THE ECONOMIC COURT OF THE COMMONWEALTH OF INDEPENDENT STATES

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I. INTRODUCTION

The Commonwealth of Independent States (CIS) was formed on December 8, 1991 by Belarus, Russia, and Ukraine on the basis of the Minsk Agreement Establishing the CIS.[1] On December 21, 1991, eleven newly-independent states of the former Soviet Union confirmed and developed the original Minsk Agreement. They adopted the Alma-Ata Declaration and signed the Alma-Ata Protocol to the Agreement Establishing the CIS.[2] The Alma-Ata Protocol, which formed the initial legal basis for the operations of the new regional organization, became an integral part of the Minsk Agreement. The formal structures of the CIS were clarified and developed by the Charter of the CIS adopted in 1993.[3] The CIS Charter envisions a multipurpose regional organization based on the fairly close cooperation of its members in political, military, economic, social, and cultural spheres. It also establishes the governance structure of the organization, which includes the Council of Heads of State, the Council of Heads of Government, the Council of Ministers of Foreign Affairs, the Council of Ministers of Defense, the Coordination and Consultative Committee (executive organ), the Commission on Human Rights, and the Inter-Parliamentary Assembly.

Because of conflicting national interests and fear of domination by Russia, the CIS states opted for multi-speed and multi-option integration. This arrangement allowed individual members to choose the level and pace of integration into

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1. *See* Agreement Establishing the Commonwealth of Independent States, Dec. 8, 1991, 31 I.L.M. 138 (1992).

2. *See* Alma-Ata Declaration and Protocol, Dec. 21, 1991, 31 I.L.M. 147 (1992).

3. *See* Commonwealth of Independent States Charter, June 22, 1993, 34 I.L.M. 1279 (1995) [hereinafter CIS Charter].

the existing CIS structures. As a result, the growth and development of the CIS as a regional organization has been accompanied by the adoption of numerous additional agreements establishing different levels of integration between participating states.[4] The most important agreement is the 1993 Treaty on Creation of an Economic Union.[5]

The 1993 Treaty called for the progressive establishment of a free trade association, a customs union, a common market for goods, services, capital, and labor, and a monetary union. While the CIS is composed of all of the former Soviet republics, apart from the three Baltic states, not all members participate in the basic documents of the CIS. For example, Ukraine did not sign the CIS Charter, and it is not a full member of the emerging Economic Union. Rather, it is an associate member.

Like other regional organizations, the CIS frequently becomes involved in the resolution of disputes. Dispute settlement has been proclaimed one of the major goals of the CIS. Article 2 of the CIS Charter provides that one of the objectives of the CIS is "peaceful settlement of disputes and conflicts among the states of the Commonwealth." Article 1 of the 1993 Treaty on Creation of an Economic Union also states that the contracting parties will be guided by the principle of "peaceful settlement of disputes."[6]

Under the CIS Charter, the settlement of disputes is primarily the responsibility of member states and the principal political organ of the organization—the Council of Heads of State. Under Article 17 of the CIS Charter, member states must make efforts "towards just and peaceful resolution of

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4. For details concerning the structure and powers of the CIS, see V.N. Fisenko & I.V. Fisenko, *The Charter of Cooperation*, 4 FIN. Y.B. INT'L L. 229 (1993); S.A. Voitovich, *The Commonwealth of Independent States: An Emerging Institutional Model*, 4 EUR. J. INT'L. L. 403 (1993); V. Pechota, *The Commonwealth of Independent States: A Legal Profile*, 2 PARKER SCH. J. E. EUR. L. 583 (1995).

5. 1 *Bulleten mezhdunarodnykh dogovorov* [*Bulletin of International Treaties*] 4 (1994). For an English translation, see The Commonwealth of Independent States Treaty on Creation of an Economic Union, Sept. 24, 1993, 34 I.L.M. 1298 (1995). The Treaty has been ratified by Armenia, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Russia, Tajikistan, Turkmenistan and Uzbekistan, all of which became members of the emerging Economic Union. Ukraine became an associate member of the Economic Union.

6. *See id.* Excerpts in this article from documents printed in Russian were translated by the author.

their disagreements by means of negotiation or the reaching of an understanding on a proper alternative procedure for dispute settlement." If member states fail to resolve a dispute through these means, they may refer the matter to the Council of Heads of State. Under Article 18 of the CIS Charter, the Council of Heads of State may recommend to the parties an appropriate procedure, or methods, for settling a dispute the continuation of which could threaten the maintenance of peace and security within the Commonwealth. In view of these provisions of the CIS Charter on the settlement of disputes, a question arises as to the proper role of the Economic Court. An answer to this question calls for a closer look at the origins of the Court and its jurisdiction.

The Economic Court, which has its seat in Minsk, Belarus, was not created formally by the CIS Charter but rather by the Agreement on the Statute of the Economic Court, approved by the Council of Heads of State of the CIS on July 6, 1992.[7] All member states of the CIS, except Turkmenistan and Ukraine, signed the 1992 Agreement. Armenia, Belarus, Kazakhstan, Kyrgystan, Moldova, Russia, Tajikistan, and Uzbekistan ratified the 1992 Agreement and the 1992 Statute of the Economic Court.

As a formal matter, the Economic Court became a judicial organ of the CIS only after the adoption of the CIS Charter in 1993. The CIS Charter lists the Economic Court among the principal organs of the Commonwealth. On July 6, 1994, the Economic Court adopted its Rules of Procedure.[8] The first opinion of the Court was issued the same year. In 1997, the Economic Court adopted a revised version of its Rules of Procedure.[9]

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7. *See* 6 SODRUZHESTVO. INFORMATSIONNII VESTNIK [COMMONWEALTH. INFORMATION BULLETIN] 53 (1992) [hereinafter CIB]. The text of the 1992 Statute of the Court is published in *id.* at 54 [hereinafter 1992 Statute].

8. *See* 12 VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA ROSSIISKOI FEDERATSII [BULLETIN OF THE SUPREME ARBITRATION COURT OF THE RUSSIAN FEDERATION] [hereinafter VESTNIK] 64 (1994).

9. On file with the author [hereinafter 1997 Rules of Procedure]. The revised version has not yet been published.

II. Structure and Composition of the Economic Court

The Economic Court operates at two levels: as a court of first instance and as an appellate court. Decisions of the chambers of the Economic Court may be challenged in the Plenum of the Economic Court, which has a unique composition. From an organizational perspective, both the Economic Court and the Plenum of the Economic Court are separate parts of the same institution—the Economic Court of the CIS.

All contentious cases in the first instance are heard by the chambers of the Economic Court. In contrast, advisory opinions are rendered by the full Court.[10] Under Article 9 of the 1997 Rules of Procedure, chambers composed of three or five judges are formed by the full Court. Judges serve on the chambers for one year. The parties have no means to control the composition of the chambers.[11] The appellate instance of the Court—the Plenum of the Economic Court—reviews decisions of the chambers of the Court. In addition, under Article 10 of the 1992 Statute, the Plenum has the right to issue "recommendations to ensure consistent practice in the implementation of agreements and other acts of the Commonwealth and its institutions when resolving economic disputes." Furthermore, the Plenum may submit to member states and CIS's institutions proposals aimed at removing conflicts among the laws of member states.[12] States participating in the 1992 Statute appoint two judges to the Court. As a result, the Court in principle may operate with an even number of sixteen judges.[13] In addition to the large number of regular judges, each member state sends one additional judge to the Plenum of the Economic Court. Additional judges are chief justices of the highest economic or commercial courts of participating states who have jurisdiction over domestic economic disputes. The Plenum thus consists of regular judges and chief justices of economic or commercial courts of member states. This

10. *See* 1997 Rules of Procedure, *supra* note 9, arts. 116-50.

11. Under Article 52 of the 1997 Rules of Procedure, a party may challenge formally the impartiality of a member of the chamber. However, even if the challenge is granted, according to Article 53 a successor judge is selected by the Chairperson of the Economic Court.

12. *See* 1992 Statute, *supra* note 7, art. 10.

13. At this stage, the Economic Court has only ten judges. This is explained by the fact that some participating states did not appoint judges while others appointed only one judge.

means that the full Plenum of the Economic Court may have twenty-four judges—sixteen permanent judges and eight additional chief justices. This rather unusual composition of the Court reflects the desire of the CIS states to build more confidence in the Court. Another justification for this approach may be the power of the Court to apply and interpret not only international law but also legislation of the former USSR and principles of domestic law of participating states.[14] In order to be able to provide a fair common interpretation of these principles, the Court must have domestic judges from all participating states. The creation of the second instance may also contribute to better elaboration of questions of applicable law.

At the same time, such a composition of the Plenum of the Economic Court raises concerns about its cohesion and efficiency. Chief justices of the highest economic courts of member states tend to have busy schedules, and their absence from the plenary sessions in Minsk, Belarus, might result in an unpredictable Plenum of the Court.

Regular judges of the Court are elected or appointed by member states in accordance with their own domestic procedure used for the election or appointment of judges to their highest economic or commercial courts. The candidates must have a higher legal education and judicial experience as members of economic or commercial courts or otherwise be experts of recognized competence in the field of "economic legal relations."[15] Two things should be noted in connection with the qualifications for appointment or election to the Court. First, the 1992 Statute does not require competence in public international law. Second, there is no means of ensuring that the qualifications indicated in the 1992 Statute actually are possessed by the judges who are elected or appointed by the CIS states.

Judges are appointed or elected for a term of ten years. The 1992 Statute does not exclude the possibility of re-appointment or re-election for a further term or terms. There is no prescribed age for retirement. The Chairperson of the Economic Court and Deputy Chairpersons are elected by a simple majority of judges for a term of five years. However,

14. *See infra* notes 48-54 and accompanying text.
15. *See* 1992 Statute, *supra* note 7, art. 7.

their appointment requires subsequent formal approval of the Council of Heads of State.

The 1992 Statute provides certain guarantees of judicial independence. The Chairperson of the Court, Deputy Chairpersons, and judges cannot be removed from office unless they are recalled by their states for misuse of their powers, commission of a crime, or illness.[16] Judges are also independent and immune from prosecution.[17] Article 8 of the 1992 Statute expressly states that judges do not represent states, state organs, or organizations. It is doubtful, however, that these general provisions will ensure true independence of every single permanent judge from his or her state. At least two factors may undermine the neutrality of individual judges. First, permanent judges only serve for ten years. Second, and more importantly, under the 1992 Statute permanent judges may be removed from office not by collective CIS organs or judges, but by individual home states. It should be noted, however, that doubts about the neutrality of individual judges do not necessarily undermine the impartiality of the Economic Court as a whole. As a tribunal composed of individual judges coming from all participating states, the Court may still act as an impartial body which accords equal treatment to those appearing before it.

III. Jurisdiction of the Economic Court

The CIS Charter contains only very general provisions concerning the Court's jurisdiction. Under Article 32 of the CIS Charter, the Court's principal function is to "ensure the implementation of economic obligations within the Commonwealth." The Court has been granted jurisdiction over "disputes arising in connection with implementation of economic obligations." According to Article 32, the Court may also resolve other disputes referred to its jurisdiction by agreements between member states. Furthermore, under this article the Court may interpret the provisions of "agreements and other acts of the Commonwealth on economic issues."

The 1992 Statute of the Court provides more detailed rules on jurisdiction. Under Article 3 of the Statute, the Court

16. *See id.* art. 7.
17. *See id.* art. 8.

has jurisdiction only over "interstate economic disputes." These include "disputes arising from implementation of economic obligations envisioned by agreements, decisions of the Council of Heads of State, Council of Heads of Governments and other institutions of the Commonwealth." In addition, "interstate disputes" include disputes concerning "the conformity of normative and other acts of member states of the Commonwealth on economic issues with the agreements and other acts of the Commonwealth."

Article 3 of the 1992 Statute also provides that the Economic Court may have jurisdiction over "other disputes involving implementation of agreements and other acts of the Commonwealth adopted on their basis" if these disputes are referred to the Court by agreements of CIS States containing "a compromissory clause." In addition, CIS states always may refer a particular dispute to the Court by means of a special agreement or *compromis*.

Under Article 3 of the 1992 Statute, "disputes are resolved by the Economic Court pursuant to a petition submitted by the interested states acting through their competent organs and by institutions of the Commonwealth." This provision indicates that proceedings before the Court may be initiated only by a contesting state or a CIS institution. It also indicates that the Court's jurisdiction is compulsory for states that ratified the 1992 Statute without reservations.[18] At the same time, the 1992 Statute does not establish any compulsory jurisdiction with respect to other states members of the CIS.

However, the Court may be granted compulsory jurisdiction with respect to other members of the CIS over disputes arising from agreements where such agreements contain a "compromissory clause" providing for it. The Court dealt with this grant of jurisdiction in its advisory opinion No. C-1/1-97.[19] The Court's opinion listed eleven multilateral CIS treaties specifying that disputes arising under them may be resolved by the Economic Court upon the supplication of any party. The Court emphasized that if CIS states conclude agreements containing "compromissory clauses," the Court is open not only to

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18. Moldova formulated a reservation according to which disputes are submitted to the Court only "by mutual consent of states." *See* 6 CIB, *supra* note 7, at 54 (1992).

19. *See* 2 VESTNIK, *supra* note 8, at 99 (1998).

CIS states party to the 1992 Statute, but also to other CIS states. Access to the Court for CIS states not party to the 1992 Statute raises difficult questions about the sources of their procedural rights and obligations. How can the 1992 Statute and the 1997 Rules of Procedure adopted in accordance with the 1992 Statute create procedural rights and obligations for states that are not parties to the Statute? Apparently the problem may be resolved by some kind of *ad hoc* agreement or a declaration by which non-parties accept the 1992 Statute and the 1997 Rules of Procedure. Access to the Economic Court by non-parties to the 1992 Statute may also require contribution to Court expenses. Another issue of interest to non-parties, who may not wish to be placed in a position of inequality, is the possibility of appointing *ad hoc* judges by states that are not represented on the bench. Regrettably, opinion No. C-1/1-97 did not deal with any of these issues.[20]

An important CIS agreement containing a "compromissory clause" is the 1993 Treaty on Creation of an Economic Union.[21] The 1993 Treaty contains several provisions concerning the powers of the Economic Court. Article 31(1) of the 1993 Treaty provides that "the contracting parties pledge to resolve their disputes in respect to interpretation and implementation of the present Treaty by means of negotiations or through the Economic Court of the Commonwealth of Independent States." In cases of a dispute concerning the Treaty's interpretation and application, Article 31(1) appears to exclude resort by state parties to the 1993 Treaty to other international judicial organs capable of settling disputes between them in accordance with general or special agreements in force, including the International Court of Justice. However, this interpretation of Article 31 may contradict another clause of the 1993 Treaty. Article 31(4) of the 1993 Treaty states that "if the contracting parties fail to resolve their disputes by means of negotiations or through the Economic Court of the Commonwealth of Independent States, they have

20. The drafters of the 1997 Rules of Procedure recognized that access to the Economic Court by non-parties to the 1992 Statute requires a contribution to the expenses of the Court. According to Article 49 of the 1997 Rules of Procedure, non-parties must pay not only regular court fees but also an additional court duty.

21. *See Bulletin of International Treaties, supra* note 5.

agreed to resolve them in other international judicial bodies in accordance with their respective rules of procedure."

The Economic Court attempted to reconcile Articles 31(1) and 31(4) in its opinion No. C-1/19-96.[22] The Court emphasized that under Article 31 states parties to the 1993 Treaty on Creation of an Economic Union "have no right to resort to other international judicial organs without first turning to the Economic Court."[23] The Court held that Article 31(4) simply confirms the general willingness of the participating states to resolve their disputes through other international judicial organs. The participating states may turn to these organs only if it is not possible to resolve their differences through the Economic Court of the CIS under the Rules of Procedure. Nor do the participating states have the right to challenge decisions of the Economic Court in other international judicial organs. Appeals may be submitted only to the Plenum of the Economic Court. This opinion indicates that the Economic Court regards the legal order of the CIS Economic Union as a self-contained regime that not only regulates rights and duties of participating states, but also establishes effective procedures for determining and adjudicating possible disputes. It remains to be seen whether members of the Economic Union will agree with the Court's holding that by ratifying the 1993 Treaty on Creation of an Economic Union they have relinquished their right to dispute settlement outside of the 1993 Treaty.

In opinion No. C-1/19-96, the Court also pointed out that Article 31(1) of the 1993 Treaty establishes compulsory jurisdiction of the Economic Court for members of the Economic Union with respect to disputes concerning interpretation and implementation of the 1993 Treaty. The Court stressed that although contesting states may always resort to negotiations, failure to negotiate does not preclude unilateral resort to the Economic Court.

Since under Article 3 of the 1992 Statute the Court has jurisdiction only over "interstate economic disputes," it cannot resolve disputes between political subdivisions or commercial entities of the CIS states. However, practice indicates that some disputes submitted to the Court are not pure govern-

22. *See* 9 VESTNIK, *supra* note 8, at 86 (1997).
23. *Id.* at 87.

ment-to-government disputes. For example, proceedings initiated by Russia against Kazakhstan in case No. C-1/15-96[24] were triggered by provincial governments and private parties which concluded private law contracts on the basis of the Russian-Kazakhstan 1992 Agreement on Principles of Trade and Economic Cooperation. The Court found that it was still competent to decide the case because it held that "obligations assumed by commercial entities and territorial units to specify intergovernmental agreements and subsequently approved by the governments must be regarded as obligations assumed by the governments."[25] The Court noted in this connection that "fulfillment of a private obligation between trading companies means fulfillment of a public obligation of governments, and vice versa, while non-fulfillment of a private obligation (assumed in the framework of an intergovernmental agreement) means non-fulfillment of a public obligation."[26]

Article 3 of the 1992 Statute excludes the possibility of submitting to the Court disputes that do not arise from "economic obligations." Under the CIS Charter, non-economic disputes are resolved by other means, including negotiations and submission of the dispute to the principal political organ of the CIS—the Council of Heads of State. It is not entirely clear, however, what qualifies as a dispute arising from "economic obligations." In advisory opinion No. C-1/1-97,[27] the Court made an attempt to define the notion of "economic obligations." According to the Court, "economic obligations" are obligations concerned with "tangible benefits that have monetary value."[28] Examples mentioned by the Court include transfers of goods or monetary resources and provision of service. The Court noted that such "economic obligations" are assumed by the CIS states not only in the sphere of trade, production, finance, or transport but also when cooperating in "humanitarian, ecological, cultural, and other spheres."[29] Although this approach appears to be fairly broad, it may not cover some disputes that may be essentially non-economic but involve serious economic consequences. For example, will the

24. *See* 4 (24) CIB, *supra* note 7, at 131 (1996).
25. *Id.* at 135.
26. *Id.*
27. *See* 2 VESTNIK, *supra* note 8, at 99 (1998).
28. *Id.* at 99.
29. *Id.* at 100.

Court have jurisdiction over territorial disputes? If the Court adopts an even more extensive interpretation of the notion of an "economic obligation" as any obligation affecting economic relations between contesting states, then such disputes may well fall within the Court's jurisdiction. It will be interesting to see how the Economic Court will rule in future contentious cases on the question of what constitutes an "economic obligation" or an "economic dispute."

In addition to its contentious jurisdiction, the Economic Court has also been granted advisory jurisdiction. Under Article 32 of the CIS Charter the Court may interpret the provisions of "agreements and other acts of the Commonwealth on economic issues." Under Article 5 of the 1992 Statute, the Court is authorized to rule on the "interpretation" of "the provisions of agreements and other acts of the Commonwealth and its institutions," as well as of "the legislative acts of the former Union of SSR which apply within the time limits defined by the mutual agreement [of the parties]." Article 5 of the 1992 Statute makes it clear that decisions on "interpretation" may be given not only by rendering judgments in specific cases but also by issuing abstract opinions at the request of the highest legislative and executive organs of member states, their highest economic and commercial courts, or CIS institutions. The 1992 Statute does not make any distinction between opinions on a dispute and abstract opinions regarding such interpretation.

From a constitutional perspective, an important issue in this area is the possibility that the Economic Court could provide an authoritative interpretation of the CIS founding documents, in particular the CIS Charter. The Court has not been authorized specifically to interpret the CIS founding documents. An analysis of Article 32 of the CIS Charter and Article 5 of the 1992 Statute does not provide a definite answer to the question. While Article 32 of the CIS Statute refers only to "agreements and other acts of the Commonwealth on *economic issues*" (emphasis added), Article 5 of the 1992 Statute does not limit the advisory jurisdiction of the Court to economic matters. Article 5 appears to allow requests for advisory opinions on the interpretation of any CIS "agreement" or "act," including the CIS Charter. Under this interpretation, members of the CIS can always resolve their differences concerning the correct interpretation of the CIS Charter by referring them to

the Economic Court for an advisory opinion. In practice, the CIS Court appears to take a broad view of its advisory jurisdiction. Although the Court has not yet issued an advisory opinion concerning the meaning of a provision of the CIS Charter, it has rendered several advisory opinions on non-economic issues.[30]

Under Article 5 of the 1992 Statute, advisory opinions may be requested only by the highest legislative and executive organs of member states, their highest economic and commercial courts, and CIS institutions. However, in practice the Court showed considerable flexibility in the types of entities from which it received requests for advisory opinions. In particular, it is apparently willing to accept requests from non-governmental organizations. For example, opinion No. 07/95[31] on the interpretation of the CIS Agreement on the International Legal Guarantees for the Activities of the Inter-State Television Company MIR was requested by MIR, a multinational corporation. Opinion No. C-1/2-96,[32] which dealt with the interpretation of the CIS Agreement on Mutual Recognition of Rights and Compensation to Injured Workers, was requested by the General Confederation of Trade Unions, a non-governmental organization. The reasons for this extremely liberal and somewhat puzzling attitude remain unclear. It appears that the Court adopted a flexible approach with respect to parties who are able to submit requests for advisory opinions in order to expand the scope of its advisory jurisdiction.

Another interesting aspect of advisory jurisdiction concerns the tendency among some states to seek advisory opinions on actual disputes between states. Practice suggests that advisory opinions usually are sought in situations where it may be difficult to compel another state to submit the dispute to the Court. For example, in 1996 the Economic Court rendered advisory opinion No. 14/95/C-1/7-96[33] on the interpretation of the 1992 CIS Agreement on Recognition and Regulation of Property Rights. The request for an advisory opinion

30. *See, e.g.*, case No. C-1/14-96 dealing with the interpretation of the notion "refugee," or case No. C-1/13-96 dealing with the interpretation of the 1993 CIS Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Cases. 4 (24) CIB, *supra* note 7, at 128 (1996).

31. *See* 1 (21) CIB, *supra* note 7, at 100 (1996).

32. *See* 3 (23) CIB, *supra* note 7, at 72 (1996).

33. *See id.* at 82.

related to a dispute between Tajikistan and Uzbekistan over secession with respect to state property of the former Soviet Union located on the territory of Tajikistan. Tajikistan requested an advisory opinion because Uzbekistan did not fully participate in the activities of the Court. That same year, at the request of the Moldovian Arbitration Court, the Court issued its advisory opinion No. 11/95/C-1/4-96[34] on the interpretation of the Moldovian-Belarus Agreement on Free Trade. The case involved a dispute between Moldova and Belarus triggered by Belarus's reintroduction of export duties. The Moldovian Arbitration Court may have decided to request an advisory opinion because, as noted earlier, Moldova formulated a reservation according to which disputes could be submitted to the Court only "by mutual consent of states."[35] Another explanation may be the power of the Moldovian Arbitration Court to request an advisory opinion directly from the Economic Court. Under the Court's 1992 Statute, arbitration or commercial courts of member states are unable to initiate proceedings other than those leading to an advisory opinion.

The Court's apparent willingness to use advisory proceedings to try to resolve actual disputes between CIS states is problematic. In such proceedings the Court renders opinions without the participation of all the contesting parties. Non-participating states are likely to reject such opinions as lacking legitimacy. As a result, the tendency to extend advisory functions may pose serious threats to the Court's prestige.

One of the major powers of the Court is its power to determine whether a matter brought before it is properly within its jurisdiction. Under Article 26 of the 1997 Rules of Procedure, disputes as to whether the Court has jurisdiction are "settled by the Economic Court (chamber, full Court, the Plenum)." A careful analysis of the Court's opinions indicates that it uses every opportunity to enhance its jurisdictional bases and powers. In advisory opinion No. C-1/1-97[36] the Court found that it is open not only to states parties to the 1992 Statute, but to all CIS states. Opinion No. C-1/19-96[37] held that states parties to the 1993 Treaty on Creation of an Economic

34. *See id.* at 88.
35. *See supra* note 18.
36. *See* 2 VESTNIK, *supra* note 8, at 99 (1998).
37. *See* 9 VESTNIK, *supra* note 8, at 86 (1997).

Union "have no right to resort to other international judicial organs without first turning to the Economic Court."[38] In case No. C-1/15-96,[39] the Court came very close to admitting claims submitted not only by states but also by their political subdivisions and private companies. Although under the 1992 Statute only the highest legislative and executive organs of member states, their highest commercial courts, and CIS institutions may request the Court to give advisory opinions, the Court considered requests for advisory opinions from other actors in cases No. 07/95[40] and No. C-1/2-96.[41] These developments indicate that the Court seeks a more prominent role in CIS integration generally and dispute settlement in particular. However, one may wonder whether the Economic Court's existing institutional underpinnings are strong enough to support this kind of judicial activism. The problem of judicial activism becomes particularly serious in view of the fact that the CIS still lacks effective means for enforcement of its agreements and regulations.

IV. Judgments and Their Enforcement

Although under the 1992 Statute the Court's jurisdiction is compulsory, its judgments generally are not legally binding. According to Article 4 of the 1992 Statute, the Court only may issue "recommendations" to contesting states. Although advisory opinions may provide an authoritative interpretation of an international treaty or other instrument, thus defining the rights and duties of CIS states or CIS organs, they do not have binding legal force. It follows that under the 1992 Statute there is no difference between the binding force of a judgment and the authority of an advisory opinion.

It is important to note, however, that the 1993 Treaty on Creation of an Economic Union seems to have granted the Economic Court the power to render legally binding judgments with respect to states parties to the 1993 Treaty.[42] Article 31 of the 1993 Treaty provides that "if the Economic Court finds that a member state of the Economic Union has failed to

38. *Id.* at 87.
39. *See* 4 (24) CIB, *supra* note 7, at 131 (1996).
40. *See* 1 (21) CIB, *supra* note 7, at 100 (1996).
41. *See* 3 (23) CIB, *supra* note 7, at 72 (1996).
42. *See Bulletin of International Treaties, supra* note 5.

fulfill an obligation under the present Treaty, the state shall be required to take necessary measures to comply with the judgment of the Economic Court." Although Article 31 is hardly a model of clarity, it may mean that states parties to the 1993 Treaty agreed to regard the Court's judgments as legally binding. The Economic Court endorsed this interpretation of Article 31 in advisory opinion No. C-1/19-96.[43] The Court held that "judgments of the Economic Court are binding on states members of the Economic Union."[44]

Although some judgments of the Economic Court may be legally binding, the statutory documents of the Court contain no provisions envisioning sanctions for non-compliance with judgments. Under Article 4 of the 1992 Statute, the losing states themselves are required to "ensure the enforcement" of the judgment. In the CIS, there is no independent body responsible for enforcing the judgments of the Court. Non-compliance with the judgment in principle may be referred by the interested state to the Council of Heads of State. However, this political organ of the CIS lacks the power to enforce judgments. Even if non-compliance threatens the maintenance of peace and security within the Commonwealth, the Council is only empowered to recommend to the parties an appropriate procedure or method of settling.[45] The powers of the Council are further weakened by the consensual nature of its decisions under Article 23 of the CIS Charter. As a result, the losing party can always veto a possible implementation decision of the Council.

The non-binding nature of some judgments and the weaknesses of the enforcement allow losing states to ignore rulings of the Economic Court. For example, in one of its first judgments (Case No. 03/94),[46] the Court found that Kazakhstan violated its obligations under the 1991 Agreement on Principles of Trade and Economic Cooperation concluded with Belarus. The Court issued a recommendation to Kazakhstan to remedy the situation within three months. However, Kazakh-

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43. *See* 9 VESTNIK, *supra* note 8, at 86 (1997).

44. *Id.* at 87.

45. CIS Charter art. 18.

46. *See* RESHENIYA EKONOMICHESKOGO SUDA SODRUZHESTVA NEZAVISIMYKH GOSUDARSTV (1994-1995) [JUDGMENTS OF THE ECONOMIC COURT OF THE COMMONWEALTH OF INDEPENDENT STATES] 10 (1996).

stan refused to comply with the decision. Because the recommendation issued by the Court failed to settle the dispute, the contesting states had to resolve their dispute, including the issue of compensation, through bilateral negotiations.[47] Although the judgment of the Economic Court strengthened the bargaining posture of Belarus in subsequent negotiations, the refusal of the losing party to comply with one of the first judgments of the Court was a major setback to the newly established judicial organ of the CIS.

V. Sources of Applicable Law

Article 4 of the 1992 Statute provides that judgments of the Economic Court must be based on "the provisions of agreements and other acts of the Commonwealth of Independent States, as well as on other applicable normative acts." Article 3 of the 1992 Statute also deals with the problem of *non liquet*, by providing that the Court cannot refuse to decide a matter on the ground that there is no applicable rule of law or no clear rule of law.

The 1997 Rules of Procedure contain a more elaborate provision on the matter. Article 29 of the Rules provides that the Court applies: (1) international treaties of the contesting states; (2) CIS acts; (3) rules contained in the legislative acts of the former USSR whose validity is confirmed by mutual assent; (4) national legislation of the contesting states; (5) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (6) generally recognized principles of international law and international custom, as evidence of a general practice accepted as law; (7) general principles of law recognized in member states of the Commonwealth; and (8) rulings of the Plenum of the Economic Court and other decisions of the Economic Court that have precedential value.

The drafters of this long list of applicable sources obviously were not bothered by the fact that it contained several overlapping clauses, some of which were taken verbatim from

47. For details, see I.V. Fisenko, *Praktika Ekonomicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv* [*Practice of the Economic Court of the Commonwealth of Independent States*], 3 Moscow J. Int'l L. 16 (1997).

Article 38 of the Statute of the International Court of Justice.[48] At least three items on this list merit particular attention.

First, the Court, at least for a certain period of time, will apply rules contained in the legislative acts of the former USSR. Continued reliance on the legislation of the former USSR is explained by the fact that a total rejection of Soviet laws would have created serious gaps in legal systems of many successor states. A special situation is created by numerous CIS disputes concerning secession of states with respect to former USSR property. In addressing these issues, the Economic Court has to apply the laws of the former USSR because under Article 8 of the Vienna Convention on Secession of States in Respect of State Property, Archives and Debts[49] provides that the determination of what constitutes "state property of the predecessor state" requires application of "the internal laws of the predecessor state." As a result, in advisory opinion No. 14/95/C-1/7-96[50] on the interpretation of the 1992 CIS Agreement on Recognition and Regulation of Property Rights, involving a dispute between Tajikistan and Uzbekistan over secession with respect to state property of the former Soviet Union located on the territory of Tajikistan, the Court relied on the 1961 Principles of Civil Legislation of the USSR and the 1990 USSR Law on Property in the USSR to determine what constituted "Union property" inherited by the successor states.

Second, the above list contains a surprising reference to decisions of the Economic Court as precedents. An open recognition of the Court's law-making function is a rather unusual statement for countries adhering to the civil law tradition. Whatever the reasons for such an approach, it will encourage the development of case law and therefore improve the predictability of the judicial process for all the contesting parties. In practice, the Court does treat its earlier opinions as precedents. For example, judgment No. C-1/15-96,[51] which concerned a dispute between Russia and Kazakhstan over Kazakhstan's violation of the bilateral Agreement on Principles of Trade and Economic Cooperation, relied on earlier decisions in analogous cases initiated against Kazakhstan by Belarus.

48. 1976 U.N.Y.B. 1052, 1055, U.N. Sales No. E.78.I.1.
49. U.N. Doc. A/CONF. 117/14 (1983).
50. 3 (23) CIB, supra note 7, at 82 (1996).
51. *See* 4 (24) CIB, *supra* note 7, at 131 (1996).

The Court pointed out that the 1994 Rules of Procedure expressly allowed it to rely on its earlier decisions. As a result, the Court held that "the [prior] judgments of the Economic Court having precedential value may be relied upon to resolve the present dispute between the government of the Russian Federation and the Government of the Republic of Kazakhstan."[52]

Third, the Court applies the "national legislation of the contesting states" and "general principles of law recognized *in member states of the Commonwealth*" (emphasis added). Practice indicates that the Court often relies on the domestic legislation of member states. For example, opinion No. C-1/2-96,[53] which dealt with the interpretation of the CIS Agreement on Mutual Recognition of Rights and Compensation to Injured Workers, relied on, among other things, specific clauses dealing with compensation to injured workers contained in the Civil Codes of Belarus, Kazakhstan and Russia. Opinion No. 10/95/C-1/3-96[54] on the interpretation of the CIS Agreement on Court Duties also referred to domestic legislation of several CIS states. From a theoretical perspective, it may be interesting to note that the elucidation of domestic legal principles by international tribunals often amounts to a creative act of judicial legislation. Therefore, the power of the Court to apply principles of domestic law of CIS states also may confirm that its decisions are recognized as sources of CIS law.

VI. Some Issues of Procedure

Proceedings may be brought in the Economic Court against states to establish that they have failed to carry out their CIS "economic obligations." Under Article 3 of the 1992 Statute, suits may be brought by another member state or "Commonwealth institutions." Suits are usually instituted by member states. The right of Commonwealth institutions to bring suit has not been exercised, but CIS organs may become more active in litigation if they start to function as CIS "economic watchdogs." Potentially significant, but so far not exercised, is the jurisdiction of the Court to give an opinion on the conformity of the legislation of CIS member states with the

52. *Id.* at 135.
53. *See* 3 (23) CIB, *supra* note 7, at 72 (1996).
54. 3 (23) CIB, *supra* note 7, at 77 (1996).

agreements and other acts of the CIS with respect to economic issues. In this case, member states and CIS institutions may also institute proceedings to obtain a declaratory judgment.

The 1997 Rules of Procedure contain detailed provisions governing the proceedings. In general, the proceedings are fairly straightforward. The Court's procedure has two principal phases, namely, written and oral pleadings. Proceedings are begun by filing a written application with the Court. The application is then assigned by the Chairperson of the Court to one of the chambers. The Chairperson of the Court also nominates a judge-rapporteur and a General Counsel for the case. General Counsel are Court officials appointed by the Economic Court. They help the chamber of the Court investigate the circumstances of the case and give their opinions on the substance of the dispute during investigation and oral hearings. If the claim passes their preliminary review, it is served upon the defendant and forwarded to other interested parties.

The initial stage of proceedings includes submission of written claims and counterclaims as well as supporting documentary and other evidence. At this stage, the chamber of the Court also may conduct its own investigation of the facts. The investigation and preparatory inquiry are guided by the judge-rapporteur, with consideration of any views expressed by the General Counsel. For example, the chamber of the Court may call for the production of new evidence on points of fact with respect to which the parties are not in agreement. The chamber of the Court also is empowered to commission expert opinions and independently conduct research of economic and trade practices in a particular area of controversy.

Oral proceedings before the chamber of the Court are open to the public. They include addresses by the representatives of the parties, testimony of witnesses, statements of experts, and the opinion submitted by the General Counsel. Judgments are adopted by majority vote and are handed down after secret deliberations. The principle of secrecy of deliberations means that the majority view emerges as the judgment of the whole chamber. Although Article 86 of the 1997 Rules of Procedure envisions drafting of dissenting opinions, dissents are not disclosed.

This brief sketch of the Court's procedure indicates that it replicates many of the rules of procedure followed by other international courts, including European courts.[55] The Court's procedure has been influenced by the domestic rules of civil procedure of CIS countries, evidenced by the strong emphasis on written and documentary process, as well as the active role of the Court, which always is able to supplement the parties' evidence with its own investigation.

Article 28 of the 1997 Rules of Procedure provides that Russian is the working language of the Court. As a result, all applications, supporting documentary evidence, memorials, oral arguments, and judgments are drafted or submitted in Russian. All judgments and opinions of the Court are published in an official CIS publication (*Sodruzhestvo. Informatsionnii Vestnik* [Commonwealth. Information Bulletin]), and no separate or dissenting opinions are published. Under Article 16 of the 1992 Statute, judgments and opinions of the Court also must be published in "the mass media" of member states. The intent of this provision is to encourage a wider knowledge of the Court's work among lawyers and the general public and influence its use by contesting parties.[56]

Appeals are submitted to the Plenum of the Economic Court. An appeal can only be based on grounds of a violation of law. Any new assessment of facts is excluded. Because in practice it is often difficult to draw a clear line between "questions of law" and "questions of fact," the Plenum of the Economic Court will have to clarify its position with respect to the interpretation of the term "questions of law." Under Article 157 of the 1997 Rules of Procedure, the Plenum of the Economic Court has the power to: (1) leave the judgment of the chamber of the Economic Court unchanged and dismiss the appeal; (2) vacate the judgment of the chamber of the Economic Court wholly or in part and remand the case for a new trial to one of the chambers; (3) vacate the judgment of the chamber of the Economic Court wholly or in part and dismiss

55. *See* R. Plender, *Procedure in the European Courts: Comparisons and Proposals*, 267 RECUEIL DES COURS 9 (1997).

56. The necessity of ensuring that the Court's opinions should receive full publicity was emphasized by the Court in its opinion No. 07/95 on the interpretation of article 16 of the 1992 Statute of the Economic Court of the CIS. *See* 3 (20) CIB, *supra* note 7, at 110 (1995).

the case; (4) change the judgment of the chamber of the Economic Court; and (5) vacate the judgment and render its own. It remains to be seen how the Plenum will resolve the question of determining whether the case should be decided by the Plenum or remanded to one of the chambers of the Economic Court.

Practice suggests that the major procedural problem facing the Economic Court is the non-appearance and non-participation of the parties and the non-performance of judgments. All judgments in cases dealing with actual disputes between CIS states involved an unwilling party to the litigation. In three cases initiated by Belarus and Russia against Kazakhstan, the defendant refused to submit detailed written replies to the Court and did not participate in the proceedings before the Court. Under Article 64 of the 1997 Rules of Procedure, the unwillingness of one of the parties to cooperate with the Court and non-appearance do not prevent the Court from deciding a case. Regrettably, these powers do not resolve the issue of implementation. Practice suggests that an unwilling party is unlikely to comply with the decisions of the Court. As noted earlier, Kazakhstan refused to comply with one of the first judgments of the Economic Court.[57] If CIS states fail to address these issues, the Court is likely to suffer a serious decline in judicial authority and legitimacy.

VII. Caseload and Impact

Since its establishment in 1994, the Court has handed down judgments in several cases involving disputes between states and has issued numerous advisory opinions. From 1994-1996, the Court issued eighteen opinions.[58] The overwhelming majority of these opinions dealt with interpretations of international agreements. Although some of the Court's advisory opinions dealt with fundamental and significant legal matters, it is important to note that during this initial period only three cases involved actual disputes between CIS states.[59] In 1997 and 1998, the Court issued twelve opinions. None of

57. *See supra* notes 46-47 and accompanying text.

58. *See* E.G. Moiseev, Mezhdunarodno-Pravovye Osnovy Sotrudnichestva Stran SNG [International Legal Foundation for the Cooperation of CIS States] 31 (1997).

59. *See id.*

these cases involved an actual dispute between CIS states.[60] This means that through the end of 1998 the Court had decided only a handful of actual disputes. The number of actual disputes decided by the Court may be higher if one considers several advisory opinions that at least substantively concerned disputes between states. However, it is evident that many controversies among CIS states are not submitted to the Economic Court but are handled through other means of dispute settlement.

A major factor that negatively affects the role of the Court is the existence of multiple dispute settlement mechanisms within the CIS, including dispute settlement by the principal political organ—the Council of Heads of State. The reluctance to use the Economic Court may result from a desire of the CIS states to maintain their freedom of action. It also may indicate a lack of confidence in the Court. Whatever the reason, the Economic Court's actual impact on the functioning of the CIS remains essentially marginal.

An increase in the workload of the Court will depend on the general willingness of the CIS states to submit their disputes to a judicial institution. In this respect, the Soviet legacy of distrust of international judicial organs does not leave much room for optimism. However, there may be certain institutional developments within the CIS that could increase resort to the Court. In particular, gradual implementation of the 1993 Treaty on Creation of an Economic Union[61] might lead to a higher workload. The Economic Court also may gain greater prominence if the CIS states agree to proposals aimed at reforming the Court.

VIII. Proposals for Reform

Discussions on improving the judicial organ of the CIS focus on several areas. The principal area of concern is the limited powers of the Economic Court. Of particular interest are proposals for reform coming from the judges of the Court. Former Judge M.I. Kleandrov,[62] an active participant in discussions of matters pertaining to the role of the Economic Court,

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60. The author would like to thank Judge G.V. Simonian for this information.

61. *See Bulletin of International Treaties, supra* note 5.

62. Judge M.I. Kleandrov was appointed by the Russian Federation.

made far-reaching proposals to widen the Court's jurisdiction by giving it the power to resolve not only economic disputes but also other kinds of disputes, including disputes involving the legality of CIS acts, territorial disputes, human rights disputes, disputes between the CIS and its staff members, and disputes involving private parties.[63] More radical proposals include the creation of an integrated dispute settlement mechanism within the CIS by means of transforming the Economic Court into a Court of Justice of the CIS.[64] It is not clear to what extent these proposals reflect the thinking of the current members of the Court.[65]

Governments of the CIS states have acknowledged the need for reform. In 1995, the Council of Heads of State approved the idea of expanding the jurisdiction of the Economic Court.[66] The Council also approved the idea of preparing a convention establishing a Court of Justice of the CIS.[67] Although these concepts were reviewed at subsequent meetings of the Council,[68] there appears to be no progress in their implementation.

At this stage, a radical transformation of the Economic Court into a Court of Justice of the CIS appears unrealistic. A more realistic approach would involve a gradual widening of the Court's jurisdiction in several crucial areas. In particular, it might be worthwhile to examine whether the future Court should have jurisdiction over disputes involving the legality of CIS acts. At present, the Court does not exercise any control over the legality of the acts of the CIS organs. The participating states did not feel the need to grant these powers to the Economic Court because they felt sufficiently protected by

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63. *Cf.* M.I. Kleandrov, EKONOMICHESKII SUD SNG: STATUS, PROBLEMY, PERSPECTIVY [THE ECONOMIC COURT OF THE CIS: STATUS, PROBLEMS, PERSPECTIVES] 118-69 (1995).

64. *See id.*

65. In a recent paper, Armenian judge G.V. Simonian endorsed some of the above proposals, in particular the extension of the jurisdiction of the Economic Court over commercial disputes, legality of CIS acts, and human rights disputes. *See* G.V. Simonian, *Problemy kompetentsii Ekonomicheskogo Suda SNG v usloviakh reformirovania v SNG* [*Problems of the Jurisdiction of the CIS Economic Court During the Implementation of CIS Reforms*], 6 VESTNIK, *supra* note 8, at 103 (1999).

66. *See* 2 (19) CIB, *supra* note 7, at 85 (1995).

67. *See id.*

68. *See, e.g.*, 2 (20) CIB, *supra* note 7, at 94 (1995).

their right of veto guaranteed by the consensus rule that governs the decision-making procedure of practically all organs of the CIS.

However, experience indicates that closer regional integration, especially in the economic field, requires the adoption of majority rule. Indeed, the CIS states have already recognized the need for majority rule in some areas of cooperation. In October 1994, the Council of Heads of State unanimously approved the Agreement on the Creation of the Interstate Economic Committee of the Economic Union.[69] That body became the first CIS organ endowed with supranational powers to carry out a coordinated economic and social policy. Unlike other CIS organs that operate on the principle of "one state—one vote," the Interstate Economic Committee takes decisions on the basis of a weighted voting system.[70] Certain decisions binding for all parties to the 1994 Agreement on the Creation of the Interstate Economic Committee of the Economic Union may be taken by a majority vote. In view of this ground-breaking development, it should be examined whether the assumptions under which the CIS states opted for a rather limited jurisdiction of the Economic Court are still valid.

Another important aspect calling for immediate attention is the enforcement of judgments. Although acceptance of judgments by individual states will continue to be of vital importance, the CIS must have express powers to impose sanctions upon reluctant losing parties in cases of noncompliance with legally binding judgments. Without a new mechanism for enforcing the judgments of the Economic Court, its role as a principal judicial institution within the CIS will be jeopardized.

IX. Concluding Remarks

It is well known that the efficiency of regional courts depends not only on the formal powers and structures of the courts or the enforceability of their judgments, but also on the organizational structure in which a particular court has been integrated. As a regional organization, the CIS still operates as

69. *See* 3 (16) CIB, *supra* note 7, at 41 (1994).

70. Russia has 50% of the votes; Ukraine has 14%; Belarus, Kazakhstan and Uzbekistan have 5% each. All the remaining states have 3% each.

a loose association rather than as a supranational institution. It is therefore not surprising that the powers of the Economic Court are rather limited.[71]

The future of the Economic Court depends upon the future of the CIS. At the present time, the future of the CIS remains uncertain. The CIS was originally regarded by many newly-independent states as a means to manage the divorce process among the successor states of the former USSR. This explains why during its initial period the CIS lacked a firm institutional structure. Subsequent evolution transformed the CIS into a more integrated entity. The creation of the Economic Court, the adoption of the 1993 CIS Charter, and the 1993 Treaty on Creation of an Economic Union, and, last but not least, the creation of the Interstate Economic Committee indicate the desire of at least some participating states to establish closer institutionalized cooperation in various spheres of activity.

However, operation of the CIS proved to be unsatisfactory. Practice indicates that implementation of CIS arrangements and decisions on cooperation remains limited.[72] The low level of implementation of CIS agreements has led to dissatisfaction among participating states. Furthermore, CIS governments often express concern about the viability and prestige of the Commonwealth. As a result, they initiated a process aimed at restructuring the CIS. In 1998, the CIS governments reached an agreement to convene a "special interstate forum for discussing the problem of improvement of activities of the CIS and its reformation."[73] Although efforts at restructuring the CIS have not yet produced concrete results, it appears that many CIS governments still regard the CIS as the main framework for broad regional political debate and economic cooperation.

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71. A Ukrainian scholar noted in this connection that "a certain correlation apparently exists between the level and intensity of integration within an international institution, on the one hand, and the effectiveness of its judicial organs, on the other." *See* Voitovich, *supra* note 4, at 415.

72. *Cf.* Pechota, *supra* note 4, at 596; R.M. Buxbaum, *Modernization, Codification, and Harmonization: The Influence of the Economic Law of the European Union on Law Reform in the Former Socialist Bloc*, *in* EUROPEAN ECONOMIC AND BUSINESS LAW: LEGAL AND ECONOMIC ANALYSIS OF INTEGRATION AND HARMONIZATION 125, 134 (Buxbaum et al. eds., 1996).

73. 2 (29) CIB, *supra* note 7, at 20 (1998).

The principal question before the CIS governments today is the need, effectiveness, and intensity of future integration. There is a growing concern that the increasing differences among CIS countries may result in a *de facto* disintegration of the CIS. At the same time, some member states continue to express reservations with respect to proposals aimed at strengthening the institutional structure of the CIS. If the CIS governments fail to achieve consensus on closer integration and the CIS remains a loose association of states progressively going their separate ways, the Economic Court's role may become even more marginal. If the CIS governments adopt a supranational integration model and take further steps toward creating supranational organs, the judicial organ of the CIS is likely to become more prominent. Of particular importance in this connection is the Court's supervisory function. At some stage, the CIS states interested in closer integration will have to decide whether there is a real need for judicial control of the legality of CIS acts. These states, many of which are still afraid to lose their newly-acquired sovereignty, might be more willing to transfer additional powers to a stronger CIS if there is some guarantee that an independent and impartial judicial body will be able to protect their interests in cases of misuse of new supranational powers.

A major weakness of the Economic Court results from the decision of the CIS states to adopt the model of multi-speed and multi-option integration. As noted earlier, this arrangement allows individual members to choose the level and pace of integration into the existing CIS structures. As a result, the 1992 Statute of the Court is not an integral part of the CIS Charter. CIS members are not *ipso facto* parties to the 1992 Statute of the Economic Court, as only some CIS states became parties to the 1992 Statute. A multipurpose regional organization that has parliamentary and executive organs, one of which already enjoys certain supranational powers, is obviously incomplete unless it possesses a fully integrated judicial organ capable of resolving disputes among all members of the organization. Any further reform of the CIS that fails to address this fundamental issue will undermine any hopes for a well-functioning regional organization capable of fulfilling its objectives and maintaining the rule of law.