CAEC are authorized to produce decisions by majority vote, thus embodying in principle a significant

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104. The decisions of the Council and the resolutions of the Common Market Group are binding on the parties to the Treaty. Protocol of Ouro Preto, *supra* note 100, arts. 9,15. Moreover, the parties commit to take all necessary steps to ensure compliance in their domestic jurisdictions with the norms emanating from the Treaty's decision-making organs. *Id.* art. 38.

105. Treaty of Asunción, *supra* note 5, art. 10; Protocol of Ouro Preto, *supra* note 100, art. 3.

106. The MERCOSUR Council and the Common Market Group are not fully supranational in character, as the representatives on each are under instruction from their home government and controlled through national ministries of foreign affairs or the economy. *See supra* notes 100–01. Although similar to the European Community in terms of goals, MERCOSUR thus lacks the EC's powerful supranational institutions. *See* Thomas A. O'Keefe, *An Analysis of the Mercosur Economic Integration Project from a Legal Perspective*, 28 INT'L LAW. 439, 439, 444 (1994); Marta Haines-Ferrari, *Mercosur: A New Model of Latin American Economic Integration?*, 25 CASE W. RES. L. REV. 413, 423–4, 448 (1993). By contrast, the ANCOM executive body, the Junta or Board, is expressly charged with acting in the interests of the regional integration effort, and not under instruction from any home governments, thus resembling more closely the Commission of the European Community. *See infra* note 120. Moreover, Article 37 specifies action by consensus for all MERCOSUR organs. Protocol of Ouro Preto, *supra* note 100, art. 37.

107. The CAEC is comprised of the Ministers of the Economy of the member states. Treaty of Managua, *supra* note 5, art. 20.

108. The EC consists of one principal member and one alternate from each contracting state. *Id.* art. 21.

109. *Id.* art. 20.

110. The Executive Council was formed for the purpose of applying and administering the Treaty. *Id.* art. 21. The Executive Council has authority to take measures to promote integration, including the proposal of other agreements. *Id.* art. 22.

111. The Permanent Secretariat, established in Article 23, is also charged with ensuring "the proper application . . . of [the] Treaty", *id.* art. 24, and is authorized to convene the Executive Council. *Id.* art. 21.

transfer of state power beyond that permitted by the MERCOSUR participants,[112] the Treaty of Managua does not expressly state that CAEC or EC decisions bind the participants,[113] thereby possibly undercutting the appearance of supranationality.

The ANCOM institutions were constituted to serve both facilitative and producing roles, and given perhaps the most extensive state power—at least on paper—with which to perform the latter functions. ANCOM's principle governance bodies are the Commission, which serves as the principal consultative forum for the ANCOM countries,[114] and the Board or Junta.[115] In addition to its supportive roles, the Commission has a broad producing mandate, with "exclusive legislative capacity as to matters within its competence."[116] Under Article 7, the Commission is charged with establishing general policies for the Common Market, approving the standards for harmonization of the economic policies of the members,[117] and taking decisions regarding the proposals of the Board. It is also empowered to appoint Board members, to provide instructions to the Board, and even to delegate its functions to the Board when appropriate.[118] The ANCOM organs are authorized to produce new norms and

112. Executive Council resolutions are adopted by majority vote. Treaty of Managua, *supra* note 5, art. 21. Before ruling on any matter, the CAEC must first decide whether for that issue it will proceed by a unanimous or majority vote. *Id.* However, it must decide this unanimously. *Id.*

113. In contrast to the MERCOSUR Protocol of Ouro Preto, the Treaty of Managua is silent as to the binding or nonbinding status of decisions made by the CAEC or EC, and does not provide for their legal effect in the domestic law of CACM members, or even commit the CACM parties to their best efforts at domestic compliance.

114. The ANCOM Commission, consisting of one representative from each member's government, is the highest body within the ANCOM institutional framework. Treaty of Cartagena, *supra* note 5, art. 6.

115. *Id.* art. 5. The Board is the "technical" body of ANCOM. *Id.* art. 13. In 1979 the ANCOM countries established an Andean Parliament, an advisory body with no direct legislative role or capacity. Treaty Establishing the Andean Parliament, 19 I.L.M 269 (1980).

116. Treaty of Cartagena, *supra* note 5, art. 6.

117. The ANCOM organs have been active in attempting to increase efficiency through the production of coordination points, though with mixed results. The common market was to be supported on a national level by a vigorous program of harmonization, especially in the areas of foreign capital and technology transfer rules, where the ANCOM countries adopted an aggressive stance towards foreign investment and in general tried to limit the force of MNEs in ANCOM territory. This approach, as symbolized by a key measure, Decision 24 restricting foreign investment, ultimately failed, but not until Chile had left ANCOM, RTA discipline among members had collapsed over widespread national derogations from this approach, and overall levels of foreign investment had decreased substantially. *See* Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress"*, 14 NW. J. INT'L L. & BUS. 493, 501 (1994).

118. Treaty of Cartagena, *supra* note 5, art. 7.

interpret the treaty, often by majority vote,[119] and with results directly applicable in the jurisdictions of participants.[120]

Within the hemisphere's customs union or common market RTAs, CARICOM appears as something of an anomaly. Although it establishes a common market[121] and empowers a facilitative and a producing organization, the CARICOM Treaty itself establishes only a single governance mechanism as the "principal organ" of CARICOM, the Common Market Council.[122] However, the Council works in tandem with another institution, the Conference of Heads of Government, created by the Caribbean Community Treaty as the decisional body for the Community.[123] Together, both institutions operate as a two-tier governance structure for CARICOM; while each institution plays a primary role in its area of competence, the Council is still subject to the general authority of the Conference.[124] The Conference plays the principal consultative role, while the Council exercises a supportive role with the Secretariat, and has the

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119. Under Article 11 of the Treaty of Cartagena, the Commission may generally act by 2/3 majority. Treaty of Cartagena, *supra* note 5, art. 11. Most importantly, while the decisions of the Board must be unanimous, the Board is charged with acting solely for the interests of the subregion as a whole, and shall not seek nor accept instructions from any government or other group. *Id.* arts. 14, 17.

120. The decisions of the Commission now have direct applicability in the member countries. Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, art. 3, 18 I.L.M. 1203 (1979) [hereinafter "Andean Court of Justice Treaty"]. This resolves in principle a major gap in the earlier legislative process of the Cartagena Agreement. *See* Scott Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEX. INT'L L. J. 39, 43–44 (1982). The fact that ANCOM has in reality fared so poorly suggests that in fact the ANCOM institutions were designed with powers that exceeded the actual goals of the participants for the institution, regardless of the formal objectives stated in the treaty.

121. The Treaty Annex establishing CARICOM sets forth the basic provisions necessary to create an FTA and to move progressively towards a customs union and common market. Caricom Treaty, *supra* note 5, chs. III to V. The CET is largely in place, but progress has been slow, with several missed timetables. *See* HUFBAUER & SCHOTT, *supra* note 97, at 124–25. Economic integration through CARICOM's common market is on of three principal objectives of the Caribbean Community, which also aims for regional cooperation in infrastructure and basic services projects including health, education, information and broadcasting; and coordination of foreign policy. Caribbean Community Treaty, *supra* note 5, art. 4.

122. CARICOM Treaty, *supra* note 5, art. 5. The council is composed of one minister of government from each member state. *Id.* art. 6.

123. The Conference consists of the heads of state of the treaty signatories. CARICOM Treaty, *supra* note 5, arts. 6, 12.

124. The Conference has final authority over matters affecting the Community, and resolves disputes concerning interpretation and application of the Community Treaty except with regard to CARICOM matters. Caribbean Community Treaty, *supra* note 5, arts. 8, 19. The Council is responsible for the operation and development of CARICOM, and resolves disputes concerning the CARICOM agreement. CARICOM Treaty, *supra* note 5, art. 7. However, even in decisional matters affecting CARICOM the Council is still subject to the general authority of the Conference, since CARICOM matters come with the overall objectives of the Caribbean Community. CARICOM Treaty, *supra* note 5, art. 5; Caribbean Community Treaty, *supra* note 5, art. 8.3.

power of initiative.[125] Both treaties authorize their respective organs to produce decisions that bind the member state addressed. However, the fact that only the Council may proceed by a majority vote, and only in certain cases, undercuts the supranational reach of these provisions.[126]

2. Dispute Resolution

The dispute resolution and enforcement role that IO participants contemplate for their institutions requires independent consideration, because, by definition, the role will have a significant influence on the design of the governance mechanism. As with the design of decision-making mechanisms, dispute resolution and enforcement also hinge on the basic decision between facilitation or production. For example, if the IO is intended to offer arbitration services involving the production of a binding decision, then particular questions involving the appointment of panelists, the scope of inquiry, and the binding effect of panel decisions will need to be addressed, raising again the question of state power. If the dispute resolution function will be confined simply to facilitation involving mediation or consultation, or even an arbitral procedure leading to something less than a binding decision, then less formal mechanisms involving little or no transfer of state power may be suitable.

While the majority of the hemisphere's RTAs follow arbitration-style dispute settlement mechanisms (DSMs), these systems differ in important respects. NAFTA's primary DSM, found in Chapter 20 of the Treaty, involves consultation, Commission intervention and international arbitration.[127] However, the NAFTA Commission's role has been characterized as that of a "political troubleshooting institution rather than as an inde-

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125. Article 15 of the Caribbean Commonity Treaty establishes a Secretariat. Caribbean Community Treaty, *supra* note 5, art. 15. Article 7 of the CARICOM Treaty authorizes the Council to make proposals to the Conference towards the development of the Common Market and for entering into other treaties. Caricom Treaty, *supra* note 5, art. 7.

126. Article 9 of the Caribbean Community Treaty, *supra* note 5, and Article 8 of the CARICOM Treaty, *supra* note 5, establish the power for binding decisions in their respective organs. Moreover, Article 5 of the Caribbean Community Treaty, *supra* note 5, and Article 4 of the CARICOM Treaty, *supra* note 5, obligate members to take all appropriate measures to ensure compliance with the decisions of their respective organs, at least with respect to the Common Market (the text is unclear as to Community decisions outside the Common Market). However, the Conference must act by unanimity, as must the Council in most cases. Caribbean Community Treaty, *supra* note 5, art. 9; CARICOM Treaty, *supra* note 5, art. 8.

127. NAFTA's principal DSM is set forth in Articles 2003–2019 of the treaty. *See* James R. Holbein & Gary Carpentier, *Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere*, 25 CASE W. RES. J. INT'L L. 531, 560–65 (1993); Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603 (1993).

pendent arbitral body"[128] largely because the final reports of the arbitral panels are not binding and are not supranational in this sense.[129] Thus, despite the appearance of a producing role, the NAFTA DSM actually plays a facilitative role, supporting the resolution of disputes among NAFTA parties through the development of recommendations and options for agreement, but falling short of authoritatively resolving the dispute.[130]

CARICOM's DSM resembles that of NAFTA in key respects. If the parties fail to settle their dispute, they may refer the matter to the Council, which may in turn convene an arbitral tribunal.[131] At the conclusion of a Council or tribunal proceeding, the Council makes recommendations that are not binding on the parties to the dispute.[132] If a party fails to implement the recommendations, however, the Council may authorize sanctions.[133] In its resemblance to NAFTA's DSM, the CARICOM DSM reveals a similar decision on the behalf of its parties that the resolution of their disputes should ultimately remain in their direct control.

The G-3, MERCOSUR, CACM and ANCOM treaties all go beyond NAFTA and CARICOM's facilitative models and establish DSMs with a producing capability. The G-3 and MERCOSUR follow a binding arbitration model, while the CACM and ANCOM establish quasi-judicial or judicial procedures.

As is the case with NAFTA, the G-3 Treaty gives the parties the option of pursuing the WTO dispute resolution process[134] or the Treaty's

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128. David S. Huntington, *Settling Disputes under the North American Free Trade Agreement*, 34 HARV. INT'L. L. J. 407, 416 (1993).

129. Article 2018 requires that the parties "shall agree on a resolution of the dispute" upon receipt of the final report, "which *normally* shall conform with the determinations and recommendations of the panel" (emphasis supplied). NAFTA, *supra* note 5, art. 2018. *See also NAFTA Dispute Settlement Flawed by Politics, Canadian Official Said*, 12 BNA-ITR 1774, Oct. 25, 1995 (final outcome of DSM involves political decision regarding implementation of arbitral decisions).

130. Nevertheless, if the parties fail to reach an agreement, they may face a loss of treaty benefits. NAFTA, *supra* note 5, art. 2019. NAFTA's overall dispute settlement system does contain one true supranational element, however. The decisions of the trilateral panel review process of Chapter 19 will subject national agency antidumping and countervailing duty decisions to international review and remand, as appropriate. NAFTA, *supra* note 5, ch. 19. This suggests that in the highly contentious area of dumping determinations, the parties (US and Canada in this case) decided that the costs of further decentralized activity outweighed the costs of creating a more centralized, producing organization for this issue, perhaps in part due to the legitimizing effect of institutional decisions.

131. Caribbean Community Treaty, *supra* note 5, art. 11 annex. The Council must convene an arbitral tribunal a the request of a party to the dispute. *Id.*

132. *Id.* art. 11.3.

133. *Id.* art. 11.4.

134. This option is contained in Article 19-03 of the G-3 Treaty, G-3 Treaty, *supra* note 5, art. 19-03, and Article 2005 of the NAFTA Treaty. NAFTA, *supra* note 5, art. 2005. The WTO dispute resolution mechanism is found in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. *See* WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 112 (1994).

own DSM, which also resembles NAFTA in providing for consultation, Commission intervention, and arbitration.[135] However, in contrast to NAFTA, final decisions are binding on the Parties,[136] and in this aspect the G-3 DSM reflects a producing IO model.[137]

Disputes within MERCOSUR are to be settled according to an international arbitration process, preceded by consultation and mediation by the CMG.[138] As is the case with the G-3 DSM, the decisions of the arbitral panel are binding on the states party to the controversy.[139] The Protocol also clarifies that the decision has the effect of *res judicata* as to the parties to the dispute.[140]

The CACM DSM also operates through an arbitration process. Under Article 26 of the Treaty of Managua, members can bring disputes to the Economic Council or Executive Council for resolution.[141] If not settled there, the dispute will be referred for binding arbitration.[142] The CACM DSM, however, goes a step farther than other arbitration-based DSM's in terms of the supranationality of its decisions. First, the arbitral panel is composed of justices of the highest court of each member state, giving the proceedings a more adjudicatory nature.[143] Moreover, the decision of the arbitral panel concerning interpretation and application of the Treaty

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135. G-3 Treaty, *supra* note 5, arts. 19-05 to 19-19.

136. For disputes not directly related to G-3 obligations, however, Colombia and Venezuela are bound to follow the provisions of the Cartagena Agreement. *Id.* art. 19-04. This raises a troubling hierarchy of norms issue which will have to be faced by FTAA planners as well. *See infra* notes 210–17 and accompanying text.

137. *See* G-3 Treaty, *supra* note 5, art. 19-16.

138. Protocolo de Brasilia Para La Solucion de Controversias [Protocol of Brasilia for the Solution of Controversies], arts. 2,4,7, 6 INTER-AM. LEG. MAT. 1 (1992) [hereinafter Protocol of Brasilia]. Annex III of the Treaty of Asunción set out an interim DSM involving "binding mediation" by the Common Market Group and Council. Treaty of Asunción, *supra* note 5, Annex III. Pursuant to Article 18 of the Treaty of Asunción, the Parties negotiated and in 1993 enacted the Protocol of Brasilia, setting forth MERCOSUR's definitive DSM rules. *Id.* art. 18.

139. Protocol of Brasilia, *supra* note 138, art. 21. However it has been elsewhere noted in connection with problems attendant to negotiation of a new MERCOSUR-ANCOM agreement that Brazil's constitution prohibits the decisions of international bodies from overriding Brazilian law. *See MERCOSUR, Andean Group Make Little Headway Toward South American FTA*, *supra* note 4, at 27. In connection with that negotiation, Brazil is raising this issue to press for a NAFTA-style DSM, in which dispute resolution panel decisions are brought forward as recommendations to the FTA commission. *Id.*

140. Protocol of Brasilia, *supra* note 138, art. 21.

141. Treaty of Managua, *supra* note 5, art. 26.

142. *Id.*

143. Whether or not the additional quasi-judicial elements in the CACM system render the binding arbitration process correspondingly more effective cannot be determined empirically, due to the flaws and failures of the overall CACM system. However, if the revitalized CACM carries over this model of DSM and a meaningful practice develops, this may offer important new alternatives for the FTAA process.

is *res judicata* for *all* member states, not just those which are parties to the dispute.[144]

The members of ANCOM established via a separate treaty the Court of Justice of the Cartagena Agreement.[145] The Court has jurisdiction over all disputes involving ANCOM norms,[146] including disputes brought by member states or ANCOM institutions and, in appropriate cases, disputes brought by private parties.[147] In principle the Court has significant supranational authority. The Court "produces" judgements, and Member states found by the Court to be in noncompliance with ANCOM norms must take all necessary measures to come into compliance.[148] National courts are required to refer questions of ANCOM law to the Court if there is no further appeal possible of their rulings, and the interpretations of the Court must be adopted by the referring judge.[149] In practice the Court's effectiveness has been stymied by the general lack of political cooperation and coordination among ANCOM states.[150]

C. *Implications*

It follows from the basic rationality assumption underlying regime theory that states will tailor governance mechanisms to the particular goals they have for the IO generally. As informed by a mesoinstitutions perspective, a regime analysis of governance involves an investigation into the degree to which the IO is intended to perform facilitative or producing goals, and a critique of the effectiveness of the established (or intended) governance mechanisms in view of those goals.

A preliminary analysis of trade institutions in the Western hemisphere suggests as a general matter that parties intending to create an FTA establish primarily facilitative IOs, and parties creating a customs union or common market establish an IO with at least some producing capacity.

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144. Treaty of Managua, *supra* note 5, art. 26. Because of the scope of the Treaty, these decisions can involve sensitive issues affecting national interests, such as rules of origin, disputes, and claims of unfair trade practices, making this provision all the more remarkable.

145. Andean Court of Justice Treaty, *supra* note 120.

146. These norms include the Cartagena Agreement, its protocols and instruments, the Treaty itself, the decisions of the Commission and the Resolutions of the Board. *Id.* art. 1.

147. *Id.* arts. 19, 27, 29, 33. Actions which can be brought concerning these norms include actions for nullification of acts of ANCOM institutions, actions for noncompliance on the part of a member state, and requests by national courts for advisory opinions. *Id.* arts. 17–33.

148. *Id.* art. 25.

149. *Id.* arts. 29, 31. In theory, the ANCOM system resembles, quite self-consciously, the highly successful judicial model developed in the European Community.

150. *See* O'Hop, *supra* note 97, at 160. As with the CACM, the additional effectiveness conferred by this model to a regional integration system in a non-European setting remains to be determined as the ANCOM system matures.

In terms of governance, analysis of the NAFTA and G-3 decision-making mechanisms suggests, along functionalist lines, that states consider a relatively weak single-tier system to be adequate when establishing a facilitative FTA and not contemplating a significant transfer of state power, nor deeper levels of integration in the future.[151] In contrast, analysis of the hemisphere's customs union and common market RTAs suggests that states employ a two-tier decision-making system when integrating beyond an FTA and creating a producing IO. The decision-making mechanisms of MERCOSUR, the CACM, ANCOM, and CARICOM each is designed to play a producing role, with the "work product" taking the form of "policy" or "norms" created through the two-tier system.[152]

Whether the political will exists to achieve the intended levels of integration set for an RTA, and whether its institutions have been adequately designed to facilitate the parties' goals, remain two significant questions.[153] Nevertheless, the preceding analysis suggests as a starting point that states contemplating a producing organization for trade liberalization and deeper levels of integration appear to adopt two-tier systems of governance, in which an "executive" organ with some degree of independence is broadly overseen by a "policy-making" organ, which remains expressly in the control of the states-parties.[154] In contrast, free trade systems adopting a strictly facilitative model and embodying more

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151. Of course, considerably more comparative study would be needed to bear this out. An initial comparison to the European Community's association program is consistent with this observation, with qualifications. The first generation accession agreements, or "Partnership and Cooperation Agreements," used by the European Community to link itself with the countries of Central and Eastern Europe also use simple single-tier decision-making mechanisms, and include modest integration goals up to, but not including, an actual FTA. *See* Garcia, *Americas Agreements*, *supra* note 4, at 91 & nn.143–46. The second generation Europe Agreements establish a two-tier system reminiscent of that established for the European Community itself, although the integration system established by such agreements is an FTA only. However, in this case, one of the goals of the agreement is to begin training the associating country in the Community-style institutional system, which may account for the creation of the two tiers at this FTA stage of integration. *Id.* at 94–96 & nn.170–76.

152. The supranational strength of each system, and consequently its real effective producing capacity, varies with each system. *See supra* notes 106, 112–13, and 119–20 and accompanying text.

153. For example, the consensus requirement limiting supranationalism in MERCOSUR and CARICOM decision-making might go too far in limiting state power towards creating effective producing organs. However, MERCOSUR has in fact succeeded beyond CARICOM, and ANCOM, which has formal supranationalism beyond both, has failed, suggesting that formal characteristics alone cannot explain the effectiveness of producing organizations. Paradoxically, it may be that a consensus "brake" on decisional supranationalism may enhance the possibility of developing normative supranationalism, as has been asserted with regard to the EC institutions. *See* Weiler, *supra* note 95.

154. Again, more analysis is needed, but a comparison to Europe Agreements bears this out. *See supra* note 151 and accompanying text.

limited integration goals seem to adopt single tier governance mechanisms, without a significant norm-creating capacity.

Turning to dispute resolution, the relatively consistent correlation between integration goals and institutional design found in decision-making among hemispheric RTAs is not to be found at first glance with regard to their dispute resolution systems. Whereas both hemispheric FTAs (NAFTA and G-3) have relatively simple arbitration-style DSMs, the DSMs of the CACM and MERCOSUR (both intended to be common markets) are also arbitration-based. Moreover, arbitral decisions are binding in the G-3 while non-binding in NAFTA. Whereas three of four common markets (ANCOM, CACM, and MERCOSUR) also have binding DSMs, CARICOM's DSM is nonbinding and resembles NAFTA more than its sister common markets. Finally, the ANCOM system is more judicialized in design than those of its sister common markets, or any other hemispheric RTA for that matter.

Overall, however, there does appear to be a trend in the hemisphere towards binding dispute resolution in an arbitration model. The most important variable at work in DSM design appears to be the willingness of the parties to submit themselves to binding decisions arising from international dispute resolution. In mesoinstitutions terms, parties face a decision involving the costs of such binding dispute resolution (loss of discretion, increased institutional costs, etc) and its benefits (predictability, stability, legitimacy) against the costs and benefits of resolving disputes more informally and diplomatically. That most of the hemisphere's RTAs have established a binding arbitration system suggests that states have generally resolved the aforesaid calculus in favor of submitting their disputes to binding dispute resolution.[155] The fact that many of these regimes nevertheless limit the supranationality of their decision-making mechanisms suggests that decisionmaking and dispute resolution involve a separate calculus as to the costs and benefits of producing capabilities and, perhaps, that states have more experience with—and are more accepting of—supranationalism in an international arbitration context than they do in the context of norm creation and decision-making mechanisms.[156]

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155. Slaughter Burley cautions, however, that it is in connection with analyzing such questions concerning when the costs of institutionalization (or increased institutionalization) outweigh its benefits that IR theory in general shows one of its key weaknesses. *See* Slaughter Burley, *supra* note 16, at 225.

156. It may be that the primary structural effects of the distinction between facilitative and producing IOs are to be found in their decision making mechanisms, and only secondarily in the DSM design, as arbitration style systems are prevalent.

II. Towards an FTAA Governance System

Turning now to the matter of institutional design for the FTAA, the decision on the part of the Summit countries to commit to the formation of the FTAA represents, in mesoinstitutions theory terms, at least a tentative decision that the costs of more centralized cooperation on hemispheric trade matters may be outweighed by the costs of further decentralized activity.[157] The question explored in this Article involves, from a governance point of view, precisely how much centralization is intended by the Summit countries, or desirable in view of their goals and past integration practice in hemispheric RTAs. It is to these goals, therefore, that we now turn.

A. *The Summit of the Americas: Guidelines but Scant Guidance*

1. Declaration and Plan of Action

a. Goals of the FTAA

The prinicipal Summit document, the "Declaration of Prinicples and Plan of Action,"[158] sets forth certain broad elements to be addressed through the FTAA process:

> —"trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments;"[159]
>
> —an FTAA that "will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together;"[160]
>
> —"strengthened mechanisms that promote and protect the flow of productive investment in the Hemisphere, and to promote the development and progressive integration of capital markets;"[161] and

157. *See* Americas Agreements, *supra* note 4, at 103–04 & nn.214–16 (characterizing existing hemispheric integration as decentralized).

158. Summit of the Americas: Declaration and Plan of Action, 34 I.L.M. 808 (1995).

159. *Id.* at 811.

160. *Id.*

161. *Id.* at 812.

—"a hemispheric infrastructure" through sectoral negotiations "in fields such as telecommunications, energy and transportation, which will permit the efficient movement of the goods, services, capital, information and technology that are the foundations of prosperity."[162]

Item 9 of the Declaration's Plan of Action sets out a list of specific trade policy areas in which "balanced and comprehensive agreements" will be sought. These areas include tariffs and NTBs affecting trade in goods and services, as well as the following: agriculture, subsidies, investment, intellectual property rights, government procurement, technical barriers, safeguards, rules of origin, antidumping and countervailing duties, sanitary and phytosanitary measures, dispute resolution, and competition policy.[163]

The Declaration and Plan of Action reveal that however comprehensive, the Free Trade Area of the Americas is intended to be no more than its name suggests: a free trade area, not a customs union or common market. The Declaration and Plan of Action present, in general terms, an agenda for a market-oriented FTA, without any reference to deeper integration at a future date.[164] This is in marked contrast to the goals of several hemispheric RTAS, which as seen above seek to create customs unions, and eventually common markets.

While it is not possible to conclusively determine from the Declaration and Plan of Action precisely how facilitative or producing an organization is intended by the Summit countries, the statements of the Summit countries suggest a facilitative FTAA, largely along the passive, normative model: the embodiment of agreed-upon rules for hemispheric trade. It is notable that no express reference is made to the creation of strong central institutions to manage or even support the integration process, beyond some mention of an FTAA that can "broaden and deepen" hemispheric integration and "promote and protect" capital market development.

b. Governance

While understandably vague on the particulars concerning the actual structure of the FTAA, the Declaration and Plan of Action can be read to

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162. *Id.*

163. *Id.* at 821. The coverage is as comprehensive as that found in NAFTA.

164. This goal is in itself challenging, but stops short of some of the more difficult issues that would confront any attempt at deeper integration in this hemisphere, such as free movement of workers and the coordination of macroeconomic policy.

adopt, or endorse, a negative approach to governance within the FTAA.[165] In paragraph four of Item 9, the Summit parties "recognize that decisions on trade agreements remain a sovereign right of each nation."[166] This is consistent with the approach favored by the U.S. and taken in NAFTA.

Beyond this suggestion, the Declaration and Plan of Action are largely silent on the specific approach to governance which the FTAA might take. Some form of central decision-making institution is likely to be created, at a minimum to supervise the implementation of the agreement and, where necessary, provide a framework in which decisions can be taken on agreement matters. Given the limited integration goals of the FTAA and the approach taken to these issues in NAFTA, it is unlikely that the FTAA's decision-making institutions will be significantly supranational.

With regard to dispute resolution, the Summit parties' emphasis that "decisions on trade agreements remain a sovereign right of each nation"[167] can be read to suggest that an FTAA DSM will not contain significant supranational elements. However, in connection with the implementation of agreements in areas covered by the Plan of Action, the Parties also affirm that they "recongiz[e] the importance of effective enforcement of international commitments."[168] This suggests that designing an FTAA DSM will involve a process of carefully balancing its desired effectiveness on the one hand, and a reluctance to cede national authority on the other, in which the parties would do well to study carefully their collective experience in existing hemispheric RTAs.[169]

2. Ministerials

While the Summit Declaration did not set out a detailed plan for achieving its many goals,[170] the "Immediate Action Agenda" of Item 9 of

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165. *See supra* note 92 and accompanying text.

166. Summit Declaration and Plan of Action, *supra* note 158, at 821.

167. *Id.* at 821, item 9.4.

168. *Id.*

169. This is echoed by the Parties' rather cryptic remark that dispute resolution is one of the areas in which "balanced and comprehensive" agreement will be sought. *Id.* at 821, item 9.3. However, one commentator questions whether, in view of adequacy of the GATT/WTO DSM, there should even be a separate DSM in NAFTA or the FTAA. Charles M. Gastle, *Policy Alternatives for Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms*, 26 LAW & POL'Y INT'L BUS. 735, 796 (1995); *See also Chile-Canada FTA Differs From NAFTA, but Could Aid Chilean Accession*, *supra* note 4, at 21 (Chile and Canada decide not to negotiate standards, IP and sanitary/phytosanitary provisions for bilateral FTA on grounds that WTO commitments adequate.).

170. Such a plan is not expected before the third ministerial, due to occur in 1997. *Chaotic Trade Ministerial Ends in Agreement on FTAA Declaration*, INSIDE NAFTA SPECIAL REPORT, March 25, 1996, at 1, 5 [hereinafter "*Chaotic Trade Ministerial*"].

the Plan of Action[171] directs the hemisphere's trade ministers to take "concrete initial steps" to achieve the FTAA, including the initiation of a series of ministerial meetings for the development of short, medium and long-term recommendations for implementation of the FTAA.[172]

Pursuant to this charge, the hemisphere's Trade Ministers met in June of 1995 in Denver, Colorado (the "Denver Ministerial") and again in March of 1996 in Cartagena, Colombia (the "Cartagena Ministerial"). While these ministerials have established eleven working groups and their initial agendas,[173] they have postponed discussion of more substantive issues to the third ministerial[174] and have not created a working group to address institutional matters.[175] Thus, the Summit process to date has added little to the clues, discussed above, that are contained in the basic Summit documents concerning the FTAA's approach to governance.

3. Summary

In view of the goals expressed by the Summit countries and their minimal statements regarding institutional design, it seems that in mesoinstitutional terms the FTAA is intended to play largely a facilitative role, charged with supporting the Parties' integration efforts within a framework that retains decision on trade matters as "a sovereign right of each nation." It remains to be seen how this basic commitment will be developed, in particular with regard to a governance mechanism that can manage the decision-making and dispute resolution requirements of so large and complex an agreement, even at a facilitative FTA level, within the negative integration parameters set by the Parties.

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171. Summit of the Americas: Declaration and Plan of Action, *supra* note 158, at 822–23.

172. *Id.* at 822.

173. The Denver ministerial established working groups to cover market access, customs and rules of origin, investments, standards, sanitary measures, dumping and subsidies, and the effects of integration on smaller economies. *Trade Ministers' Conference Reinforces Commitment to Construct Hemispheric Free-Trade Zone*, CHRON. LATIN AM. ECON. AFF., July 6, 1995, at 1 *available in* 1995 WL 2297474. The Cartagena Ministerial added four working groups in the areas of government procurement, intellectual property, services, and competition. *Chaotic Trade Ministerial*, *supra* note 170, at 5–6.

174. One of the key agenda items for the Cartagena Ministerial had been to begin to identify the strategy for building the FTAA, including the basic parameters of such an agreement. *See Cartagena Meeting Should Give Definition to FTAA, IDB Economist Says*, INSIDE NAFTA, February 21, 1996, at 18. However, the Cartagena Declaration falls short in this area, and does not even require that trade ministers decide when and how to start negotiations at the *next* ministerial. *Chaotic Trade Ministerial*, *supra* note 170, at 5.

175. Also notably absent are working groups in the key areas of environmental standards and labor standards, which have already proven contentious and controversial. *See Chaotic Trade Ministerial*, *supra* note 170, at 5–6. The U.S. sought unsuccessfully to have working groups in the latter two areas established at the Cartagena Ministerial. *Id.* at 1, 5.

B. *FTAA Governance: Basic Framework*

Since it appears that the FTAA is intended principally as a facilitative organization, the foregoing mesoinstitutions analysis of hemispheric trade governance suggests that one should not anticipate that FTAA governance mechanisms will enjoy any appreciable degree of state power with which to accomplish their tasks. However, the Summit countries must still determine the range of facilitative roles which the FTAA may be empowered to play, which will significantly affect the design of its governance mechanisms. Moreover, the parties may opt for a limited producing role, hence a certain amount of supranationalism, in connection with some aspects of decision making and, in particular, dispute resolution, if that is seen as rendering the FTAA institutions more effective within the confines of the Summit countries' overall goals and tolerance for supranationalism.

1. Decisionmaking

In determining the structure of an FTAA decision-making mechanism, a basic issue to be resolved by the Summit countries involves the choice between a single-tier system such as that of NAFTA and the G-3, and a two-tier system like that of MERCOSUR, CACM and ANCOM.[176] Since it appears that the FTAA is intended to be a facilitative organization, the analysis in Part I of this Article suggests that the Summit countries may consider the adoption of a single-tier decision-making system as adequate to their goals for the FTAA. If the FTAA decision-making organ will not be charged with the responsibility or authority to "produce" norms or coordination points, then there would appear to be little need for a more complex two-tier system.[177]

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176. When undertaking a comparative study of governance mechanisms with a view towards construction of a new IO, one must remember that, as a corollary of regime theory's rationalist assumption, governance mechanisms cannot simply be "imported" from other integration systems. Attention must be paid to how the governance mechanism of that other system was designed in view of that system's goals, and whether those goals are similar to or compatible with the goals of the system which the new governance mechanism is intended to serve. This is no more than a plea for intelligent comparative analysis.

177. Moreover, since there is no equivalent to a second tier within NAFTA, and the U.S. appears loathe to commit to the type of transfer of power necessary for an effective two-tier system, it would be unlikely for the U.S to agree to initiate such a system in the FTAA absent a compelling reason.

a. The FTAA Commission

Following the NAFTA and G-3 model, the principal decision-making and consultative organ of the FTAA could be designated the "FTAA Commission." If the FTAA is structured as an independent, multilateral agreement, then Commission membership would most naturally consist of 34 government ministers representing the Summit countries.

Alternatively, if the FTAA is formed through some sort of linkage or coalescence among existing RTAs, then the FTAA Commission could consist of the NAFTA Commission and representatives of the primary coordinating institutions of the other member RTAs acting as blocs.[178] In such a case, since NAFTA has no supranational institutions, NAFTA representation on the FTAA Commission would be conducted through separate representation of the three NAFTA parties. RTA representation would depend on the authority of each RTA's institutions to represent the RTA and its members in other institutions.[179] In general, it would seem the most appropriate representative on the FTAA Commission in such cases would be the body with highest overall authority for policymaking in its respective RTA, so that the FTAA Commission would have the widest possible authority within the respective legal

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178. Although these might be the same individuals, they would be operating in a different institutional context, with different considerations and accountability to different sets of norms and expectations. This might be quite significant, for example, in the case of ANCOM, whose Board is charged with operating for the best interests of the region as a whole, and whose members are not operating under instructions. *See supra* note 120 and accompanying text. It is interesting to note in this regard that in the current negotiations for a South American FTA between MERCOSUR and ANCOM, the ANCOM countries are negotiating the tariff phase-out schedules as a bloc rather than individually. *Colombian Urges US Fast Track Action to Bring FTAA 'Back to Life'*, INSIDE NAFTA, Nov. 13, 1996, at 6. Also, CARICOM leaders recently decided to follow a bloc approach to negotiating free trade agreements with other trading groups, citing the need for a unified, coordinated approach. *CARICOM Leaders Agree to Field Single Team for Trade Negotiations*, INSIDE NAFTA, Oct. 30, 1996, at 4.

179. For example, the FTAA Commission could include the G-3's Commission and the ANCOM Commission, ANCOM's highest body. For MERCOSUR, CACM and CARICOM, representation on the FTAA Commission would be less clear because of the distribution of competences within the two-tier systems found in these RTAs. In MERCOSUR, the Council has overall responsibility for MERCOSUR policy, but the Common Market Group is charged with the executive function and has an important role in international treaty matters. *See supra* notes 100–03 and accompanying text. The Protocol of Ouro Preto provides that the Common Market Group can, upon delegation by the Council, negotiate treaties on behalf of MERCOSUR. Protocol of Ouro Preto, *supra* note 100, art. 14.7. In CACM, the Economic Council has the overall responsibility but, again, important executive functions are fulfilled by the Executive Council, including proposing new agreements. *See supra* notes 108–13 and accompanying text. In CARICOM, the Council plays a primary role in the operation of the common market but is still subject to the overall authority of the Conference of the Caribbean Community. *See supra* notes 124–26 and accompanying text.

orders of its constituent systems, and decisionmaking could proceed with a minimum of interference from other institutions.[180]

Even in an organization charged only with facilitative duties, the size and ministerial level of such a Commission could limit meetings to once a year and special meetings.[181] One alternative would be for the Commission to appoint an Executive Committee or Council at a lower ministerial level to undertake certain limited action between Commission meetings in much the same way that the pre-WTO GATT had a Council to act between meetings of GATT Contracting Parties.[182] While technically the governance mechanism would consist of two bodies, this is not the same as a two-tier system that has full and differentiated legislative and executive roles.[183]

b. The Commission's Scope of Action

Turning from composition to function, the division between single and two-tier institutions reflects a deeper division between systems with no significant producing role and consequently no appreciable degree of supranational authority, and systems which will play a producing role and in which there is some capability for supranational decisionmaking. Since the FTAA is likely to be principally a facilitative IO, it is unlikely that the FTAA Commission would receive any broad grant of state power.

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180. With reference to the RTAs discussed above in section I.B.1, that would be the MERCOSUR Council, the CACM Economic Council, and the Caribbean Community's Conference of Heads of Government. *See* discussion *supra* Part I.B.1. It may be the case that for operational or other reasons the primary body of each two-tier system may wish to delegate its authority to the second tier, usually executive, organ, in which case the primary organs would need to affirm or ratify the decisions of the FTAA Commission. MERCOSUR, for example, expressly provides for such delegation in the Protocol of Ouro Preto. *See supra* note 102. If so, the need for the RTA component of the FTAA Commission to then operate "under instructions" from its primary organ is not that dissimilar from the need which the NAFTA Party representatives on the FTAA Commission will have to operate under similar constraints.

181. Again reminiscent of the NAFTA and G-3 examples.

182. The GATT Council consisted of representatives of all willing Contracting Parties, and was charged with certain consultative, support, and initiative roles between sessions of the Contracting Parties. *See* JACKSON, *supra* note 82, at 154–56. This role has been carried over in the WTO in the form of the General Council, which meets between meetings of the Ministerial Conference. Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M 1144, 1145 (1994); *see generally* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J INT'L L. 349 (1995).

183. Neither would an interim body exercise any decision-making authority with less than full representation of all FTAA members. Otherwise such a system would amount to a supranational decision-making process for any FTAA member not represented, and would move the FTAA towards a producing model. However, if some such interim authority was to be designed to operate with less than full representation, such an Executive Committee could be structured to ensure that each Summit country was "represented" by the major state of its RTA, together with, for example, one representative of the smaller economies, elected from among themselves.

Thus, the FTAA Commission would be probably constituted along the negative lines of the NAFTA and G-3 Commissions.[184]

At a minimum, the FTAA Commission should be charged with the same rather general duties given the NAFTA and G-3 Commissions: to supervise the FTAA's implementation, oversee its further elaboration, resolve disputes in its interpretation or application, supervise the work of any committees and working groups, and consider any other matter relevant to operation of the treaty.[185] As an aid to its work and to the work of the FTAA parties, the Summit countries should equip the Commission to play a supportive role by empowering it to supervise an FTAA Secretariat[186] and any ad hoc committees or working groups, to seek the advice of NGOs or individuals, and to take any other action agreed to by the Parties[187] by adopting either resolutions or "decisions" (which have no legal effect without subsequent implementation).[188] In this manner, the FTAA Commission would be equipped to carry out the FTAA's facilitative mission by serving a consultative role, offering a forum for consultations among the FTAA parties, and, to some degree, a supportive role as well.

However, for the purpose of effectively driving the hemispheric integration process forward, the Summit countries may wish to consider forming a somewhat stronger institution than the NAFTA Commission. The FTAA Commission could be given a power of initiative along the lines of the G-3 Commission, enabling it to evaluate and report on the results achieved under the Treaty and recommend to the Parties any modifications it deems advisable, and, in general, to recommend to the Parties measures it deems advisable to implement the decisions of the Parties.[189]

Moving farther towards the positive integration axis, the FTAA Commission could be constituted with the clear power to make binding decisions, and not merely to pass resolutions. Even if national action remains necessary to implement these decisions on a national level, the

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184. *See supra* note 90 and accompanying text.

185. *See supra* note 88 and accompanying text.

186. The Secretariat could be a separate institution, as in NAFTA, or it could be an additional function added to the combined institutional capacities of the FTAA states' trade ministries, as with the G-3.

187. *See supra* notes 88–89 and accompanying text (NAFTA Treaty and G-3 Treaty).

188. NAFTA is unclear as to the extent to which, in a decision making role, the decisions of the NAFTA Commission can be considered to bind the parties. It is clear that the NAFTA Commission lacks the power to take decisions which have legal effect in the Parties' jurisdictions without further implementation. However, it may be that NAFTA Commission decisions will nevertheless be considered binding on Parties as a matter of international law.

189. *See supra* note 89.

FTAA treaty could clearly state that the decisions of the FTAA Commission are binding on the parties as a matter of the treaty, and that the parties are required to take all necessary steps to implement these decisions in their jurisdictions.[190] However, this would involve a shift towards a producing model for the FTAA, at least in this limited respect, and this may exceed the stated goals of the Summit countries.

c. Voting Procedures

With regard to the process for actually reaching decisions, the starting point for negotiation will likely be a consensus requirement, as that is the approach favored by the United States in NAFTA, and followed by the G-3 agreement as well. This approach is the most protective of FTAA countries' sovereign power, and is most consistent with the position taken in the Summit Declaration and Plan of Action that decisionmaking "remain a sovereign right of each nation."[191]

However, the Summit countries may wish to consider whether the FTAA Commission should be able to proceed by some form of majority vote short of unanimity.[192] With such a large number of representatives on the FTAA Commission, the existing consensus practice followed in the single-tier systems of NAFTA and the G-3 would be difficult to implement and could easily frustrate Commission action.[193] This feature, more than simply clarifying the binding character of decisions, truly raises the issue of supranationality, and for this reason is likely to be opposed by the U.S.[194] Alternatively, it is possible to stipulate in the FTAA treaty that the Commission, and/or any Executive Committee, may act by majority or supermajority in certain limited cases, but will require

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190. Of course, as long as decisions are to be taken by consensus, clarifying their binding nature adds little. *See infra* Part II.B.1.c.

191. *See supra* note 167 and accompanying text.

192. *See* O'Hop, *supra* note 97, at 162–63 & n.220 (discussion of various voting issues and options).

193. It is not impossible to proceed under consensus rules, as the Summit countries have done during the periodic ministerial meetings of the Summit process. However, this has involved considerable behind-the-scenes diplomacy, and the demands on decision-making processes during a protracted multilateral negotiation may not be comparable to those placed on an institution governing the large and complex FTA which would result from that process.

194. It should not be an insurmountable difficulty to obtain U.S. approval for an FTAA Commission with the power to make binding decisions. The U.S. accepts in principal membership in institutions which create binding obligations, since its dualist system gives it flexibility in creating contrary domestic legal obligations, and the current consensus requirement in NAFTA protects the US veto. However, if the FTAA Commission were to deviate from the NAFTA Commission practice of unanimous decision making, the U.S. would lose its veto and would be very likely to oppose such an institution.

unanimity in other, specified cases, such as the creation of new obligations or the interpretation of the Treaty.

2. Dispute Resolution

It should be recalled that one of the principal functions of mesoinstitutions, across facilitative and producing lines, is to assist in the cooperative resolution of disputes among their participants.[195] Facilitative intervention generally consists of the traditional activities of good offices, mediation, conciliation and factfinding.[196] Binding intervention, as the name suggests, involves the production of neutral findings of fact and law that will bind the participants, usually through the medium of international arbitration.[197]

As is the case with creation of decision-making organs, the primary decision to be made in DSM design involves whether to follow a facilitative or producing model for dispute resolution. This Article has characterized the NAFTA model as facilitative, despite its formal, arbitral quality, because ultimately the parties retain final control over the resolution of their disputes.[198] With the exception of CARICOM, the other hemispheric RTAs have adopted a producing model, with dispute resolution procedures empowered to produce binding results of varying scope, implementation and preclusive effect.[199]

Given the fact that the majority of the hemisphere's RTAs have an arbitration-based DSM, it would seem appropriate and not especially controversial for the FTAA Treaty also to establish, at a minimum, a facilitative DSM built around consultation and the good offices of the FTAA Commission, culminating in an international arbitration proceeding. This much would generally be consistent with the negative governance inclinations expressed by the Summit parties in the Plan of Action.

The main issue of contention would likely be the binding character of the decisions of the arbitral panel. Effective integration depends not only on the creation of appropriate institutions, but on the degree to which participating states implement the decisions of those institutions.[200] In terms of mesoinstitutions theory, it is clear that participant states

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195. *See supra* notes 64–67 and accompanying text.

196. *See Mesoinstitutions*, *supra* note 26, at 37.

197. *Id.* at 47.

198. *See supra* notes 129–31 and accompanying text.

199. *See supra* notes 135–51 and accompanying text.

200. Francis G. Jacobs & Kenneth L. Karst, *The "Federal" Legal Order: The U.S.A. and Europe Compared—A Juridical Perspective*, *in* INTEGRATION THROUGH LAW, *supra* note 10, at 199.

engage in a cost-benefit analysis regarding, among other things, the endowment of their institutions with producing capabilities. The NAFTA states opted in the case of certain disputes (intergovernmental matters) for a facilitative DSM, and in the case of others (antidumping) a DSM capable of producing binding decisions.[201] While NAFTA and CARICOM are the only hemispheric RTAs in which the decisions of the arbitral panel are not themselves binding on the parties, the NAFTA approach in particular is bound to be disproportionately influential due to NAFTA's market power.[202]

Mesoinstitutions theory does not predict, across the board, what level of authority is ideal for a given set of participant goals and preferences. IOs can provide valuable dispute resolution services at all levels of facilitation and production.[203] Nevertheless, there may be grounds to conclude that it would best serve the interests of the FTAA states if, despite NAFTA's influence, the FTAA parties created a fully producing FTAA DSM providing for binding arbitral decisions. This would seem a minimum condition for effective dispute settlement in an agreement of this scope.[204] Moreover, such an approach would be consistent with the hemispheric trend towards creating more formal and authoritative DSMs.[205] Finally, to the extent that the decisions of the FTAA parties are seen to be constrained by the norms of the system, as well as by the rules of public international law, the FTAA's perceived legitimacy will be enhanced.[206]

A second issue to be addressed involves the status of arbitral panel decisions regarding authoritative interpretation of the FTAA treaty. Under NAFTA it is clear that the parties retain for themselves the authority to interpret the treaty definitively independent of the dispute settlement process.[207] Although disputes as to interpretation may become the subject

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201. *See supra* notes 130–31 and accompanying text.

202. *See* Gastle, *supra* note 169, at 821 (NAFTA DSM "clearly will become the basis" of the FTAA DSM.).

203. *See supra* notes 64–75 and accompanying text.

204. Gastle, *supra* note 169, at 807–808, 820 (FTAA DSM working group should negotiate binding arbitration for FTAA DSM.). This level of commitment would seem appropriate, based on the European Community's experience with Europe Agreements. *See* Garcia, *Americas Agreements*, *supra* note 4, at 95 (Europe Agreements establish binding arbitration.).

205. *See* Holbein & Carpentier, *supra* note 128, at 570. *See also* Note, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369 (1993).

206. In this sense, the absence of binding arbitral decisions in the NAFTA Chapter 20 DSM can be criticized as undermining the perceived legitimacy of NAFTA as a whole.

207. The Commission, consisting of the governmental representatives of the NAFTA Parties acting by consensus, has primary responsibility for resolving disputes regarding the interpretation of the Treaty. NAFTA, *supra* note 5, art. 2001.2c.

of dispute settlement proceedings, the decisions of the arbitral panel as to interpretation of a treaty provision are not binding on the parties.[208] In contrast, in the CACM the decisions of the arbitral panel are *res judicata* for all parties regarding the interpretation of the treaty provision in question, and the Andean Court of Justice has broad interpretive powers reaching down into the national legal systems of the members.[209]

If the FTAA parties were to provide that arbitral decisions would establish authoritative interpretations of the FTAA agreement binding on all parties, this would move the FTAA farther towards a producing model, at least in its dispute resolution functions, and increase the FTAA's supranationality. However, it is precisely this point which makes it unlikely that the United States would agree to such a system, given its preference for negative integration. Nevertheless, if the FTAA system is to be capable of developing influential norms to guide trade in this hemisphere, then giving arbitral decisions the status of definitive treaty interpretations could make the creation of such norms a more judicial and less political process.

CONCLUSION

The mesoinstitutions approach to IO analysis provides a valuable bridge between an understanding of the perceived benefits and characteristics of regime formation in international relations and the actual structure and function of institution-based regimes. Upon analyzing the Summit countries' FTAA goals from a mesoinstitutions perspective, it would seem that the Summit countries intend the FTAA to play a principally facilitative role. Therefore, a mesoinstitutions analysis of existing patterns of trade governance in this hemisphere suggests that a single-tier decision-making mechanism with the power to make binding decisions might best serve the FTAA and accomplish the parties' goals. This entity, which this Article terms the FTAA Commission, would also have to play a role in the FTAA's dispute resolution process, which should be a relatively straightforward system of consultation, mediation by the Commission, and binding arbitration.

Creating a new level of trade governance, however, intensifies an existing problem posed by overlapping RTAs in this hemisphere: the potential for conflicting norms.[210] In the context of the FTAA, such conflicts might arise concerning the relative priority of decisions by the

208. *Id.* art. 2018.1.

209. *See supra* notes 149–51.

210. *See* Jacobs and Karst, *supra* note 200, at 225.

FTAA Commissions and the decisions of the respective RTA institutions to which the FTAA parties are also bound.[211]

One solution, simple but improbable, would be for the existing RTA governance bodies to transfer powers to the FTAA Commission, then disband.[212] This approach would create the best chance for consistent rulemaking. However, given the complex and specialized roles which RTA institutions play in their systems, and the Summit countries' own commitment to a continuing role for existing RTAs in hemispheric integration even after completion of the FTAA,[213] this option is probably neither workable nor desirable.

Another possibility would be for RTA institutions to continue, but to incorporate rules into the FTAA to allocate competence between the FTAA Commission and other RTA institutions, and to provide rules for resolving conflicts between the institutions.[214] For example, one simple but controversial plan would be for the FTAA Commission to retain veto power over any RTA decision in an FTAA area.[215] A less contentious alternative would be for the FTAA to contain provisions clearly spelling out the priority of differing sets of treaty obligations when there is a conflict.[216] Which obligations take precedence in a given case would depend in part on the balance struck by the Summit countries between regional integration and the FTAA effort.[217]

Perhaps the most critical issue to be determined by the Summit countries is the degree of producing capability and resulting supranationality necessary for effective integration at the hemispheric level. If some producing capability is deemed necessary, and this Article suggests several points at which it may be so determined, then the

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211. This problem is already faced in the G-3 Treaty due to Colombia and Venezuela's simultaneous ANCOM membership. *See supra* note 136 and accompanying text.

212. O'Hop, *supra* note 97, at 162. This assumes all RTA obligations would be transferred to the FTAA, and then the RTAs would essentially disband.

213. *See supra* notes 157–58 and accompanying text.

214. *Id.*

215. This would put acute pressure on the issue of RTA representation within the FTAA Commission and Commission decision making generally, and would create numerous opportunities for conflict and friction.

216. NAFTA has such a provision in the case of conflicts between its rules and certain environmental treaties. NAFTA, *supra* note 5, art. 104. The G-3 is also a good example of this approach, as many of its provisions clearly anticipate conflicts for Colombia and Venezuela between G-3 rules and ANCOM rules.

217. Alternatively, the issue could be left to the general rules of treaty law for subsequent inconsistent treaties, though this seems the least desirable result from an efficiency and predictability standpoint. Vienna Convention on the Law of Treaties, May 23, (1969), arts. 30, 39–41, 54, 57 and 59, 8 I.L.M. 679.

willingness of the Summit countries, especially the U.S.,[218] to accept the necessary transfer of state power becomes critical to the success of the FTAA project. The Summit Declaration and Plan of Action express a bias towards the facilitative approach, while most Summit countries in their own RTAs suggests a willingness to undertake such transfers when they are warranted by the parties' goals and the circumstances surrounding the particular integration effort.[219] The extent to which this becomes an issue in the FTAA negotiations depends a great deal on the parties' calculation of the minimum degree of authority required by FTAA institutions to accomplish effectively the parties' goal of free trade throughout the hemisphere.

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218. The U.S., for example, may adhere to its strong negative integration position, which cannot be said definitively ex ante to be a mistake. It may, in fact, be the case that an FTA of this magnitude could be governed successfully entirely according to a facilitative model. If not, then there is always the possibility of a further treaty specifically amending the FTAA to increase the supranational decision-making power of the FTAA institutions as the hemispheric integration system evolves and matures, in much the same way that the Single Europe Act modified the European Community's institutions towards greater supranationalism in decision making. For an illuminating analysis of the U.S. approach to supranationality and certain constitutional challenges it raises, using the German federal experience as a model, see Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395 (1996).

219. Even the U.S., as noted above, has proven willing to establish a supranational mechanism, the NAFTA Chapter 19 anti-dumping panel review process, when it was judged in the U.S. interest. NAFTA, *supra* note 5, ch. 19; *see also supra* notes 130 and 203 and accompanying text.