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TABLE 14.2 *(continued)*

Pact	Year signed	Members[a]
OECS (Organization of East Caribbean States)	1981	Antigua and Bermuda, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines
SACU (Southern African Customs Union)	1969	Botswana, Lesotho, Namibia, South Africa, Swaziland
U.S.–Israel Free Trade Agreement	1985	Israel, United States
UDEAC (Central African Customs and Economic Union)	1964	Cameroon, Central African Republic, Chad, Republic of Congo, Gabon, Equatorial Guinea

[a] Dates in parentheses indicate years of accession for member states that were not among the original signatories. Countries that signed but later withdrew from the agreement are also noted, as are their years of departure.

OVERVIEW OF REGIONAL DISPUTE SETTLEMENT

In this segment I summarize the level of legalism in each of the regional trade pacts in the data set. The basic features of dispute settlement in each pact are highlighted in Table 14.3, which draws on the treaty texts listed in Appendix A. Related agreements in Europe and the Americas are aggregated; within each group, dispute settlement provisions are identical in every important respect. I include two observations for EFTA, whose membership changed significantly over time (see Table 14.2) and whose 1960 dispute settlement system was transformed with the creation of the EEA in 1992. *** In this respect, EFTA is an exception to the rule. There are a handful of other agreements whose dispute settlement procedures changed over time – namely the Andean Pact, Central American Common Market (CACM), Common Market of the South (MERCOSUR), AFTA, and a few bilateral EFTA agreements. Unlike EFTA, however, these cases have not undergone radical changes in membership or in other variables of interest to this study. As a result, I report and evaluate their most recent dispute settlement design (citations for the relevant agreements are listed in Appendix A).

Table 14.3 underscores the dramatic extent of institutional variation in the data set. Its final column organizes the agreements into five clusters

TABLE 14.3. *Levels of Legalism in Dispute Settlement Design*[a]

Pact	Treaty provision					Level of legalism
	Third-party review	Third-party ruling	Judges	Standing	Remedy	
ANZCERTA	None	—	—	—	—	None
Baltic FTA	None	—	—	—	—	None
CEEC Pacts (5)	None	—	—	—	—	None
CEFTA	None	—	—	—	—	None
EEA	None – unless by mutual consent to ECJ on EC law	—	—	—	—	None
EFTA agreements with Czech Republic, Hungary, Poland, Romania, Slovak Republic, and Turkey	None	—	—	—	—	None
Mano River Union	None	—	—	—	—	None
SACU	None	—	—	—	—	None
UDEAC	None	—	—	—	—	None
AFTA	Yes – automatic	Not binding (ministers "consider" report in vote)	Ad hoc – roster	States only	Compensation, sanctions (only by vote of Council)	Low

(continued)

TABLE 14.3 *(continued)*

Pact	Treaty provision					Level of legalism
	Third-party review	Third-party ruling	Judges	Standing	Remedy	
CARICOM	Yes – automatic	**Not binding (Council "may" vote to recommend)**	Ad hoc – roster	States only	Sanctions (only by vote of Council)	Low
EFTA 1960	Yes – but only by majority vote of Council	**Not binding (Council "may" vote to recommend)**	Ad hoc	States only	Sanctions (only by vote of Council)	Low
GCC	Yes – but only by vote of Council	**Not binding (panel issues recommendation to Supreme Council)**	Ad hoc – roster	States only	None	Low
U.S.–Israel Pact	Yes – automatic	**Not binding (merely a conciliation report)**	Ad hoc	States only	Sanctions("any appropriate measure")	Low
Chile and Mexico Pacts[b] (9)	Yes – automatic	Binding	Ad hoc – roster	States only	Sanctions (if prescribed or authorized)	Medium
EC associations (12)	Yes – but risk of deadlock at panel formation	Binding	Ad hoc	States and EC	None	Medium
EC–Israel Pact	Yes – but risk of deadlock at panel formation	Binding	Ad hoc	States and EC	None	Medium

EFTA agreements with Bulgaria, Israel, Estonia, Latvia, Lithuania, and Slovenia	Yes – automatic	Binding	Ad hoc	States only	None	Medium
MERCOSUR	Yes – but only after three preliminary reviews	Binding	Ad hoc – roster	States only	Sanctions	Medium
NAFTA	Yes – automatic (except in side accords, where two of three states must approve review)	Chap. 20 general disputes: not binding (contrary settlement or compensation allowed) Chap. 19 unfair trade law and Chap. 11 investment disputes: binding Side accords on labor and environment: binding	Ad hoc – roster	Chap. 20: states only Chap 11: individuals only Chap. 19 and side accords: states and individuals	Chap. 20: sanctions Chap. 11 and Chap. 19: direct effect Side accords: fines (direct effect for Canada)	Medium
OECS	Yes – automatic	Binding	Ad hoc – roster	States only	None	Medium

(continued)

TABLE 14.3 *(continued)*

Pact	Treaty provision					Level of legalism
	Third-party review	Third-party ruling	Judges	Standing	Remedy	
CEAO	Yes – automatic	Binding	**Standing tribunal**	States only	None	High
CIS	Yes – but jurisdiction limited	Binding	**Standing tribunal**	States only	None	High
EAC	Yes – automatic	Binding	**Standing tribunal**	States only	None	High
ECOWAS	Yes – automatic	Binding	**Standing tribunal**	States and treaty organs	Sanctions (imposed by heads of state)	High
Andean Pact	Yes – automatic	Binding	Standing tribunal	**States, treaty organs, and individuals**	Direct effect, sanctions (prescribed by tribunal)	Very High
CACM	Yes – automatic	Binding	Standing tribunal	**States, treaty organs, and individuals**	Direct effect	Very High
COMESA	Yes – automatic	Binding	Standing tribunal	**States, treaty organs, and individuals**	Sanctions (prescribed by tribunal)	Very High
EC	Yes – automatic	Binding	Standing tribunal	**States, treaty organs, and individuals**	Direct effect	Very High
EFTA 1992	Yes – automatic	Binding	Standing tribunal	**States, treaty organs, and individuals**	Direct effect	Very High

[a] Boldface indicates the distinguishing features of cases at levels above and below medium legalism.
[b] Several of the Chilean and Mexican pacts also include investor-state dispute mechanisms, rather like Chapter 11 of NAFTA.
Sources: See Appendix A.

that capture basic differences in the level of legalism. To define these categories, I start with the most basic question: whether a treaty provides any system of independent third-party review of disputes. For eighteen treaties, the answer is no, and they thus constitute the lowest level of legalism: none.[33] At the next level, with low legalism, are five agreements with dispute settlement mechanisms whose rulings are not binding in international law. These pacts nominally provide a system of third-party review but hold it hostage to decisions by political bodies, often a council of ministers, or in the case of the U.S.–Israel accord treat its rulings as mere recommendations.[34]

The midpoint of the sample – medium legalism – includes a diverse set of thirty-one agreements that provide for some version of standard international arbitration, offering states an automatic right to binding rulings by ad hoc arbitrators. Within this category there is variation regarding remedies, since a few pacts provide for sanctions. The only agreements with multiple dispute settlement procedures – NAFTA and several pacts signed by Chile and Mexico – also fall into this category. NAFTA includes at least five distinct mechanisms for different issue areas ***.[35] The mechanism most relevant to this study, Chapter 20 for general disputes, might qualify NAFTA at the level of low legalism because its rulings are not legally binding: compensatory payments can substitute for compliance, and disputants can reach a settlement contrary to the terms of a panel ruling after it has been issued. However, NAFTA's innovative procedures for unfair trade law and investment disputes – which include binding rulings and standing for individuals – push the agreement in the direction of legalism. Without any standing tribunal, the combination of these mechanisms arguably leaves NAFTA at the level of medium legalism. Many of the Chilean and Mexican pacts incorporate a version

[33] Inclusion of the EEA in this category may be controversial. Technically, all member states of both EFTA and the EC have access to highly legalistic tribunals for the resolution of disputes regarding issues of EC law, which the EEA extends to EFTA. Nevertheless, this option applies only to disputes among EFTA states before the EFTA Court or among EC states before the European Court of Justice. For disputes *between* the EC and EFTA, neither group has automatic access to third-party review. By common consent, questions of interpretation of EC law may be referred to the European Court of Justice, but EFTA states have no direct access. Their complaints go instead to the EEA Joint Committee for bilateral consultations between the EC Commission and the EFTA states "speaking with one voice." The original EEA draft proposed an EEA Court, but the European Court of Justice struck it down as an usurpation of its exclusive authority over EC law. See Bierwagen and Hull 1993, 119–24.

[34] Azrieli 1993, 203–205.

[35] For details on NAFTA's different mechanisms, see Smith 1995.

of NAFTA's mechanism for investment disputes. Although this procedure grants standing to individuals, it is limited in scope to rules on investment and relies on ad hoc arbitrators, which keep the Chilean and Mexican pacts within this category.

At the level of high legalism are four agreements that establish a standing tribunal to issue binding rulings on cases brought by states. Although in other respects these pacts resemble standard arbitration, the appointment of judges to a permanent court implies a significant step in the direction of legalism. These agreements create supranational institutions whose judges are likely to issue consistent legal rulings in developing their treaty jurisprudence. In practice, these four accords are among the most poorly implemented in the data set. Both the East African Community (EAC) and the West African Economic Community (CEAO), in fact, have been formally dissolved. The Economic Community of West African States (ECOWAS) Community Court of Justice awaits the realization of trade commitments in that largely dormant economic area, while the jurisdiction of the Commonwealth of Independent States (CIS) Economic Court appears to be severely restricted even among the CIS signatories that have endorsed it.[36]

There is a sizable leap toward legalism at the final level. All five agreements with very high legalism expand the definition of standing beyond member states to include both treaty organs and private individuals. With the exception of COMESA, they also give the rulings of standing tribunals direct effect in national law. To a significant extent, the judicial bodies envisaged for the CACM, Andean Pact, EFTA 1992, and COMESA draw on the model of the European Court of Justice. For example, all five tribunals have the authority, on request, to issue preliminary rulings to national courts, which can serve to broaden the access of individuals to supranational judicial review. On encountering questions of treaty interpretation, domestic judges may or may not exercise this option, but the preliminary question procedure has helped forge important links between the European Court of Justice and national judiciaries in Europe.[37]

* * *

[36] Very little information is available, but reports suggest that the jurisdiction of the CIS Economic Court has lawfully been refused by Kazakhstan. Three CIS members have not recognized it, and others have ignored its rulings. See "CIS Court Dismisses Moldova Claim for Kazakh Grain," *Reuter European Business Report*, 6 February 1997; and "CIS Economic Court to Be in Session," *TASS*, 7 July 1997.

[37] See Stone Sweet and Brunell 1998; and Mattli and Slaughter 1996.

MEASURING ASYMMETRY AND PROPOSED INTEGRATION

To test my argument on the trade-off between treaty compliance and policy discretion, I must find summary statistics that describe the level of economic asymmetry and proposed depth of integration within each regional trade arrangement. Measuring GDP asymmetry in trade pacts is not unlike measuring the level of industry concentration – or market share asymmetry – in different sectors of the economy. A standard measure for industrial concentration in economics is the Herfindahl-Hirschman index (HH), which equals the sum of the squared market shares of the firms in a given industry. In a situation of pure monopoly, the index is $(1.0)^2 = 1.00$. Where two firms divide the market evenly, HH = $(0.5)^2 + (0.5)^2 = 0.50$.

In its traditional form, this index is not an ideal measure of intrapact GDP asymmetry. In the two-firm example, a score of 0.50 – which is very high by antitrust standards – for me represents a situation of perfect symmetry if derived from a bilateral pact where the two countries have identical GDP shares. Yet the same index score could reflect a situation of high asymmetry in a pact with six signatories where the GDP shares are as follows: HH = $(0.68)^2 + (0.17)^2 + (0.10)^2 + (0.02)^2 + (0.02)^2 + (0.01)^2 = 0.50$. To correct for this problem, I subtract from the Herfindahl-Hirschman index what the index would be in a situation of perfect economic symmetry, where all signatories to a trade accord have identical shares of the total pact GDP. Given the nature of summed squares, this baseline of perfect symmetry always equals 1 divided by the number of signatories *(N)*. By subtracting it, I obtain a new measure (*P*) that describes the proportional asymmetry of each pact. It captures the distance of each pact from symmetry: the further a pact is from that baseline, the higher the index. In the two-signatory example *P* would be zero, indicating perfect symmetry, but in the six-signatory example it would be much higher: $P = 0.50 - (1/6) = 0.33$.

To define this proportional asymmetry index in more formal terms,

$$P = \Sigma x_i^2 - 1/N \text{ for all } i$$

where x_i = each member's share of total pact GDP, such that $\Sigma x_i = 1$.

Among alternative indicators of inequality, *P* is related to variance measures. In fact, *P* is formally equivalent to *N* times the variance of income shares.[38] In other words, *P* represents the sum of the squared

[38] The variance of a given sample (Var) is the average squared deviation of data points from their sample mean, which for income shares that sum to one is by definition 1/*N*: Var $(x) = (1/N) \cdot \Sigma(x_i - 1/N)^2$.

TABLE 14.4. *The Proportional Asymmetry Index of Intrapact GDP Shares*

Asymmetry	Pact	Year	GDP shares (x)	N	P	P/MAX
Low	Mano River Union	1973	.52, .48	2	.0007	.001
	EAC	1967	.38, .34, .28	3	.005	.007
	Romania–Czech Republic	1994	.545, .455	2	.004	.008
	Chile–Colombia	1993	.55, .45	2	.005	.010
	Bulgaria–Slovak Republic	1995	.57, .43	2	.011	.021
	COMESA	1993	.11, .10, .10, .08, .07, .07, .06, .06, .06, .05, .05, .04 and below	22	.023	.024
	Baltic FTA	1993	.45, .31, .23	3	.025	.037
	OECS	1981	.26, .22, .14, .12, .12, .10, .05	7	.032	.037
	Chile–Venezuela	1991	.61, .39	2	.024	.048
	CACM	1960	.38, .23, .19, .12, .08	5	.053	.067
	AFTA	1992	.34, .27, .14, .13, .12, .01	6	.068	.082
	EFTA 1992	1992	.27, .26, .20, .14, .12, .01, .002	7	.073	.085
	Andean Pact	1969	.34, .28, .27, .07, .04	5	.072	.089
	CEAO	1973	.38, .19, .14, .09, .08, .08, .05	7	.076	.089
	EC	1957	.36, .33, .18, .07, .06, .003	6	.113	.136
	Romania–Slovak Republic	1994	.69, .31	2	.069	.138
High	UDEAC	1964	.47, .16, .14, .13, .09, .01	6	.124	.149
	CEFTA	1992	.53, .23, .17, .07	4	.112	.149
	Hungary–Slovenia	1994	.74, .26	2	.118	.235
	Chile–Ecuador	1994	.77, .23	2	.134	.268
	CARICOM	1970	.48, .31, .09, .05, .02, .01 and below	12	.252	.275
	Bulgaria–Czech Republic	1995	.79, .21	2	.162	.325

EFTA 1960	1960	.63, .12, .07, .05, .05, .04, .02	7	.281	.328
MERCOSUR	1991	.65, .32, .02, .01	4	.278	.371
GCC	1981	.67, .14, .11, .04, .03, .01	6	.313	.376
Group of Three	1994	.75, .13, .12	3	.261	.392
ECOWAS	1975	.72, .07, .05, .04, .02 and below	15[a]	.458	.491
ANZCERTA	1983	.88, .12	2	.293	.586
CIS	1993	.79, .06, .05, .04, .01 and below	11	.540	.594
Mexico–Chile	1991	.89, .11	2	.311	.622
Chile–Canada	1995	.89, .11	2	.311	.622
Chile–Bolivia	1993	.89, .11	2	.311	.622
NAFTA	1992	.87, .08, .05	3	.430	.645
EEA	1992	.91, .09	2[b]	.338	.676
EFTA Agreements (mean)	Various	.96, .04	2[b]	.421	.841
Mexico–Costa Rica	1994	.98, .02	2	.458	.916
Mexico–Bolivia	1994	.99, .01	2	.472	.944
SACU	1970	.984, .007, .005, .004	4	.718	.957
EC–Israel	1995	.99, .01	2[b]	.479	.958
U.S.–Israel	1985	.99, .01	2	.487	.974
EC Associations (mean)	Various	.99, .01	2[b]	.490	.980

Note: Shares of GDP may not sum to 1 or match the index scores exactly because of rounding.
GDP shares = members' GDP shares (x_i) (in current $US) in reported year.
$P = \Sigma x_i^2 - 1/N$ for all i where x_i is member i's share of total pact GDP such that $\Sigma x_i = 1$.
MAX = $1 - 1/N$, the upper bound of P for each pact.
N = number of members at the time the agreement was signed.

[a] GDP data for Guinea were unavailable.

[b] Member states of the EC and/or EFTA act collectively as a unit in a bilateral governance structure.

Sources: World Bank (various years); OECD (various years); and *UN Statistical Yearbook* (various years).

deviation of individual GDP shares from their sample mean. One disadvantage is that the upper bound (MAX) of *P*, which is equivalent to $1 - 1/N$, varies with the number of signatories. To control for differences in the maximum value of *P*, I use the ratio of the proportional asymmetry index to its range (*P*/MAX).

To estimate the level of asymmetry within each accord, I use aggregate GDP figures denominated in U.S. dollars at current exchange rates. Where possible the index uses data from the year in which the treaty was signed.[39] For all cases, the index incorporates only countries that signed the accord at the time of its creation or reinvigoration; it excludes member states that later acceded and includes any that later withdrew. [EFTA] is the only pact to have duplicate entries. *** Other agreements that underwent various changes over time *** hardly shifted in terms of asymmetry and thus have one entry from the year of their establishment. *

Using these guidelines, Table 14.4 ranks and organizes the sixty-three data points into two categories, low and high, based on the level of economic asymmetry within each pact. The rank order of the pacts derives from their *P*/MAX scores, which are listed from low to high. To facilitate comparisons, Table 14.4 reports the underlying GDP shares of signatories to each agreement in descending order ***. These GDP shares make evident the intuitive appeal of this ordering, but with a small sample size and categorical dependent variable it is also necessary to draw a line between low and high asymmetry. Although this *P*/MAX index captures the level of asymmetry across all signatories, my theoretical approach suggests that the relative size of the largest members may be more important than the distribution of shares among smaller economies. The reason is that two or three symmetrically positioned regional powers that depend heavily on access to each others' markets may endorse a legalistic system even if the gap in size between them and their neighbors is substantial.[40] By focusing on the relative size of the largest signatories, one can define a threshold between high and low asymmetry that conforms to the rank order in Table 14.4. For bilateral pacts, if the larger country's share of GDP exceeds 70 percent, asymmetry is high, as it is in

[39] The two exceptions are the 1973 CARICOM and the 1969 SACU, both of which reflect GDP data from 1970.

[40] For an argument along these lines regarding the critical role of the United States and the European Union in the legalistic dispute settlement reforms of the Uruguay Round of GATT, see Smith 1998.