

# SUBSIDIARITY IN REGIONAL INTEGRATION REGIMES IN LATIN AMERICA AND AFRICA

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## I

### INTRODUCTION

The principle of subsidiarity features prominently in discussions concerning the allocation and exercise of political and legal authority in multilevel governance arrangements in which at least some competences are shared between different levels of politico-legal decisionmaking—so much so that some have heralded, at least in Europe, an emerging “age of subsidiarity.”<sup>1</sup> Understood as signifying a “rebuttable presumption for the local,”<sup>2</sup> or favoring lower levels of political organization and decisionmaking more generally, much of the legal and political science literature on the topic takes its principal theoretical and empirical cues from the experience with subsidiarity and its cognates in European institutional contexts. In the European Union (EU), subsidiarity made its first appearance in the 1992 Treaty of Maastricht<sup>3</sup> and is currently codified in Article 5(3) of the Treaty on European Union (TEU);<sup>4</sup> an additional protocol provides national parliaments with monitoring rights as to the EU’s compliance with the principle.<sup>5</sup> In the context of the European Convention of Human Rights (ECHR),<sup>6</sup> subsidiarity considerations have figured in particular as part of the “margin of appreciation” doctrine, which grants respondent states some freedom of choice in how they interpret and

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1. See, e.g., Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487, 491 (2014).

2. Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 147, 148.

3. Treaty on European Union arts. B & G (5), Feb. 7, 1992, 1992 O.J. (C 191) 1, 6 (introducing new article 3(b) on the subsidiarity principle into the Treaty Establishing the European Economic Community).

4. See Consolidated Version of the Treaty on European Union art. 5(3), 2012 O.J. (C 326) 13, 18 [hereinafter TEU].

5. See Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, 2010 O.J. (C 83) 206.

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. no. 5 [hereinafter ECHR].

apply Convention provisions domestically.<sup>7</sup> Developed especially in the jurisprudence of the European Court of Human Rights (ECtHR), express references to the margin of appreciation and subsidiarity as guides for the Court's supervisory practice will be added to the preamble of the ECHR once Protocol No. 15 to the Convention enters into force.<sup>8</sup>

Whereas the meaning and operation of subsidiarity in the European context are fairly well investigated and understood, less is known about the principle's significance outside of Europe. Nothing about subsidiarity would prevent it from being deployed in multilevel governance arrangements elsewhere, and some authors have discussed the subsidiarity principle in terms of its general applicability.<sup>9</sup> Regarding specifically regional contexts, there is no dearth of organizations in the Americas, Africa, or Asia—nor of organizations that cut across regions and continents—that strive for greater economic and, less frequently, political integration of their member states. In these organizations, subsidiarity might have a role to play. Because the institutional designs of many regional integration organizations have been inspired by the European model, and because the question of the exercise of overlapping competences located at different levels of politico-legal organization can arise in all multilevel governance systems, one might expect that a fundamental principle that addresses precisely this question and that has fruitfully been employed elsewhere would be adopted as well.

This article investigates the presence or absence of subsidiarity in select regional economic integration organizations—namely, the Southern Common Market (Mercosur) and the Andean Community in Latin America, and also the Economic Community of West African States (ECOWAS), the East African

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7. See Herbert Petzold, *The Convention and the Principle of Subsidiarity*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41, 59 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds., 1993) (noting that the “margin of appreciation . . . stems directly from the principle of subsidiarity as it applies within the Convention system”); Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 *HUM. RTS. L. REV.* 313, 320–39 (2015) (tracing the use of subsidiarity in the ECtHR's jurisprudence); Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 *INT'L & COMP. L.Q.* 21, 22–32 (2016) (examining justifications and critique for the Court's deference based on the use of the margin-of-appreciation doctrine).

8. See Protocol No. 15 Amending the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, June 24, 2013, C.T.E.S. no. 213; see also Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms pmbl. & art. 1, Oct. 2, 2013, C.T.E.S. no. 214 (establishing the right of the highest national courts to request ECtHR advisory opinions in order to “reinforce implementation of the Convention, in accordance with the principle of subsidiarity”); Føllesdal, *supra* note 2, at 153.

9. See, e.g., DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION (Lukasz Gruszczynski & Wouter Werner eds., 2014); Andreas Føllesdal, *Subsidiarity as a Constitutional Principle in International Law*, 2 *GLOBAL CONSTITUTIONALISM* 37 (2013); Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *AM. J. INT'L L.* 38 (2003); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EUR. J. INT'L L.* 907 (2005); see also Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, *LAW & CONTEMP. PROBS.*, no. 2, 2016, at 123.

Community (EAC), and the Southern African Development Community (SADC) in Africa. Part II briefly restates the theoretical framework for this investigation. Parts III and IV examine, at the level of formal legal instruments and other official documents, the use and definition of subsidiarity in the regional contexts under consideration. The final part concludes.

## II

### SUBSIDIARITY AND REGIONAL INTEGRATION REGIMES

As noted above, the basic thrust of the subsidiarity principle<sup>10</sup> favors governance at lower, more local levels. The functional role of the principle in concrete governance arrangements beyond the state is to lay down the criteria that, if met, rebut that presumption and authorize or justify the exercise of authority at the regional or global level of organization. These criteria turn subsidiarity into a conditional switch between levels of governance. In the case of the EU, the implied criteria are effectiveness and efficiency: as stipulated by Article 5(3) of the TEU, for the EU to exercise a nonexclusive competence, the subsidiarity principle requires that the intended objective cannot be adequately accomplished by the member states acting alone *and* “can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”<sup>11</sup> Both the negative and the positive criteria must be met before the subsidiarity principle points to the EU as the institution appropriate for regulation and policymaking.<sup>12</sup>

In other institutionally bounded contexts,<sup>13</sup> different criteria have been employed. The “complementarity principle,” operating at the admissibility stage of cases brought before the International Criminal Court, also employs the logic of subsidiarity by using a country’s inability or unwillingness to pursue prosecutions domestically as the criteria for rebutting the presumption for the local.<sup>14</sup> Elsewhere, the “exhaustion of domestic remedies” requirement, a standard admissibility requirement litigants must meet before the merits of individual human rights complaints can be considered by judicial and quasi-

10. See Theodore Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 YB. EUR. L. 203, 213–17 (1994) (using Ronald Dworkin’s distinction between rule and principle to point out that subsidiarity as codified in the EU represents an instance of the former rather than the latter, but that subsidiarity may also operate in a principle’s guiding, rather than a rule’s outcome-determinative manner).

11. TEU, *supra* note 4, art. 5(3).

12. PHILIPP KIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY: CONSTITUTIONAL THEORY AND EMPIRICAL REALITY* 70 (2012).

13. See Markus Jachtenfuchs & Nico Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1, 8–9 (distinguishing between the operation of subsidiarity in unbounded versus institutionally bounded contexts).

14. See Rome Statute of the International Criminal Court art. 17(1), July 17, 1998, 2187 U.N.T.S. 90 (stipulating that cases are inadmissible before the ICC except where a state involved with jurisdiction over the charged crime(s) is “unwilling or unable” to investigate and prosecute itself); see also *id.* arts. 17(2) & 17(3) (laying down criteria for determining unwillingness and inability).

judicial dispute-settlement bodies beyond the state,<sup>15</sup> expresses a sequential version of subsidiarity. In the same issue area, the ECtHR's "margin of appreciation" foregrounds the epistemic advantages of national decisionmakers,<sup>16</sup> the greater democratic legitimacy of domestic procedures,<sup>17</sup> and the absence of a European policy of near-consensus as compelling, but still rebuttable, reasons for deference.<sup>18</sup>

In line with the demand and supply conjectures articulated in the introduction to this issue,<sup>19</sup> in the case of the regional organizations here under consideration, one should expect the appearance of subsidiarity, or of a related competence-selecting principle, to be conditioned by the following factors: First, demand for subsidiarity should be higher the more the regional arrangement creates an actual multilevel governance system that situates consequential politico-legal decision-making power at the regional level and whose nonexclusive competence overlaps with that of the member states.<sup>20</sup> Second, subsidiarity should more likely be demanded the more regional decisionmaking is removed from state consent, that is, when consensus and unanimity give way to majority voting—"pooled sovereignty"<sup>21</sup>—or even to full delegation of decision-making authority to a regional organ no longer directly controlled by states.<sup>22</sup> Third, the demand for subsidiarity should be positively correlated with the intrusiveness and specificity of an organization's or organ's output.<sup>23</sup> Fourth, the more a regional integration regime deals preponderantly with the regulation and management of (economic) externalities, the smaller the probability that a subsidiarity principle will be supplied; by the same token, as more internal matters are being regulated, the probability of its supply should increase.<sup>24</sup> Fifth, the preferences of powerful member states for regulatory uniformity, and, sixth, preferences of well-entrenched regional

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15. See, e.g., ECHR, *supra* note 6, art. 35(1) ("The Court may only deal with the matter after all domestic remedies have been exhausted . . ."); American Convention on Human Rights art. 46(1), Nov. 22, 1969, 1144 U.N.T.S. 123; Optional Protocol to the International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

16. See ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY* 148–50 (2012).

17. See *id.* at 75–79; see also Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023, 1041–42 (2012).

18. KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* 132–42 (2015) (discussing the role of consensus in the width of the margin of appreciation).

19. Jachtenfuchs & Krisch, *supra* note 13, at 14–17.

20. *Id.* at 14–15.

21. See generally Liesbet Hooghe & Gary Marks, *Delegation and Pooling in International Organizations*, 10 REV. INT'L ORGS. 305, 307 (2015) (distinguishing delegation as a "conditional grant of authority by member states to an independent body" from pooling, defined as "joint decision making among the principals themselves").

22. Jachtenfuchs & Krisch, *supra* note 13, at 15.

23. *Id.*

24. *Id.*

bodies for securing or broadening their own authority should likewise be expected to lower the probability of the provision of a formally articulated subsidiarity principle.<sup>25</sup>

Given these conjectures, the institutional contexts in which one should most likely find references to subsidiarity are the regional regimes' third-party dispute-settlement arrangements. Regarding the question of overlapping competences as the most obvious general context for the application of a subsidiarity principle, assessments are complicated by the fact that few treaties follow the EU's example of expressly allocating competences in terms of exclusiveness and nonexclusiveness.<sup>26</sup> As a result, their exclusive or nonexclusive character will usually have to be inferred from the governance architecture as a whole and subsequent practice under the treaty in question. Furthermore, although the demand for subsidiarity may be highest under conditions of delegation and pooled sovereignty, it also retains some utility in arrangements that preserve a national veto by requiring consensus or unanimity. This is so because the exercise of that veto is generally in the hands of the executive branch, which represents the state in international organizations, and its exercise or nonexercise may not reflect the subsidiarity concerns of other national stakeholders with competences at stake, such as national parliaments. That said, executives generally have little incentive, unless compelled, to press for the inclusion of subsidiarity principles that benefit other, possibly rival, domestic institutions.

Subsidiarity may play different roles in the institutional design and operation of regional organizations. When formally included in an organization's constitutive instrument, as in the case of the EU, subsidiarity may be invoked to regulate, guide, or otherwise inform the choice of the level, or site, of politico-legal decision-making competence that is to be exercised to achieve a given objective. In this sense, then, subsidiarity primarily serves a selection function. The absence of any mention of subsidiarity in the organization's legal or policy instruments, however, does not necessarily mean that considerations of subsidiarity have been absent. Instead, subsidiarity concerns may have already affected the decision as to which competences have been delegated to the regional organization in the first place, which reveals an allocation function. Though there may be contention over whether, in the absence of express stipulation, the competences allocated to the regional organization are exclusive or not, at least with respect to those decision-making powers that have been left entirely at the national level one may safely infer that the treaty drafters determined that the domestic level was the appropriate one for achieving any objectives within the relevant policy domain. Last but not least, irrespective of whether formally stipulated as an institutional principle or not, considerations of subsidiarity may still inform the manner and modalities of

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25. *Id.* at 16–17.

26. See Consolidated Version of the Treaty on the Functioning of the European Union arts. 2–6, 2012 O.J. (C326) 47, 50–53 [hereinafter TFEU].

the exercise of both exclusive and nonexclusive competences of international organizations. Whereas all three uses of the subsidiarity principle are important and may be separately or jointly present, this article focuses only on the extent to which subsidiarity is being articulated and employed as an express competence-selecting principle in the regional organizations reviewed here.

### III

#### SUBSIDIARITY IN LATIN AMERICAN REGIONAL INTEGRATION REGIMES

In addition to the intricate web of regional trade agreements, aptly captured by the memorable metaphor of the “spaghetti bowl” of multiple and often overlapping agreements,<sup>27</sup> the Americas are home to a sizable number of formal regional organizations that at least nominally pursue economic and political integration. Indeed, since the late 1960s, “integration” is mentioned as a programmatic goal in the continent-wide Charter of the Organization of American States (OAS).<sup>28</sup> With the exception of the OAS and a few subregional organizations of which Mexico is a member, all of these are located in Latin America, which is home to at least thirteen regional and subregional organizations as of 2012.<sup>29</sup> This part discusses two of the most prominent Latin American regional integration organizations: Mercosur and the Andean Community.<sup>30</sup>

##### A. Mercosur

Mercosur was founded in 1991 by the Treaty of Asunción, concluded between Argentina, Brazil, Paraguay, and Uruguay.<sup>31</sup> In 2012, Venezuela joined

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27. See ANTONI ESTEVADEORDAL ET AL., BRIDGING REGIONAL TRADE AGREEMENTS IN THE AMERICAS viii–x (Inter-American Developmental Bank Special Report on Integration and Trade, 2009) (discussing the increase in regional trade agreements and the consequences of the “spaghetti bowl’s” continued expansion).

28. See Charter of the Organization of American States (as amended) arts. 39(a), 41–44, 46 & 52, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.pdf](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.pdf) (outlining how member states should cooperate to achieve, *inter alia*, regional integration). The original OAS Charter did not include any express commitment to integration; see Charter of the OAS, Apr. 30, 1948, 119 U.N.T.S. 1609. The integration-related provisions were introduced by the Protocol of Amendment to the Charter of the Organization of American States (“Protocol of Buenos Aires”) art. VIII, Feb. 27, 1967, [http://www.oas.org/dil/treaties\\_B-31\\_Protocol\\_of\\_Buenos\\_Aires.htm](http://www.oas.org/dil/treaties_B-31_Protocol_of_Buenos_Aires.htm), whose preamble expressed the OAS member states’ commitment “to speed up the process of economic integration.” *Id.* pmbl.

29. Detlef Nolte, *Latin America’s New Regional Architecture: A Cooperative or Segmented Regional Governance Complex?* 2 (European University Institute Working Paper RSCAS 2014/89, Sept. 2014).

30. In 2008, aiming at integrating Mercosur and the Andean Community, their member states, plus Chile, Guyana, and Suriname, signed the constitutive treaty of the Union of South American Nations (UNASUR, in force since 2011), which may eventually displace the subregional organizations but so far has not done so. See, e.g., José Briceño-Ruiz & Andrea Ribeiro Hoffmann, *Post-Hegemonic Regionalism, UNASUR, and the Reconfiguration of Regional Cooperation in South America*, 40 CAN. J. LATIN AM. & CARIBBEAN STUD. 48 (2015) (discussing the creation of UNASUR in the context of Latin American regionalism).

31. Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 2140 U.N.T.S.

as the fifth full member,<sup>32</sup> and Bolivia is in the process of becoming the sixth.<sup>33</sup> The Treaty of Asunción expressed the objective of establishing a common market by December 31, 1994,<sup>34</sup> but it did not provide for any effective mechanism in the Treaty's mere twenty-four articles by which the laws and policies necessary for its creation were to be put in place. Only two decision-making bodies, the Council of the Common Market and the Common Market Group, were established, and both were composed of governmental representatives from all member states—at the ministerial level in the Council and lower ranks in the Common Market Group. Beyond some basic allocation of responsibilities, “the final institutional structure of the administrative organs of the common market, as well as the specific powers of each organ” were left to be determined prior to the establishment of the common market, that is, before December 31, 1994.<sup>35</sup> This eventually occurred in the Protocol of Ouro Preto.<sup>36</sup> Despite institutional minimalism, remarkable initial progress was achieved, with internal tariffs abolished for ninety percent of traded goods and a uniform external tariff applied to eight-five percent of such goods by the end of 1994.<sup>37</sup> Since then, hampered by intervening economic crises, political disagreements, political and economic imbalance among its members, and failure to implement and comply with Mercosur rules domestically, further progress has been less smooth.<sup>38</sup> As a result, the customs union—a key step toward a common market—remains imperfect,<sup>39</sup> and intragroup trade as a percentage of overall exports is less today than it was in the late 1990s.<sup>40</sup>

No Mercosur treaty or protocol mentions subsidiarity as a guiding principle for the exercise of competences within the organization.<sup>41</sup> An apparent

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257 [hereinafter Treaty of Asunción].

32. See Rafael A. Porrata-Doria, Jr., *Mercosur at Twenty: From Adolescence to Adulthood?*, 27 TEMP. INT'L & COMP. L.J. 1, 34–35 (2013) (discussing Venezuela's accession to Mercosur).

33. See Graciela Rodríguez-Ferrand, *Mercosur: Protocol for Accession of Bolivia Approved* (Aug. 18, 2015), <http://www.loc.gov/law/foreign-news/article/mercosur-protocol-for-accession-of-bolivia-approved/> (last visited Apr. 7, 2016).

34. Treaty of Asunción, *supra* note 31, art. 1.

35. *Id.* art. 18.

36. Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur, Dec. 17, 1994, 2145 U.N.T.S. 298 [hereinafter Protocol of Ouro Preto].

37. Karsten Bechle, *Kein Auslaufmodell: 20 Jahre Mercosur*, GIGA FOCUS no. 3 at 3 (2011), [http://www.giga-hamburg.de/de/system/files/publications/gf\\_lateinamerika\\_1103.pdf](http://www.giga-hamburg.de/de/system/files/publications/gf_lateinamerika_1103.pdf).

38. See *id.* at 4–5 (addressing factors that have impeded further integration); see also Laura Gómez-Mera, *Obstacles to Regional Integration in Latin America and the Caribbean*, in REGIONAL INTEGRATION FIFTY YEARS AFTER THE TREATY OF ROME: THE EU, ASIA, AFRICA AND THE AMERICAS 111 (Joaquín Roy & Roberto Domínguez eds., 2008) (discussing compliance and implementation gaps in regional organizations in Latin America, including Mercosur).

39. Finn Laursen, *Requirements for Regional Integration: A Comparative Perspective on the EU, the Americas and East Asia*, in COMPARATIVE REGIONAL INTEGRATION: EUROPE AND BEYOND 239, 250 (Finn Laursen ed., 2010).

40. UNITED NATIONS, UNCTAD HANDBOOK OF STATISTICS 2014 at 41 (2014).

41. See, e.g., Roberto D. Bloch, *El Principio de Subsidiariedad en la Unión Europea y en el Mercosur*, in LA CONSTRUCCIÓN DEL MERCOSUR: LA EVOLUCIÓN DE UN NUEVO ACTOR EN LAS RELACIONES INTERNACIONALES 137, 143 (2003) (noting the absence of subsidiarity in Mercosur's

explanation for this absence, in line with the first conjecture,<sup>42</sup> is that Mercosur has been designed as a purely intergovernmental organization and continues to operate as such.<sup>43</sup> Though the Protocol of Ouro Preto increased the number of official Mercosur organs to six,<sup>44</sup> three of these—the Joint Parliamentary Commission, which later became the Mercosur Parliament;<sup>45</sup> the Economic–Social Consultative Forum; and the Administrative Secretariat—have consultative and supportive functions, but no consequential decision-making authority.<sup>46</sup> The three bodies that do—the Council of the Common Market, the Common Market Group, and the newly introduced Mercosur Trade Commission—can issue legally binding decisions, resolutions, and directives.<sup>47</sup> Not only are all three composed of government representatives, but their decisions also need to be adopted “by consensus and in the presence of all the States Parties.”<sup>48</sup> There is no majoritarian decisionmaking or “pooled sovereignty,” and hence there is no genuine supranational authority in Mercosur,<sup>49</sup> nor do its constitutive instruments provide for any express stipulation as to which of Mercosur’s broadly defined competences are exclusive and which ones are shared with the member states.<sup>50</sup> Each government can veto decisions that it thinks should not be considered at the level of Mercosur or with which it simply disagrees. Thus, there is no obvious demand for subsidiarity, as each government retains full control over which decisions should be made domestically versus at the regional level.

Rather than at the level of intergovernmental organs, subsidiarity might instead surface as part of Mercosur dispute settlement. Annex III to the Treaty of Asunción<sup>51</sup> and the 1991 Protocol of Brasilia<sup>52</sup> first implemented basic elements of Mercosur third-party dispute settlement, which the 2002 Protocol of Olivos replaced with a more elaborate system.<sup>53</sup> The current system essentially

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constitutive instruments); FELIX FUDERS, *DIE WIRTSCHAFTSVERFASSUNG DES MERCOSUR* 75, 587 (2008) (noting the absence in Mercosur of a subsidiarity principle).

42. See *supra* Part II.

43. See MARIANNE KLUMPP, *SCHIEDSGERICHTSBARKEIT UND STÄNDIGES REVISIONSGERICHT DES MERCOSUR* 64–67 (2013); Santiago Deluca, *La subsidiariedad y las competencias de la Unión Europea y el Mercosur*, 2 *REVISTA LATINOAMERICA DE DERECHO*, no. 4, 125, 144–47 (2005) (both discussing intergovernmental nature of Mercosur and the absence of supranational elements); see also Protocol of Ouro Preto, *supra* note 36, art. 2 (referring to Mercosur’s decision-making bodies as “inter-governmental organs”).

44. Protocol of Ouro Preto, *supra* note 36, art. 1.

45. Protocol on the Establishment of the Mercosur Parliament, Dec. 9, 2005, 2444 U.N.T.S. 172.

46. See Protocol of Ouro Preto, *supra* note 36, arts. 26, 29 & 32.

47. *Id.* arts. 9, 15 & 20.

48. *Id.* art. 37.

49. KLUMPP, *supra* note 43, at 70 (noting the lack of autonomy of Mercosur organs).

50. FUDERS, *supra* note 41, at 75, 587 (noting the imprecisely defined competences of Mercosur).

51. Treaty of Asunción, *supra* note 31, annex III.

52. Protocol of Brasilia for the Solution of Controversies, Dec. 17, 1991, 2145 U.N.T.S. 25.

53. Protocol for the Settlement of Disputes in Mercosur, Feb. 18, 2002, 42 I.L.M. 2 (2003) [hereinafter Protocol of Olivos]. See generally Raúl Vinuesa, *The Mercosur Settlement of Disputes System*, 5 *L. & PRACT. OF INT’L CTS. & TRIB.* 77, 83–87 (2006).



follows the WTO model, rather than that of the EU, providing both for arbitration before a three-member ad hoc tribunal if a dispute cannot be settled through direct negotiations as well as for the possibility of requesting review of an arbitral award's legal arguments by a Permanent Review Tribunal (PRT).<sup>54</sup> The members of the ad hoc tribunals and the PRT are, as to be expected from judicial bodies, formally independent. Unlike the other decision-making organs within Mercosur, the ad hoc tribunals and the PRT are thus in a position to impose, by way of judicial lawmaking through treaty interpretation, legal obligations upon member states that these have not consensually agreed upon.<sup>55</sup>

So far, however, subsidiarity has not played any role in Mercosur jurisprudence. Indeed, the lack of jurisprudence so far is in part due to the fact that Mercosur members remain free to take trade complaints to the WTO dispute-settlement body instead of to Mercosur tribunals.<sup>56</sup> As of early 2016, ten arbitral awards had been issued under the rules of the Protocol of Brasilia, two under the revised rules of the Protocol of Olivos, and six awards and three advisory opinions by the PRT.<sup>57</sup> No case mentions “subsidiarity,” the “margin of appreciation,” or other related concepts.

At the same time, however, both the institutional design of the dispute-settlement system and the practice of the arbitral tribunals can be interpreted to imply considerations of subsidiarity. Institutionally, the absence of compulsory jurisdiction of a permanent court and the apparent preference for ad hoc arbitration, with its greater control over the appointment of arbitrators and procedural issues, is indicative of a preference for maintaining greater control over Mercosur dispute settlement by the member states and thus of subsidiarity in its allocative function. In their jurisprudence, Mercosur tribunals have emphasized the organization's intergovernmental character and distinguished it from the EU's supranationality.<sup>58</sup> They have, moreover, differed in spelling out the concrete remedial obligations that follow from an adverse finding, leaving the question of how to execute awards in some cases—and thus granting at least some margin of appreciation—to the respondent states.<sup>59</sup> In one award, the Tribunal articulated what might be identified as a “factual” understanding of subsidiarity when it noted that national authorities could regulate certain matters as long as Mercosur had not done so; the Tribunal did not, however, specify any normative criteria Mercosur would have to meet to preempt

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54. Protocol of Olivos, *supra* note 53, arts. 6(1), 17(1) & 17(2). The parties can also decide to submit their case directly to the PRT, which then has the same jurisdiction as the ad hoc tribunals. *See id.* art. 23.

55. KLUMPP, *supra* note 43, at 68–69.

56. *See* Protocol of Olivos, *supra* note 53, art. 1(2).

57. *See* awards and advisory opinions at *Sistema de Solución de Controversias*, TRIBUNAL PERMANENTE DE REVISIÓN, [http://www.tprmercosur.org/es/sol\\_controversias.htm](http://www.tprmercosur.org/es/sol_controversias.htm) (last visited Apr. 7, 2016).

58. *Uru. v. Arg.*, Arbitral Award of Sept. 6, 2006, para. 150, [http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/TPR\\_Tribunal%20AdHoc\\_Laudo%20Libre%20Circulacion\\_ES.pdf](http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/TPR_Tribunal%20AdHoc_Laudo%20Libre%20Circulacion_ES.pdf).

59. *See* KLUMPP, *supra* note 43, at 251–53.

national regulation.<sup>60</sup> In the absence of such criteria, this approach effectively privileges one national actor, the executive, over other domestic actors, such as the legislature; unlike the latter, the executive could use Mercosur to stave off national regulation by other domestic actors. In short, although certain judicial pronouncements might be interpreted in terms of the subsidiarity principle, no related judicial doctrine has thus far been articulated by the Mercosur tribunals.

In conclusion, given the absence of genuine multilevel governance in Mercosur, the continuing centrality of state consent due to the prevalence of consensual decisionmaking, and an institutionally weak dispute-settlement system, there has so far been little pressing need for a formal subsidiarity principle, a finding that meets the expectations under the first three demand conjectures previously articulated.<sup>61</sup> Because Mercosur regulation remains squarely focused on managing economic transactions and externalities—Mercosur does not possess any competence in the field of human rights, for example—the probability of the supply of a subsidiarity principle is low on that account as well, in line with the fourth conjecture.<sup>62</sup> If subsidiarity has played a role within Mercosur, it has been with respect to allocating exclusive politico-legal decision-making authority to—or, rather keeping it in—the hands of national executives, reflecting “member states’ desire to achieve economic integration through political cooperation rather than institutionalism.”<sup>63</sup> Implementation and enforcement of Mercosur norms and decisions likewise remain the member states’ responsibility.<sup>64</sup> The strong position of presidents in Latin American political systems has made Mercosur and its further development effectively subject to “member state presidential diplomacy,” resulting in a “state of affairs . . . described as interpresidentialism.”<sup>65</sup> When actors other than the executive, including subnational actors such as the constituent entities of federal states, have sought to exert influence on Mercosur policymaking, this has happened through informal channels and procedures.<sup>66</sup> The actual impact of such informal attempts, however, always remains conditional on the willingness of national executives to act according to them at the level of Mercosur decisionmaking.

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60. *Brza. v. Arg.*, Arbitral Award of May 21, 2001, para. 110, <http://www.mercosur.int/msweb/portal%20intermediario/es/controversias/archivos/IV%20LAUDO.pdf>.

61. See *supra* Part II.

62. See *id.*

63. Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and Mercosur*, 17 J. INT'L L. & BUS. 850, 867–68 (1996-97).

64. Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. DAVIS J. INT'L L. & POL'Y 255, 270–71 (2008).

65. Porrata-Doria, *supra* note 32, at 15–16.

66. See Marcelo de Almeida Medeiros, *Multi-Level Governance and the Problem of Balance within Mercosur*, in *MERCOSUR: BETWEEN INTEGRATION AND DEMOCRACY* 75, 75 (Francisco Domínguez & Marcos Aurélio Guedes de Oliveira eds., 2004).

## B. Andean Community

The Andean Community (AC) was founded by the 1969 Cartagena Agreement,<sup>67</sup> known at the time as the Andean Pact, and currently has four members: Bolivia, Colombia, Ecuador, and Peru. Institutionally enhanced through subsequent protocols and decisions,<sup>68</sup> it was fully overhauled and received its present name in 1996;<sup>69</sup> further reforms followed in 1997.<sup>70</sup> The AC's declared objective is "balanced and harmonious development . . . through economic and social integration and cooperation."<sup>71</sup>

That the AC has taken some institutional design cues from the European Communities and later the EU accounts for a number of differences between the AC and Mercosur. First, the current institutional setup that defines the "Andean Integration System" is denser and more diversified, though not necessarily more effective.<sup>72</sup> It is composed of no less than ten main organs and a number of additional entities.<sup>73</sup> Second, the AC's institutional setup contains certain nominally supranational elements that are missing from Mercosur. Although the AC's Presidential Council, the Council of Foreign Affairs Ministers, and the Commission are all intergovernmental in nature,<sup>74</sup> the General Secretariat, the AC's executive body<sup>75</sup> headed by a formally independent General Secretary,<sup>76</sup> is to be staffed with officials chosen primarily

67. Agreement on Andean Sub-Regional Integration, May 26, 1969, 8 I.L.M. 910 (1969).

68. See Treaty Creating the Andean Tribunal of Justice, May 28, 1979, 18 I.L.M. 1203 (1979); Treaty Establishing the Andean Parliament, Oct. 25, 1979, 19 I.L.M. 269; Protocol of Cochabamba Amending the Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1996, [http://www.wipo.int/edocs/lexdocs/treaties/en/pcjca/trt\\_pcjca.pdf](http://www.wipo.int/edocs/lexdocs/treaties/en/pcjca/trt_pcjca.pdf); Additional Protocol to the Treaty Establishing the Andean Parliament, April 23, 1997, [http://www.wipo.int/edocs/lexdocs/treaties/en/pteap/trt\\_pteap.pdf](http://www.wipo.int/edocs/lexdocs/treaties/en/pteap/trt_pteap.pdf); Instrument for the Creation of the Andean Presidential Council, May 23, 1990, in Acta de Machu Picchu 7, [http://intranet.comunidadandina.org/Documentos/Presidencial/CP\\_01.doc](http://intranet.comunidadandina.org/Documentos/Presidencial/CP_01.doc) (in Spanish).

69. Protocol of Amendment Establishing the Andean Community and the Andean Integration System (Protocol of Trujillo), Mar. 10, 1996, [http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=224901](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=224901).

70. Protocol of Sucre, June 25, 1997, [http://www.sice.oas.org/trade/junac/Carta\\_Ag/sucre\\_e.asp](http://www.sice.oas.org/trade/junac/Carta_Ag/sucre_e.asp). See generally José Luís da Cruz Vilaça & José Manuel Sobrino Heredia, *The European Union and the Transformation of the Andean Pact into the Andean Community: From the Trujillo Protocol to the Sucre Act*, 3 EUR. FOR. AFF. REV. 13, 27–36 (1998). A consolidated version of the text of the Cartagena Agreement is available at <http://www.sice.oas.org/trade/JUNAC/Decisiones/dec563e.asp> (last visited Apr. 7, 2016) [hereinafter Cartagena Agreement (as amended)].

71. Cartagena Agreement (as amended), *supra* note 70, art. 1.

72. See Laurence R. Helfer, Karen J. Alter & Florencia Guerzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1, 1 n. 3 (2009) (noting that "most commentators have ignored the Andean Community or dismissed it as a failure").

73. Cartagena Agreement (as amended), *supra* note 70, art. 6.

74. *Id.* arts. 11 (Andean Presidential Council), 15 (Council of Ministers of Foreign Affairs), 21 (Commission of the Andean Community).

75. *Id.* art. 29.

76. *Id.* art. 32 ("During his term in office, the General Secretary shall not be able to carry out any other activity; nor will he seek or accept instructions from any government, national entity or international body.").

for merit,<sup>77</sup> and its purpose is to “act[] solely in accordance with the interests of the sub-region.”<sup>78</sup> Not only are these aspects important to the Secretariat’s competence of initiating Community legislation, which is shared with the member states, but the Secretariat can also issue binding resolutions that become part of the “legal system of the Cartagena Agreement.”<sup>79</sup> Another supranational element is the Commission’s power to adopt the principal legislative instrument, known as Decisions, by absolute majority, or, with respect to a list of enumerated issues, by absolute majority so long as no negative vote is cast. By contrast, Decisions by the Council of Foreign Affairs Ministers, which are also part of AC law, require consensus.<sup>80</sup> Third, AC law, like EU law, formally enjoys both supremacy over national law and direct effect within national legal orders. Owing to a lack of agreement on these issues at the time of the ratification of the original Andean Pact, legal stipulations to these effects are found in the Treaty creating the Andean Court of Justice (ACJ) rather than in the Cartagena Agreement.<sup>81</sup>

The creation of a supranational multilevel governance arrangement with pooled sovereignty should, per conjectures one and two,<sup>82</sup> increase the likelihood of the inclusion of a competence-selecting principle such as subsidiarity. Yet despite the otherwise liberal borrowing of institutional elements from the European model and the fact that major institutional reforms were implemented after subsidiarity had made its formal appearance in the 1992 Maastricht Treaty, the principle is not explicitly mentioned in any of the AC’s constitutive legal instruments.<sup>83</sup> Although a detailed academic proposal to amend the existing treaties to include subsidiarity as a competence-selecting principle within the AC has surfaced,<sup>84</sup> at the political level there has been little meaningful debate about the desirability of adopting a subsidiarity principle and no initiative to introduce it.<sup>85</sup> The likely explanation for this absence, in line

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77. *Id.* arts. 35 (Directors-General) & 37 (technical and administrative staff).

78. *Id.* art. 29.

79. ACJ Treaty (as amended), *supra* note 68, arts. 1(d) & 4.

80. Cartagena Agreement (as amended), *supra* note 70, arts. 17 & 26.

81. Decisions by the Andean Council of Foreign Ministers or of the Commission and Resolutions of the General Secretariat shall be directly applicable in Member Countries. ACJ Treaty (as amended), *supra* note 68, art. 3. Member states are obliged to comply “with the provisions comprising the legal system of the Andean Community” and must “refrain from adopting or employing any such measure as may be contrary to those provisions or that may in any way restrict their application.” *Id.* art. 4 (echoing a similar provision in EU law, which is now codified in the TEU, *supra* note 4, art. 4 (3)). Citing to CJEU jurisprudence, the ACJ affirmed the supremacy and direct effect of AC law in its first judgments. *See* Helfer, Alter & Guertzovich, *supra* note 72, at 16 n.76.

82. *See supra* Part II.

83. Marvin Vargas Alfaro, *Los Principios Generales del Derecho Comunitario y Andino*, REVISTA DE DERECHO COMUNITARIO, INTERNACIONAL Y DERECHOS HUMANOS no. 2 at sec. E.1 (2012), [http://www.derechocomunitario.ucr.ac.cr/index.php?option=com\\_content&view=article&id=200%3Aprincipios-generales-derecho-comunitario-andino-vargas-alfaro&Itemid=4](http://www.derechocomunitario.ucr.ac.cr/index.php?option=com_content&view=article&id=200%3Aprincipios-generales-derecho-comunitario-andino-vargas-alfaro&Itemid=4) (noting the absence of subsidiarity in AC legal instruments).

84. DANIEL ACHÁ, EL PRINCIPIO DE SUBSIDIARIEDAD: CLAVE JURÍDICA DE LA INTEGRACIÓN 113–16 (2013).

85. *Id.* at 13.

with conjecture four,<sup>86</sup> is the primarily externality-regulating nature of the AC in the area of economic transactions—like Mercosur, the AC does not have any competence in the area of human rights—which may be seen as arguing against providing member states with greater regulatory and policy freedoms.

Nor is there a general subsidiarity principle to be found in the ACJ's jurisprudence. To the contrary, under the ACJ's *complemento indispensable* principle, member states may enact domestic legislation in areas governed by AC law only to the extent that these measures serve the implementation of, and do not conflict with, AC norms.<sup>87</sup> Elsewhere, however, the Court has taken a more measured approach. For example, in one decision, the ACJ noted that issue areas falling within the Community's competence also remain "within the competence of the national legislator for an indefinite [*sic*] time until they are effectively covered by the Community norms."<sup>88</sup> In another decision, the ACJ "coupled its recognition of shared legislative authority with deference to state actors to determine the boundaries between Andean and national authority"<sup>89</sup> and it has generally refrained from directing domestic courts to apply its responses from preliminary ruling requests to the facts of the case, despite having authority to do so under the 1996 Cochabamba Protocol.<sup>90</sup> Overall, it appears that the ACJ's approach to the relationship between member states and AC institutions as they exercise competences comprises a mix of considerations that cannot yet be condensed into a straightforward judicial subsidiarity doctrine.

In sum, although the formal institutional design of the Andean Community ostensibly makes it a much more likely candidate than Mercosur for the adoption and operation of subsidiarity, so far no such principle has been articulated either at the level of the AC's constitutive legal instruments or in the ACJ's jurisprudence.

#### IV

#### SUBSIDIARITY IN AFRICAN REGIONAL INTEGRATION REGIMES

In addition to the African Union (AU) and its precursor, the Organization of African Unity, there have been at least nineteen attempts to create new or reforming and strengthening existing organizational schemes for the economic or political integration of subregional groups of African states in the post-World War II era.<sup>91</sup> Moreover, in 1991, the Organization of African Unity

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86. See *supra* Part II.

87. See, e.g., ACJ, Ruling 15-IP-2014, paras. 45–46 (Apr. 30, 2014); Karen J. Alter & Laurence R. Helfer, *Legal Integration in the Andes: Law-Making by the Andean Tribunal of Justice*, 17 EUR. L. J. 701, 711 (2011) [hereinafter *Legal Integration in the Andes*]; Karen J. Alter & Laurence R. Helfer, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INT'L. ORG. 563, 571 (2010). I thank Larry Helfer for pointing out this doctrine to me.

88. *Legal Integration in the Andes*, *supra* note 87, at 712 (quoting ATJ, Ruling 2-IP-90, point 1).

89. Alter & Helfer, *Legal Integration in the Andes*, *supra* note 87, at 712.

90. *Id.*

91. WOLFF-CHRISTIAN PETERS, THE QUEST FOR AN AFRICAN ECONOMIC COMMUNITY:

proclaimed the creation of a continental African Economic Community (AEC), which is to come about “through the co-ordination, harmonization and progressive integration of the activities of regional economic communities.”<sup>92</sup> There are currently eight such “Regional Economic Communities” (RECs) recognized by the AU as AEC building blocks,<sup>93</sup> and many states belong to more than one:<sup>94</sup> the Common Market for Eastern and Southern Africa, the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the East African Community (EAC), the Economic Community of Central African States, the Arab Maghreb Union, the Community of Sahel-Saharan States, and the Intergovernmental Agency for Development.<sup>95</sup> Only the first four are currently sufficiently effective to serve as reliable building blocks for the AEC.<sup>96</sup> The principle of subsidiarity has made a formal appearance in several RECs as well as in documents outlining the relationship between the AU and RECs in security matters.<sup>97</sup>

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REGIONAL INTEGRATION AND ITS ROLE IN ACHIEVING AFRICAN UNITY—THE CASE OF SADC 64–66 (2010).

92. Treaty Establishing the African Economic Community art. 88(1), June 3, 1991, 30 I.L.M. 1241 (1991); *see also* Constitutive Act of the African Union art. 3, July 11, 2000, 2158 U.N.T.S. 33; Protocol on Relations between the African Union and the Regional Economic Communities, July 3, 2007, <https://caast-net-plus.org/object/document/239/attach/AU-RECs-Protocol.pdf>. Further pronouncements that the “ultimate goal of the African Union is full political and economic integration leading to the United States of Africa,” AU Doc. Assembly/AU/Dec. 90 (V) (July 4-5, 2005), have so far remained aspirational.

93. *See* Assembly of the African Union, Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs), Doc. Assembly/AU/Dec.112 (vii) (July 1–2, 2006) (suspension of recognition of further RECs beyond the eight already recognized). *See generally* Richard Frimpong Oppong, *The African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web*, 18 AFR. J. INT'L & COMP. L. 92 (2010).

94. JAMES T. GATHII, AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 65–85 (2011); *see also* ECONOMIC COMMISSION FOR AFRICA, ASSESSING REGIONAL INTEGRATION IN AFRICA (ARIA V): TOWARD AN AFRICAN CONTINENTAL FREE TRADE AREA 78 (2012) (“Six African countries are members of one REC, 26 are members of two RECs, 20 are members of three RECs, and one country belongs to four RECs.”).

95. *See generally* GATHII, *supra* note 94, 143–242 (discussing key institutional elements and trade liberalization policies of the eight recognized RECs, plus of the Community of Sahel-Saharan States).

96. *See* PETERS, *supra* note 91, at 105–07; RICHARD FRIMPONG OPPONG, LEGAL ASPECTS OF ECONOMIC INTEGRATION IN AFRICA 11 n. 19 (2011) (noting that the other four RECs have “witnessed very little progress in their economic integration process”).

97. *See* Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities, and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern Africa and Northern Africa art. IV (iv), June 2008, <http://www.peaceau.org/uploads/mou-au-rec-eng.pdf> (affirming “adherence to the principles of subsidiarity, complementarity and comparative advantage, in order to optimize the partnership between the Union, the RECs and the Coordinating Mechanisms in the promotion and maintenance of peace, security and stability”). However, the Memorandum also asserts “recognition of, and respect for, the primary responsibility of the Union in the maintenance and promotion of peace, security and stability in Africa, in accordance with Article 16 of the P[er]eace and] S[ec]urity C[ouncil] Protocol.” *Id.* art. IV(ii). How these conflicting stipulations are to be reconciled remains unresolved. *See* AFRICAN UNION, AFRICAN PEACE AND SECURITY ARCHITECTURE: 2010 ASSESSMENT STUDY 67 (2010) (noting the lack of clarity as to the application of subsidiarity between the AU and the RECs in practice).

### A. Economic Community of West African States

ECOWAS was founded in 1975.<sup>98</sup> After failing to achieve its ambitious goal of bringing about a customs union within fifteen years of its creation, the organization was redesigned in 1993,<sup>99</sup> and further changes were introduced by subsequent protocols.<sup>100</sup> The revised treaty set the even more demanding objective of establishing an economic union that comprises a common market and a monetary union within fifteen years.<sup>101</sup> In its preamble, it furthermore expressly recognizes that “integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community” and affirms the “need to establish Community Institutions vested with relevant and adequate powers.”<sup>102</sup>

The types and nomenclature of many of the organs of the current ECOWAS governance architecture suggest that ECOWAS has begun to follow the institutional blueprint of the EU and to move, at least in theory, toward supranational governance. The two highest decision-making bodies, however, remain intergovernmental. At the top, the so-called Authority of Heads of State and Government is responsible for taking “all measures to ensure [the Community’s] progressive development and the realisation of its objectives.”<sup>103</sup> Just below it, the Council of Ministers has certain decision-making powers of its own, including those that derive from acts of delegation by the Authority.<sup>104</sup> There is an ECOWAS Parliament<sup>105</sup> that is to be eventually directly elected by the people of the member states and whose powers are foreseen to be “progressively enhanced from advisory to co-decision making and subsequently to law making in areas to be defined by the Authority.”<sup>106</sup> Neither has occurred, so the parliament remains limited to an advisory and consultative role.<sup>107</sup> In

98. Treaty of the Economic Community of West African States, May 28, 1975, 14 I.L.M. 1200. The ECOWAS members are Benin, Burkina Faso, Cape Verde, Gambia, Ghana, Guinea, Guinea-Bissau, Ivory Coast, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

99. Revised Treaty of the Economic Community of West African States, July 24, 1993, 2373 U.N.T.S. 233 [hereinafter Treaty of Cotonou]. See generally KOFI OTENG KUFOR, THE INSTITUTIONAL TRANSFORMATION OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES 35–68 (2006) (discussing the 1993 revisions of the ECOWAS Treaty).

100. See Supplementary Protocol A/SP1/12/01 Amending Articles 1, 3, 6, and 21 of the Revised Treaty of the Economic Community of West African States, Dec. 21, 2001; Supplementary Protocol A/SP.1/06/06 Amending the Revised ECOWAS Treaty, June 14, 2006 [hereinafter Suppl. Protocol of Abuja]. The texts of the protocols are available at ECOWAS, LEGAL DOCUMENTS, <http://documentation.ecowas.int/legal-documents/protocols/>.

101. Treaty of Cotonou, *supra* note 99, arts. 3(1), 3(2)(d) and (e) & 54(1).

102. *Id.* pmbl.

103. *Id.* art. 7(2).

104. *Id.* art. 10.

105. *Id.* art. 13; see also Protocol A/P.2/8/94 Relating to the Community Parliament, Aug. 6, 1994, [http://www.parl.ecowas.int/documents/protocols\\_eng.pdf](http://www.parl.ecowas.int/documents/protocols_eng.pdf).

106. Supplementary Protocol A/SP.3/06/06 Amending Protocol A/P.2/8/94 Relating to the Community Parliament art. 4 (revising art. 6 (2)), June 14, 2006, [http://www.parl.ecowas.int/documents/protocols\\_eng.pdf](http://www.parl.ecowas.int/documents/protocols_eng.pdf).

107. See Parliament of the Economic Community of West African States, Strategic Plan of the ECOWAS Parliament (Third Legislature) 2011–2015, ¶¶ 2 & 19–20, <http://www.parl.ecowas.int/>

2006, the Executive Secretariat was transformed into the “ECOWAS Commission,”<sup>108</sup> now consisting of fifteen Commissioners,<sup>109</sup> and was given the competence to “formulate proposals that will enable the Authority and Council to make decisions on the main orientations of policies of Member States and the Community.”<sup>110</sup> Lastly, the ECOWAS Community Court of Justice has been operational since 2001,<sup>111</sup> and its judgements are “binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.”<sup>112</sup> The 2006 reforms also clarified the supranational nature of the various ECOWAS law-making instruments, again taking cues from the EU model.<sup>113</sup> All Community Acts are to be adopted either by unanimity, consensus, or—and this is new—a two-thirds majority.<sup>114</sup> Which standard will apply to which types of decisions, however, is not specified.

The reforms have thus paved the ground for the introduction of supranationality into the governance architecture of ECOWAS,<sup>115</sup> which could open up space for subsidiarity to operate. Though none of the treaties and protocols explicitly mentions subsidiarity, the principle surfaces in a number of Community documents, such as the ECOWAS Vision 2020,<sup>116</sup> the 2007–2010

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documents/Strategic\_Plan\_Final\_Eng.pdf.

108. Suppl. Protocol of Abuja, *supra* note 100, arts. 1 & 2 (introducing new art. 17 into Treaty of Cotonou).

109. Economic Community of West African States, Decision Expanding the Management Cadre of the ECOWAS Commission and Increasing the Number of Commissioner Positions to Fifteen, Feb. 28, 2013, ECOWAS Doc. A/DEC.4/02/13, [http://documentation.ecowas.int/download/en/legal\\_documents/regulations/acts/15%20Commissioners.pdf](http://documentation.ecowas.int/download/en/legal_documents/regulations/acts/15%20Commissioners.pdf).

110. See Suppl. Protocol of Abuja, *supra* note 100, art. 2 (introducing new Article 19(5) into Treaty of Cotonou).

111. Karen J. Alter, Laurence R. Helfer & Jacqueline McAlister, *A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT’L L. 737, 748 (2013).

112. Treaty of Cotonou, *supra* note 99, art. 15(4).

113. The Authority’s Supplementary Acts are binding and have direct effect in member states. Council Regulations have the same effects; whereas directives are binding only with respect to their objectives, Council decisions are binding for those to whom they are addressed. The ECOWAS Commission “may adopt Rules relating to the execution of Acts enacted by the Council of Ministers,” and these “[r]ules . . . shall have the same legal force as Acts adopted by Council for the execution of which the Rules are adopted.” See Suppl. Protocol of Abuja, *supra* note 100, art. 2 (introducing new art. 9 into Treaty of Cotonou). Compare this with the provision on the EU’s secondary legislation in TFEU, *supra* note 26, art. 288.

114. Suppl. Protocol of Abuja, *supra* note 100, art. 2 (introducing new art. 9(8) into Treaty of Cotonou).

115. Currently most of the supranational potential of these reforms continues to exist more in theory than in practice, and decisionmaking remains centered in the Authority; see STEFAN PLENK, REGIONALE INTEGRATION IM SUB-SAHARISCHEN AFRIKA: EINE ANALYSE VON EAC, SADC UND ECOWAS 399, 418 (2015) (noting that the supranational potential of ECOWAS institutions remains largely theoretical); Jadesola O. Lokulo-Sodipe & Abiodun J. Osuntogun, *The Quest for a Supranational Entity in West Africa: Can the Economic Community of West African States Attain the Status?*, 16 POTCHEFSTROOM ELECTR. L. J. 255, 278, 282 (2013); Chidebe M. Nwankwo, Jr., *Legitimation of the Economic Community of West African States (ECOWAS): A Normative and Institutional Inquiry* 225–26 (June 2014) (unpublished PhD dissertation, Brunel University), <http://bura.brunel.ac.uk/bitstream/2438/9387/1/FulltextThesis.pdf>.

116. ECOWAS Vision 2020: Toward a Democratic and Prosperous Community 7 (June 2010)



Strategic Plan,<sup>117</sup> and some other policy documents and reports.<sup>118</sup> In most of these, subsidiarity is mentioned simply as a presumptive ECOWAS principle without further elaboration as to any criteria according to which it should operate. One document defines subsidiarity as “intended to identify all stakeholders with specific competencies and comparative advantages in their operational areas and assign them tasks relating to their specialised fields of endeavour.”<sup>119</sup> While this “comparative advantage” notion might function as a suitable criterion for switching between competences, this definition, applying to “all stakeholders,” no longer necessarily revolves around different levels of politico-legal authority and is linked to policy implementation, not policymaking.<sup>120</sup> Subsidiarity is also mentioned in the legally binding 2008 Supplementary Act on Environmental Policy.<sup>121</sup> The Act describes subsidiarity as a “guiding principle” according to which the “Community shall only deal with, at the regional level, matters that cannot be better treated at the national or local level. It is accepted that national competence shall be the rule, and Community competence the exception.”<sup>122</sup> While the Act expresses subsidiarity’s presumption for the local, it adopts a quite indeterminate criterion—“better treated”—for determining whether the appropriate level of governance is national or supranational. Subsidiarity continues to be invoked occasionally in political statements, but again without specification of the specific conditions under which ECOWAS, rather than the member states, should act.<sup>123</sup>

The ECOWAS Court of Justice should be a most likely candidate for the application of the subsidiarity principle, especially because it has been given formal jurisdiction to adjudicate human rights complaints.<sup>124</sup> Surprisingly, however, the Court’s human rights jurisdiction comes without the most

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<http://www.ecowas.int/wp-content/uploads/2015/01/ECOWAS-VISION-2020.pdf>.

117. ECOWAS Strategic Plan 2007-2010 at 24, 25, 53 (May 2007) (on file with author). The 2011-2015 version, however, no longer mentions subsidiarity; see ECOWAS Regional Strategic Plan 2011-2015 (Sept. 2010), <http://www.spu.ecowas.int/wp-content/uploads/2010/06/REGIONAL-STRATEGIC-PLAN-RFV-in-English.pdf>.

118. See, e.g., ECOWAS Renewable Energy Policy 23 & 41 (2015), [http://www.ecreee.org/sites/default/files/documents/ecowas\\_renewable\\_energy\\_policy.pdf](http://www.ecreee.org/sites/default/files/documents/ecowas_renewable_energy_policy.pdf).

119. ECOWAS Draft Community Development Programme 92 (Dec. 2012), [http://events.ecowas.int/wp-content/uploads/2013/03/CDP-Doc\\_Draft1\\_EN\\_Translated\\_070313.pdf](http://events.ecowas.int/wp-content/uploads/2013/03/CDP-Doc_Draft1_EN_Translated_070313.pdf).

120. *Id.* at 184.

121. ECOWAS, Supplementary Act A/SA.4/12/08 Relating to the ECOWAS Environmental Policy art. 7 (1)(a) (Dec. 19, 2008), [http://www.ecowas.us/files/ecowas\\_environment\\_policy.pdf](http://www.ecowas.us/files/ecowas_environment_policy.pdf).

122. *Id.*

123. See, e.g., Final Communiqué of High Level Coordination Meeting of ECOWAS Partners on the Fight against Ebola Virus Disease, press release 009/2015 para. 7 (Jan. 16, 2015), <http://news.ecowas.int/presseshow.php?nb=009&lang=en&annee=2015> (stressing respect, *inter alia*, for principle of subsidiarity “as guiding principle for effective coordination among stakeholders” in the Ebola crisis).

124. Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice art. 4, Jan. 19, 2005, [http://www.court.ecowas.org/site2012/pdf\\_files/supplementaryprotocol.pdf](http://www.court.ecowas.org/site2012/pdf_files/supplementaryprotocol.pdf).

common subsidiarity criterion in this context:<sup>125</sup> the requirement to exhaust domestic remedies before a case becomes admissible in an international tribunal.<sup>126</sup> The Court itself has repeatedly affirmed that the absence of this requirement is not an unintended oversight, and it has refused to import the exhaustion of local remedies into ECOWAS law as a generally recognized principle in human rights litigation beyond the state,<sup>127</sup> effectively turning itself into a human rights court of first instance.<sup>128</sup> An initiative in 2009 by The Gambia to introduce an exhaustion requirement failed.<sup>129</sup> On the other hand, in a practice that protects domestic judicial authority, the Court refuses to adjudicate cases that have already been decided by domestic courts in the member states, reasoning that it is not an appellate court.<sup>130</sup> This approach to overlapping levels of competence thus yields mixed results, denying deference in one respect and granting it in another.

This brief review suggests that subsidiarity has a potential role to play in ECOWAS, but the manner in which it is being invoked and, less frequently, defined, also reveals that it has not yet been subject to a systematic and coherent articulation. This may be due, in part, to the fact that ECOWAS, despite its potential for genuinely supranational governance architecture, in practice still largely operates as an intergovernmental, rather than a supranational, organization.<sup>131</sup>

## B. East African Community

The reestablished<sup>132</sup> EAC, comprised of the founding members Uganda, Kenya, and Tanzania, plus Rwanda and Burundi, ambitiously aims both at economic integration in the form of a common market and a monetary union, and at the eventual creation of a “political federation.”<sup>133</sup> The EAC is currently

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125. See *supra* note 15 and accompanying text.

126. *Id.*

127. See generally Amos Enabulele, *Sailing Against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice*, 56 J. AFR. L. 268 (2012) (analyzing the Court’s position on the exhaustion of domestic remedies doctrine).

128. Solomon Ebobrah, *Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice*, 54 J. AFR. L. 1, 9 (2010).

129. Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences* 10 (iCourts Working Paper No. 21, Aug. 30, 2015).

130. See Ebobrah, *supra* note 128, 9–10, 15–16 (noting instances in which the ECCJ refused to hear or to decide cases involving domestic judgments on the basis of the argument that it was not a court of appeal).

131. See, e.g., *id.* at 12.

132. The first EAC had been created by the Treaty for East African Co-Operation, June 6, 1967, 6 I.L.M. 932, but collapsed again in 1977. See Domenico Mazzeo, *The Experience of the East African Community: Implications for the Theory and Practice of Regional Cooperation in Africa*, in AFRICAN REGIONAL ORGANIZATION 150 (Domenico Mazzeo ed., 1984).

133. Treaty Establishing the East African Community art. 5 (2), Nov. 30, 1999, 2144 U.N.T.S. 255. The treaty has been amended in 2006 and 2007, the consolidated version of the text is available at [http://www.eac.int/sites/default/files/docs/treaty\\_eac\\_amended-2006\\_1999.pdf](http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf) [hereinafter EAC Treaty (as amended)].

the only African regional organization that includes an express reference to the principle of subsidiarity in its founding instrument as one of the “operational principles” of the Community. According to the EAC Treaty, “the practical achievement of the objectives of the Community” is to be governed by “the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake-holders in the process of integration.”<sup>134</sup> This formulation could still be read to imply the EU version of the principle, with an additional emphasis on the participation of various stakeholders across different levels. An article on interpreting the Treaty’s key terms, by contrast, defines subsidiarity as a “principle which emphasises multilevel participation of a wide range of participants in the process of *economic* integration.”<sup>135</sup> In this definition, participation by stakeholders across levels is made the defining characteristic of the principle as it applies, *expressis verbis*, to economic integration, but possibly not to political integration, at least when applying the principle *expressio unius est exclusio alterius*.<sup>136</sup>

This definitional incongruence aside, the governance architecture of the EAC remains ultimately intergovernmental in character. There is an East African Legislative Assembly (EALA) whose members are to be elected by national parliaments<sup>137</sup> and that makes decisions, including on legislative bills, on the basis of simple majorities.<sup>138</sup> However, its bills become “Acts of the Community” only when subsequently “assented to” by the Summit of Heads of State,<sup>139</sup> whose decisions require consensus.<sup>140</sup> The intergovernmental, ministerial-level Council is the Community’s “policy organ,” which can initiate and submit bills to the Assembly and, echoing again EU secondary legislation,<sup>141</sup> “make regulations, issue directives [and] take decisions”<sup>142</sup> that “shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.”<sup>143</sup> Although the Council can make some decisions by simple majority, decisions to submit a bill to the Assembly and recommendations on treaty amendments and protocols, among others, require consensus.<sup>144</sup> The EAC’s Secretariat has no policy-

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134. EAC Treaty (as amended), *supra* note 133, art. 7(1)(d).

135. *Id.* art. 1(1) (emphasis added).

136. Under this interpretive principle, the express mentioning of one thing (for example, an objective, beneficiary, or exception) is inferred to mean that other things that are not mentioned are excluded; see BLACK’S LAW DICTIONARY 581 (6th ed. 1990).

137. EAC Treaty (as amended), *supra* note 133, art. 50.

138. *Id.* art. 58(1).

139. *Id.* art. 62(1).

140. *Id.* art. 12(3).

141. Compare TFEU, *supra* note 26, art. 288.

142. EAC Treaty (as amended), *supra* note 133, art. 14(3)(d).

143. *Id.* art. 16.

144. See *id.* art. 15(4) (“Subject to a protocol on decision-making, the decisions of the Council shall be by consensus.”); see also Protocol on Decision-making by the Council of the EAC art. 2, Apr. 21, 2001, [http://www.eac.int/legal/index.php?option=com\\_docman&task=doc\\_download&gid=173&Item](http://www.eac.int/legal/index.php?option=com_docman&task=doc_download&gid=173&Item)

making competence of its own.<sup>145</sup> Notably, the legal status of the “Acts of the Community,” in contrast to the Council’s decisions, is nowhere explicitly addressed but might be inferred from the denotation of Council decisions as “legislation,” and from the express stipulation of “precedence” of EAC law over national law,<sup>146</sup> which is unique among African RECs.<sup>147</sup>

This leaves the East African Court of Justice (EACJ), operational since 2001, as a community actor with consequential normative powers not subject to direct member-state control. The EAC Treaty gives the Court jurisdiction over complaints brought by states,<sup>148</sup> the EAC Secretary-General,<sup>149</sup> and legal and natural persons,<sup>150</sup> and it expressly notes that EACJ decisions on the interpretation and application of the EAC Treaty shall have precedence over decisions of national courts.<sup>151</sup> While EACJ jurisdiction over human rights is foreseen in the EAC Treaty, subject to a still-to-be adopted future protocol,<sup>152</sup> the Court construed an incidental human rights jurisdiction on the basis of the EAC’s “fundamental” and “operational principles,”<sup>153</sup> which encompass a commitment to “good governance including . . . the recognition, promotion and protection of human and peoples’ rights [. . .].”<sup>154</sup> Notably, as in ECOWAS, the EAC Treaty lacks an exhaustion of domestic remedies requirement. The Court’s appellate division has affirmed in this respect that the exhaustion of local remedies forms part of customary law but noted that “though the Court could be flexible and purposeful in the interpretation of the principle of the local remedy rule, it must be careful not to distort the express intent of the EAC Treaty.”<sup>155</sup>

Another EACJ decision—the Court’s very first one—triggered immediate treaty amendments, motivated by the Court’s alleged failure to pay due deference to the exercise of domestic authority. Less than three weeks after the EACJ had issued an interim injunction in 2006 related to charges that the

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id=47 (identifying the Council decisions that shall be made by consensus).

145. EAC Treaty (as amended), *supra* note 133, art. 71 (outlining functions of the EAC Secretariat).

146. *Id.* art. 8(4). Despite this provision, in its early jurisprudence the East African Court of Justice shied away from expressly declaring the supremacy of EAC law. See Anne Pieter van der Mei, *Regional Integration: The Contribution of the Court of Justice of the East African Community*, 69 HEIDELBERG J. INT’L L. 403, 421 (2009).

147. See OPPONG, *supra* note 96, at 312.

148. EAC Treaty (as amended), *supra* note 133, art. 28.

149. *Id.* art. 29(1).

150. *Id.* art. 30(1).

151. *Id.* art. 33(2).

152. *Id.* art. 27(2).

153. Ally Possi, *Striking a Balance Between Community Norms and Human Rights: The Continuing Struggle of the East African Court of Justice*, 15 AFR. HUM. RTS. L.J. 192, 204–09 (2015) (analyzing the Court’s jurisprudence on cases involving human rights aspects).

154. EAC Treaty (as amended), *supra* note 133, art. 6(d); see also *id.* art. 7(2) (including among the EAC’s operational principles “the maintenance of universally accepted standards of human rights”).

155. *Att’y Gen. of Rwanda v. Plaxeda Rugumba*, EACJ App. Div., appeal no. 1 of 2012, at 15 (2015).

Kenyan procedure for selecting EALA members infringed Article 50 of the EAC Treaty,<sup>156</sup> preventing the Kenyan delegates to the EALA from being sworn in, the EAC Summit adopted several new amendments. The amendments expanded opportunities for removing sitting EACJ judges, resulted in the creation of the appellate division, and stipulated that “jurisdiction to interpret [the Treaty] shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States.”<sup>157</sup> Article 50, as a case in point, provides that the procedure for selecting EALA members shall be determined by the National Assembly of each member state.<sup>158</sup> The member states thus “rectified” the EACJ’s failure to pay deference as a matter of judicial policy by reasserting their exclusive jurisdiction through treaty amendments.

### C. The South African Development Community

In terms of governance architecture, the SADC, founded in 1992,<sup>159</sup> is essentially intergovernmental in character. The only nonjudicial organ whose decisions are binding is the Summit of Heads of State or Government, described as SADC’s “supreme policy-making institution.”<sup>160</sup> The Organ on Politics, Defence and Security Co-operation,<sup>161</sup> the Council of Ministers,<sup>162</sup> the Sectoral and Cluster Ministerial Committees,<sup>163</sup> and the Standing Committee of Officials<sup>164</sup> are all composed of members of the national executive branches, and the general decision-making rule for all of them is consensus.<sup>165</sup> The SADC Secretariat and Executive Secretary have purely supportive and administrative

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156. Henry Onoria, *Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community*, 54 J. AFR. L. 74, 77 (2010).

157. EAC Treaty (as amended), *supra* note 133, art. 27(1); *see also id.* art. 30(3) (“The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.”).

158. EAC Treaty (as amended), *supra* note 133, art. 50(1).

159. Treaty of the Southern African Development Community. Aug. 17, 1992, 32 I.L.M. 120 (1993). The fifteen members are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia, and Zimbabwe. The SADC emerged from the Southern African Development Coordination Conference (SADCC), which was established in 1980; regarding the SADCC, see Peter Meyns, *The Southern African Development Coordination Conference (SADCC) and Regional Cooperation in Southern Africa*, in AFRICAN REGIONAL ORGANIZATION 196 (Domenico Mazzeo ed., 1984). The SADC Treaty has since been amended on several occasions; for the current version see Consolidated Text of the Treaty of the Southern African Development Community (as amended) (Oct. 21, 2015), available at <http://www.sadc.int/documents-publications/show/4171> [hereinafter SADC Treaty (as amended)].

160. SADC Treaty (as amended), *supra* note 159, arts. 10(1) & 10(9).

161. *Id.* art. 10A.

162. *Id.* art. 11.

163. *Id.* art. 12.

164. *Id.* art. 13.

165. *Id.* arts. 10(9), 10A(7), 11(6), 12(8), 13(7); *see also id.* art. 19 (stipulating consensus as SADC’s general decision-making rule, unless otherwise noted).

roles.<sup>166</sup> The decisions of the SADC Tribunal, which was provided for in the 1992 Treaty but was effectively established only in 2005, are legally binding and final.<sup>167</sup> As noted below, however, the Tribunal has become inoperative as a result of political backlash against its first controversial decision.

Subsidiarity is not mentioned in the SADC Treaty, but it became a recognized principle in 2001 when the SADC heads of state and government unanimously adopted<sup>168</sup> the “Report on the Review of the Operations of SADC Institutions,”<sup>169</sup> which aimed to reform the SADC institutional infrastructure. Conspicuously, however, the principle has not been elevated to legally binding treaty status as part of any of the subsequent amendments of the SADC Treaty.<sup>170</sup> The report noted that the pursuit of the SADC’s “common agenda” should be guided by several principles, including subsidiarity. Subsidiarity is defined in the report as a principle according to which

all programmes and activities should be undertaken at levels where they can best be handled based on consultations between governments and relevant stakeholders. The involvement of institutions, authorities, and agencies outside SADC structures to initiate and implement regional programmes using their own generated resources should be promoted and encouraged.<sup>171</sup>

Several aspects of this definition are worth noting. First, the principle appears to be operating not between the SADC as the regional actor and national governments but, instead, between national governments and “relevant stakeholders” located at different levels. Second, the criterion for determining what is the best actor and level for exercising competence is not specified *ex ante* but is instead made subject to subsequent “consultations.” Third, the definition speaks somewhat obliquely of “programmes and activities” to be undertaken at the appropriate level, not of lawmaking or policymaking, suggesting that the principle, as in the ECOWAS Development Program discussed above,<sup>172</sup> applies to the implementation, rather than to the making, of law and policy.<sup>173</sup> Finally, the reference to the promotion and encouragement of

166. *Id.* arts. 14 & 15.

167. *Id.* art. 16(5); *see also* Protocol on Tribunal and Rules of Procedure Thereof, Aug. 7, 2000, [http://www.sadc.int/files/1413/5292/8369/Protocol\\_on\\_the\\_Tribunal\\_and\\_Rules\\_thereof2000.pdf](http://www.sadc.int/files/1413/5292/8369/Protocol_on_the_Tribunal_and_Rules_thereof2000.pdf) [hereinafter Protocol on Tribunal].

168. *See* Communiqué of the Extra-Ordinary Summit of Heads of State and Government of the SADC, held in Windhoek, Namibia, March 9, 2001, *in* SADC Head of State and Government Summit Communiqués 1980- 2006, at 123, 124, [http://www.sadc.int/files/3913/5292/8384/SADC\\_SUMMIT\\_COMMUNIQUES\\_1980-2006.pdf](http://www.sadc.int/files/3913/5292/8384/SADC_SUMMIT_COMMUNIQUES_1980-2006.pdf) (noting unanimous adoption of Report on the Review of the Operations of SADC Institutions).

169. Report on the Review of the Operations of SADC Institutions (Apr. 2001), [http://www.sadc.int/files/6113/5281/6304/REPORT\\_ON\\_THE\\_REVIEW\\_OF\\_OPERATIONS.pdf](http://www.sadc.int/files/6113/5281/6304/REPORT_ON_THE_REVIEW_OF_OPERATIONS.pdf) [hereinafter Report on Review of Operations].

170. *See* SADC Treaty (as amended), *supra* note 159.

171. Report on Review of Operations, *supra* note 169, at 7.

172. *See supra* note 120 and accompanying text.

173. *See, e.g.*, SADC Regional Indicative Strategic Development Plan (Mar. 1, 2001), 83–84 & 88, [http://www.sadc.int/files/5713/5292/8372/Regional\\_Indicative\\_Strategic\\_Development\\_Plan.pdf](http://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf) (including subsidiarity as a “principle for RSDIP implementation” in the chapter on implementation and coordination mechanisms).

the involvement of actors “outside SADC structures” indicates that the operation of subsidiarity as here understood is not strictly institutionally bounded.

Elsewhere the notion of stakeholders is made more specific. Explanatory notes to the report describe subsidiarity as a principle that aims to “facilitate” the participation of stakeholders in the “furtherance of SADC’s Common Agenda” and says that such stakeholders can be “associate organizations”; “SADC agencies and institutions”; “political, social, cultural and economic institutions and agencies”; and “NGOs and civil society.”<sup>174</sup> By giving subsidiarity a facilitative function in bringing in both governmental and nongovernmental actors at various levels of political organization, the more limited understanding that subsidiarity has in the European context as a switching device between different levels of politico-legal competence in multilevel governance systems is being diluted. Instead, in the SADC, subsidiarity appears as a principle that seeks to regulate the circumstances in which action in pursuit of SADC’s objectives may be delegated or assigned, presumably by the governments of the member states, to actors that appear appropriately qualified for that purpose, without *ex ante* criteria for determining the type of actor and at what level of governance the actor needs to be situated. The usefulness or desirability of supportive action, rather than a rebuttable presumption for a particular level as such, seems to be at the core of this understanding. The fact, for example, that the creation of the SADC Development Finance Resource Center (SADC-DFRC)—an institution supporting national development finance institutions (DFIs) through research, advice, and other types of assistance<sup>175</sup>—is described as having been “established under the Principle of Subsidiarity”<sup>176</sup> appears to buttress this interpretation.<sup>177</sup> The creation of the Center neither expressly resulted from a conflict between overlapping competences nor created a need to regulate the exercise of its competences vis-à-vis the national DFIs due to the DFRC’s lack of executive or legislative powers.

Last, but not least, it is noteworthy that, in contrast to the SADC Tribunal’s two subregional sister institutions discussed above, the exercise of its jurisdiction is subject to an exhaustion of domestic remedies requirement and thus sequential subsidiarity.<sup>178</sup> Although it lacks “a clear competence in the area

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174. Report on Review of Operations, *supra* note 169, at 47–48.

175. For information on the DFRC, see the institution’s website at SADC-DFRC, <http://www.sadc-dfrc.org/> (last visited Apr. 7, 2016).

176. *Subsidiarity*, SADC-DFRC, <http://www.sadc-dfrc.org/subsidiarity> (last visited Apr. 7, 2016).

177. SADC-DFRC had its origins in an initiative by national DFIs, rather than by the SADC Summit or Council of Ministers. See *History*, SADC-DFRC, <http://www.sadc-dfrc.org/history> (last visited Apr. 7, 2016). It was subsequently recognized as a formal SADC institution. See Protocol on Finance and Investment annex 9 art. 8, Aug. 18, 2006, [http://www.sadc.int/files/4213/5332/6872/Protocol\\_on\\_Finance\\_Investment2006.pdf](http://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf).

178. Protocol on Tribunal, *supra* note 167, art. 15(2).

of human rights,”<sup>179</sup> the Tribunal has, like the EACJ, claimed and construed jurisdiction over human rights issues on the basis of a general commitment to “human rights, democracy and the rule of law” in the SADC Treaty<sup>180</sup> over whose interpretation and application it does possess jurisdiction.<sup>181</sup> The Tribunal’s first foray into human rights prompted an immediate political backlash that resulted in its factual demise.<sup>182</sup> The trigger for that reaction was the ruling in the *Campbell* case:<sup>183</sup> the Tribunal held that the land expropriation and redistribution policies pursued by Zimbabwe, which were entrenched by constitutional amendment, constituted a form of racial discrimination because expropriations were targeted virtually exclusively at white farmers. In addition, it found that the removal of domestic courts’ jurisdiction over claims contesting any such actions violated the right of access to a court and to a fair hearing.<sup>184</sup> Zimbabwe, however, viewed the decision as an “intolerable interference in the country’s domestic affairs.”<sup>185</sup> Not only did Zimbabwe not comply with the judgment—even its High Court refused enforcement on the ground that the judgment conflicted with weightier considerations of domestic public policy<sup>186</sup>—it managed to generate support among SADC members to effectively suspend the Tribunal and to replace it with a new body, not yet created, that will be competent to hear only disputes between states.<sup>187</sup>

The decision to redefine the SADC Tribunal’s jurisdiction is an exercise of the allocative function of subsidiarity, making the presumption for local competence in both human rights matters and with respect to individual complaints permanent and no longer subject to rebuttal. This decision also shows, however, that the criteria for reallocating competences to another level need not necessarily be normatively appealing or benign.

## V

### CONCLUSION

This article has examined the role of subsidiarity in select regional integration regimes in Latin America and Africa by formal reference to the

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179. Solomon Eboobrah, *Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges*, 17 AFR. J. INT’L & COMP. L. 79, 84 (2009).

180. SADC Treaty (as amended), *supra* note 159, art. 4(c).

181. Protocol on Tribunal, *supra* note 167, art. 14(a).

182. See generally Alter, Gathii & Helfer, *supra* note 129, at 23–28 (discussing the political repercussions of the controversial *Campbell* case that resulted in the tribunal’s suspension).

183. See *Mike Campbell (Pvt) Ltd. & Others v. Republic of Zimbabwe*, SADC (T) case no. 2/2007, Nov. 28, 2008.

184. *Id.*

185. Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870, 876 (2013).

186. GATHII, *supra* note 94, at 296.

187. See generally Gerhard Erasmus, *The New Protocol of the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law* (Trade Law Centre Working Paper No. US15WP01/2015, 2015), <http://www.tralac.org/images/docs/6900/us15wp012015-erasmus-new-protocol-sadc-tribunal-20150123-fin.pdf>.



principle in their constitutive treaties and other official documents and decisions. Such analysis is necessarily only a first step in assessing the spread and use of the principle of subsidiarity and needs to be complemented with additional research on formal and informal practices of giving effect to considerations of subsidiarity. Even without a more comprehensive picture, however, a few conclusions may be offered.

First, of the hypothesized relationships concerning supply and demand of subsidiarity that underpin the conjectures examined here, none holds across all cases. As the example of the Andean Community illustrates, the establishment of nominally multilevel governance system with pooled sovereignty or delegated authority does not necessarily lead to the stipulation of a subsidiarity principle. Likewise, the different regimes' courts, which should have been the most likely candidates for stipulations of subsidiarity, especially with respect to their human rights jurisdiction, have not adopted anything akin to a margin-of-appreciation doctrine in their jurisprudence to date, and ECOWAS and the EAC omit even the most common subsidiarity requirement with respect to the admissibility of individual complaints at the international level: the exhaustion of domestic remedies. Considerations of subsidiarity have played a role, if any, only to the extent that the backlashes against the African courts have sought to repatriate certain competences fully to the member states. The analysis in part supports other scholars' arguments that expectations and conclusions on the basis of comparing institutional blueprints will often be misleading—here with respect to the need for, and utility of, a principle of subsidiarity—simply because replicated institutional designs are frequently not intended or expected to operate the same way as they did, or do, in the contexts from which they were borrowed.<sup>188</sup>

Second, where the principle of subsidiarity has been expressly defined, such as in the institutional contexts of Latin America and Africa, its meaning deviates from that in use in the European context. In particular, the specific application to instances of nonexclusive, overlapping competences has largely been replaced with a more general consideration of the comparative advantages of various types of actors, regardless of level and even their public or private character, in the implementation—not the articulation—of community policies. Third, this deviation provides further evidence of the fact that although several of the organizations canvassed in this article have been inspired by, and have borrowed from, the EU model, such transplants rarely employ “wholesale copying of EU institutional arrangements.”<sup>189</sup> Nor are these definitional differences examples of what Amitav Acharya has called “norm subsidiarity,” which he defines as a “process whereby local actors create rules with a view to

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188. See generally Babatunde Fagbayibo, *Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview*, 16 POTCHEFSTROOM ELECTR. L. J. 32 (2013) (discussing the attempts to create supranational organizations in Africa and the challenges that these organizations have faced over time).

189. Tobias Lenz, *Spurred Emulation: The EU and Regional Integration in Mercosur and SADC*, 35 W. EUR. POL. 155, 156 (2012).

preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors.”<sup>190</sup> The alternative approaches to subsidiarity identified here, after all, do not relate to the relationship between the regional regimes and other, more powerful actors, but they instead address mainly intraregime matters.

In conclusion, then, rather than being a standardized European export that fits and benefits all multilevel regional governance systems alike, both the nonuse and the redefinition of subsidiarity in the institutional settings examined in this article suggest that its utility and meaning are very much conditioned by local needs and preferences. Future research must further examine these needs and preferences to explain the role, or absence thereof, of the subsidiarity principle in regional integration arrangements outside of Europe.

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190. Amitav Acharya, *Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World*, 55 INT’L STUD. Q. 95, 96 (2011).