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International and Regional Courts and Tribunals

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"International and Regional Courts and Tribunals"

Domestic Measures Adopted by States to Give Effect to Processes of International Dispute Settlement Volume II: International and Regional Courts and Tribunals

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The purpose of the present report is to provide an overview and analysis of the measures that States adopt internally to implement treaties establishing international court and tribunals and other international dispute settlement mechanisms ("IDSM treaties"). Although this report cannot be comprehensive in its survey of practices across all States, this analysis is intended to be useful in three ways. First, it can be useful with respect to the design and drafting of an instrument establishing a multilateral investment dispute settlement mechanism. Second, it can be useful for States when considering what types of implementing measures they may need to adopt in order to give effect to the jurisdiction of a multilateral investment dispute settlement mechanism. Third, it indicates the kind of capacity building and technical assistance that States may need to adopt such measures.

The approach of the research contained within this report has been to gather information about State experiences with respect to IDSM treaties both at the international and regional levels, giving special attention to a number of recurrent questions: (i) What provisions in IDSM treaties require or implicate the need for States to adopt domestic measures? (ii) What measures do States in fact take in domestic law to give effect to IDSM treaties? (iii) What steps do States take in domestic law to ensure the funding of their contributions to maintain international courts and tribunals or other bodies tasked with administering dispute settlement frameworks? (iv) What kinds of measures do States adopt in order to ensure that the decisions issued pursuant to the dispute resolution mechanisms of a IDSM treaty are given legal effect within the domestic order?[1] To address these questions, each IDSM treaty is analysed to determine which of its provisions implicate a need or desirability for contracting States to adopt measures to give effect to their rights and obligations. Thereafter, the report analyses the domestic measures adopted (or not) in selected States in connection with the IDSM treaty.

The report proceeds in three volumes. Volume I begins by providing an examination of international dispute settlement mechanisms such as the ICSID Convention, the New York Convention, and the Singapore Convention. While these mechanisms do not establish international courts or tribunals as

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[1] This report does not address the fundamental question of how States broadly receive international treaty obligations into domestic law. While this question raises addresses a central issue regarding the interplay between domestic legal systems and international law, given its generality and scope it is not treated in a systematic way in this report. Instead, as noted in the text, this report focuses specifically the measures that States adopt to implement IDSM treaties. For more information, see generally Malcolm N. Shaw, *International Law* (6th ed., Cambridge University Press 2008), 129-132.

such, they do establish mechanisms requiring a grant of jurisdiction by participating States with respect to the matters which come within their scope. The current volume, Volume II, looks at international and regional courts and tribunals, both those which have jurisdiction to hear disputes between States and those which have jurisdiction to hear disputes between States, e.g., the Dispute Settlement Body under the WTO agreements, and non-State actors, e.g., the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Volume II also includes an overview of regional dispute settlement arrangements which do not rely upon standing courts and tribunals but instead use arbitration, such as the MERCOSUR dispute settlement mechanism. Finally, Volume III addresses the implementation of regional courts designed to address human rights claims (e.g., the European Court of Human Rights) as well as specialised dispute settlement mechanisms designed to address investor-State disputes under treaties providing substantive protection to investors and their investments (e.g., the Arab Investment Court and the investment court system established under the European Union's recent treaties). Volume III also contains this report's conclusions, providing a final assessment and set of observations on State experience with domestic law amendments when signing onto IDSM treaties.

I. International Courts and Tribunals

A. The International Tribunal for the Law of the Sea: Seabed Disputes Chamber

1. The Jurisdiction of ITLOS

The International Tribunal for the Law of the Sea ("ITLOS") is a permanent international judicial body established by Article 287 UN Convention on the Law of the Sea ("UNCLOS").[2] As a general matter, ITLOS has both contentious and advisory jurisdiction over disputes between States parties arising under UNCLOS.[3] As to contentious matters, ITLOS has broad jurisdiction to hear disputes submitted to it by agreement,[4] as well as compulsory jurisdiction for certain types of disputes, such as those concerning the seabed area (assigned to its Seabed Disputes Chamber ("SBDC"));[5] those relating to the prompt release of arrested vessels and their crews according to the special procedure regulated by Article 292 of UNCLOS; and, subject to the possibility of exceptions and opt-outs, those disputes concerning the interpretation or application of the Convention as to which the disputing parties have made a declaration electing ITLOS pursuant to UNCLOS Article 287.

[2] On ITLOS generally, see, e.g., Patibandla Chandrasekhara Rao, "International Tribunal for the Law of the Sea (ITLOS)", *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2011); Kriangsak Kittichaisaree, *The International Tribunal for the Law of the Sea* (Oxford University Press 2021).

[3] UNCLOS Part XV only allows for UNCLOS States parties to appear before ITLOS to resolve their disputes. Although natural persons may appear before ITLOS to seek the prompt release of a vessel and its crew when detained by a coastal State, they may only do so "on behalf" of the flag State of the vessel and therefore must receive authorization from the flag State.

[4] Pursuant to Article 287(1) of UNCLOS, when signing, ratifying, or acceding to UNCLOS, a State may make a declaration choosing one or more of the following means for settling such disputes: ITLOS; the International Court of Justice; ad hoc arbitration (in accordance with Annex VII of UNCLOS); or a "special arbitral tribunal" constituted for certain categories of disputes (established under Annex VIII of UNCLOS).

[5] The SBDC is a permanent tribunal established within ITLOS with advisory and contentious jurisdiction over matters related to activities in the International Seabed Area. See generally Tullio Treves, "Seabed Disputes Chamber: International Tribunal for the Law of the Sea (ITLOS)", *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2019).

2. Enforcement and Recognition of ITLOS Decisions

UNCLOS Article 296 and ITLOS Statute Article 33 provide for decisions of ITLOS to be final and binding between the parties to a dispute, but do not prescribe specific requirements with respect to the recognition or enforcement of those decisions in domestic legal orders, e.g., by national courts. That said, Article 95 of the ITLOS Rules obliges each party to submit a report regarding the steps it has taken in order to ensure prompt compliance with provisional measures prescribed by the Tribunal.[6] There is, however, no requirement that these reports be published, and only some have been.

3. The Jurisdiction of the Seabed Disputes Chamber

The SBDC is a unique institution within the ITLOS system. The SBDC is empowered to resolve disputes arising under Part XV of the Convention, which may involve States parties, State enterprises, the International Seabed Authority, and, in certain circumstances natural or juridical persons and prospective contractors who have been sponsored by a State.[7] Unlike decisions of ITLOS more broadly, the ITLOS Statue imposes specific requirements on States parties regarding the recognition or enforcement of SBDC decisions in domestic legal orders. Under ITLOS Statute Article 39, decisions of the SBDC shall be "enforceable in the territories of the States parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought".[8]

4. Domestic Measures Regarding the Enforcement and Recognition of SBDC Decisions

Although Article 39 creates a specific obligation with respect to the domestic recognition and enforcement of decisions of the SBDC by States parties, few States appear to have enacted domestic measures to implement this commitment. According to a 2018 CIGI/Commonwealth Secretariat review of national legislation relating to deep seabed mining in eleven States sponsoring such mining,[9] only two – Singapore and the United Kingdom – have adopted legislative provisions for the enforcement SBDC decisions.[10]

In the case of Singapore, Part 3 of the Deep Seabed Mining Act (2015) provides for the registration of decisions of the SBDC, and their subsequent enforcement in Singapore as though they were judgments of the General Division of the High Court.[11] The Singapore law does not limit the kinds of SBDC decisions that can be registered, although it does qualify that the registration of a decision involving a State Party does not affect "any privilege or immunity that a State may claim against the enforcement [of the decision]."[12]

The law in the United Kingdom is slightly different. Section 8A of the Deep Sea Mining Act 1981 (as amended) stipulates that a decision of the SBDC which has been properly registered in the UK shall be

[6] The IACHR has adopted a similar practice.

[7] UNCLOS, Art. 1816-187.

[8] This language mirrors Article 52 of the ICSID Convention.

[9] Belgium, China, Czech Republic, France, Germany, Japan, Kiribati, Nauru, Singapore, Tonga, and the United Kingdom.

[10] Hannah Lily, 'Sponsoring State Approaches to Liability Regimes for Environmental Damage Caused by Seabed Mining', *Liability Issues for Deep Seabed Mining Series*, Paper No. 3 (CIGI and Commonwealth Secretariat, 2018).

[11] See Art. 18-19. See also Art. 2.

[12] Singapore Deep Seabed Mining Act (2015), Art. 18(2).

enforced as though it was a judgment of the High Court or the Scottish Court of Session decision in relation to a dispute arising out of a contract involving the sponsoring State, the International Seabed Authority, and/or the mining contractor.[13]

B. The WTO Dispute Settlement Body

The Dispute Settlement Understanding (DSU) establishes a unified system for resolving trade disputes under the WTO agreements between Member States.[14] The General Council discharges its responsibilities under the DSU through the Dispute Settlement Body (DSB), which is composed of representatives of all WTO Members.[15] The DSB has authority to establish dispute settlement panels, refer matters to arbitration, adopt panel, Appellate Body and arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and authorize suspension of concessions in the event of non-compliance.[16]

1. Provisions in the DSU Regarding the Implementation of Dispute Settlement Body Rulings and Recommendations

After the DSB adopts the report of a panel (or the Appellate Body), the recommendations or rulings contained in that report become binding upon the parties to the dispute. In the event of a finding of non-compliance with the WTO agreements, the Member in non-compliance must inform the DSB of its intentions regarding implementation. Members are entitled to a "reasonable period of time" in which to bring their conduct into compliance with the recommendations and rulings of the DSB.[17] In the event that the non-complying Member does not implement that DSB's recommendations and rulings within a reasonable time, the complaining Member may seek authority from the DSB to suspend the application of concessions or other obligations owed to the non-complying Member under the covered agreements.[18]

The DSB keeps under surveillance the implementation of its recommendations or rulings by Members. Any Member may raise the issue of implementation at any time in the DSB.[19] Once the issue of implementation has been raised, it is placed on the DSB's agenda, where it is to remain until the issue is resolved.[20] At least ten days prior to meetings of the DSB at which the issue of implementation is on the agenda, the Member concerned is required to provide the DSB with a status report in writing of its progress in implementation.[21] Ultimately, in situations in which the disputing parties disagree as to

[13] The UK Deep Sea Mining Act indicates specifically that it covers disputes coming within Article 187(c), (d) or (e) of the LOSC. See Deep Sea Mining Act 1981 (as amended), section 8A(1).

[14] Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU") (1994).

[15] Article IV:3 of the Marrakesh Agreement Establishing the World Trade Organization.

[16] DSU, Art. 2(1).

[17] DSU, Art. 21(3).

[18] DSU, Art. 22(2).

[19] DSU, Art. 21(6). Unless the DSB decides otherwise, the issue of implementation is placed on the agenda of the DSB six months following the date of establishment of the "reasonable period of time" set forth in Article 21(3) of the DSU. The item remains on the DSB's agenda until the issue is resolved. At least ten days prior to each such DSB meeting, the Member concerned is required to provide the DSB with a status report in writing of its progress in implementation. *Id.*

[20] DSU, Art. 21(6).

[21] *Id.*

whether there has been compliance with the DSB's report, either party may request the establishment of a "compliance" panel under Article 21(5) of the DSU.

2. Domestic Law Measures Regarding the Implementation of Dispute Settlement Body Rulings and Recommendations

The recommendations and rulings contained DSB reports are binding upon the parties to the dispute. The WTO agreements, however, do not contain provisions directing Members to adopt particular modalities of implementation or mechanisms for facilitating implementation.[22] Instead, the implementation of WTO obligations, including reports of the DSB, is left to be effected through the domestic laws and domestic institutions of the Member States.

In some countries, the WTO agreements themselves are directly applicable by local tribunals and individuals can invoke them before such tribunals. This is, for example, the case of Argentina, where the Supreme Court and lower national tribunals have recognized the self-executing character of trade agreements in general (including WTO and free trade agreements) unless the provisions of the treaty require implementing regulation that gives content to the obligations contained in the treaty ('non-self-executing provisions').[23]

With respect to WTO rulings, however, research of fifteen WTO Members[24] has found no instances in which such rulings are directly applicable in the domestic law of Member States.[25] Instead, research indicates that most WTO members rely upon generally applicable legal mechanisms to effect implementation.[26] That said, research has revealed unique domestic laws in two jurisdictions which bear upon the implementation of DSB reports but are not designed to facilitate implementation. These examples are discussed below.

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[22] See, e.g., Sean Murphy, "International Judicial Bodies for Resolving Disputes Between States" in Cesare Romano et al., *Oxford Handbook on International Adjudication* (Oxford University Press, 2013).

[23] See, for example, *Mercedes Benz Argentina SACIFIM v ANA*, Judgment dated 21 December 1999, Fallos 322:3193; *Autolatina Argentina SA v Dirección General de Aduanas*, Judgment dated 12 February 2002, Fallos 325:113; *Pfizer Inc v Instituto Nacional de la Propiedad Industrial, on denial of patent,* Judgment dated 21 May 2002, Fallos 325:1056; and *Adidas Argentina SA v the National State - Ministry of Economy*, Judgment dated 6 February 2007, Fallos 330:5.

[24] Argentina, Australia, Brazil, Canada, Chile, China, EU, India, Indonesia, Japan, the Republic of Korea, Singapore, the United Kingdom, the United States, and Viet Nam.

[25] For example, in European Council Decision 94/800, which approved the Uruguay Round Agreements (including the DSU) for the European Union, the WTO Agreements and DSU are expressly stated not to have direct effect in the European legal order. Subsequent interpretation of this language by the Court of Justice of the European Union has concluded further that rulings and recommendations by the DSB similarly are without direct effect in the EU. See Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, para. 47. See also AG Saggio Opinion in Case C-149/96 Portugal v. Council [1999] ECR I-8395, para. 18-23.

[26] See, e.g, Camila Capucio, "Implementing Decisions of the WTO Dispute Settlement in Brazil: Is There a Place for Transparency and Participation?" (2016) 59 *Revista Brasileira de Politica Internatiocional* 1: "In Brazil, there is no provision of a procedure for the implementation of decisions of any international organizations and in practice the implementation has occurred in a casuistic way - depending on the peculiarities and uniqueness of the concrete case". See also Xiaowen Zhang and Xiaoling Li, "The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China" (2014) *Journal of Contemporary China* 143 ("There is no special procedural law regarding the implementation of WTO panel/Appellate Body recommendations.").

3. Examples of Specialised Domestic Laws Addressing the Implementation of DSB Reports

Two examples of specialised domestic laws related to DSB reports are found in the European Union and the United States. For the European Union, the law establishes a mechanism to monitor the implementation of WTO rulings favourable to the EU. For the United States, the law establishes mandatory provisions to ensure legislative oversight of any US implementation of rulings against it.

a. European Union

The EU has no specialised legal process for addressing the implementation of adverse DSB reports. EU law does address, however, the situation in which the EU has brought a successful complaint. In such cases, EU law establishes a "fast track" procedure to facilitate the suspension or withdrawal of concessions or other obligations owed to the WTO Member against which the EU has made a successful complaint.[27] There is no "fast track" procedure to facilitate bringing the EU into compliance when it is found to have violated its WTO commitments.

b. United States

In the United States, the 1994 Uruguay Round Agreements Act (URAA) contains a number of provisions relevant to the implementation of DSB reports in cases in which the United States has been found to be in non-compliance with its WTO commitments.

For example, Section 123(g) of the URAA provides that in any case in which a DSB report finds that an administrative regulation or practice of the United States is inconsistent with a WTO agreement, the regulation or practice may not be "amended, rescinded or otherwise modified in implementation of such report *unless and until*"[28] (a) the United States Trade Representative (USTR) and relevant agencies consult with the U.S. Congress and seek private sector advice; (b) the proposed change is published in the *Federal Register* with a request for public comment; and (d) the final rule or other modification is likewise published.[29] Section 123(g) further provides a mechanism for committees of both houses of the U.S. Congress to vote to indicate their agreement or disagreement with the proposed change.

Further, Section 129 of the URAA sets forth specialised procedures to be used in implementing adverse DSB reports involving determinations in U.S. safeguards, antidumping, and countervailing duty proceedings (which implicate the WTO Agreement on Safeguards, the Agreement on Antidumping, and the Agreement on Subsidies and Countervailing Measures, respectively). In the event of an adverse WTO decision involving such a determination, Section 129 requires that, upon request by the USTR, the affected agency must first determine if it may take action to comply with the WTO decision under existing law. If it finds that it may do so, the USTR may request the agency involved to issue a determination that would render the agency's action "not inconsistent with the findings" of the WTO panel or Appellate Body. The statute also requires consultation with Congress at various stages of the implementation process.

II. Regional Courts and Tribunals

This Part provides an overview of a number of regional courts and tribunals in three regions of the world: Africa, Europe, and Latin America. The section on Africa is divided into three sub-sections: 1)

[27] Regulation 654/2014, Art. 4 and Art. 5; Regulation 2015/1843 (amending Regulation 3286/94), Art. 13.

[28] Emphasis added.

[29] Uruguay Round Agreement Act (URAA), P.L. 103-465 (1994), 19 U.S.C. §§ 3501 et seq.

the OHADA Common Court of Justice and Arbitration; 2) the ECOWAS Court; and 3) other African regional courts (including the East African Court of Justice, the COMESA Court of Justice, and the SADC Tribunal). The section on Europe addresses the Court of Justice of the European Union. Finally, the section on Latin America looks at the Central American Court of Justice and the Andean Community Court of Justice. Regional human rights courts are addresses separately in Volume III.

A. OHADA Common Court of Justice and Arbitration

OHADA is the French acronym for "*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*", which translates into English as "Organisation for the Harmonization of Business Law in Africa".[30] A central goal of OHADA is to promote a stable business environment and the expeditious resolution of disputes by harmonising commercial law within its Member States.

In pursuit of its mission, OHADA has drafted, and its members have adopted, a number of Uniform Acts. One of these acts is the OHADA Uniform Arbitration Act, with provisions on the administration of arbitral proceedings and the execution of arbitral awards.

The OHADA Uniform Arbitration Act (UAA) creates unified arbitration laws in the countries which have adopted it. The Act applies to "any arbitration" – both international and domestic – seated in a signatory State.[31] Covered arbitration proceedings can be either institutional arbitrations administered by the Common Court of Justice and Arbitration (CCJA) located in Abidjan, or ad hoc arbitrations taking place in any of the OHADA Member States. Awards rendered under the Uniform Arbitration Act are not subject to appeal in domestic courts but may be subject to a petition for annulation (a far narrower challenge) before competent domestic courts, whose decisions remain subject to the approval of the CCJA.[32]

The following provisions of the UAA bear highlighting:[33]

1. Provisions Addressed to the Responsibilities and Powers of Domestic Courts under the UAA

- Articles 5 and 8 provide for the competent court in a UAA State to appoint arbitrators in situations in which the process found in the parties' arbitration agreement is ineffective or insufficient.[34]

[30] OHADA was created on October 17, 1993, in Port Louis, Mauritius. It is comprised of 17 West and Central African nations.

[31] OHADA Uniform Arbitration Act, Article 35: "This Uniform Act shall be the arbitration law in the Member States. It shall apply only to arbitral proceedings commenced after its entry into force."

[32] OHADA Uniform Arbitration Act, Article 25.

[33] The revised OHADA Uniform Act on Arbitration (the Arbitration Act) and revised Rules on Arbitration of the Joint Court of Justice and Arbitration (the CCJA) (the Rules), as well as the new Uniform Act on Mediation, entered into force on 15 March 2018.

[34] UAA, Art 5: "Arbitrators shall be appointed, removed or replaced in accordance with the agreement of the parties. Failing such arbitration agreement, or where the arbitration agreement is insufficient:

> a) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall choose the third arbitrator; if a party fails to appoint an arbitrator within a period of thirty (30) days from the receipt of a request to do so from the other party, or if the two arbitrators fail to agree upon the third arbitrator within a period of thirty (30) days from their appointment, the appointment shall be made, upon request of a party, by the competent judge in the State Party;

- Articles 7, 8, 12, 13(4), 14(7), 22(4), 25 and 30 of the UAA empower the competent judge in a UAA State to rule on challenges to an arbitrator in the event a dispute between the parties regarding the challenge procedure; to extend the legal or contractual time limit for the exercise of the arbitrator's mission; to order, in case of urgency, interim or conservatory measures notwithstanding the existence of an arbitration agreement, provided that such measures do not involve an examination of the merits of the dispute; to assist, where necessary, in the taking of evidence; to interpret an arbitral award or to correct material errors or omissions affecting it if the arbitral tribunal cannot be reconvened to do so; to hear applications to set aside (annul) an arbitral award; and to order the enforcement of an arbitral award.

2. UAA Provisions on the Enforcement and Recognition of Awards

- Article 30 establishes the general rule that an arbitral award "shall only be subject to enforcement by virtue of an exequatur decision issued by the competent jurisdiction in the Member State."

- Article 31 sets forth certain procedural requirements for the enforcement and recognition of awards, requiring that the party relying on an award "establishes the existence of the arbitral award" by producing the "original award accompanied by the arbitration agreement or copies of these documents meeting the conditions required to establish their authenticity", and, "[w]here those documents are not written in one of the original language(s) of the Member State where the exequatur is demanded, the party shall submit a translation certified by a translator registered on the list of experts established by the competent jurisdictions."

- Article 32 provides rules addressing the possibility of appeal of exequatur decisions: "The decision which rejects the exequatur shall only be subject to appeal on points of law before the Common Court of Justice and Arbitration. The decision granting the exequatur shall not be subject to any appeal. However, the annulment action of the arbitral award shall automatically entail an appeal against the decision granting he exequatur within the limits of the referral of the competent jurisdiction of the Member State."

- Finally, Article 34 provides that awards that are rendered under rules other than the UAA shall be "shall be recognized in the Member States under the conditions provided for by international conventions possibly applicable and, in the absence thereof, under the same conditions as those provided in this Uniform Act."[35]

3. State Practice Implementing the Obligations of the Uniform Arbitration Act

Research has revealed few examples of domestic measures adopted by OHADA States designed to implement or facilitate the dispute settlement process established under the UAA. The limited examples that been found are noted below.

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b) in an arbitration with a sole arbitrator, if the parties fail to agree upon appointment of the arbitrator, the latter shall be appointed, upon request of a party, by the competent judge in the State Party."

[35] By a judgment of January 26, 2017, the OHADA Common Court of Justice and Arbitration ruled that: "*Whereas it should be noted of its own motion that under the terms of Article 34* [of the UAA] *'arbitral awards rendered on the basis of rules different from those provided for in this Uniform Act, shall be recognized in the Contracting States, under the conditions provided for by any international conventions that may be applicable...*" (unofficial translation).

a. Senegal

Senegal has adopted two laws related to the designation of the court with jurisdiction in connection with an arbitration in accordance with the provisions of the UAA.[36]

- Law No 2016-1192 designates the national "court" with jurisdiction to take measures as provided in the UAA.[37]

- Law No 2016-570 relates to the status of judicial representatives taken in application of the Uniform Act on the organisation of collective procedures for the settlement of liabilities.[38]

Senegal appears not to have adopted any other laws in connection with the UAA.

b. Côte d'Ivoire

Côte d'Ivoire has also designated the competent national court ("*la juridiction compétente dans l'Etat Partie*") for the purposes of the UAA, with the adoption of *Ordonnance N° 2012-158 du 9 février 2012 déterminant l'intervention des jurisdictions nationales dans la procédure d'arbitrage*.[39] Like Senegal, Côte d'Ivoire appears not to have adopted any other laws in connection with the UAA.

B. The ECOWAS Court

The ECOWAS Community Court of Justice is an international court of the Economic Community of West African States (ECOWAS), established in 2001.[40] Its functions and jurisdiction are governed by the ECOWAS Revised Treaty and the First and Supplementary Protocols of the ECOWAS Court adopted in January 2005.[41] The ECOWAS Court is the main judicial organ of the Community and is in charge with resolving ECOWAS law matters.[42] In addition to State-to-State disputes, the ECOWAS Court also has jurisdiction to hear human rights claims filed by individuals, corporate bodies and non-governmental organizations.[43]

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[36] *Journal officielle de la République du Sénégal*, Communiqué Droit interne d'application du Droit OHADA (7 September 2016).

[37] République du Sénégal Décret n° 2016-1192 *portant désignation de la juridiction' nationale compétente en matière de coopération étatique dans le cadre de l'arbitrage pris en application de l'Acte uniforme relatif au droit de l'arbitrage* (3 August 2016).

[38] République du Sénégal Décret n° 2016-570 *relatif au statut des mandataires judiciaires pris en application de l'Acte uniforme portant organisation des procédures collectives d'apurement du passif* (28 April 2016).

[39] Cameroon and Togo have also done so. See Marie-Andrée Ngwe, "État des lieux de l'arbitrage en Afrique", Conference of the Association française d'arbitrage, 19 September 2018.

[40] ECOWAS Revised Treaty, Articles 6 and 15.

[41] Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991.

[42] Including alleged failure by a Member State to comply with Community law, disputes relating to the interpretation and application of Community acts, disputes between Community institutions and their officials, issues of Community liability and the legality of Community laws and policies.

[43] See Supplementary Protocol of the ECOWAS, Art 10 (not changed by Amendments made to supplementary Protocol of the ECOWAS Court A/SP.1/01/05).

1. Summary of Obligations Created by Participation in the ECOWAS Court System

- Article 15(4) of the ECOWAS Revised Treaty sets forth the fundamental rule that the Court's decisions shall be binding.

- Article 19(2) of the First Protocol of the Community Court of Justice establishes that decisions of the Court are immediately enforceable without the possibility of appeal.

- Article 24(2) of the Supplementary Protocol of the ECOWAS Court provides that "execution of any decision of the Court shall be in the form of a writ of execution, which shall be submitted by the Registrar of the Court to the relevant Member State for execution according to the rules of civil procedure of that Member State".

2. State Practice Implementing the Obligations of the ECOWAS Court System

Although the Supplementary Protocol of the ECOWAS Court requires Member States to execute judgments of the ECOWAS Court pursuant to their "rules of civil procedure" – which might suggest that Member States need not adopt specialised legislation to give effect to this commitment – in practice the enforcement of judgments of the ECOWAS Court has been a problem. Reportedly, Nigeria has put in place mechanisms for the enforcement of judgments of the court, although it is not clear as to whether this has been effective.[44]

C. The Court of Justice of the European Union

The Court of Justice of the European Union ("CJEU") is the collective name for the judicial branch of the European Union ("EU"). Its main purpose, in cooperation with the national courts and tribunals of the EU's Member States, is to ensure the uniform interpretation and application of EU law. In fact, most cases that apply EU law are adjudicated by the national courts of the Member States. That said, as discussed below, when novel questions of interpretation arise with respect to EU law, the courts of the Member States may become obligated to ask the CJEU for guidance.

At the outset of this Section, it should be noted that the EU judicial order - as the EU legal order as a whole - is in many ways *sui generis*. Given its intricacies and its constitutional character for the Member States of the EU, the system can hardly be compared to any other supranational court or tribunal that has been established between States. As a consequence, this section focuses only on three specific aspects of EU Member State implementation: (1) law adaptation and judicial reform when acceding to the EU (and the CJEU's jurisdiction); (2) domestic laws and practice for the election of CJEU judges; and (3) national procedures for "preliminary references" to the CJEU by Member State courts.

1. The EU Court System: A Brief Overview

The CJEU consists of three distinct judicial entities, the highest of which is the European Court of Justice ("ECJ"), which constitutes the EU's final court of appeal. Beneath the ECJ are two subordinate courts, the General Court, and the Civil Service Tribunal.

[44] Olisa Agbakoba Legal, "Nigeria: Enforcement of the Judgements of the ECOWAS Court", available at www.mondaq.com/nigeria/human-rights/755842/enforcement-of-the-judgments-of-the-ecowas-court. The article States that "Nigeria has put in place mechanisms for the enforcement of judgments of the court". It does not, however, provide a source supporting this statement.

The ECJ is the court of final appeal on all matters of EU law.[45] It does not adjudicate claims arising under the national laws of the Member States, except to the extent that those laws conflict with EU law.

The ECJ has jurisdiction over the following procedures:

- References for Preliminary Rulings made by national courts seeking clarification on points of EU law. This procedure is further discussed below.

- Actions for Failure to Fulfil an Obligation taken by the Commission or a Member State against another Member State for failing to live up to its obligations under EU law. For example, a proceeding initiated by the Commission against a Member State for failing to enact legislation implementing an EU directive.

- Actions for Annulment seeking to invalidate a regulation, directive or decision made by the EU. If the action is brought by a Member State or an EU institution, the ECJ has original jurisdiction. If the action is brought by a private party, it is heard by the General Court, subject to appeal to the ECJ.

- Actions for Failure to Act brought against an EU institution. If the action is initiated by a Member State or another EU institution, the ECJ has original jurisdiction. If the action is initiated by a private party, it is heard by the General Court, subject to appeal to the ECJ.

- Appeals on points of law from decisions made by the General Court.

- Reviews of decisions made by the Civil Service Tribunal that have been appealed to the General Court, but only in exceptional circumstances.

The *General Court*, formerly known as the Court of First Instance, is the EU's trial court of general jurisdiction.[46] The General Court has jurisdiction over the following procedures:

- Direct Actions brought by private parties against an agent or institution of the EU or with respect to a legal act taken by the EU that directly affects the private party. For example, a corporation that was assessed a fine pursuant to a decision by the European Commission could bring a direct action to have the decision annulled.

- Actions Against the Commission initiated by one or more of the Member States.

- Actions Seeking Compensation for Damages directly caused by an EU institution or staff member.

[45] The ECJ consists of 27 judges, one from each of the Member States. Judges are appointed by the common consent of the governments of the Member States and serve for a term of six years, which may be renewed. The ECJ can sit as a full court, as a Grand Chamber of 13 judges, or in smaller chambers of three to five judges. In most instances, the ECJ sits in smaller chambers. Larger chambers are reserved for special types of cases, such as when a Member State is a party to the litigation. The judges of the ECJ are assisted by eight Advocates-General who prepare advisory opinions with respect to cases that raise novel points of law. The opinions of the Advocates-General are not binding on the ECJ, but they are often influential.

[46] The General Court consists of 54 judges, two from each of the Member States. Judges of the General Court also are appointed by the common consent of the governments of the Member States and serve for six-year, renewable terms. Like the ECJ, the General Court usually sits in small chambers of three to five judges, but can sit as a full court, or as a Grand Chamber of 13 judges, in special types of cases.

- Actions Arising from Contracts Made by the EU when jurisdiction is expressly given to the General Court under the terms of the contract.

- Actions Related to EU Trademarks.

- Appeals of decisions made by the Civil Service Tribunal.

The *Civil Service Tribunal* was established in 2005 to resolve disputes between the EU and members of its civil service. The Tribunal consists of seven judges appointed by the common consent of the EU Council. The Tribunal ordinarily sits in panels of three judges, but may sit in larger or smaller panels, according to its rules of procedure. Decisions of the Civil Service Tribunal may be appealed to the General Court on points of law and may, in exceptional cases, be subject to review by the ECJ.

2. Summary of Selected Issues

a. Accession to the EU and Acceptance of the Jurisdiction of the CJEU

Acceding to the EU and its judicial system is not similar or comparable to signing onto an international court or tribunal. Accession is a long (political and often economic) process. The TFEU (Article 49) States that any European country may apply for membership if it respects the democratic values of the EU and is committed to promoting them. The first step is for the country to meet the key criteria for accession, which include independent institutions, the rule of law and the capacity to implement the obligations of membership.[47]

As far as the EU judicial system is concerned, prospective EU Member States often need to undertake judicial reforms within their country.[48] In the case of Croatia, for instance, a reform of the judiciary was needed, including the improvement of settling delayed cases, of legal education and training of judges and State attorneys.[49] As a consequence, Croatia undertook a substantial reform of the judiciary and of the judges' profession.[50] A comprehensive analysis of the various judicial and legal reforms adopted by the different Member States would go beyond this report.[51]

[47] These were mainly defined at the European Council in Copenhagen in 1993 and are hence referred to as "Copenhagen criteria": stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the capacity to cope with competition and market forces in the EU; the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.

[48] Emil Konstantinov, "Necessary Changes in the Implementation of the Judicial Reform in Bulgaria in View of its Accession to the EU" in Dirk Fischer (ed.), *Transformation des Rechts in Ost und West: Festschrift für Prof. Dr. Herwig Roggemann zum 70* (BWV Berliner Wissenshafts 2006), 95-106.

[49] Siniša Rodin, "Croatian Accession to the European Union: The Transformation of the Legal System" in Katarina Ott (ed.), *Croatian Accession to the European Union: Economic and Legal Challenge*s, (2003), 231.

[50] For instance, the status of judges and the process of their election have been altered, the obligation to re-appoint judges after the first five years on the bench is abolished, and judgeship has become personal and permanent. The purview of the Supreme Court as well as the new authorities of its President have been additionally specified, and the composition and the competences of the National Judicial Council, as well as of the Office of the Public Prosecutor and the National Council of the Public Prosecution Service, have been altered.

[51] For more detail see e.g., Hollin K. Dickerson "Judging the Judges: The State of Judicial Reform in Eastern Europe on the Eve of Accession" (2004) 32 *International Journal of Legal Information* 539.

b. Preliminary References: Article 267 TFEU

The preliminary reference procedure, provided for in Article 267 TFEU, is an institutionalised mechanism of "dialogue" between the CJEU and national courts. According to the ECJ, the preliminary procedure is the keystone of the EU's judicial system serving to ensure EU law's consistency, full effect and autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[52] Preliminary references have three principal purposes: (1) to provide national courts with assistance on questions regarding the interpretation of EU law; (2) to contribute to a uniform application of EU law across the Union; and (3) to create an additional mechanism – on top of the action for annulment of an EU act (set out in Article 263 TFEU) – for an *ex post* verification of the conformity of acts of the EU institutions with primary EU law (the Treaties and general principles of EU law).

A judgment of the CJEU in a preliminary reference procedure is, strictly speaking, binding only on the national court that submitted the question, as well as on other courts in the same domestic procedure.[53]

The decision whether to submit a preliminary reference to the CJEU rests with the national court concerned. However, if it is a court of last instance and a question of interpretation of EU law or the validity of an act of the EU institutions is necessary to decide a question before it, that court must submit a question. If it refrains from doing so, the Member State concerned may be held liable for a breach of EU law.

EU law does not prescribe any specific procedural rules for the preliminary reference, leaving the matter to national law. In a 2018 informational note, the CJEU observed that the reference "may be in any form allowed by national law as regards procedural steps".[54] The CJEU did, however, enumerate a list of essential elements that should be contained in a request for a preliminary reference.[55]

3. National Law and Practice for Preliminary Reference Procedures

As mentioned, EU law does not prescribe specific procedural steps that need to be taken in order to submit a preliminary reference but leaves the matter to the Member States and their courts.[56] The decision whether to submit a preliminary reference to the CJEU rests with the national court concerned. That said, if it is a court of last instance in the Member State and a question of interpretation of EU law or the validity of an act of the EU institutions is necessary to decide a question before it, that court must submit a question. An omission not to refer a question to the CJEU, in such a case, violates EU law and in most Member States also national law. In Germany, for instance, if a court of last instance violates its duty to make a reference, this constitutes a violation of the right to a lawful judge pursuant to Article

[52] Case C-284/16 *Slowakische Republik v. Achmea BV*, EU:C:2018:158, para 37. See also paras 35-36; Opinion 2/13 (Accession of the EU to the ECHR), EU:C:2014:2454, para 176 and the case-law cited.

[53] Nonetheless, CJEU judgments interpreting EU law enjoy an authority similar to those of national supreme courts in civil law countries – national courts interpreting EU law should take them into account. Furthermore, if the CJEU decides that an act of the EU institutions is illegal, no national court may find to the contrary and consider that act legal. See European Parliament, Briefing Note (2017), "Preliminary Reference Procedure".

[54] CJEU, "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings" OJ C 257/1, para 14.

[55] CJEU, "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings" OJ C 257/1, Annex.

[56] For more details see Giorgio Gaja, "The Growing Variety of Procedures concerning Preliminary Rulings" in David O'Keeffe and Antonio Bavasso (eds.), *Judicial Review in European Union Law, Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer 2000), vol I, 143, 148.

100(1) sentence 2 of the Basic Law. Consequently, it is possible to introduce a complaint before the Constitutional Court for a violation of the constitution where, in contravention of Article 267(3), a court of last instance has refused to make a preliminary reference. Where the Constitutional Court finds that this is the case, it may render the judgment or order in question invalid.

For example, the *Bundesverfassungsgericht* has on several occasions annulled rulings of lower courts where the latter declined to make a preliminary reference when acting as courts of last instance. The *Bundesverfassungsgericht*'s examination is limited to whether the lower German courts' application of Article 267 was manifestly unjustifiable, and in particular whether that court had totally violated its obligation to refer. Moreover, in order for there to be such infringement, it must be clear that the case before the German court gives rise to a question of the interpretation of EU law as opposed to a question of its application to the particular factual situation facing the court. Similar approaches have been taken by the constitutional courts in Austria (*Verfassungsgerichtshof*), in the Czech Republic (*Ústavní soud*), in Slovakia (*Ustavný súd*), in Slovenia (*Ustavno sodišče*), in Spain (*Tribunal Constitucional*), and arguably also (by implication) in Poland (*Sąd Najwyższy - Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych*).[57]

Ensuring compliance with Article 267 TFEU operates in most Member States through judicial practice and not specific legislation. In two Member States, however, specific legislation has been adopted with respect to preliminary references:

a. Hungary

In July 2015, the Constitutional Court found that the Hungarian Constitution imposes an obligation upon the Hungarian National Assembly to adopt measures requiring Hungarian courts to State reasons for the refusal to make a preliminary reference. The Constitutional Court therefore asked the National Assembly to adopt a law requiring courts to state reasons for the refusal to introduce a reference for a preliminary ruling.[58] In November 2015, an amendment (Statute Nr CLXXX of 2015) was made to the Hungarian Civil Procedural Code 1952 so that where a court refuses a request from a party that a preliminary reference should be made, the court is "obliged" to give reasons for this.[59]

b. Sweden

In 2004 the Commission issued a letter of formal notice to Sweden for breach of Article 267.[60] According to the Commission, the Swedish authorities should have adopted rules to ensure that the Swedish courts of last instance made references for preliminary rulings in connection with decisions on whether a right of appeal should be granted. Next, the Commission argued that reasons should be given for the refusal of the court of last instance to grant leave to appeal, so as to make it possible to assess whether the requirements of Article 267(3) were fulfilled. On the basis of the Commission's letter of formal notice, the Swedish Parliament adopted the "Law on certain provisions on preliminary rulings

[57] Analysis taken from Broberg M and Fenger N, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Oxford University Press, 2021) 235-238.

[58] *Alkotmánybiroság*, decision of 14 July 2015, no 26/2015. (VII. 21), reported in *Reflets* (English edition) 3/2015, pp 33-34.

[59] Hungarian Civil Procedural Code 1952, Art 155/A.

[60] The Commission's reasoned opinion was made available to the public under the Swedish rules on access to documents. See Commission docket no 2003/2161, C(2004) 3899 of 13 October 2004.

from the Court of Justice".[61] As a consequence of this law, if one party in a case before the Swedish court argues that, in order to decide a case, it is necessary to clarify the circumstances in which the CJEU has powers to make a preliminary ruling, a Swedish court, that in principle is under a duty to obtain a preliminary ruling, must now give reasons in its judgment why it has not made a reference for such preliminary ruling.[62]

4. Election of CJEU Judges: Articles 253-255 TFEU

The ECJ consists of 27 judges, one from each of the Member States. They are assisted by 11 advocate generals. The General Court consists of 54 judges, two from each of the Member States. As set out in the TFEU, judges are appointed by the common consent of the governments of the Member States and serve for a term of six years, which may be renewed.

Member States are free to adopt their own domestic process for the nomination of judges of the Court of Justice. That said, the TFEU imposes certain criteria with respect to persons selected by the Member States. Accordingly, Member States must ensure that persons selected to be ECJ judges are "persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence" (Article 253 TFEU). General Court judges must be "persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office" (Article 254 TFEU).

Further, the TFEU establishes a panel of former ECJ and General Court judges, members of national supreme courts, and lawyers of "recognised competence" to give an opinion on candidates' suitability to perform the duties of judges (and advocate generals) of the ECJ and the General Court (Article 255 TFEU). Nevertheless, the governments of the Member States make the final appointments.

5. Selected National Law and Practice for Election of Judges to the CJEU

a. Finland

In Finland, the nomination of national candidates for judges of the CJEU is governed by the Act on the Nomination of Candidates for Judges and Members of International Courts and the Court of Justice of the European Union (Law 676/2016)[63] and by the Government Decree on the Panel of Experts[64] Preparing the Nomination of Candidates for Judges and Members of International Courts and the Court of Justice of the European Union (Law 179/2017).[65]

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[61] Law on certain provisions on preliminary rulings from the Court of Justice (Lag med vissabestämmelser om förhandsavgörandefrån EG-domstolen).

[62] Morten Broberg and Niels Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (3rd ed., Oxford University Press 2021), 241-241.

[63] *Lakiehdokkaiden nimeämisestä kansainvälisten tuomioistuinten ja Euroopan unionin tuomioistuimen tuomarin ja jäsenen tehtäviin* ('Law on the nomination of candidates for the positions of judge and member of international courts and the Court of Justice of the European Union'), 676/2016 (25 August 2016).

[64] Website of Prime Minister of Finland, 'Panel of Experts – International Courts and Court of Justice of the European Union', at https://vnk.fi/en/-/rekisterit.

[65] *Valtioneuvoston asetuskansainvälisten tuomioistuinten ja Euroopan unionin tuomioistuimen tuomari- ja jäsenehdokkaiden nimeämistä valmistelevasta neuvottelukunnasta* ('Decree of the Government from the advisory board preparing the nomination of judges and member candidates for international courts and the Court of the European Union'), 179/2017 (30 March 2017).

b. France

In France, as in most Member States, there are no legal regulations regarding the selection of CJEU judges. In practice, it is the Minister of Justice that submits a proposal to the government. Before that several State agencies are involved in the process of proposing a suitable person. These include, the Ministry of Foreign Affairs, as a rule the Prime Minister and the President or Vice-President of the *Conseil d'Etat*, France's highest court. If the candidate is a person from academia, the Minister of Education is also asked for an opinion. At the end, the government's decision, is forwarded by the Prime Minister, to the President of the Republic.

c. Germany

In Germany for many years there were no legal regulations regarding the selection of CJEU judges. The decision was taken solely by means of a formal cabinet decision. In practice, this was based on an agreement between the government and the opposition.[66] The Bundesrat and Bundestag were not involved but several ministries were consulted beforehand. With the Treaty of Lisbon, however, an amendment to the German Judges' Election Act (*Richterwahlgesetz (RiWahlG)*) was adopted. § 3 of section 1 of the RiWahlG was introduced, according to which the persons to be appointed in accordance with Article 253 TFEU shall be nominated by the Federal Government in agreement with the Judicial Election Committee. The Judicial Selection Committee consists of members by virtue of office and an equal number of members by virtue of election (§ 2 RiWahlG). The members by virtue of office are the Ministers of the Länder. The other members are elected by the Bundestag.

d. Slovenia

The Slovenian Law on Nomination of Judges from the Republic of Slovenia to International Tribunals/Courts harmonizes the nomination process for all international courts and tribunals.[67] It seems that the law also regulates the election of judges of the CJEU.

D. Central American Court of Justice

The Central American Court of Justice (CACJ) was first established in 1907 to maintain peace and resolve disagreements among Central American States and operated for 10 years in Costa Rica. In 1991, Central American States adopted the Protocol of Tegucigalpa, which established the Central American Integration System (SICA). Under the SICA, the Statute of the CACJ was reconfigured in an effort to revive the Court. The Statute of the CACJ was signed in Panama City on 10 December 1992 and entered into force on 2 February 1994. To date, only El Salvador, Honduras, Nicaragua, and Guatemala have ratified the CACJ Statute.

1. Summary of the Obligations of the CACJ

The Statute of the CACJ includes different provisions that may require measures by States for their implementation:

[66] Gundel, Eur, 2008, Beiheft 2 23 (25).

[67] Slovenia, Law on Nomination of Judges from the Republic of Slovenia to International Tribunals/Courts, No. 700-04/00-19/1 17 July 2001). The law was adopted prior to Slovenia's accession to the EU. No amendment to this law could be found; nor any more CJEU specific legislation.

- The Judges of the CACJ are to be elected by the supreme courts of justice of the States Parties (Article 10);

- The CACJ is to act as permanent court of consultation for the supreme courts of justice of the States Parties (Article 22);

- States Parties undertake to grant the CACJ all necessary facilities for the proper performance of its functions (Article 26). Accordingly,

    - States Parties are to pay in equal parts the general budget prepared by the CACJ (Article 41); and

    - States Parties are to provide the CACJ with appropriate financial resources, so that it can adequately perform its functions (Article 47).

2. State Practice Implementing the Obligations of the CACJ

State Parties to the CACJ Statute have enacted legislation for the purpose of implementing it. This legislation includes, for instance, procedures for the election of judges at the national level,[68] and mechanisms to contribute to the budget of the Court.[69]

E. Andean Community Court of Justice

The Andean Community Court of Justice ("ACCJ") is the main mechanism of the Andean Community of Nations ("ACN") for the interpretation of the Cartagena Agreement and ACN law, and for the resolution of disputes involving or affecting the Community.[70] The Treaty Creating the Court of Justice of the Cartagena Agreement ("CJCA") was signed in 1979, and the Court was established in 1983. Subsequently, the Protocol of Cochabamba signed on 28 May 1996, modified the Treaty Creating the CJCA and the Court was renamed as ACCJ.

1. Summary of the Obligations of the ACCJ

The following provisions relate to the implementation at the domestic level of the dispute settlement mechanism provided for in the Protocol of Cochabamba:

- The Court has one judge for each Member State. The judges are appointed by consensus from shortlists presented by each Member State (Articles 6 and 7).

- Member States undertake to grant the Court all the necessary assistance for the performance of its functions and the Court, and its judges shall enjoy necessary immunities and privileges (Article 12).

- Member States shall ensure compliance with the provisions of the treaty (Article 36).

- Judgments and arbitral awards will be binding on the parties (Articles 38 and 41).

[68] The judges of the CACJ are representatives of their States and are elected by the Supreme Courts of each of the member States, each State must establish the election mechanism in accordance with its internal legislation.

[69] See, e.g., Guatemala, Decree No. 78-2007, date of publication 28 December 2007.

[70] See https://www.tribunalandino.org.ec.

The Statute of the ACCJ, for its part, includes the following provisions related to implementing regulations.[71]

- The establishment of the remuneration of the members of the Court from contributions from Member States (Article 26).

- The power of the ACCJ to make direct requests to the national judges of the Member States for assistance in taking evidence and the fulfilment of other judicial proceedings (Article 80).

- Judgments of the ACCJ have binding force and the character of res judicata and are applicable in the territory of the Member States without the need for homologation or exequatur (Article 91).

- A Member State whose conduct has been declared in a judgment of the ACCJ as contrary to the Andean legal system is obliged to adopt the necessary measures for its due execution (Article 111).

- Member States shall notify the Court of the designation of the competent national authority that will represent them in the proceedings before the Court (Article 141).

2. State Practice Implementing the Obligations of the ACCJ

The ACN includes a general "principle of supremacy" or "prevalence" of community law of in the Andean Community over national legislation. In this way, ACN rules prevail over national norms, without the need to follow a special procedure or procedure for approval, reception or incorporation in national legal systems.[72] That said, to the extent that certain obligations created with respect to the jurisdiction of the ACCJ require technical implementation at the domestic level, research has not revealed specific domestic laws addressing those matters.

III. Non-Judicial Systems of Dispute Settlement under Regional Treaties

A. MERCOSUR Dispute Settlement System

The Common Market of the South ("MERCOSUR") was established by the Treaty of Asunción for the Establishment of a Common Market of 1991 concluded between Argentina, Brazil, Paraguay and Uruguay as founding members. The Treaty of Asunción established the institutional structure of Mercosur and a political dispute settlement mechanism. The Brasilia Protocol for the Settlement of Disputes of 1995 complemented the Asunción Protocol and established a two-step dispute settlement mechanism, with a binding political step before the arbitral (State-to-State) phase could be activated. In 2002, the Olivos Protocol for the Settlement of Disputes in MERCOSUR replaced the Brasília Protocol.[73]

The dispute settlement process under the Olivos Protocol is based upon negotiation and State-to-State arbitration,[74] rather than adjudication before a supranational tribunal. Arbitration pursuant to the Olivos

[71] See https://www.tribunalandino.org.ec/transparencia/normatividad/EstatutoTJCA.pdf.

[72] Luis Rafael Vergara Quintero, *La importancia del control Jurisdiccional en el Ordenamiento Comunitario Andino Apuntes de Derecho Comunitario Andino* (Ed. San Gregorio 2019), 138.

[73] Southern Common Market (MERCOSUR), Olivos Protocol (18 Feb. 2002).

[74] Olivos Protocol, Art. 4, 6 & 9. There is no direct standing for private parties to bring claims in arbitration under the Protocol.

Protocol is ad hoc in character,[75] however, the Protocol creates a "Permanent Court of Review", a body composed of five arbitrators[76] with the power to review legal questions addressed in awards rendered by ad hoc arbitral tribunals.[77]

1. Summary of the Obligations of the MERCOSUR Dispute Settlement System

Different provisions of the Olivos Protocol touch upon measures that States parties must adopt to implement the MERCOSUR dispute settlement system:

- Article 27 provides that arbitral awards shall be complied with in the manner and within the scope addressed therein, and that the adoption of compensatory measures will not exempt the State Party of its obligation to enforce the award.

- Article 29.3 indicates that a State against which an award has been rendered shall inform the other party to the dispute, as well as the Common Market Group as to the measures it will adopt to comply with the award.

- Article 36 provides that the expenses and fees incurred by the activity of arbitrators shall be borne by the State that has appointed them and that the expenses of the president of the ad hoc tribunal shall be borne equally by parties to the dispute, unless the tribunal decides to distribute them in a different manner.

- Finally, the Olivos Protocol provides in Article 33 that the States parties recognize the compulsory jurisdiction of ad hoc arbitral tribunals and the Permanent Court of Review. This implies that there is no need for a special acceptance of the jurisdiction of the ad hoc arbitral tribunals and the Permanent Court of Review in individual cases.

2. State Practice Implementing the MERCOSUR Dispute Settlement System

MERCOSUR Member States have made different changes to their domestic legal regimes in order to adapt them generally to the regional integration process. The constitutions of Uruguay (1967)[78] Brazil (1988),[79] Paraguay (1992)[80] and Argentina (1994)[81], to different degrees, include specific provisions

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[75] Ibid., Art. 10.

[76] Ibid., Art. 18.

[77] Ibid., Art. 17.

[78] The Uruguayan Constitution of 1967 provides in Article 6:

"In international treaties which the Republic may conclude there shall be proposed a clause to the effect that all differences which may arise between the contracting parties shall be settled by arbitration or other peaceful means. The Republic shall seek to attain social and economic integration of the Latin American States, especially in relation to the mutual protection of their products and raw materials. Likewise, it shall seek an effective complementation of their public services."

[79] The Brazilian Federal Constitution of 1988 provides in Article 4, Sole paragraph: "The Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the peoples of Latin America, viewing the formation of a Latin-American community of nations."

[80] The Constitution of Paraguay of 1992 in Article 145 provides: "The Republic of Paraguay, in conditions of equality with other States, admits a supranational juridical order which guarantees the enforcement of human rights, of peace, of justice, of cooperation and of development, in political, economic, social and cultural [matters]."

[81] The Constitution of Argentina of 1994 in Article 75, paragraph 24, provides that it corresponds to the Congress:

that deal with integration mechanisms. Apart from these examples, however, MERCOSUR Member States appear not to have adopted special implementing regulations related to the MERCOSUR dispute settlement mechanism. One exception to this practice is the measures adopted by national supreme courts to regulate the requirements for national tribunals to request advisory opinions in accordance with Article 3 of the Olivos Protocol and the Protocol's implementing regulation.[82] Uruguay was the first State Party to adopt rules authorizing national requests of advisory opinions in 2007, followed by Argentina and Paraguay in 2008, and Brazil in 2012.[83]

B. Dispute Settlement under the North American Free Trade Agreement and Canada–Mexico–United States Agreement

The North American Free Trade Agreement ("NAFTA") established a free trade area comprised of Canada, Mexico, and the United States. The NAFTA entered into force on 1 January 1994 and incorporated three distinct dispute settlement mechanisms. First, a general State-State dispute settlement mechanism was established by Chapter 20, permitting each of the States Parties to bring a claim against another regarding the interpretation and application of the agreement. Second, Chapter 19 established a specialised dispute settlement system for complaints involving anti-dumping and countervailing duty measures. Third, Chapter 11 established a process for ad hoc investor-State arbitration, the most widely used dispute settlement mechanism under the NAFTA.

The Canada–Mexico–United States Agreement ("USMCA")[84] is a free trade agreement that replaced the NAFTA upon coming into force on 1 July 2020.[85] The main dispute settlement mechanisms of the USMCA are found in Chapter 10 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters); Chapter 14 (Settlement of Disputes between a Party and an Investor of Another Party) and Chapter 30 (Dispute Settlement). Annex 14-C addresses the transition between NAFTA to USMCA regarding "Legacy Investment Claims and Pending Claims" and two other annexes (Annexes 14-D and 14-E) apply uniquely between Mexico and the United States regarding investment disputes.

"To approve treaties of integration which delegate powers and jurisdiction to supranational organizations under reciprocal and equal conditions, and which respect the democratic order and human rights. The rules derived therefrom have a higher hierarchy than laws.

The approval of these treaties with Latin American States shall require the absolute majority of all the members of each House. In the case of treaties with other States, the National Congress, with the absolute majority of the members present of each House, shall declare the advisability of the approval of the treaty which shall only be approved with the vote of the absolute majority of all the members of each House, one hundred and twenty days after said declaration of advisability.

The denouncement of the treaties referred to in this subsection shall require the prior approval of the absolute majority of all the members of each House."

[82] See Olivos Protocol Regulations, CMC/DEC Nº05/22 (Articles 3 to 14) and Regulation to Request Advisory Opinions by the Supreme Courts of Justice, CMC/DEC Nº02/07 updated according to CMC/DEC Nº15/10 and CMC/DEC Nº07/20.

[83] See, for example, Uruguay: Acordada 7604 Reglamenta la Solicitud de Opiniones Consultivas al Tribunal Permanente de Revisión del Mercosur Suprema Corte de Justicia [Supreme Court of Justice of Uruguay] [24 August 2007]; Argentina: Acordada No 13/08 Corte Suprema de Justicia de la Nación [Supreme Court of Justice of Argentina] [18 June 2008].

[84] The Canada–Mexico–United States Agreement is known variously as the "CUSMA", "TMEX" or "USMCA" in Canada, Mexico and the United States respectively. It this paper we adopt "USMCA" as it appears to have acquired the widest usage in English.

[85] The text of the agreement is available at https://can-mex-usa-sec.org/secretariat/index.aspx?lang=eng.

1. State Practice Implementing the Obligations of the USMCA

Although the USMCA is a relatively new agreement, all three parties have adopted internal regulations to implement the jurisdiction of the dispute settlement mechanisms in the treaty. Thus, the United States adopted the United States-Mexico-Canada Agreement Implementation Act,[86] which includes different provisions dealing with the dispute settlement mechanisms of the USMCA. Canada has enacted the Canada–United States–Mexico Agreement Implementation Act,[87] which includes amendments to the Commercial Arbitration Act, Canadian International Trade Tribunal Act, and the Special Import Measures Act. Finally, Mexico has made changes in the internal regulation which establishes the structure and functions of the Secretariat of Economy, including functions related with the settlement of disputes.[88]

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[86] H.R.5430, United States-Mexico-Canada Agreement Implementation Act 116th Congress (2019-2020).

[87] Canada–United States–Mexico Agreement Implementation Act (S.C. 2020, c. 1).

[88] Reglamento Interior de la Secretaría de Economía, DOF 17 October 2019 (last reform published in DOF 12 April 2021).