1. Introduction

This paper examines the role national sovereignty plays in three regional groups: Mercosur, ASEAN and NAFTA. It looks in particular at their dispute settlement mechanisms and bodies that are designed to respect the domestic sovereignty of the member states. The aim of the paper is to show that, in order to avoid the possibility of any supranational constitutional moment of the type fostered by the Court of Justice of the European Union, these three groups have studiously avoided modelling their dispute resolution processes on Luxembourg and have instead preferred an anti-model in the form of the World Trade Organisation's adjudicatory system.

In addition, the paper subsequently discusses the extent to which any neo-functionalist institutional "spillover"[1] has or has not been contained, as a regional organisation matures and develops over time. It thus questions the possible existence –despite the determined aims of the participating states in Mercosur, ASEAN and NAFTA to maintain an intergovernmental regional integration ideal– of an inherent evolutionary propensity in DSMs (Dispute Settlement Mechanisms) of these organisations to evolve further along the quasi-adjudicative route towards a completely adjudicative DSM.

Moreover, the research poses the further question as to whether or not deepening regional integration ultimately requires as a sine qua non of guaranteed continued success the creation or existence, inter alia, of a permanent regional judicial body charged with settling disputes, whether directly or indirectly, between litigants whether Member States, regional institutions, or private parties.

This Working Paper consequently begins with a contextualising of the present research (section 2), before seeking to provide a categorisation of international and regional courts, tribunals and dispute settlement mechanisms (section 3). The focus then shifts to the EU and deals with the CJEU as a model together with the European "supranational constitutional moment" (section 4), before looking at the role of a CJEU anti-model in the guise of the WTO DSM (section 5).

Having provided the overall context for the research, the following three sections deal with the DSMs of the studied regional economic organisations: Mercosur (section 6); ASEAN (section 7); and NAFTA (section 8). Each organisation is examined for the same points, viz., the treaty framework, issues of sovereignty, and dispute settlement mechanisms (both initial and current models). The aim is to juxtapose concerns over continuing state sovereignty in the face of demands for regional co-operation and/or integration. The Conclusion (section 9) attempts to argue that even if neofunctional spillover can be contained, absent a central judicial organ regional economic groupings are likely "to come apart at the seams."

2. General context of the present research

The preservation of national sovereignty in the face of the perceived threat to its continued existence from the forces of globalisation as well as regionalisation has been the subject of much academic discourse over recent years[2]. For example, in the field of jurisdictional authority, states have experienced an increasing migration of

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1 For a full discussion of neofunctionalism in the EU context, see W. Sandholtz & A. Stone Sweet (eds.), *European Integration and International Governance*, OUP, Oxford (1998).

2 Early globalisation theorists posited the demise or obsolescence of the nation-state; they claimed it was leaking authority and sovereignty upwards (to

their traditional powers in judicial adjudication – through the increase in the number and scope of regulatory treaties and development of transnational regimes– to internationally-and regionally-based courts and tribunals[3]. Such transnational regulatory regimes not only ensure the legalisation or judicialisation of dispute settlement processes within their purview[4] but also radically redefine the nature of these processes by conferring on non-state actors procedural rights to access the relevant dispute settlement system in order to enforce their substantive rights guaranteed under the relevant treaty: this individualisation of remedies under transnational regimes is one of the legal indicators of globalisation[5].

Within this evolving, judicially-pluralist international legal order, the EU model of integration has proven to be a great attraction and has consequently been emulated throughout the world; its focus on integration through law and the operation of the Court of Justice of the European Union ("CJEU") as the exemplary integrationist regional court and the creator of a supranational regional legal system has been widely lauded.

Nevertheless, abnegation of sovereignty – even for the stated ideals of regional economic integration– has been strongly eschewed by state participants in a number of regional organisations, in their search for an acceptable and workable paradigm that preserves their independent status while allowing economic, financial and even political rapprochement between them. In this sense, the EU model is rejected –rather than emulated– as being the "anti-model" par excellence of certain groupings, with the CJEU considered as the judicial "*bête noire*" to the preservation of the vestiges of national constitutional sovereignty in the face of the perceived supranational pretensions that inure in the Union. In searching for a workable paradigm, some regional entities emphasise amicable settlement, conciliation and arbitration and rather look for inspiration to predominantly or exclusively political dispute settlement mechanisms ("DSMs"). In such cases, it is strongly arguable that the participants in such intergovernmental regional integration mechanisms intend to avoid or eliminate any type of supranational constitutional moment as has already occurred in the EU.

In this research, the DSMs of regional organisations in the Americas and South East Asia are particularly relevant since they tend to reject the sort of judicial contextualisation of integration as has been allowed to be formulated by the CJEU. To varying degrees, Mercosur, NAFTA and ASEAN all strive to avoid any replication of the "success" of supranationality by preserving the role of national sovereignty as a necessary brake on issues of regional (economic) integration in their treaty-based communities. Instead they currently reaffirm the centrality of political or intergovernmental means in their DSM institutional set-up.

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supranational organisations), downwards (to sub-national units) and sideways to markets (and dominant players in them, like multinational corporations) and emerging players, such as international civil society: for the classic exposition of the obsolescence of the state, see K. Ohmae, *The borderless world: power and strategy in the interlinked economy*, Harper Business, New York (1990). Subsequent entrants to the discussion discredited the extreme version of this thesis as it was apparent that states, rather than being the passive victims of external processes, were the architects, authors or "midwives of globalization": J. Brodie, "New State Forms, New Political Spaces," in R. Boyer & D. Drache (eds.), *States Against Markets: The Limits of Globalization*, Routledge, London (1996), 383, at 386.

3 See generally: A. Del Vecchio, "Globalization and its Effect on International Courts and Tribunals" (2006) 5 L. & Practice of Intl. Courts & Tribunals 1.

4 R.O. Keohane, A. Moravcsik & A.-M. Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 International Organization 457. For a historical perspective on this field, see C. Kröner, "Crossing the Mare Liberum: The Settlement of Disputes in an Interconnected World," speech delivered at the IV Conferencia Internacional Hugo Grocio de Arbitraje, Centro Internacional de Arbitraje, Mediación y Negociación ("CIAMEN"), Instituto Universitario de Estudios Europeos, Universidad CEU San Pablo, 15 June 2011, CEU Ediciones, Madrid (2011).

5 M.A. Luz & C.M. Miller, "Globalization and Canadian Federalism: Implications of the NAFTA's Investment Rules" (2002) 47 McGill L.J. 951, at 954-971.

3. International and Regional Courts, Tribunals and DSMs

Before embarking on an analysis of the various international (regional) judicial or dispute settlement organs, it might be of some assistance to define these terms[6].

On the one hand, "international courts and tribunals" or "international judicial organs" fulfil Romano's five criteria[7], themselves based on the work of Tomuschat[8]. These five criteria provide that the relevant judicial organ must be: (i) permanent[9]; (ii) established by an international legal instrument[10]; (iii) in deciding the cases before them, they must resort to international law[11]; (iv) they must decide those cases on the basis of pre-existing rules of procedure which the parties usually cannot change[12]; and (v) the outcome of the process must be legally binding[13]. To these five criteria Romano adds two further (although they could be subsumed within them)[14], viz., the international judicial body must be composed (at least in its majority) of judges appointed –through an impartial mechanism– before a case was submitted; and the body must decide cases between two or more entities, of which at least one is a sovereign state or international organisation.

Within this species of entity, a genus of "regional court or tribunal" or "regional judicial organ" exists[15] whose jurisdiction is restricted to a geographically-defined, regionally-based organisation which is established by the relevant regional treaty and applies regional law in its decision-making. Such regional judicial bodies may also decide cases (directly before it or indirectly through a reference procedure from Member States courts) where either or both parties can be private (natural or legal) persons.

On the other hand, dispute settlement mechanisms[16] of an international or regionally-based organisation consequently fail to satisfy the five criteria to be considered as the judicial organ of such an organisation. Traditional notions under public international law have differentiated between political and adjudicative DSMs[17] which division is dependent (1) on the political or legal basis upon which the actors solve their disputes; and (2) on whether or not the decision is binding and definitive[18]. According to the principle of "free choice of means," the parties can employ such means to resolve their disputes by creating their own DSM[19].

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6 Among those who seek to provide categorisation in this area, see A.K. Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations" (1998-1999) 20 Mich. J. Intl. L. 699-773.

7 C. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle" (1999) 31 N.Y.U. J. Intl. L. Pol. 709, at 713-715. That author's more recent work in the field aims to provide a definitive characterisation and categorisation of all international and regional DSMs: C. Romano, "A taxonomy of international rule of law institutions" (2011) 2(1) J.I.D.S. 241-277.

8 C. Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction," in Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht (ed.), *Judicial Settlement of International Disputes, 62 Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Springer Verlag, Berlin/Heidelberg/New York (1974), 285-416.

9 Tomuschat (1974), at 307-311.

10 Tomuschat (1974), at 293.

11 Tomuschat (1974), at 290-294.

12 Tomuschat (1974), at 311-312.

13 Tomuschat (1974), at 299-307.

14 Romano (1999), at 715.

15 See generally, Tomuschat (1974).

16 On DSMs generally, see J. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences" (2003) 38 Tex. Intl. L.J. 405.

17 A. Remiro Brotons & R.M. Riquelme Cortado, J. Diez-Hochleitner, E. Orihuela Calatayud & L. Pérez-Prat Durbán, *Derecho Internacional*, McGraw-Hill, Madrid (1997), at 827; J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 9th ed., Tecnos, Madrid (2003), at 566; and J.G. Merrills, *International Dispute Settlement*, 3rd ed., CUP, Cambridge (1998), at 1-169.

18 Brotons et al. (1997), at 831.

19 UN Charter, Art. 33.