7-1-1997

Dispute Resolution Under a FreeTrade Area of the Americas:The Shape of Things to Come

David Lopez

DISPUTE RESOLUTION UNDER A FREE TRADE AREA OF THE AMERICAS: THE SHAPE OF THINGS TO COME

DAVID LOPEZ*

I. INTRODUCTION

As we gather in Miami, the site of the 1994 Summit of the Americas, to discuss "Free Trade in the Western Hemisphere," it is clear that we stand at an historic crossroads for the future

* Professor of Law, St. Mary's University School of Law; Visiting Professor of Law, University of California at Davis School of Law, 1997-1998. J.D., Harvard Law School, 1988, *cum laude*; B.S.F.S., Georgetown University, 1985, *magna cum laude*.

economic prosperity and political freedom of all Americans—North, Central, and South. The original Summit of the Americas lies more than two years in our past and the second Summit of the Americas, to take place in Santiago, Chile in March 1998,[1] lies less than one year into our future. A series of important events has and will continue to unfold between these two points in the history of the Western Hemisphere.

In December 1994, the heads of state of all thirty-four American democracies declared a commitment to integrate their economies into a Free Trade Area of the Americas (FTAA) by the year 2005.[2] Since then, the governments have begun to lay the groundwork for FTAA negotiations. For example, Trade Ministerial Meetings occurred in June 1995, March 1996, and May 1997.[3] In addition, several vice-ministerial sessions have been held and eleven FTAA working groups have been busy assembling and systematizing data on different aspects of trade, with the assistance of the Organization of American States (OAS), Inter-American Development Bank (IDB), and the Economic Commission for Latin America and the Caribbean (ECLAC).[4]

---

1. *See Administration's Fast-Track Measure May be Ready by End of March, Lang Says*, 14 Int'l Trade Rep. (BNA) 406 (Mar. 5, 1997).

2. *See* Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 810-14 (1995) [hereinafter Declaration of Principles]. As envisioned, the FTAA will stretch from Alaska to Argentina and include over 850 million consumers. *See Ministerial Meeting Adopts Hemispheric Trade Declaration*, 12 Int'l Trade Rep. (BNA) 1137 (July 5, 1995) [hereinafter *Ministerial Meeting*]; *U.S. Exports to Western Hemisphere Could Reach $200 Billion Next Year*, 11 Int'l Trade Rep. (BNA) 1447 (Sept. 21, 1994).

3. The trade ministers met in Denver in July 1995 and in Cartagena, Colombia in March 1996. *See Ministerial Meeting*, *supra* note 2, at 1137-38; *The Summit of the Americas Second Ministerial Trade Meeting Joint Declaration Adopted March 21, 1996*, 13 Int'l Trade Rep. (BNA) 538 (Mar. 27, 1996) [hereinafter *Second Ministerial*]. The May 1997 meeting of the hemisphere's trade ministers took place in Belo Horizonte, Brazil. *See id.* at 539.

4. *See* Organization of American States—Trade Unit, *Toward Free Trade in the Americas*, at 1, 54-57 (on file with the OAS and (visited Mar. 20, 1997) <http://www.oas.org/>) [hereinafter *Toward Free Trade*]. Trade ministers authorized the establishment of seven working groups (i.e., those on market access, customs procedures and rules of origin, investment, standards and technical barriers to trade, sanitary and phytosanitary measures, subsidies, and small economies) at the Denver Ministerial. *See* James Stamps, *Free Trade Area for the Americas: Chile is the Linchpin*, 5 MEX. TRADE & L. REP. 7 (Oct. 1995). They then launched four additional working groups (i.e., those on government procurement, intellectual property, services, and competition policy) at the Cartagena Ministerial. *See FTAA Ministers Agree to Establish a Dispute Settlement Working Group*, 13 Int'l Trade Rep. (BNA) 510 (Mar. 27, 1996) [hereinafter *FTAA Ministers Agree*].

We now stand at a crossroads because the thirty-four American democracies soon will have to make crucial decisions about key aspects of hemispheric integration—decisions that, up to this point, they have had the luxury of avoiding behind the veneer of essential, yet preliminary data-gathering activity. These fundamental issues include: Will the countries approach the negotiating table individually or in trading blocs?[5] What path to free trade will the negotiations take?[6] What pace will negotiations assume?[7] What new institutions, if any, will be created to facilitate the negotiations? Will the FTAA be comprehensive or limited in scope?[8] The ability of representatives of the thirty-four American democracies to successfully confront these issues at the Santiago Summit in 1998 will determine the future of economic integration in this hemisphere.

---

5. "MERCOSUR comprises Brazil, Argentina, Paraguay, and Uruguay, and plans to negotiate as a bloc in the FTAA talks ... . [A]ll three NAFTA countries would be negotiating individually and not as part of NAFTA." *NAFTA Negotiator Says FTAA Should be Bridge to Customs Union*, 14 Int'l Trade Rep. (BNA) 478 (Mar. 12, 1997).

6. The trade ministers had an opportunity to begin to address the "path" issue at the Belo Horizonte Ministerial in May 1997. *See Mercosur-Mexico Pact's Main Points Decided, Details Remain Unresolved, Brazil's Lampreia Says*, 13 Int'l Trade Rep. (BNA) 1490 (Sept. 25, 1996). The approach most recently suggested by the United States is to begin with WTO obligations, add to those the "best" elements from existing trade arrangements in the hemisphere, and add to that combination "additional obligations that neither [the WTO nor existing pacts] currently addresses." *See United States Wants Fewer Groups in FTAA Negotiations, Eizenstat Says*, 14 Int'l Trade Rep. (BNA) 477 (Mar. 12, 1997).

7. Currently, the timing (or pace) of negotiations is a major point of contention. The United States has proposed a two-stage strategy, involving: first, initial negotiations (on market access, customs procedures and rules of origin, investment, standards and technical barriers to trade, sanitary and phytosanitary measures, government procurement, intellectual property rights, and services) beginning after the Santiago Summit and, second, later negotiations (on subsidies, antidumping and countervailing duties, competition policy, and smaller economies) starting in 2000, all of which are to be concluded by 2005. *See U.S. and Mercosur Disagree on FTAA Negotiating Timetable*, 14 Int'l Trade Rep. (BNA) 409 (Mar. 5, 1997). In contrast, the MERCOSUR countries, and particularly Brazil, desire a three-stage approach, starting in 1998 with customs procedures, rules of origin, and sanitary and phytosanitary measures; progressing in 2000 to subsidies; and "leaving the issue of market access for last, starting in 2003." *Id.* at 409. The Brazilians wish to move slowly on market access matters ostensibly because they and other "Latin nations have made major concessions in recent years and need time to adjust their economies to increasing competition from imports." *Id.* Nonetheless, "there appear[s] to be an 'emerging consensus' that the launch of negotiations should take place at the summit to be held in March 1998 in Chile." *Id.*

8. "The June [1995] ministerial failed to resolve two key points of disagreement about the future path of FTAA negotiations: (1) the scope of the FTAA negotiations and (2) the approach to be used to achieve the FTAA." Stamps, *supra* note 4, at 8.

A number of people who study and write about international trade organization and the Western Hemisphere believe that the structure and systems of a future FTAA may resemble those of the North American Free Trade Agreement (NAFTA).[9] Recently, for example, Professor Boris Kozolchyk, a pre-eminent scholar on Latin America and trade and a U.S. Delegate to the United Nations Commission for International Trade, wrote, "[i]n my opinion, NAFTA's model, and not that of supra-national federalism is more likely to become universally acceptable. In the grand scheme of international cooperative forces, NAFTA is the model most consistent with the nature of the modern nation state and with the limits of man's cooperative impulses."[10]

In this Article, the final piece in a trilogy on trade dispute resolution in the Western Hemisphere,[11] I examine the general topic of dispute resolution in a future Free Trade Area of the Americas, focusing on the following questions: Are the FTAA negotiators ultimately more likely to adopt a legalistic or pragmatic approach to dispute resolution? What institutions will they create, if any, to administer FTAA dispute settlement? Will NAFTA's dispute resolution mechanisms serve as the models for the devices used in an integrated hemisphere? In short, what is the probable shape of dispute resolution under a future FTAA?

In Part II of this Article, I begin to address these points by describing the work undertaken under the auspices of the FTAA in the field of dispute resolution since the 1994 Miami Summit and the three models of dispute settlement from which FTAA mechanisms are most likely to be drawn, i.e., the trade dispute resolution systems of the Mercado Común del Sur (MERCOSUR), NAFTA, and the World Trade Organization (WTO).

In Part III, I present my theory of the manner in which dispute resolution systems in an FTAA may unfold. I conclude that although NAFTA-like dispute settlement systems will at some

---

9. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 and 32 I.L.M. 605 (1993) [hereinafter NAFTA].

10. Boris Kozolchyk, *NAFTA in the Grand and Small Scheme of Things*, 13 ARIZ. J. INT'L & COMP. L. 135, 144 (1996).

11. *See* David Lopez, *Dispute Resolution Under NAFTA: Lessons form the Early Experience*, 32 TEX. INT'L L.J. 163 (1997) [hereinafter Lopez, *Dispute Resolution Under NAFTA*]; David Lopez, *Dispute Resolution Under MERCOSUR from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas*, 3 NAFTA LAW & BUS. REV. AM. 3 (1997) [hereinafter Lopez, *Dispute Resolution Under MERCOSUR*].

point prevail in the FTAA, this may not be entirely true during the FTAA's inception, nor, perhaps, in periods of advanced development in this hemispheric institution. Initially, the American democracies are likely to utilize flexible, informal dispute settlement mechanisms more akin to those now used in MERCOSUR than those in place in NAFTA and the WTO. During this first stage of development, several features of NAFTA's dispute settlement structures may be present; however, the practice will be decidedly non-NAFTA. Only after a period of years will reliance substantially increase on more formal, rule-driven devices such as those present in NAFTA and the WTO.

II. EXISTING MODELS FOR FTAA DISPUTE RESOLUTION

Since the 1994 Miami Summit, the American democracies have taken a two-stage approach to developing an FTAA: 1) from the 1994 Summit to the eve of the 1998 Santiago Summit, the parties are to build a database containing information about various components of a prospective free trade agreement, and 2) from the 1998 Summit to the year 2005, the parties will negotiate the agreement and secure its ratification, using the database created in the first stage.[12] In the Plan of Action issued at the Miami Summit, the hemisphere's leaders designated numerous matters for study during the initial phase, including subsidies, intellectual property rights, government procurement, technical barriers to trade, rules of origin, and dispute resolution.[13] Although working groups were created relatively early in the process to collect data on all other issues designated in the Plan of Action, no working group on FTAA dispute resolution was formed until May 1997.[14]

---

12. "The FTAA process is unfolding in a series of ministerial and vice-ministerial meetings and with 11 working groups engaged in data-gathering efforts ... . Negotiations have not started yet." *Three Framework Proposals to Guide Talks at this Week's FTAA Vice-Ministers' Meeting*, 14 Int'l Trade Rep. (BNA) 357 (Feb. 26, 1997) [hereinafter *Three Framework Proposals*].

13. *See* Declaration of Principles, *supra* note 2, art. II(9)(3).

14. "Dispute settlement was the only issue addressed at the Miami Summit's Action Plan that was neither taken up at the June 1995 ministerial nor mentioned as an item to be considered at the March 1996 meeting. Several sources reported that there was 'widespread feeling' that efforts at this stage should support the dispute procedures in the World Trade Organization (WTO) and not strive to set up new procedures in the FTAA context at this time." Stamps, *supra* note 4, at 7. *See also Ministerial Meeting*, *supra* note 2, at 1138 ("On the issue of dispute resolution, a U.S. trade official said the

It was not until the Cartagena Ministerial in March 1996 that the trade ministers began to focus attention on dispute resolution under a future FTAA. At that time, the ministers agreed to establish a working group on Dispute Settlement (but not until the Belo Horizonte Ministerial)[15] and "asked the Organization of American States to start compiling information on dispute settlement mechanisms used in bilateral and subregional pacts in the Hemisphere."[16] The OAS finished its compilation of this material by May 1997, in time for presentation in Belo Horizonte.[17]

Much like the Analytical Compendium of Western Hemisphere Trade Arrangements the OAS produced in 1995,[18] the compilation of data on dispute resolution covers the dispute settlement regimes now operative in MERCOSUR, NAFTA, the WTO, the Andean Group, the Central American Common Market (CACM), the Caribbean Community and Common Market (CARICOM), the Group of Three, and Chile's bilateral free trade agreements with Mexico, Colombia, Ecuador, and Venezuela.[19] The dispute settlement mechanisms of these trading arrangements, then, will become the models for such mechanisms in a future FTAA. Of these models, the dispute resolution systems of MERCOSUR, NAFTA, and the WTO are likely to be the most influential in shaping dispute resolution structures for the FTAA.[20] A brief description of the essential contours of dispute resolution under each of these trading organizations follows.[21]

---

ministers felt it best to concentrate on the current mechanism within the World Trade Organization while continuing to work out the obligations of each nation in the FTAA.").

15. *See FTAA Ministers Agree, supra* note 4, at 510; *FTAA Dispute Settlement Working Group has been Under Discussion, Sources Say*, 13 Int'l Trade Rep. (BNA) 478 (Mar. 20, 1996).

16. *Second Ministerial, supra* note 3, at 538.

17. Telephone Interview with Jeannette M.F. Tramhel, Legal Counsel, Department of International Law, Secretariat for Legal Affairs, Organization of American States (Mar. 10, 1997) [hereinafter Tramhel Interview].

18. *See generally* OAS TRADE UNIT, AN ANALYTICAL COMPENDIUM OF WESTERN HEMISPHERE TRADE ARRANGEMENTS (1995).

19. The members of the major subregional trading groups of the Western Hemisphere are: NAFTA (the United States, Canada, and Mexico), CARICOM (Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Surinam, and Trinidad and Tobago), CACM (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua), MERCOSUR (Argentina, Brazil, Paraguay, and Uruguay), the Group of Three (Mexico, Colombia, and Venezuela), and the Andean Group (Bolivia, Colombia, Ecuador, Peru, and Venezuela). *See Toward Free Trade, supra* note 4, at 5.

20. Tramhell Interview, *supra* note 17.

21. For more exhaustive descriptions of the MERCOSUR, NAFTA, and WTO dis-

A. Dispute Resolution in the Mercado Común del Sur

MERCOSUR is a budding customs union between Argentina, Brazil, Paraguay, and Uruguay, created in 1991 by the Treaty of Asunción.[22] The organization's present dispute resolution processes did not exist when the Treaty of Asunción took effect in November 1991. From that time until April 1993, the MERCOSUR parties relied upon an extremely elementary three-step dispute resolution process that began with direct negotiations between the disputing countries, then led to evaluation by MERCOSUR's Common Market Group (CMG), and, failing resolution at these early stages, ended with review by MERCOSUR's Council of the Common Market (Council).[23] The disputes which could be resolved within this preliminary system were limited strictly to conflicts between the member states arising "as a result of the application of the Treaty [of Asunción]."[24] No provision was made for the settlement of disputes between a member state and private party, a MERCOSUR institution and private party, a member state and a MERCOSUR institution, or exclusively between private parties.[25]

MERCOSUR's current dispute resolution system is premised on two accords: the Brasilia Protocol, which took effect in April 1993,[26] and the Ouro Preto Protocol, which took effect in January 1996.[27] This system provides for the resolution of two general

---

pute settlement processes, see Lopez, *Dispute Resolution Under MERCOSUR*, *supra* note 11; Lopez, *Dispute Resolution Under NAFTA*, *supra* note 11; PIERRE PESCATORE ET AL., HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT (1996).

22. *See* Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1044 (1991) [hereinafter Treaty of Asunción]. The Treaty of Asunción was signed in March 1991 and entered into force in November 1991. *See* JORGE PÉREZ OTERMIN, EL MERCADO COMUN DEL SUR: DESDE ASUNCIÓN A OURO PRETO—ASPECTOS JURÍDICOS-INSTITUCIONALES 11 (1995).

23. Treaty of Asunción, *supra* note 22, annex III(1). The eight-member Council, MERCOSUR's supreme institution, is composed of the ministers of foreign affairs and ministers of the economy of the four member states. *Id.* art. 10. The sixteen-member CMG consists of four representatives of each country's ministry of foreign affairs, economic ministry, and central bank. *Id.* art. 13.

24. *Id.* annex III(1).

25. *See* OTERMIN, *supra* note 22, at 30.

26. Protocol of Brasilia for the Resolution of Controversies, Dec. 12, 1991, 6 INTER-AM. LEGAL MATERIALS 1 (1992) [hereinafter Brasilia Protocol].

27. Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244 (1995) [hereinafter Ouro Preto Protocol].

types of controversies: those between member states ("government-to-government" or "public" disputes) and those between private firms or individuals and a member state ("private/public" disputes).

In general terms, disputes between member states concerning the interpretation, application, or breach of the Treaty of Asunción, its related accords, or any decision of the Council or CMG are subject to a three-stage dispute resolution process involving direct negotiations, intervention by the CMG, and binding arbitration.[28] The Brasilia Protocol stipulates that direct negotiations are not to last more than fifteen days beyond the date on which they were requested and that CMG intervention should end no later than thirty days from the date the dispute was submitted to the CMG.[29] Assuming a public dispute advances through negotiations and the CMG to an arbitral finding against a MERCOSUR country, and assuming the country fails to comply with the tribunal's decision, the other disputant(s) may adopt "temporary compensatory measures," such as the suspension of trade concessions or other equivalent steps designed to obtain compliance.[30]

Private/public disputes may be initiated by any natural or legal person who resides or is headquartered in Argentina, Brazil, Paraguay, or Uruguay and who is adversely affected by a MERCOSUR country's breach of the Treaty of Asunción or its related accords, or by certain official acts of the MERCOSUR institutions.[31] Assuming the National Section of the CMG receives a claim which it elects to pursue, the controversy may become the subject of discussions with the National Section of the offending country or, at the CMG's discretion, the subject of review by an ad hoc, three-member panel of experts.[32] In the event the panel of experts verifies the private party's claim, any MERCOSUR country may demand that the violator either take

28. Brasilia Protocol, *supra* note 26, art. 1 and chs. 2-4. A slightly more complicated process is involved in resolving public disputes within the "sphere of competence" of the MERCOSUR Trade Commission, a new entity created by the Ouro Preto Protocol in 1994. Ouro Preto Protocol, *supra* note 27, art. 1. For a full description of that process, see Lopez, *Dispute Resolution Under MERCOSUR*, *supra* note 11, at 15-18.

29. Brasilia Protocol, *supra* note 26, arts. 3(2), 4(2)-6.

30. *Id.* art. 23. The Brasilia Protocol provides that arbitral panels are to issue a written decision by no later than ninety days after being formed. *Id.* art. 20(1).

31. *Id.* arts. 25, 26(1); Ouro Preto Protocol, *supra* note 27, art. 43.

32. Brasilia Protocol, *supra* note 26, arts. 27-30.

corrective steps or annul the measure in question.[33] If that demand is not met in a timely fashion, the MERCOSUR country making the demand may resort directly to the arbitral proceedings created for resolving public disputes.[34]

In practice, from the group's inception in 1991 through 1996, the most remarkable feature of trade dispute resolution in MERCOSUR has been the parties' reluctance to use the foregoing provisions. Although various trade-related disputes arose during this period, the MERCOSUR parties did not rely on the structure they had created to settle such disputes.[35] Two factors may help to explain the nonuse of the organization's formal dispute settlement systems: 1) "a cultural predisposition toward informal, non-public, non-adversarial methods of conflict resolution," and 2) "the active and direct involvement of the presidents of Argentina, Brazil, Paraguay, and Uruguay" in resolving such controversies.[36]

B. Dispute Resolution Under the North American Free Trade Agreement

Unlike MERCOSUR, which is evolving toward a customs union, NAFTA is merely a free trade pact. In constructing a free trade zone, the United States, Canada, and Mexico put in place four major dispute settlement mechanisms. NAFTA itself contains a mechanism for the resolution of general controversies involving the interpretation, application, or breach of the Agreement (Chapter 20, Section B) and a separate device specifically for resolving antidumping and countervailing duty disputes (Chapter 19). In addition, the North American Agreement on Environmental Cooperation (Environmental Side Agreement)[37] and North American Agreement on Labor Cooperation (Labor Side Agreement)[38] each contain their own dispute resolution systems.

---

33. *Id.* art. 32.

34. *Id.*

35. *See* Lopez, *Dispute Resolution Under MERCOSUR*, *supra* note 11, at 20-24.

36. *Id.* at 24-27.

37. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993) [hereinafter NAAEC].

38. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter NAALC].

In general terms, Chapter 20 provides for a three-stage dispute resolution process that escalates as necessary from consultations, to a meeting of NAFTA's Free Trade Commission, to nonbinding arbitration.[39] Chapter 20 envisions that consultations will last no more than thirty days from the request for consultation and, similarly, that the Free Trade Commission will endeavor to resolve a controversy within thirty days after it first meets to consider the matter.[40] Assuming a dispute works its way through consultations and the Free Trade Commission to an arbitral finding against a NAFTA country, Chapter 20 provides that the disputing countries are to attempt to reach a "mutually satisfactory resolution."[41] If this does not occur within thirty days of receipt of the arbitral panel's final report, the complaining party may suspend NAFTA benefits to the offending party until the time an agreed resolution is reached.[42]

Under Chapter 19, a private Canadian, Mexican, or American business subject to a final antidumping determination of one of the three governments may request that the determination be reviewed by a binational arbitral panel.[43] Chapter 19 panels are charged with assessing "whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party."[44] Panels are to issue a final decision no later than 315 days after a request for a panel is made.[45] A panel ruling that a final determination is not in compliance with the importing Party's law is binding on the Party.[46] "No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."[47]

The Environmental Side Agreement provides for the resolution of two general types of controversies: those not involving allegations that a NAFTA government has failed to enforce its en-

39. NAFTA, *supra* note 9, arts. 2006-2008. The Free Trade Commission consists of cabinet-level officials of the NAFTA parties. *Id.* art. 2001.

40. *Id.* arts. 2007(1)(a), 2008(1).

41. *Id.* art. 2019. Chapter 20 provides that panels shall issue a final report in a dispute by no later than 120 days after the last panelist is selected. *Id.* arts. 2016(2), 2017(1)-(3).

42. *Id.* art. 2019(1).

43. *Id.* arts. 1904(2), 1911.

44. *Id.* art. 1904(2).

45. *Id.* art. 1904(14).

46. *Id.* art. 1904(9).

47. *Id.* art. 1904(11). Chapter 19 includes an elaborate set of procedures for ensuring that the member states comply with panel rulings. *See id.* art. 1905.

vironmental laws (nonenforcement matters) and those in which a government's failure to enforce its environmental law is directly at issue (enforcement matters).[48] The category of enforcement matters further is divided into cases of mere failure to enforce environmental laws and of a "persistent pattern" of failure to enforce environmental laws.[49] As to all cases other than "persistent pattern" cases, the Environmental Secretariat is authorized only to conduct an investigation, subject to limitation by the Council of the Commission for Environmental Cooperation, and to prepare a report, potentially for distribution to the public.[50] Disputes involving allegations of a "persistent pattern" of failure to enforce environmental laws are subject to a more intricate settlement process, involving consultations, a special session of the Council, and, ultimately, an arbitral panel.[51] If it does not occur voluntarily, compliance with adverse determinations by an arbitral panel is to be obtained by imposing a "monetary enforcement assessment" on the offending country or by suspending NAFTA benefits to it.[52]

The Labor Side Agreement creates a four-step dispute settlement process that progresses sequentially from initial consultations between the disputants' National Administrative Offices (NAOs), to ministerial consultations, to expert evaluations, and to further consultations which may lead to nonbinding arbitration.[53] A broadly defined category of "labor law" matters may be subjected only to the first two dispute resolution steps.[54] A smaller category of labor-related controversies may proceed to expert evaluation.[55] Only three types of labor controversies, those involving occupational safety and health, child labor, or

48. NAAEC, *supra* note 37, arts. 13-15, 22-36.

49. *Id.* arts. 14, 15, 22-36.

50. *Id.* art. 15.

51. *Id.* arts. 22-34.

52. *Id.* arts. 34(5), 36(1).

53. NAALC, *supra* note 38, pts. 4, 5.

54. *Id.* arts. 21(1), 22(1). Consultations may involve the following labor matters: freedom of association and the right to organize; the right to bargain collectively; the right to strike; prohibition of forced labor; labor protections for children and young persons; minimum employment standards (such as minimum wages and overtime pay); elimination of employment discrimination; equal pay for men and women; prevention of occupational injuries and illnesses; compensation in cases of occupational injuries and illnesses; and protection of migrant workers. *Id.* art. 49.

55. *Id.* art. 23. Expert evaluation extends to all of the labor matters listed in the previous footnote except freedom of association, the right to organize, the right to bargain collectively, and the right to strike. *Id.*

minimum wage concerns, may advance to the fourth stage of dispute settlement.[56] As is true for environmental cases, assuming compliance with a labor panel's ruling does not occur voluntarily, compliance is to be obtained by imposing a "monetary enforcement assessment" on the offending country, and if that fails to earn compliance, by suspending NAFTA benefits to the country.[57]

From January 1994, when NAFTA came into force, until December 1996, forty-six separate controversies formally entered NAFTA's four primary dispute resolution systems.[58] The early experiences from these NAFTA cases reveal several significant lessons for dispute settlement in a future FTAA. First, certain devices, such as the Chapter 19 mechanism for resolving antidumping and countervailing duty conflicts, can be extremely successful in generating relatively speedy and conclusive results.[59] In addition, even informal, nonbinding dispute settlement techniques, such as those contained in the Environmental Side Agreement, can effectively address serious social conditions.[60] Second, governments operating in good faith and with a substantial interest in the success of a free trade arrangement will comply with dispute settlement rulings, even if such rulings are strongly adverse to them.[61] Third, the parties to a free trade agreement will try, but, more often than not, will fail to abide by time limits specified for undertaking various dispute settlement activities; however, this practice does not necessarily imperil the underlying agreement and may, in fact, add a desirable measure of flexibility to the dispute resolution process.[62] Fourth, from time to time, dispute resolution mechanisms will be expected to bend to the domestic political needs of the trading partners.[63] The best mechanism of the sort is one that limits such deviations to a handful of only the most essential political matters. Finally, although it is clear that no free trade agreement can be formed which does not contain a general dispute resolution device, such

56. *Id.* art. 27(1).

57. *Id.* arts. 39(4), 41.

58. This includes eight cases under Chapter 20, 24 disputes under Chapter 19, and seven disputes each under the Environmental and Labor Side Agreements. *See* Lopez, *Dispute Resolution Under NAFTA*, *supra* note 11, at 168, 175, 188, 195.

59. *See id.* at 201.

60. *See id.*

61. *See id.* at 202-04.

62. *See id.* at 204-06.

63. *See id.* at 206-07.

as the device contained in Chapter 20, one should not underestimate the enormous practical importance of including in an agreement a Chapter 19-type process for addressing antidumping and countervailing duty disputes.[64]

C. *Dispute Resolution in the World Trade Organization*

All of the American democracies except Panama are members of the World Trade Organization.[65] Although the WTO was inaugurated only in January 1995, its dispute resolution mechanisms derive from the 1947 General Agreement on Tariffs and Trade (GATT).[66] The WTO dispute settlement framework is set forth primarily in the Understanding on Rules and Procedures Governing the Settlement of Disputes,[67] which establishes a three-stage dispute resolution process involving consultations, panel review, and appellate review.[68]

A WTO member may request consultations with any other member concerning action by the latter that affects the operation of the Agreement Establishing the WTO or various multilateral and plurilateral trade agreements or both within the WTO's supervision.[69] The member to which the request is made "shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution."[70] If consultations do not resolve the dispute within sixty days after the date of the request for consultations, the complaining party may ask that a

---

64. *See id.* at 207.

65. *See* World Trade Organization, *WTO Membership* (visited Mar. 20, 1997) <http://www.wto.org/>. Panama has requested to join the WTO. *See id.*

66. Agreement Establishing the World Trade Organization [Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations], Apr. 15, 1994, 33 I.L.M. 1143 (1994); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT'L LAW. 389, 391-401 (1995) (tracing the evolution of dispute resolution under GATT from its inception to 1994).

67. Final Act, annex 2, Understanding on Rules and Procedures Governing Settlement of Disputes, 33 I.L.M. 1226 (1994) [hereinafter Final Act].

68. *Id.* arts. 4-19. By mutual agreement, disputing parties may opt out of the three-stage dispute resolution process and submit a WTO controversy to binding arbitration. *Id.* art. 25.

69. *Id.* arts. 1, 4, app. I.

70. *Id.* art. 4(3). The member that requested consultations may directly request that a WTO dispute resolution panel be established in the event the member to which the request was made does not reply to the request or enter consultations. *Id.*

dispute resolution panel be formed.[71]

Upon a member's request, the Dispute Settlement Body (DSB), a newly created WTO institution, shall establish a panel, unless the DSB decides by consensus not to do so.[72] The task of the panel is to examine the controversy in light of the trade agreement(s) in question and "to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."[73] Ordinarily, WTO panels are to consist of three "governmental and/or non-governmental individuals" (none of whom can be a citizen of any disputing party) nominated by the WTO Secretariat.[74] Panel proceedings are designed to progress from the parties' initial written submissions to a final panel report in a period not to exceed nine months.[75] "Within 60 days after the date of circulation of a panel report to the Members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."[76]

Any such appeal is made to a standing WTO Appellate Body composed of seven experts in law and international trade who are unaffiliated with any government.[77] The Appellate Body is to issue a report upholding, modifying, or reversing the legal find-

---

71. *Id.* art. 4(7). In lieu of requesting a panel, or while panel proceedings are ongoing, the disputants may attempt resolution through good offices, conciliation, and mediation. *Id.* art. 5.

72. *Id.* arts. 1(1), 6(1). Potentially, the DSB includes all members of the WTO. *See* Young, *supra* note 66, at 399. A "consensus" is reached within the DSB "if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision." Final Act, *supra* note 67, art. 1(4). "But since the requesting country would presumably not join such a consensus, as a practical matter the DSB must always establish a panel when requested." Young, *supra* note 66, at 402.

73. Final Act, *supra* note 67, art. 7(1).

74. *Id.* art. 8.

75. *Id.* art. 12(8), (9).

76. *Id.* art. 16(4). By virtue of the difficulty of obtaining consensus against adopting a panel's report under the 1994 innovations to traditional GATT practice, Professor Young describes this as "a rule of almost automatic adoption of panel reports." Young, *supra* note 66, at 402.

77. Final Act, *supra* note 67, art. 17(1)-(3). Although the Appellate Body is composed of seven persons, it hears individual appeals sitting in three-member panels. *Id.* art. 17(1). The current members of the WTO Appellate Body are James Bacchus (United States), Christopher Beeby (New Zealand), Claus-Dieter Ehlermann (Germany), Said El-Naggar (Egypt), Florentino Feliciano (Philippines), Julio Lacarte Muro (Uruguay), and Mitsuo Matsushita (Japan). *See WTO Appellate Body's Seven Members Expected to Begin Work in Early 1996*, 12 Int'l Trade Rep. (BNA) 2018 (Dec. 6, 1995).

ings and conclusions of the dispute settlement panel no later than ninety days from the formal notice of appeal.[78] "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members."[79]

Thereafter, the DSB is to continuously monitor the implementation of its recommendations or rulings until the issue is resolved.[80] In the event a disputant fails to comply with the DSB's directives within a "reasonable period of time," the party failing to comply may elect to pay appropriate compensation to the injured party; alternatively, the injured party may request that the DSB authorize it to suspend the application of concessions or other obligations under the trade agreement(s) involved in the dispute to the party not in compliance.[81]

The Uruguay Round also produced new provisions concerning antidumping and countervailing duty disputes.[82] With respect to antidumping measures, when an importing member has taken final action to levy definitive antidumping duties on the products of an exporting member and previously requested consultations have failed to resolve the controversy, the exporting member may request that a WTO panel be established.[83] Upon request, the DSB shall form a panel, and the panel, in turn, shall assess whether the importing member's investigation underlying the antidumping duties was proper, unbiased, and objective.[84] "If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be over-

78. Final Act, *supra* note 67, art. 17(5), (13).

79. *Id.* art. 17(14).

80. *Id.* art. 21.

81. *Id.* arts. 21(3), 22.

82. *See generally* James R. Cannon, Jr., *Dispute Settlement in Antidumping and Countervailing Duty Cases*, *in* THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTATION LEGISLATION 359 (Terence P. Stewart ed., 1996).

83. Agreement on Implementation of Article VI of GATT 1994, art. 17(4), (5), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453 (1994) [hereinafter Agreement on Implementation]. The rules and procedures that govern DSU panels also apply to panels established by the DSB to review antidumping controversies. *See* Final Act, *supra* note 67, art. 1(2), app. 2.

84. Agreement on Implementation, *supra* note 83, art. 17(5), (6).

turned."[85]

With respect to countervailing measures, a WTO member which believes that another member is maintaining a prohibited subsidy may request consultations with such member.[86] If consultations fail to produce a solution within thirty days of the request for consultations, any disputant may request that the DSB establish a panel, which the DSB shall do unless it decides by consensus not to do so.[87] Within ninety days of the panel's formation, the panel shall circulate a final report to all WTO members, recommending that the subsidy in question be withdrawn immediately if it is determined to be prohibited.[88] Within thirty days thereafter, the DSB shall adopt the panel's report, unless one of the disputants decides to appeal the report or the DSB decides by consensus not to adopt the report.[89] In the event a member maintaining a prohibited subsidy fails to comply with the DSB's recommendation to withdraw the subsidy, the DSB shall authorize the complaining member to take "appropriate countermeasures."[90]

Numerous trade disputes have been submitted to the WTO in the brief time since its creation. From January 1995 to October 1996, the WTO received fifty-nine requests for consultation in forty-one different cases.[91] "The former [GATT] workload averaged about three formal complaints per year during the 1970s and some eleven complaints per year during the 1980s."[92] According to a member of the WTO Appellate Body, "[t]here were more cases filed in the first year of the WTO than in the four

85. *Id.* art. 17(6)(I).

86. Agreement on Subsidies and Countervailing Measures, art. 4(1), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. 1533 (1994) [hereinafter Agreement on Subsidies]. The member believed to be maintaining the subsidy "shall" enter into consultations "as quickly as possible." *Id.* art. 4(3).

87. *Id.* art. 4(4). The rules and procedures that govern DSU panels also apply to panels established by the DSB to review countervailing measure disputes. *See* Final Act, art. 1(2), app. 2.

88. Agreement on Subsidies, *supra* note 86, art. 4(6), (7).

89. *Id.* art. 4(8). The Agreement on Subsidies provides that proceedings before the WTO Appellate Body shall not exceed sixty days and that the appellate report "shall" be adopted by the DSB and "unconditionally accepted" by the disputants, unless the DSB decides by "consensus" not to adopt the appellate report. *Id.* art. 4(9).

90. *Id.* art. 4(10).

91. *See Sharp Increase Seen in WTO Disputes, Including Many from Developing Countries*, 13 Int'l Trade Rep. (BNA) 1634 (Oct. 23, 1996) [hereinafter *Sharp Increase*].

92. *Id.* at 1634.

years before the WTO."[93] Some believe that this early, frequent resort to the WTO is a sign that the members have confidence in its dispute settlement mechanisms.[94]

These WTO cases span the spectrum of traded goods. Agricultural cases include disputes arising out of U.S. objections to South Korea's slow import clearance procedures for agricultural products;[95] European Union (E.U.) restraints on banana exports from Ecuador, Guatemala, Honduras, and Mexico;[96] E.U. restrictions on grain exports from Canada;[97] the E.U. ban on imports of meat produced with growth hormones;[98] Hungarian agricultural export subsidies;[99] objections by Thailand, India, Malaysia, and Pakistan to the U.S. ban on wild shrimp imports;[100] Japanese testing of apples exported from the United States;[101] desiccated coconut exports from the Philippines to Brazil;[102] and Australian restrictions on uncooked salmon exports from Canada.[103]

Intellectual property cases that have been brought before the WTO include cases arising out of U.S. and E.U. complaints over Japan's failure to afford copyright protection to sound re-

---

93. *Phytosanitary, Investment, Standards Issues are Future Trends in WTO Dispute Settlement*, 13 Int'l Trade Rep. (BNA) 1312 (Aug. 14, 1996) [hereinafter *Phytosanitary*].

94. *See Sharp Increase, supra* note 91, at 1634.

95. *See U.S. Seeks WTO Talks with Korea on Customs Clearance Procedures*, 13 Int'l Trade Rep. (BNA) 864 (May 29, 1996); *U.S. Brings Korean Food Issues to World Trade Organization*, 12 Int'l Trade Rep. (BNA) 606 (Apr. 5, 1995).

96. *See WTO Dispute Panel Begins Hearing on EU Banana Regime Complaint by U.S.*, 13 Int'l Trade Rep. (BNA) 1423 (Sept. 11, 1996); *Ecuador, Mexico, U.S. Request WTO Consultations on EU Banana Regime*, 13 Int'l Trade Rep. (BNA) 206 (Feb. 7, 1996).

97. *See Canada Seeks WTO Panel on EU Grain Regulations*, 12 Int'l Trade Rep. (BNA) 1573 (Sept. 20, 1995).

98. *See WTO Dispute Panel to Hear U.S. Case Against EU Meat Ban Next Month, Official Says*, 13 Int'l Trade Rep. (BNA) 1447 (Sept. 18, 1996) [hereinafter *WTO Dispute Panel*]; *U.S. Files WTO Complaint Against EU Ban on Meat Imports with Hormones*, 13 Int'l Trade Rep. (BNA) 160 (Jan. 31, 1996).

99. *See U.S. Asks for Talks with Hungary Over Subsidies for Farm Exports*, 13 Int'l Trade Rep. (BNA) 653 (Apr. 17, 1996).

100. *See WTO to Establish Panel on Canadian Complaint Against EU Ban on Hormone-Treated Beef Imports*, 13 Int'l Trade Rep. (BNA) 1630 (Oct. 23, 1996); *Four Asian Nations Ask United States for WTO Consultations on Shrimp Ban*, 13 Int'l Trade Rep. (BNA) 1593 (Oct. 16, 1996).

101. *See U.S. Calls for WTO Consultations with Japan on its Imported Apple Phytosanitary Standards*, 13 Int'l Trade Rep. (BNA) 1598 (Oct. 16, 1996).

102. *See WTO Panel Rules Against Philippines in Complaint Against Brazil Tax on Coconuts*, 13 Int'l Trade Rep. (BNA) 1633 (Oct. 23, 1996).

103. *See Canada Seeks WTO Action on Australian Salmon Ban*, 14 Int'l Trade Rep. (BNA) 486 (Mar. 12, 1997).

cordings made before 1971;[104] India and Pakistan's failures to extend patent protection to U.S. pharmaceutical and agricultural chemical products;[105] and Portugal's noncompliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights.[106]

WTO disputes include major automobile controversies between Japan and the United States,[107] Japan and Brazil,[108] the E.U. and Indonesia,[109] and the United States and Brazil.[110] Thus far, the WTO has undertaken to resolve two significant textile controversies, one which Costa Rica initiated against the United States concerning limits on cotton underwear imports[111] and a second which India filed against the United States over restrictions on certain wool garment imports.[112] Other major WTO cases have involved Venezuelan and Brazilian exports of reformulated gasoline to the United States,[113] the Japanese liquor tax

---

104. *See EU Seeks Separate WTO Consultations on Japan Sound Recording Copyrights*, 13 Int'l Trade Rep. (BNA) 917 (June 5, 1996); *U.S. Launches WTO Case Against Japan Over Illegal Copying of U.S. Recordings*, 13 Int'l Trade Rep. (BNA) 228 (Feb. 14, 1996).

105. *See India Accepts Formation of WTO Panel Sought by U.S. on Drug, Chemical Patents*, 13 Int'l Trade Rep. (BNA) 1816 (Nov. 27, 1996); *U.S. Calls for WTO Dispute Panel on Pakistan Intellectual Property*, 13 Int'l Trade Rep. (BNA) 1177 (July 17, 1996).

106. *See U.S., Portugal Settle Dispute Over Patent Protection Under WTO*, 13 Int'l Trade Rep. (BNA) 1566 (Oct. 9, 1996).

107. *See U.S.-Japan Auto Consultations Under WTO End with No Progress*, 12 Int'l Trade Rep. (BNA) 120 (June 14, 1995); *Japan Files Case with Trade Body in Fight with U.S. Over Auto Sanctions*, 12 Int'l Trade Rep. (BNA) 891 (May 24, 1995).

108. *See Brazil's Cardoso and Japan's Hashimoto Make Some Progress in WTO Auto Talks*, 13 Int'l Trade Rep. (BNA) 1411 (Sept. 11, 1996); *Japan Seeks WTO Talks on Brazilian Auto Policy*, 13 Int'l Trade Rep. (BNA) 1280 (Aug. 7, 1996).

109. *See EU Files Complaint with WTO Over Indonesian National Car Policy*, 13 Int'l Trade Rep. (BNA) 1566 (Oct. 9, 1996).

110. *See United States, Brazil to Hold Additional Consultations on Auto Regime*, 14 Int'l Trade Rep. (BNA) 184 (Jan. 29, 1997).

111. *See WTO Appellate Ruling has Little Impact on U.S. Use of Safeguards, USTR Says*, 14 Int'l Trade Rep. (BNA) 261 (Feb. 12, 1997); *U.S.-Costa Rica Meet Over Complaint on U.S. Limits on Underwear Imports*, 13 Int'l Trade Rep. (BNA) 207 (Feb. 7, 1996) [hereinafter *U.S.-Costa Rica Meet*].

112. *See WTO Panel Rules Against United States in Case of Woven Wool Shirts from India*, 14 Int'l Trade Rep. (BNA) 47 (Jan. 8, 1997).

113. *See WTO Dispute Mechanism to be Tested in U.S.-Venezuela Gasoline Dispute*, 12 Int'l Trade Rep. (BNA) 617 (Apr. 5, 1995). This dispute was the first submitted under the new WTO dispute settlement rules. *See id.* at 617. Venezuela and Brazil prevailed before the initial WTO panel and Appellate Body. *See Appellate Body Faults U.S. in Gas Case, But Reverses on Conservation Exception*, 13 Int'l Trade Rep. (BNA) 703 (May 1, 1996); *United States Files Appeal in Reformulated Gasoline Case*, 13 Int'l Trade Rep. (BNA) 271 (Feb. 21, 1996). Recently, Venezuela accused the United States of moving slowly to implement the WTO ruling. *See Brazil, Venezuela Claim U.S. Slow to Imple-*

system,[114] the Helms-Burton Act,[115] and Japanese restrictions on imports of photographic film.[116]

Although an exhaustive analysis of the numerous controversies that formally have entered the WTO's dispute settlement system is beyond the scope of this Article, it is possible to discern at least two important patterns from the foregoing cases. First, not only is the frequency with which member countries invoke WTO dispute resolution vastly greater than under GATT's prior processes, but the rate at which developing countries are using the WTO as a forum for resolving trade disputes also has risen dramatically. "Ninety percent of disputes brought before the GATT involved major developed countries such as the United States, European Union, Japan, or Canada."[117] In contrast, fifty percent of the disputes filed during the WTO's first year were brought by developing countries.[118] Developing countries (including several in Latin America) have freely invoked the new WTO dispute settlement mechanisms, against both developed and developing nations.[119] The Director of the WTO Secretariat has opined that the WTO system gives developing countries a new sense of enfranchisement.[120]

Second, although it is too early to conclude that the WTO dispute settlement devices are completely successful, the early cases show that these devices can resolve trade disputes effec-

---

ment Gasoline Rulings, 14 Int'l Trade Rep. (BNA) 161 (Jan. 29, 1997).

114. *See WTO Body Passes Along Report Adverse to Japan's Liquor Laws*, 13 Int'l Trade Rep. (BNA) 1702 (Nov. 6, 1996); *WTO Panel Said to Uphold U.S., EU in Case Over Japanese Liquor Taxes*, 13 Int'l Trade Rep. (BNA) 917 (June 5, 1996).

115. *See EU Formally Requests WTO Talks Over Cuba Sanctions Legislation*, 13 Int'l Trade Rep. (BNA) 762 (May 8, 1996). In February 1997, the United States declared that it would not participate in these WTO dispute proceedings, ostensibly on the grounds that the WTO panel assigned to the case "lacks competence to adjudicate a national security issue." *U.S. Says WTO Panel Not Competent to Judge Cuba Dispute, Hopes to Settle*, 14 Int'l Trade Rep. (BNA) 351 (Feb. 26, 1997).

116. *See Panel Members Agreed to for U.S.-Japan Film Dispute*, 14 Int'l Trade Rep. (BNA) 9 (Jan. 1, 1997); *U.S. Seeks WTO Panel Proceedings in Dispute Over Japan's Film Market*, 13 Int'l Trade Rep. (BNA) 1296 (Aug. 14, 1996).

117. *Sharp Increase*, *supra* note 91, at 1634.

118. *See Developing Countries Now Prime Users of WTO Dispute Procedures, Official Says*, 13 Int'l Trade Rep. (BNA) 596 (Apr. 10, 1996) [hereinafter *Developing Countries*]. Despite the surge in filings by developing nations, the United States remains the most frequent user of the WTO system. *See WTO Dispute Panel*, *supra* note 98, at 1447 (explaining that, as of September 1996, the United States had submitted seventeen cases to the WTO, "more than any other country").

119. *See Developing Countries*, *supra* note 118, at 597.

120. *See Sharp Increase*, *supra* note 91, at 1634.

tively. In August 1996, a member of the Appellate Body revealed that, "[o]ne-third of the cases filed under the WTO rules are being settled."[121] Two significant successes, in cases where the disputes did not settle during consultations, are the U.S.-Japan sound recording dispute and the U.S.-Japan liquor tax controversy.[122] One factor that may be contributing to this success, and which is unavailable in a bilateral context, is the growing practice of WTO members to join in bringing complaints: "multiple complainants brings more pressure on the targeted government to change its practices."[123]

III. THE EVOLUTION OF FTAA DISPUTE RESOLUTION SYSTEMS

Now that a body of dispute resolution experience has developed within MERCOSUR, NAFTA, and the WTO, it appears that dispute resolution under a future FTAA is likely to take one of three shapes. Following the 1998 Santiago Summit, the American democracies could decide to: 1) directly and fully transplant one of the region's existing dispute settlement systems, i.e., either that of MERCOSUR, NAFTA, or the WTO, into the FTAA, 2) disregard all of the existing trade dispute resolution mechanisms and erect entirely new processes,[124] or 3) combine specific features of the MERCOSUR, NAFTA, or WTO processes into a hybrid dispute resolution structure and, as necessary, fill any gaps with new processes or structures.

Although some support exists for the first approach,[125] it is unlikely to be chosen for several reasons. One significant, and possibly determinative, obstacle to complete replication of the WTO processes in an FTAA is the standing WTO Appellate Body and the perceived diminution of national sovereignty implicit in such an institution. Citing sovereignty concerns, the United

121. *See Phytosanitary*, *supra* note 93, at 1313.

122. *See U.S., Japan Announce Resolution of Dispute Over Sound Recordings*, 14 Int'l Trade Rep. (BNA) 170 (Jan. 29, 1997); *USTR Barshefsky Praises Ruling on Japan Liquor Tax Revision*, 14 Int'l Trade Rep. (BNA) 285 (Feb. 19, 1997).

123. *See Phytosanitary*, *supra* note 93, at 1313. At the same time, the presence of multiple parties increases the complexity of disputes and, for that reason, may hamper effectiveness. *See Sharp Increase*, *supra* note 91, at 1634.

124. This option might involve the study and duplication of dispute settlement mechanisms from international accords outside the trade context.

125. Canada has proposed that FTAA dispute settlement procedures be modeled on WTO processes. *See Three Framework Proposals*, *supra* note 12, at 357.

States never has definitively agreed to be bound by WTO rulings.[126] Moreover, the Latin American democracies simply may not be prepared in the short-term to submit to a permanent, supra-national adjudicatory tribunal in trade matters.[127] In the words of Ambassador Ambler Moss, "[c]ountries in this hemisphere are extremely jealous about their sovereignty."[128] Putting this significant difficulty aside, the frequency of use and early success of the WTO's dispute settlement framework make it an otherwise attractive model for transplantation into the Western Hemisphere. At the same time, expansion of NAFTA may be neither politically palatable to key Latin American nations nor possible absent a grant of fast-track authority to the Clinton Administration in the very near future.[129] In practice,

---

126. The WTO implementing legislation passed by Congress reserves to the United States the right to second-guess every WTO ruling involving the country as well as the right to withdraw from the WTO altogether in the event the United States does not wish to comply with an adverse WTO ruling. *See* Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism*, 4 J. INT'L L. & PRAC. 3, 37-38 (1995). Moreover, to secure passage of such legislation, the Clinton Administration had to assuage Senator Bob Dole's sovereignty concerns by agreeing to support the formation of a "WTO Dispute Settlement Review Commission." *See Documents Relating to the Clinton Administration's Agreement with Sen. Robert Dole (R-Kan) Concerning the Uruguay Round Agreement, Issued by the White House Nov. 23, 1994*, 11 Int'l Trade Rep. (BNA) 1865 (Nov. 30, 1994).

As proposed, this five-judge court would review the validity of all WTO decisions against the United States, and members of Congress, in turn, could use the court's findings to seek the United States withdrawal from the WTO. *See id.* As of August 1996, Congress had not approved legislation creating the Commission. *See Dole Vows to Defend U.S. Sovereignty Against Infringement by WTO, Enforce Trade Laws*, 13 Int'l Trade Rep. (BNA) 1328 (Aug. 21, 1996).

127. All of the dispute resolution panels in MERCOSUR and NAFTA are ad hoc in nature. To date, efforts to create a MERCOSUR Court of Justice have proven futile, largely due to opposition by Brazil. *See MERCOSUR Countries to Establish Supranational Bank and Court*, 13 Int'l Trade Rep. (BNA) 980 (June 12, 1996). It appears that Americans are unwilling to accept the sacrifices of national sovereignty implicit in the creation of a standing international adjudicatory tribunal. As the OAS recently concluded:

> Unfortunately, because of the different levels of development among the countries, the demands for compatibility regarding policies of protection and the need for the observance of a minimum level of coherence at the macroeconomic policy level, do not augur well for the achievement, in the near future, of an advanced integration scheme in the Americas, such as a customs union.

Toward Free Trade, *supra* note 4, at 37.

128. Ambassador Ambler H. Moss, Jr., Address at the *University of Miami Inter-American Law Review* Symposium on Free Trade in the Western Hemisphere (Mar. 21, 1997).

129. *See* Ambler Moss & Stephen Lande, *A Critical Year for Hemispheric Free Trade: Can Countries Agree on a Blueprint?*, 28 U. MIAMI INTER-AM. L. REV. 507 (1997) ("Lacking fast-track authority, however, the United States may not have the credibility

MERCOSUR's dispute settlement system is so dependent on intervention by the MERCOSUR presidents that it simply does not provide a workable method of settling disputes on a hemispheric scale.[130]

It appears equally unlikely that the FTAA negotiators will completely disregard existing mechanisms. First, although we have only a very limited body of experience with dispute settlement under MERCOSUR (six years), NAFTA (three years), and the WTO (two years), it would be foolish to discount this data. Presupposing that the parties do not begin formal negotiation of the FTAA's dispute settlement provisions until 2000, a relatively extensive body of dispute resolution information will exist. Second, at the Miami Summit, the leaders of the American democracies made a commitment to build the FTAA "on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together."[131] Moreover, the substantial work undertaken by the OAS in compiling data on the dispute resolution devices used in prevailing trade arrangements in the Americas ensures that those devices will not be ignored in the forthcoming FTAA negotiations.

For these reasons, it now seems likely that bits and pieces of the MERCOSUR, NAFTA, and WTO dispute settlement processes will be melded into a new and distinct system for use in the FTAA. The hybrid ultimately crafted by the parties will be shaped by various factors, some of which are unknown today, but which should become clearer in a matter of months or a few years. Despite the presence of these unknown variables, it appears probable that any dispute resolution system adopted by the year 2005 will contain several dynamic features. As explained below, this dynamism ultimately will prove to be critical to the success of the FTAA's dispute settlement mechanisms, in particular, and the FTAA, in general.

---

to achieve its preferred approach [to hemispheric integration]."). *Id.* at 538.

130. "Even Mercosur's smallest disputes have tended to go up for settlement by national presidents." Michael Reid, *A Lopsided Union—Brazil is Mercosur's Dominant Power Yet Much of Brazil Doesn't Much Care*, ECONOMIST, Oct. 12, 1996, at S9.

131. Declaration of Principles, *supra* note 2, at 811.

A. Identifying the Unknown Variables

Factors that will shape the future structure of FTAA dispute resolution include external developments beyond the immediate control of the American democracies as well as matters within the FTAA process itself. The former category includes, among others, the political stability of some of the fledgling American democracies,[132] the ability of the nations to successfully bridge vast cultural differences,[133] and future perceptions about the success or failure of the MERCOSUR, NAFTA, and WTO dispute settlement mechanisms.

Other variables, which are unclear today but which soon may become clearer, include the path to be taken by the American democracies in negotiating an FTAA, the scope of the free trade agreement, and developments within the recently established working group on Dispute Resolution. The most commonly discussed routes to an FTAA are as follows: hemispheric negotiations in which each country is represented individually; country-by-country accession to a pre-existing trading group until all American nations are included; and the formation of several regional trading blocs that are later linked together via bloc-to-bloc negotiations.[134] Presumably, a WTO-plus approach would make adoption of the WTO dispute resolution processes more likely. Similarly, a decision to integrate the hemisphere through expansion of NAFTA would make NAFTA's dispute settlement mechanisms the sensible choice. In contrast, the effect that hemispheric negotiations or bloc-to-bloc talks would have on the shape of FTAA dispute resolution is not obvious. The March 1998 Santiago Summit may provide insights into these matters.

---

132. Recent political turmoil in Ecuador and Paraguay reminds us that the young American democracies remain quite fragile. *See* David Scott Palmer, *Peru and Ecuador Juggle Democracy and Free-Market Reforms*, CHRISTIAN SCI. MONITOR, Mar. 4, 1997, at 19; *The General Loses: Paraguay*, ECONOMIST, May 4, 1996, at 40.

133. "The most obvious effect of hemispheric integration, however, would be to join the Anglos of the North with the Latinos of the South, as NAFTA was able to do in North America. The process of integration across such political and ethnic divides is undeniably difficult, as Mexico and the United States are beginning to learn." Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress,"* 14 NW. J. INT'L L. & BUS. 493, 509 (1994).

134. *See FTAA Working Groups Prepare for Vice-Ministerial in Bogota*, 12 Int'l Trade Rep. (BNA) 2011 (Dec. 6, 1995); *Officials Expect FTAA Liberalization to be Less than NAFTA, MERCOSUR Levels*, 12 Int'l Trade Rep. (BNA) 1641 (Oct. 4, 1995).

Unquestionably, the working group on Dispute Resolution will significantly influence the shape of things to come. FTAA working groups generally consist of a single representative from each country, ordinarily a technical person versed in the particular field under study.[135] Each group meets every few months in different locations throughout the hemisphere.[136] The working groups generally take action by consensus[137] and each group presents its recommendations during ministerial meetings, possibly after such recommendations have been reviewed by vice-ministers.[138] Presumably, the working group on Dispute Resolution began its work during the summer of 1997, will present recommendations as early as the March 1998 Santiago Summit, and, thereafter, will be "transformed" into the group that eventually negotiates the FTAA's dispute settlement provisions.[139]

B. The Evolving Features of Dispute Resolution Under a Future FTAA

Knowing that, for all practical purposes, the dispute settlement systems of MERCOSUR, NAFTA, and the WTO will be the models for FTAA dispute resolution, it is safe to assume that the FTAA negotiators and the working group on Dispute Resolution will start their work by focusing on features that these systems have in common. Four major points of convergence exist. First, all three models provide for the resolution of general disputes concerning the interpretation, application, or breach of the respective underlying agreement(s). Second, all three models (with the WTO being a minor exception) contain a general dispute settlement process that progresses in three stages, from negotiations or consultations, to intervention by high-level political offi-

135. Tramhel Interview, *supra* note 17.

136. *Id.*

137. *Id.*

138. For example, the FTAA Working Group on Standards and Technical Barriers to Trade recently presented its recommendation that "[e]xisting World Trade Organization rules and principles on standards, technical regulations, and conformity assessment procedures should be the basis of [FTAA negotiations on these matters]." *See FTAA Group Urges that WTO Rules on Standards be Basis of Talks*, 14 Int'l Trade Rep. (BNA) 29 (Jan. 1, 1997).

139. *See* Moss & Lande, *supra* note 129, at 527 ("[Position papers floated by the major FTAA countries] also agree that the FTAA working groups will be transformed into negotiating groups.").

cials (ministers), to panel arbitration.[140] Third, all three models rely, to a significant degree, on ad hoc (as opposed to standing) panels. Finally, the ultimate penalty for noncompliance in all three dispute resolution systems is the suspension of trade benefits or imposition of appropriate countermeasures. These four features are likely to be replicated in dispute resolution under the FTAA.

The intriguing point to ponder is what FTAA dispute settlement may look like beyond these points of convergence. To some degree, the answer lies in how the FTAA negotiators decide to handle several issues. These issues include the institutional structure they create to administer the free trade agreement, whether antidumping and countervailing duty disputes are to be addressed by the agreement,[141] and what accommodations they provide in the agreement for the least-developed nations. These matters, I contend, will encourage the negotiators to make FTAA dispute resolution systems transitional or evolutionary in character.

The brief experience with dispute settlement within MERCOSUR and NAFTA confirms that trading partners in the Western Hemisphere are capable of successfully resolving their trade disputes with one another absent a standing, supranational adjudicatory tribunal.[142] Not all trade controversies are resolved in picture perfect, procedurally precise ways or to the complete satisfaction of all interested parties; however, the settlements generated by ad hoc tribunals, supported by minimally-

140. The WTO dispute settlement process is different in the sense that it does not explicitly escalate disputes to ministerial intervention (although high-level officials certainly may become involved at the consultations stage) and it follows panel arbitration with the possibility of appeal to the WTO Appellate Body.

141. Professor Essary has argued, for example, that rather than extending the Chapter 19 binational panel system of review to subsequent trade agreements, the United States and its trading partners should try, initially, to harmonize their antidumping laws and, later, replace those laws with a common competition law. *See* Melissa A. Essary, *The Sphinx Rises: An Examination of Antidumping Laws as the Emerging Trade Weapon of Choice*, *in* FREE TRADE AREA FOR THE AMERICAS: ISSUES IN ECONOMICS, TRADE POLICY AND LAW 107, 108 (Joseph A. McKinney & Melissa A. Essary eds., 1995).

142. Professor Kozolchyk suggests that the "standard of commercial fairness born of national self-interest and of the willingness to share a common economic and environmental destiny" that underlies NAFTA allows each of the NAFTA parties to acquire "a stake in the region's economic and environmental progress." Kozolchyk, *supra* note 10, at 139. "It is for this reason that a regional association such as NAFTA ... does not require a supra-national court of compulsory jurisdiction and coercive sanctions to enforce fairness of treatment; the most effective sanction is the loss of a market." *Id.*

staffed secretariats, are sufficient to preserve the underlying trade accords.[143] Moreover, the historical experience of the Latin American countries supports the use of a minimal institutional structure at the outset of the FTAA.[144]

Nonetheless, over time, a more institutionalized form of dispute resolution may prove to be necessary. This may occur if the nations become dissatisfied with a dispute resolution scheme that merely preserves the underlying trade agreement. Certainly, the FTAA should aspire to dispute settlement mechanisms which accomplish more sophisticated objectives, such as offsetting imbalances in bargaining power between the trading partners or avoiding the problem of "relative gains" and the inequitable distribution of the benefits of integration.[145]

Our brief experience with NAFTA confirms that antidumping and countervailing duty disputes will present some of the most frequent threats to cohesion in a future FTAA. The innovative approach used first in the Canada-U.S. Free Trade Agreement[146] and now in NAFTA to address these concerns ought to be duplicated, in some form, in the forthcoming hemispheric accord.[147] Considering that "the subject of unfair trade practices has been one of the most difficult to address at all levels, be it multilateral, plurilateral or bilateral,"[148] this task will not be an easy one. One obstacle to the full transplantation of Chapter 19 is that a number of the American democracies lack the type of trade remedy legislation necessary to operate this form of dis-

143. Both the MERCOSUR Secretariat (located in Montevideo, Uruguay) and the NAFTA Secretariat (which has section offices in Washington, D.C., Mexico City, and Ottowa) operate with very small staffs.

144. According to Professor Abbott, the decision to provide a minimal institutional structure for MERCOSUR was deliberate and intended to avoid the creation of new "regional bureaucracies" of the type, officials thought, that partially were to blame for the failure of prior Latin American integration schemes. *See* FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 176-77 (1995).

145. *See* O. Thomas Johnson, Jr., *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. REV. 2175, 2176-78 (1993); Luigi Manzetti, *The Political Economy of MERCOSUR*, 1993-94 J. INTER-AM. STUD. & WORLD AFF. 101, 121; J.S. NYE, PEACE IN PARTS: INTEGRATION AND CONFLICT RESOLUTION IN REGIONAL ORGANIZATIONS 84 (1971).

146. Canada-United States Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 (1988).

147. This assumes that the parties do not choose to harmonize their antidumping laws.

148. *Toward Free Trade*, *supra* note 4, at 29.

pute resolution mechanism.[149] Furthermore, some in the United States may question the ability of Latin American panelists to produce objective rulings in future antidumping dispute proceedings.[150]

The dispute settlement structure of a future FTAA must, in addition, account for the "wide differences in the levels of development and size of economies existing in our Hemisphere."[151] "One of the greatest challenges posed by the FTAA is to craft rules that apply both to large, developed, and highly competitive economies such as the United States and Canada, as well as to smaller developing countries, in particular those in Central America and the Caribbean."[152] Any attempt at the start of the FTAA to hold the smaller economies to legalistic, rule-oriented dispute resolution processes may prove futile or counterproductive.[153] Recognizing this fact, the framers of the WTO provided in Article 24 of the WTO Dispute Settlement Understanding that:

> At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least-developed country Member. If nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to

149. *See* Gilbert R. Winham & Annie M. Finn, *Accession to NAFTA: The Implications of Extending Chapter 19 Dispute Settlement on Antidumping and Countervailing Duties*, *in* FREE TRADE AREA FOR THE AMERICAS: ISSUES IN ECONOMICS, TRADE POLICY AND LAW 100, 101 (describing the extensive substantive changes Mexico was required to make in its trade law and regulations to accommodate Chapter 19 dispute resolution processes) (Joseph A. McKinney & Melissa A. Essary eds., 1995).

150. "The American critics of NAFTA were especially concerned that Mexico would not protect the individual rights of American exporters in Mexican domestic fora or before an international AD/CVD review panel containing Mexican jurists." Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369, 2409 (1993) (footnote omitted).

151. Declaration of Principles, *supra* note 2, at 812.

152. *Toward Free Trade*, *supra* note 4, at 45.

153. *See* Lopez, *Dispute Resolution Under MERCOSUR*, *supra* note 11, at 29-32.

these procedures.[154]

An FTAA dispute settlement regime that includes dynamic elements and is open to evolution from pragmatism to legalism can successfully address these three difficulties. The notion that FTAA dispute resolution ought to be evolutionary, as opposed to static, is neither new nor surprising.[155] The process of trade liberalization that now makes an FTAA conceivable is itself a long one that has unfolded only gradually.[156] Indeed, the primary trading arrangements upon which FTAA dispute resolution will be built are themselves evolutionary in character. MERCOSUR began as little more than a free trade agreement, gradually formed a (partial) common external tariff and, eventually may become a full-fledged customs union. NAFTA seeks to reduce tariffs and nontariff barriers to trade in North America gradually over a fifteen-year transition period. The WTO itself is the result of incremental growth over a period of forty-eight years from a single multilateral accord to a series of such accords housed in a central institution.

What might this evolution look like? I envision, initially in the FTAA, the type of minimal institutional structure for dispute resolution we find in MERCOSUR and NAFTA, later evolving into a limited, standing dispute settlement entity such as the WTO Appellate Body. Also initially, the system may be heavily weighted toward pragmatic, negotiated dispute settlement, relying on active intervention by high-level officials. During this early stage, the only enclave of legalism may be a Chapter 19-like mechanism. However, at the start, this device may apply only to the relatively advanced economies (i.e., the United States, Canada, Mexico, Chile, Brazil, Argentina, Colombia, and Venezuela). As the FTAA matures, these processes could grow in at least two distinct directions: 1) gradually, the antidumping/countervailing duty dispute mechanism could be extended to more nations, and 2) other types of disputes, such as general

154. Final Act, *supra* note 67, art. 24(1).

155. U.S. officials recognize that FTAA institutions are likely to be dynamic. *See, e.g., Barshefsky Sees Formal Institutions Evolving Gradually in FTAA and APEC*, 13 Int'l Trade Rep. (BNA) 566 (Apr. 3, 1996) (reflecting the U.S. Trade Representative's belief that the FTAA's "formal institutions" are likely to be evolutionary).

156. *See* David A. Pawlak, *Learning from Computers: The Future of the Free Trade Area of the Americas*, 27 U. MIAMI INTER-AM. L. REV. 107, 118-21 (1995) (recounting integration efforts in the Americas).

conflicts over the interpretation or application of the underlying agreement, could become subject to more formal, rules-driven means of dispute settlement. In a related context, Professor Abbott has labeled this phenomenon "juridical and institutional evolution based on social and technological evolution."[157]

Sound political reasons exist for adopting a dynamic approach. First, a legalistic approach may not be sustainable under current circumstances. Professor Kozolchyk's description of the competing forces of "tribalism" and "globalism" is helpful on this point. Tribalism, he says, consists of "the clamoring by virtually every 'sub-national' ethnic group for independence and self-determination."[158] In contrast, globalism consists of "the onrushing integration of the international economy."[159] He argues that a relatively nonintrusive structure such as NAFTA, and not supra-national federalism, is the most acceptable way of balancing these competing forces. This is the model most consistent with "the nature of the modern nation state and with the limits of man's cooperative impulses."[160]

Second, a flexible, evolutionary approach allows for the development of a stronger foundation for the FTAA, before the full weight of universally applicable, comprehensive trade obligations and strong regional institutions is placed on this new arrangement. Once the Latin American democracies become more institutionalized and the rewards of integration become real, the "cooperative impulses" will rise and so too will the willingness of the nations of the Western Hemisphere to be bound by more formalistic dispute settlement mechanisms. As Kozolchyk argues, "this dilemma [between tribalism and globalism] vanishes once I acquire a significant stake in my neighbor's well being and vice-versa, because from that moment on, individual or national self interest will require me to be for my neighbor and vice versa."[161]

157. Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 919-20 (1992).

158. Kozolchyk, *supra* note 10, at 143.

159. *Id.*

160. *Id.* at 144.

161. *Id.* at 145.

C. *Anticipating the Dangers of Evolution*

Although dynamism brings with it several essential benefits, it also carries a few dangers. Such dangers arise for a number of reasons. First, the evolution is likely to be lengthy[162] and to "go forward in fits and starts," subject to the "political mood swings" of the thirty-four American constituencies.[163] Second, the FTAA dispute settlement system is unlikely to produce many early successes, if success is defined as the fair and effective resolution of controversies. It may be, as Daniel Sullivan argues, that liberal democracy is a necessary condition for effective, far-reaching international dispute settlement mechanisms; that is, "without a grouping of liberal democratic forms of government, the establishment and operation of effective [dispute settlement mechanisms] will not take place."[164]

The slow progress and lack of early success may tempt the United States to impose its will on its trading partners, as the United States clearly possesses the ability to do,[165] in a way that offends its hemispheric neighbors and further slows the integration process. Moreover, there is a danger that, as the early euphoria surrounding the achievement of formal integration wanes, the FTAA parties will not vigorously push the FTAA's dispute resolution mechanisms from an initial state of pragmatism toward greater legalism. "Legalists claim that [pragmatic] practices turned GATT law into 'soft' law and ultimately caused its erosion."[166] The risk here is that if the FTAA mechanisms never evolve toward increased legalism, they too may erode or need to be abandoned.[167]

---

162. *See* Gary Hufbauer, *International Trade Organizations and Economies in Transition: A Glimpse of the Twenty-First Century*, 26 L. & POL. INT'L BUS. 1013, 1016 (1995) (stating that "open markets work as a tide that raises all boats, but over a generation, not within two or three years").

163. *Id.* at 1014-15.

164. *See* Sullivan, *supra* note 150, at 2397.

165. "The United States is undoubtedly the largest trading partner in the Western Hemisphere. It represents 69 percent of the market (gross domestic product) of the region." *Toward Free Trade*, *supra* note 4, at 10.

166. Azar M. Khansari, *Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 20 HASTINGS INT'L & COMP. L. REV. 183, 187 (1996) (footnotes omitted).

167. *See* Abbott, *supra* note 157, at 944-46 (suggesting that an integration scheme that fails to evolve weak dispute settlement institutions into strong central dispute-resolving institutions jeopardizes fully successful economic integration).

IV. CONCLUSION

As we reflect on the Miami Summit of two years ago and look forward to next year's Santiago Summit, the idea that a hemispheric free trade area actually may come to pass in the next decade ought to be a source of great hope for the economic prosperity and political freedom of Americans. The practical success of the FTAA, and its ability to tangibly improve the lives of residents of the Western Hemisphere, inextricably will be linked to the ability of its dispute resolution systems to efficiently, effectively, and fairly settle conflicts between the parties.[168] Someday, we may look back upon the decisions made by those involved in creating the FTAA in these final years of the twentieth century and understand just how crucial a role they played in the history of our hemisphere. For the time being, however, we should relish the opportunity we have to imagine what the next generation of international dispute resolution regimes might look like.

168. *Cf. Rules-Based Dispute Settlement Called Useless Without Enforcement*, 12 Int'l Trade Rep. (BNA) 1266 (July 26, 1995) (recounting Canadian Trade Minister's statement that "the credibility of the WTO will hang on the success of its dispute settlement mechanism").