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# Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, MERCOSUL, and NAFTA Dispute Resolution on Civil Society in Latin America

Stephen Joseph Powell and  
Ludmila Mendonça Lopes Ribeiro\*

## I. ABSTRACT

The objective of this article is to analyze the extent to which World Trade Organization (WTO), Common Market of the South (MERCOSUL), and North American Free Trade Agreement (NAFTA) disputes involving Latin American (LA) countries have assisted LA governments in perfecting the rule of law. Specifically, we examine the extent to which dispute settlement facilitates the strengthening by LA governments to improve human rights and enhance civil society. Professor Powell previously has noted that trade and human rights are inextricably linked because trade rules weaken the ability of governments to promote sustainable development, to alleviate the widening gap between rich and poor, to ensure core labor rights among their workforce, to deter trafficking in women and farm workers, to address devastating levels of disease, to preserve indigenous and other cultural identities, and even helps to sustain democratic governance.<sup>1</sup>

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1. Stephen J. Powell & Paola A. Chavarro, *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*, 20 FLA. J. INT'L L. 93, 94 (2008). Powell and Berta E. Hernández-Trujol have argued, however, that a state of conflict between trade and human rights is not foreordained and that the synchronicity of

Our study permitted the creation of an extensive series of data arrays on dozens of aspects of dispute panel decisions, ranging from the countries most actively appearing before panels, the measures most often challenged, the effectiveness of dispute settlement systems to reach their treaty timelines, and the trend toward increased litigation before regional trade panels rather than the WTO. We documented the increased frequency in the rate of appeal if the USA was a party measured by the extent to which dispute resolution has brought non-conforming laws into compliance, and revealed prevailing undercurrents in MERCOSUL from the pattern of dispute settlement among the Members.

The article finds that a groundswell of legislation has increased the transparency and accountability of government rule making, which lends support to our hypothesis that trade dispute settlement contributes to the management and perfection of the rule of law in support of democratic governance for civil societies in Latin America. Although governments must enforce these laws with vigor in order for civil society to flourish in the realms of freedom of expression and due process, we are heartened by the results of this project. Particularly, the legislative data correlates positively with the proposition additional laws are improving upon the enforcement apparatus and infrastructure already in place within those respective governments.

## II. PREVIOUS STUDIES ON TRADE AND HUMAN RIGHTS

The International Trade Law Program at the University of Florida has explored in some depth the general impact of trade rules on human rights. Our premise is straightforward. Trade and human rights are inextricably linked because trade rules weaken the ability of governments to promote sustainable development, to alleviate the widening gap between rich and poor, to ensure core labor rights within the workforce, deter trafficking in women and farm workers, address devastating levels of disease, preserve indigenous and other cultural identities, and even sustain democratic governance.<sup>2</sup> The article warned that purposeful

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their common foundations and goals can be splendidly integrated "to promote the social well-being of the individual alongside the economic well-being of the world." BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 297 (2009).

2. Powell & Chavarro, *supra* note 1. See also Berta E. Hernández-Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT'L L. 167, 192 (2004).

coordination of these two critical public policies is “ignored only at the peril both of trade and human rights agendas,” we argued that “trade negotiators must ever be mindful that global trade rules do not operate in a vacuum, but instead cohabit a world of preexisting human rights laws— articulated most often by demands of the labor and environment sectors, but underpinned by even more basic human rights of individuals such as the right to education and freedom from oppression – that simply should not, in any sensible system of laws, be contravened by narrow economic precepts.”<sup>3</sup>

The study first examines the global rules, identifying the surprisingly numerous direct linkages between trade and human rights in World Trade Organization agreements.<sup>4</sup> While concluding that international trade rules have done little with their commanding strength to avoid conflict—much less promote conscious integration—with human rights law, we identified an arsenal of WTO provisions that stand ready for use as instruments of this necessary task. The general exceptions of the GATT’s Public Health and Welfare Clause contain numerous examples of potential shelter from the foundational non-discrimination premises of global trade rules. From the protection of public morals to measures aimed directly at ensuring public health to guarantees of a healthy environment, GATT Article XX, as interpreted broadly by the WTO’s new world trade court, has set a hopeful path toward elevating human rights policies above economic ones. The world trade court’s enthusiastic embrace of public international law to aid in its interpretation of WTO provisions adds to this optimism because it brings into play other customary and treaty sources of human rights law.<sup>5</sup>

From the global trade rules and the more visible and controversial linkages between international trade law and international human rights law, we turned to regional economic arrangements within the Americas to uncover more indirect or hidden linkages between trade and human rights. Our focus centers upon the contribution of regional free trade agreements (FTAs)—primarily the rich trove of such pacts found among the nations of the Western Hemisphere—to the rule of law. The rule of

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3. Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Trade Agreements*, 17 FLA. J. INT’L L. 59, 61-2 (2005).

4. Powell & Chavarro, *supra* note 1, at 95.

5. Stephen J. Powell, *The Place of Human Rights Law in World Trade Organization Rules*, 16 FLA. J. INT’L L. 219, 224 (2004).

law, the definition of which in our usage includes the substantive ingredients of justice and fairness, is basic to the enjoyment of human rights.<sup>6</sup> We hypothesized that FTAs, by their necessary ground rules and quite without meaning to do so, have pronounced effects on attainment of rules-based governance.

We found strong anecdotal evidence that FTAs indeed contribute to enjoyment by civil society in general, and not solely by those involved in international trade, of rules-based governance. Regional trade agreements require governments to conduct their activities in a more transparent and expeditious manner, relying exclusively on administrative records created with input from all affected members of civil society. These agreements mandate that government measures be subject to substantive review by an independent and accessible judiciary. They require transparency, accountability, and due process by governments. Dispute settlement systems in FTAs similarly promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process.<sup>7</sup>

That further work remained was clear from our finding that “the rule of law” remains an inaccessible objective unless defined within the context of specific cultural premises and combined with the substantive norms that frame the concept for use in a particular society. Moreover, FTAs cannot directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law for their citizens. Outside sources such as international treaties can only lend a “helping hand” to governments in their transformation of these FTAs into legislation, regulations, policy guidance, and administrative measures that will contribute to previously established national objectives to promote rules-based governance.<sup>8</sup>

We next tested our theses within the context of a particular culture and a single trade agreement. The paper examining Peru and its Trade Promotion Agreement with the United States suggested several “small steps” that the Peruvian and US governments could take within the context of their FTA to improve worker rights, protection of the environment, and preservation of

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6. Application of the rule of law is included, along with open and transparent civil institutions, in the list of the trappings of democracy, which was affirmed as a human right by the United Nations in 1999, C.H.Rule res. 1999/57/ U.N. Doc. E/CN.4/1999/57 (1999). See DAVID WEISSBRODT, JOAN FITZPATRICK, & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 540 (3d ed. 2001).

7. Powell, *supra* note 3, at 97.

8. Powell, *supra* note 3, at 70.

indigenous cultures.<sup>9</sup>

### III. CONCEPTUAL FRAMEWORK FOR THE PRESENT STUDY: THE IDEA OF RULE OF LAW

The idea of the rule of law includes the substantive ingredients of justice and fairness. It also includes open and transparent institutions.<sup>10</sup> Viewed from that perspective, the rule of law bears a strong relationship to the ideas of transparency, accountability, and due process by governments that implement these trade agreements.

Moreover, the rule of law is basic to enjoyment of human rights in general.<sup>11</sup> Therefore, the authors hypothesized that international trade agreements, by their necessary ground rules and quite without meaning to do so, assist state parties in promoting timeliness, inclusive record keeping, and impartiality in the administrative decisional process. The purpose of this study is to interrogate whether international trade dispute settlement assists in converting the visions of law as an operative system and justice as a moral construct into an integrated reality.

All international trade agreements contain provisions that incidentally aid member governments committed to strengthening the rule of law for their citizens.<sup>12</sup> In particular, dispute settlement system attributes of timeliness, impartiality, and record keeping not only determine the procedures to be followed by dispute resolution entities, but also serve as powerful supplements to measures governments already have in place to advance the rule of law. In the present study, we test this thesis by measuring the degree to which agreements actually are achieving these effects.

This first part the study, before turning to the effects on national laws, asks whether trade dispute settlement is managing its own legal regime effectively, that is, are governments administering the dispute systems and are dispute panels hearing the challenges, producing outcomes in accordance with their own obligations to issue decisions within the time frames set by the trade agreement? To that end, we gathered data from the records that each secretariat has kept and constructed a data panel related to

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9. Powell & Chavarro, *supra* note 1, at 139.

10. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214, 217 (1979).

11. Powell & Chavarro, *supra* note 1, at 95.

12. See Powell, *supra* note 3, at 96-97.

this aspect of management of the rule of law by dispute settlement systems.

#### IV. THE WTO AS A MECHANISM OF DISPUTE RESOLUTION

##### A. *Background*

To understand how the rule of law is applied in the context of the WTO dispute resolution system, it is important first to comprehend the foundations of this trade agreement. The WTO is the culmination of a series of multilateral negotiations that took place during a half century of explosive trade growth, accompanied inevitably by increasingly strident trade conflicts.<sup>13</sup> In a historical perspective, we can trace its ancestry to 1947, when the international trading system began as the General Agreement on Tariffs and Trade (GATT), which set down the fundamental nondiscrimination rules that continue to this day to govern global trade.<sup>14</sup>

On January 1, 1995, the World Trade Organization (WTO) came into force to administer the two dozen agreements that comprise the WTO/GATT system, one that requires the present 150+ Members to adhere to each agreement without exception.<sup>15</sup> This unitary structure, which replaced GATT's *a la carte* approach, made the WTO's Dispute Settlement Understanding (DSU) an even more powerful umpire of trade conflict, given the broad reach of dispute settlement and its near-binding nature.<sup>16</sup> The DSU provided for the creation of the Dispute Settlement Body to oversee the system, *ad hoc* panels of trade experts to make initial decisions on challenges to government trade measures, and the inelegantly branded "Appellate Body," (AB) which serves as the World Trade Court.<sup>17</sup>

Any dispute that originates from a complaint by a Member country that another Member has created a trade policy or taken an action that violates a WTO agreement may be brought before a dispute settlement panel created under rules of the DSU. Once a member country presents a request for consultations (complain-

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13. See JOHN H. JACKSON, WILLIAM J. DAVEY, & ALAN O. SYKES, JR., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT* 235 (5th ed. 2008).

14. Grant E. Isaac & William A. Kerr, *Genetically Modified Organisms and Trade Rules: Identifying Important Challenges to WTO*, 26 *World Econ.* 29, 30 (2003).

15. *Supra* note 15, at 240.

16. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakeesh Agreement Establishing the World Trade Organization, Annex 2., 1869 U.N.T.S. 401[hereinafter DSU].

17. See HERNANDEZ-TRUYOL & POWELL, *supra* note 1, at 39-40.

ant) in order to determine whether another country is violating a WTO rule protected by a WTO agreement (respondent), the dispute settlement system of the WTO becomes operative.<sup>18</sup>

The Dispute Settlement Body is composed of representatives of all WTO Member countries. It is essentially a "General Council" of ambassadors of the Members countries. The Dispute Settlement Body (DSB) has the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal. It monitors the implementation of the rulings and recommendations and has the power to authorize retaliation when a country does not comply with a ruling.

When a case requires further dispute resolution beyond consultations, the DSB establishes a panel. Panels consist of three (possibly five) experts from different countries who examine the evidence and produce a report with its opinion. The panel's report is passed to the DSB, which can only reject the report by consensus. Panelists for each case can be chosen from a permanent list of well-qualified candidates, or from elsewhere. They serve in their individual capacities. They cannot receive instructions from any government.

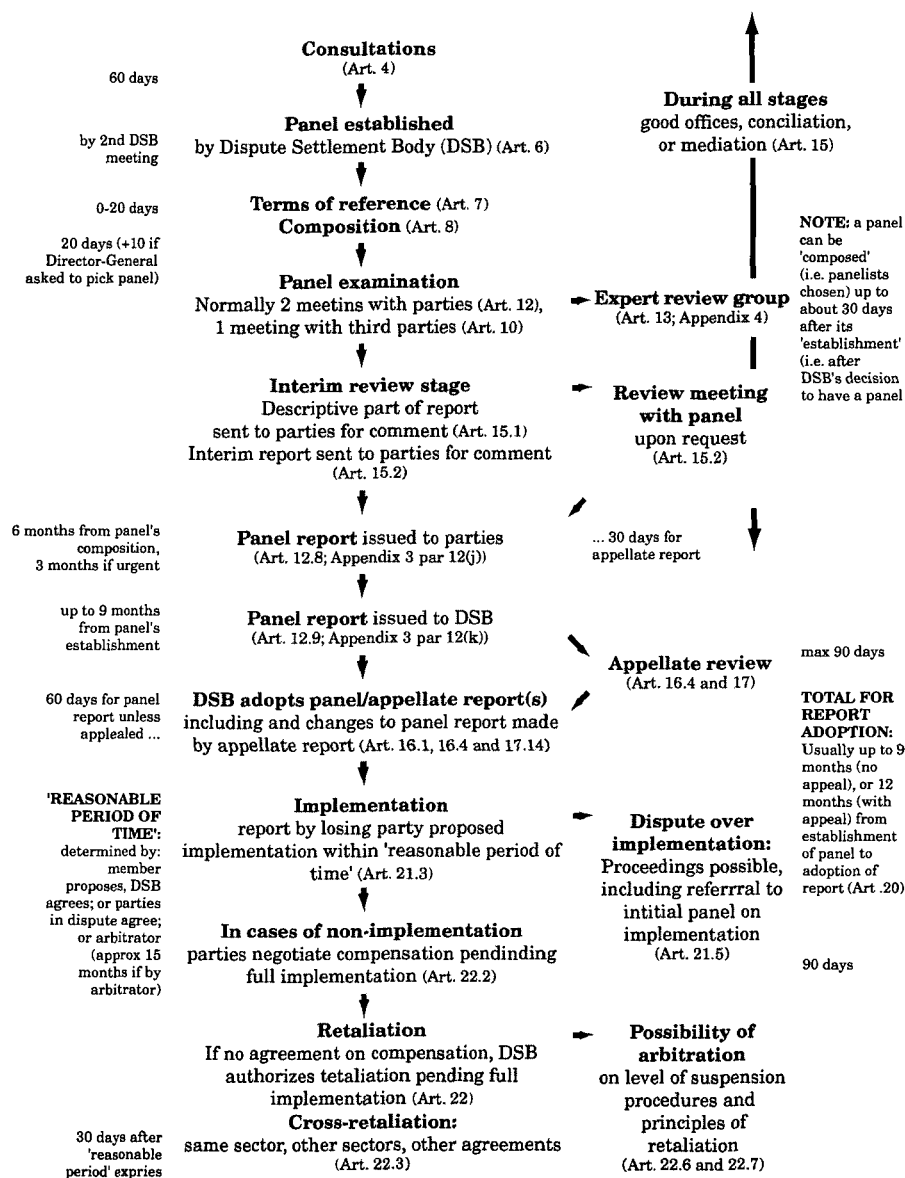
If a country disagrees with the legal reasoning of the panel decision, it may appeal the decision as of right. Three members of a permanent seven-member Appellate Body set up by the DSB and broadly representing the range of WTO membership hear each appeal. Members of the Appellate Body have four-year terms, are selected by the Members based on their recognized standing in the field of law and international trade, and may not be affiliated with any government. The appeal can uphold, modify, or reverse the panel's legal findings and conclusions. Normally appeals should not last more than 60 days, with an absolute maximum of 90 days. The DSB has to accept or reject the appeals report within 30 days; rejection is only possible by consensus.

The route that the case can follow from the time that one country presents a demand to WTO until WTO presents to the country the final solution, can be summarized by Figure IV-01.

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18. See DSU, *supra* note 16, art. 4.3.

**FIGURE IV-01 - DISPUTE SETTLEMENT BODY ARTICLES FOR  
DISPUTE RESOLUTION PROCEDURE - ALL THE ROUTES THAT  
THE CASE CAN FOLLOW WITH THE LEGAL DISPOSITION AND  
THE TIME PRESCRIBE FOR EACH PHASE**



Source: WTO web site<sup>19</sup>

19. *Understanding the WTO: Settling Disputes, The Panel Process*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm) (last visited Apr. 7, 2011).

Thus, in order to evaluate a) how many cases involving Latin America's countries had been submitted to WTO dispute settlement since it was created; b) what type of dispute resolution each case has demanded; c) how much time each case has taken to reach a decision; and d) how other trade agreements are changing the number of cases submitted to WTO, the Levin College of Law at the University of Florida developed a project to gather the data about these cases. We summarize the results of this in the following section.

### *B. The data collection and the results*

In pursuit of our objective, we gathered data about disputes from 1995 to 2007. Using this information and relevant provisions of the WTO Dispute Settlement Understanding (DSU),<sup>20</sup> we analyzed various aspects of these disputes. Among other things, we looked at the efficiency of the WTO's Dispute Settlement Body (DSB) in meeting treaty-set deadlines, the types of measures challenged, and the nature of the final resolution of the dispute.

In the 12 years included in our study, the DSB has received 74 requests for consultations involving two LA countries or one LA country and the United States of America (USA). The results illustrate that although cases between LA countries and the USA are very common (24 cases in a total of 74), most of the cases are between two LA countries (50 cases in a total of 74). Most of the cases challenge taxes and regular tariffs as well as safeguard measures.

These cases are usually settled by panel decision, although a high number of cases were resolved through a "solution mutually acceptable to the parties"<sup>21</sup> prior to establishment of a panel. This result is positive for the disputing parties because an agreement can be found in a short length of time. The length of time for issuance of a panel decision is not only longer, but the data show that panels routinely take even longer than the DSU anticipates.

Few experts have devoted their attention to empirical analyses describing these disputes, and there are almost no empirical studies that have attempted to measure how much time the DSB takes to process a case at the panel and Appellate Body levels in comparison to the timeline prescribed by the Dispute Settlement Understanding (DSU) that generally contains the procedural

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20. See DSU, *supra* note 16.

21. DSU, *supra* note 16, art. 3.7 ("A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.").

rules for WTO disputes.<sup>22</sup> Therefore, in order better to understand the details and timelines of these cases, the Levin College of Law at the University of Florida has gathered information and has drawn several conclusions based on this research.

TABLE IV-01 – COMPLAINANTS AND RESPONDENTS IN WTO DISPUTES BETWEEN 2 OR MORE LA MEMBERS OR BETWEEN 1 OR MORE LA MEMBERS AND USA

Respondent	Complainant												Total
	Argentina	Brazil	Chile	Colombia	Costa Rica	Ecuador	Guatemala	Honduras	Mexico	Nicaragua	Panama	USA	
Argentina	0	2	1	0	0	0	0	0	0	0	0	4	7
Brazil	1	0	0	0	0	0	0	0	0	0	0	5	6
Chile	5	0	0	1	0	0	1	0	0	0	0	1	8
Colombia	0	0	0	0	0	0	0	0	0	0	2	0	2
Dominican Republic	0	0	0	0	1	0	0	2	0	0	0	0	3
Ecuador	0	0	1	0	0	0	0	0	1	0	0	0	2
Guatemala	0	0	0	0	0	0	0	0	0	0	0	1	1
Mexico	0	1	1	0	0	0	2	0	0	1	0	6	11
Nicaragua	0	0	0	1	0	0	0	1	0	0	0	0	2
Panama	0	0	0	0	0	0	0	0	0	0	0	1	1
Peru	1	1	2	0	0	0	0	0	0	0	0	0	4
Uruguay	1	0	0	0	0	0	0	0	0	0	0	0	1
USA	3	9	1	1	1	2	1	0	6	0	0	0	24
Venezuela	0	0	0	0	0	0	0	0	0	0	0	2	2
Total	11	13	6	3	2	2	4	3	7	1	2	20	74

Source: WTO database, organized by College of Law – University of Florida

Thus, analyzing Table IV-01 we can assert that from the total of cases involving at least one Latin American country submitted to the DSB (74)<sup>23</sup>, 30 cases were between two Latin American countries (complainant and respondent) and 44 cases were between the USA and a Latin American country. It is interesting to observe also that the USA is a party in more of these cases than any single

22. Other WTO Agreements sometimes prescribe special rules for disputes involving these Agreements but none overrides the time frame for processing disputes anticipated by the DSU. . *E.g.*, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S 221 [hereinafter Antidumping Agreement].

23. Hundreds of other disputes not involving at least one LA country were filed with the WTO in this period. We are analyzing only the cases where an LA country was a complainant or a respondent.

Latin American country. For a breakdown of these cases organized by year, see Table IV-02.

TABLE IV-02 – NUMBER OF WTO CASES INVOLVING LA MEMBERS OR ONE LA MEMBER AND THE USA  
ORGANIZED BY YEAR DISPUTE INITIATED

Year	Number of cases between two LA countries	Number of cases between USA and LA country	Total
1995	0	4	4
1996	0	4	4
1997	1	6	7
1998	0	1	1
1999	0	3	3
2000	6	7	13
2001	7	3	10
2002	4	5	9
2003	5	4	9
2004	0	1	1
2005	2	3	5
2006	4	2	6
2007	1	1	2
Total	30	44	74

Source: WTO database, organized by College of Law – University of Florida

Analyzing Table IV-02, we can identify the following details: a) the number of cases involving the USA and an LA country is higher than the number of cases involving two LA countries; b) the number of such cases submitted to the DSB has increased in the period between 1995 and 2001 and has decreased in the period between 2002 and 2007; c) the relationship between the number of cases submitted to the DSB and the year (an increase followed by a decrease in case filings) is the same for cases involving only LA countries and cases involving USA and LA countries.

One explanation for the decrease in the number of cases submitted to WTO dispute settlement in the later years could be the fact that those countries are more often submitting their disputes to regional trade agreements as they become more confident in the credibility of those systems. We could not verify this hypothesis because of the dissimilarity of the dispute settlement systems involved. Our personal experience with these systems convinces us that the hypothesis is valid for MERCOSUL, but not for NAFTA countries.

We may hypothesize that one reason for this inward turn toward greater reliance on MERCOSUL dispute settlement is that its Members have been less willing over time to share their "internal" conflicts with the broader trade community.<sup>24</sup> For reasons discussed below, the NAFTA does not aspire to any role other than economic integration of the Parties. There is no hesitation whatever for the NAFTA Parties to "air their dirty laundry" in the global forum. Another reason is that the dispute settlement system under MERCOSUL has been slower to develop than in the NAFTA, which entered into force with a fully operation system in 1994.<sup>25</sup> MERCOSUL was established in 1991 with no dispute resolution system, which was added by the Protocol of Olivos in 1998. The 2006 Protocol of Ouro Preto added a private right of action for complaints to be brought by members of civil society, although establishment of a dispute settlement panel continues to require state-party approval.<sup>26</sup> Thus, it could be said that only in the past few years has MERCOSUL dispute settlement stood as an acceptable alternative to the sophisticated system created in the WTO.

From Table IV-03, we can see that in 27 percent of the cases the USA was a complainant against a LA country. On the other hand, in 40.54 percent of the cases, the USA was respondent in a case brought by a LA country. Therefore, although the number of cases in which the USA is complainant is high, this country usually appears as a respondent in WTO dispute settlement involving a LA country.

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24. While final decisions of MERCOSUL dispute settlement panels ultimately are posted on the treaty's web site, earlier stages of a dispute, including the majority of cases that are settled prior to establishment of a panel, are far less transparent than WTO dispute settlement, even though that system is broadly criticized for the "confidentiality" of its proceedings. Compare [http://www.mercosur.int/t\\_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6](http://www.mercosur.int/t_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6) with [http://wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://wto.org/english/tratop_e/dispu_e/dispu_e.htm).

25. The Parties did not have the luxury of a slower transition because chapter 19 of the treaty divested national courts of jurisdiction over the large number of trade remedy cases under the anti-dumping and countervailing duty laws of the Parties. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1904, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

26. Eduardo Grebler, *Dispute Settlement: Regional Approaches 6.2 MERCOSUR*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, 23 (2003), [http://www.unctad.org/en/docs/edmmisc232add28\\_en.pdf](http://www.unctad.org/en/docs/edmmisc232add28_en.pdf)

TABLE IV-03 – NUMBER OF CASES THAT INVOLVED USA AS COMPLAINANT AS OPPOSED TO USA AS RESPONDENT

Complainant	Respondent		
	USA	LA	Total
USA	0	20	20
LA	24	30	54
Total	24	50	74

Source: WTO data base, organized by College of Law – University of Florida

Exploring how these cases ended, we can observe (Table IV-04) that 20.27 per cent of cases are concluded by mutually acceptable solution prior to issuance of a panel decision. This is high rate of settlement, no doubt the result of the effectiveness of the WTO's implementation system and the unofficial but operationally effective precedent set by the Appellate Body.

In other words, each side is willing to compromise its positions to a certain degree to avoid a potentially adverse holding that is upheld by the Appellate Body to become, in essence, "WTO law." To some degree, a high rate of settlement may also reflect lack of confidence by the disputants in the quality of dispute resolution, that is, in the ability of WTO panels and the Appellate Body fully to understand the complex trade rules, which they are interpreting. In addition, as in any conflict resolution system, a certain number of requests for consultation will have been filed only for political effect. For example, a Member may need to placate a domestic industry bedeviled by imports or the Member may be placing a marker for on-going or future negotiations. Our experience teaches, however, that such cases are not so numerous as to create significant doubt in our conclusions.

TABLE IV-04 – NATURE OF RESOLUTION OF WTO DISPUTE CASES INVOLVING LATIN AMERICAN COUNTRIES

Nature of resolution	No. of cases	Percent
Mutually acceptable solution prior to panel decision	15	20,27
Panel decision issued	59	79,73
Total	74	100,00

Source: WTO data base, organized by College of Law – University of Florida

The second important task is to identify the nature of the case's resolution by the type of case submitted. These data are compiled in Table IV-05. We have grouped challenges into three categories:

(1) imposition of border or internal taxes on an imported product, including a so-called "price band" system; (2) safeguard or escape clauses measures imposed under the WTO Agreement on Safeguards;<sup>27</sup> and (3) anti-dumping or countervailing duty measures (AD/CVD) imposed under the Subsidies or Anti-dumping Agreements.<sup>28</sup>

TABLE IV-05 –NATURE OF RESOLUTION OF WTO DISPUTE  
ORGANIZED BY TYPE OF MEASURE CHALLENGED IN  
CASES INVOLVING LA COUNTRIES

Nature of resolution	Measure challenged			
	Taxes & regular tariffs	safeguard measures	AD/CVD	Total
Mutually acceptable solution prior to panel decision	6	7	2	15
Panel decision issued	24	17	18	59
Total	30	24	20	74

Source: WTO data base, organized by College of Law – University of Florida

Thus, analyzing Table IV-05, we can conclude that there were more cases settled without a panel for the trade remedy cases than for those challenging taxes or regular tariffs. To probe the meaning of this statistically significant difference, we summarized in Table IV-06 the types of cases in disputes involving either two LA countries or an LA country and the USA.

TABLE IV-06 – TYPE OF MEASURE CHALLENGED ORGANIZED  
BY DISPUTING COUNTRIES

Measure challenged	Disputing countries		
	USA and Latin America	Latin America only	Total
Taxes & regular tariffs	20	10	30
Safeguard measures	10	14	24
AD/CVD	14	6	20
Total	44	30	74

Source: WTO data base, organized by College of Law – University of Florida

27. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 154 (1994) [hereinafter Safeguards].

28. See generally Anti-dumping Agreement, *supra* note 22.; See generally Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 14 [hereinafter Agreement on Subsidies].

The results summarized by Table IV-05 are interesting because they show that only disputes involving safeguard measures are more likely to involve two LA countries. In cases challenging all other types of measures, the USA is at least twice as likely to be involved. Details of the cases would be necessary to fully understand the reason for this large difference, but strictly from an empirical level, knowing only the countries involved has predictive value as to the type of measure likely to be under review.

Reviewing our results so far, we can proffer that: a) most of the cases submitted to WTO dispute settlement involving Latin American countries are between one Latin American country and the USA; b) the majority of the cases are settled by “mutually acceptable solution” under DSU article 3.7; and c) cases challenging taxes and regular tariffs are predominant. Our exploration of the outcome of the panel process based on the type of measure challenged is preliminary because some of the cases in our study still are in progress. A number of cases have been settled prior to a panel decision and no information is available as to whether one party can be described as having won or lost those cases.

### *C. Length of time to complete panel review*

In order to understand our comparison of the timelines prescribed by the DSU and the timelines that the studied cases experienced (between the request for consultations and adoption of the panel report by the DSB if there is no appeal), we constructed Table IV- 07 and Graph IV-01 specifying respectively how many days the DSU prescribes for each phase and how many days the case actually took in total to be resolved. DSU time deadlines for a particular case are not always precisely calculable, for the reasons explained in the notes to Table IV- 07. As a result, when the panel, DSB, or AB is given a minimum and a maximum time within which to act, we have used the longer time period, with the exception of the time for establishment of a panel by the DSB, for which we have used a mean time period.

TABLE IV- 07 – DSU TIMELINE FOR EACH PHASE FROM  
REQUEST FOR CONSULTATIONS UNTIL THE PANEL REPORT IS  
ADOPTED BY THE DSB FOR CASES NOT APPEALED.

Phase	Days prescribed by DSU
From request for consultations to request for panel establishment <sup>29</sup>	60 <sup>30</sup>
From request for establishment of panel to DSB establishment of panel	48 <sup>31</sup>
From DSB establishment of panel to composition of panel	30 <sup>32</sup>
From panel composition to issuance of panel's final report	270 <sup>33</sup>
From issuance of panel report to DSB adoption of panel report (if no appeal)	60
Total	468

Therefore, from the request for consultations until the panel report is by the DSB, the DSU prescribes a maximum of 468 days. In order to investigate if the time deadlines established by the DSU are being met, we calculated the mean of the time between the day that consultations were requested and the day that the panel decision was adopted by the DSB<sup>34</sup> (Graph 01).

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29. Setting of terms of reference is automatic unless the parties agree otherwise within 20 days from establishment, but art. 7.1 does not intend this 20-day period to be an additional time period. DSU, *supra* note 16, art. 7.1.

30. DSU, *supra* note 16, art. 4.7.

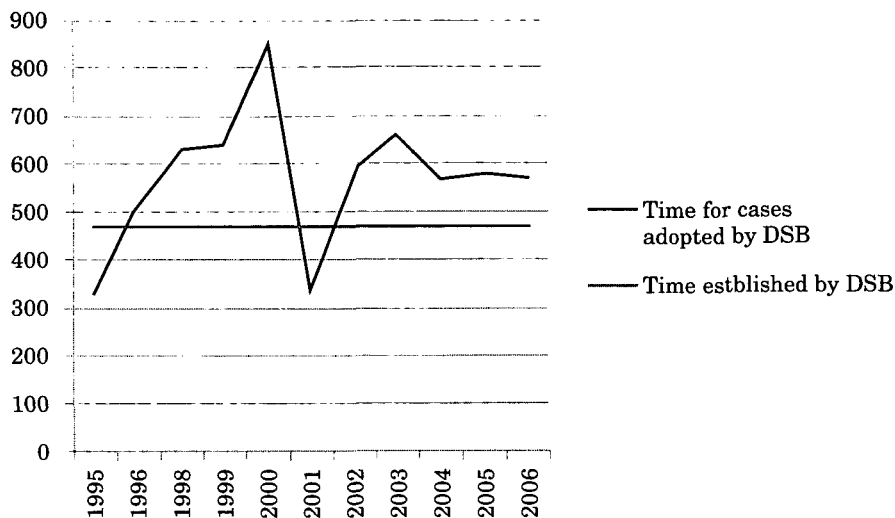
31. DSU art. 6.1 requires establishment of a panel at the second meeting of the DSB after the request is made. DSU, *supra* note 16, art. 6.1. By our calculations, this time period can range from a minimum of 26 days to a maximum of 70 days, depending upon the date on which the request is made (in relation to the DSB's monthly meeting schedule) and whether complainant seeks an accelerated second meeting of the DSB under note 5 to that article. In lieu of making an individual count of the time for establishment of each panel (this date would be its actual DSU art. 6.1 "deadline"), we have used the median number of days.

32. DSU, *supra* note 16, art. 8.7.

33. DSU art. 12.8 gives the panel 180 days "as a general rule" from its composition to issue its final report. DSU, *supra* note 16, art. 12.8. Under DSU art. 12.9, however, the panel can take up to 9 months (270 days) if it tells the DSB in writing that "it cannot issue its report within 6 months." DSU, *supra* note 16, art. 12.9.

34. Note also that if a panel "suspends" its proceedings at the request of a party under Article 12.12 of the Dispute Settlement Understanding, that suspended time does not count toward the time frames established in the DSU. This rule does not apply to any of the cases that we are analyzing. DSU, *supra* note 16, art. 12.12.

GRAPH IV-01 – MEAN TIME BETWEEN DATE CONSULTATIONS REQUESTED AND DATE OF DSB ADOPTION OF PANEL REPORT BY YEAR CASES WERE INITIATED.<sup>35</sup>



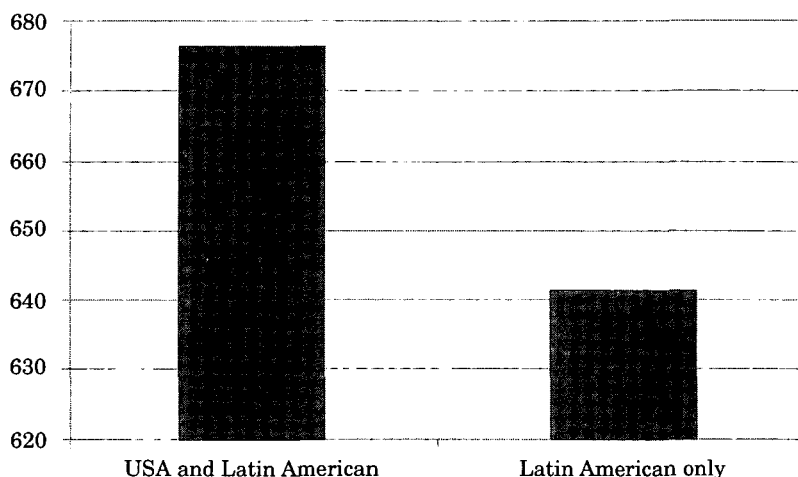
Source: WTO data base, organized by College of Law – University of Florida

In analyzing Graph IV-01, we note that: a) in general, the length of time between the request for consultations and the adoption of the panel decision by the DSB is longer than the DSU anticipates (except for the years 1995 and 2001); and b) the length of time between the request for consultations and adoption of the panel decision by the DSB had been increasing since 2001, although after 2003, it started to decline.

Another point of interest was whether the length of time between the request for consultations and the adoption of the panel decision by the DSB differed if the USA was one of the parties. In order to answer this question, we calculated the mean time between the request for consultations and adoption of the panel decision in cases involving only Latin American countries and in those involving the USA (Graph IV-02).

35. For this graph, we are taking into account only the cases in which the panel report had already been adopted. Of the 59 cases that did not end through mutually agreed solution, information is available only for 16 cases. Therefore, for the following tables only these 16 cases are going to be analyzed.

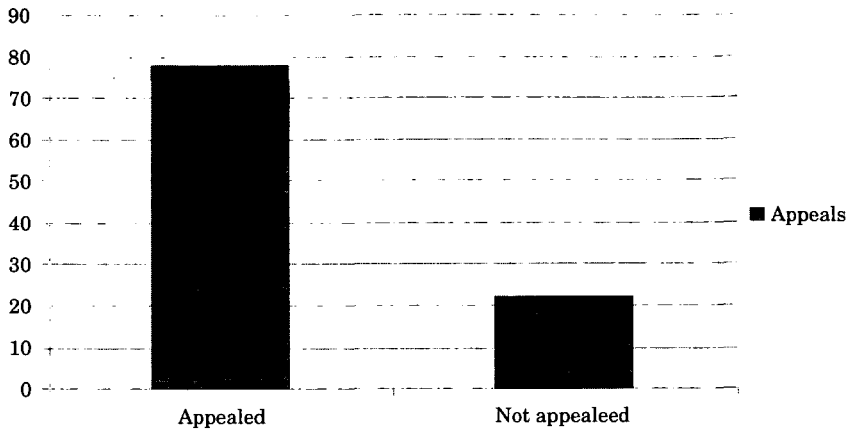
GRAPH IV-02 - MEAN LENGTH OF TIME BETWEEN REQUEST  
FOR CONSULTATIONS AND ADOPTION OF PANEL  
REPORT, ARRANGED BY  
DISPUTING COUNTRIES



We can conclude from Graph IV-02 that there is some difference between the length of time for cases that involve only Latin American countries (641 days) and cases that involve one Latin American country and the USA (676 days). In any event, both time periods are higher than the one established by the DSU (468 days).

Next, we look at whether the panel decision was appealed by one or more of the parties involved (Graph IV-03).

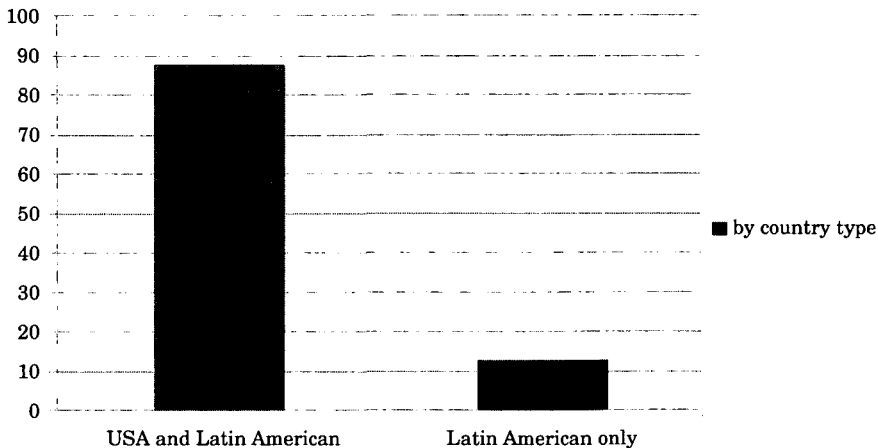
**GRAPH IV-03 – FREQUENCY OF APPEAL OF PANEL DECISIONS  
IN CASES INVOLVING LA COUNTRIES**



Source: WTO data base, organized by College of Law – University of Florida

Using Graph IV-03, we can see that about 78 percent of panel decisions were appealed. Next, we look at whether the countries involved in the dispute have an impact on whether an appeal was filed (Graph IV-04).

**GRAPH IV-04 - APPEAL OF PANEL DECISION ORGANIZED BY  
COUNTRIES INVOLVED**



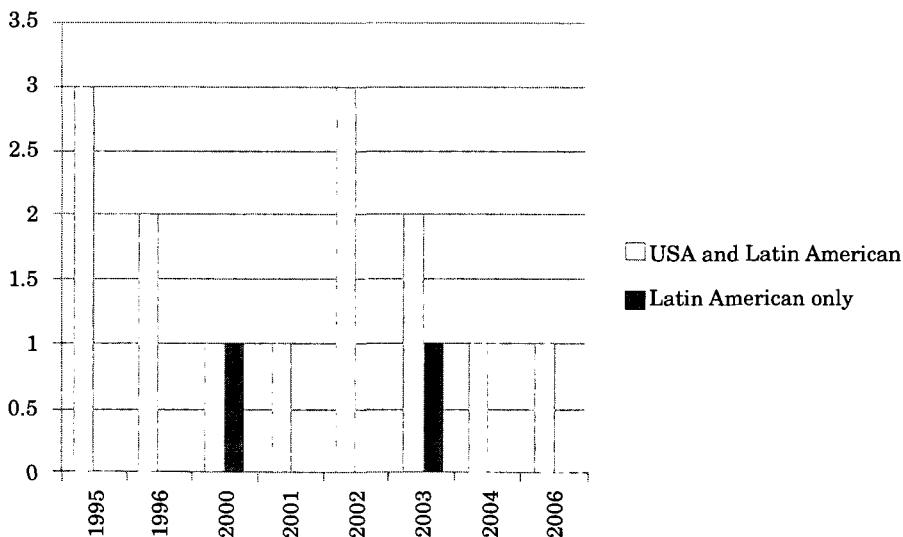
Source: WTO data base, organized by College of Law – University of Florida

Thus, Graph IV-04 demonstrates that from a total of 16 cases, 14 of the panel decisions appealed involved the USA as a party. If the case involved only Latin American countries, it was seven times less likely to be appealed than if the USA was one of the parties

(12,5% vs. 87,5%) In cases involving the USA and a LA country, the USA was the appellant 87,5% of the time (14 of 16 cases). In other words, the USA was 1,14 times more likely to appeal than the LA country. That the USA is more likely to find itself on the losing end of the panel report would help explain the outsized rate of appeal by the USA.

Analyzing appeals by year (from 1995 to 2006) confirms the trend even more vividly (Graph IV-05).

GRAPH IV-05 – NUMBER OF APPEALS BY YEAR AND BY COUNTRIES INVOLVED IN THE DISPUTE



Source: WTO data base, organized by College of Law – University of Florida

As noted earlier, only 2 of the 16 cases appealed—one in 2000 and one in 2003—involved solely Latin American countries.<sup>36</sup>

Next, we calculated the mean length of time between the request for appellate review and the adoption of the Appellate Body's decision. Similar to the timeline between the request for consultations and the issuance of the final panel report, we first determined the length of time that the DSU prescribes for this phase (Table IV-08).

36. This statistic refers to cases in which the AB has ruled and the DSB has adopted the report, even if the case has not "ended" because implementation issues are still being disputed by post-dispute arbitration under DSU arts. 21 and 22.

**TABLE IV-08 – DSU TIMELINE FOR EACH PHASE FROM  
REQUEST FOR APPELLATE REVIEW UNTIL THE DSB  
ADOPTS THE AB REPORT**

<b>Phase</b>	<b>Days prescribed by DSU</b>
From issuance of final panel report to request for appellate review	60 <sup>37</sup>
From request for appellate review to issuance of appellate report	90 <sup>38</sup>
From issuance of appellate report to adoption by DSB	30 <sup>39</sup>
<b>Total</b>	<b>180</b>

Source: WTO database, organized by College of Law – University of Florida

Table IV- 08 reports that the WTO dispute resolution procedure prescribes 180 days for the appeal phase.<sup>40</sup> In order to analyze if the DSB has met this deadline, for the cases where the Appellate Body's report already has been adopted, we calculated the mean length of time between issuance of the report and adoption of the appellate report by the DSB. Table IV- 09 summarizes the results.

**TABLE IV- 09 –LENGTH OF TIME BETWEEN REQUEST FOR  
APPELLATE REVIEW AND DSB ADOPTION OF THE  
APPELLATE REPORT BY COUNTRIES  
ENROLLED IN THE DISPUTE**

<b>Length of time</b>	<b>USA and Latin American</b>	<b>Latin American only</b>
94	1	0
112	2	0
122	4	0
132	1	0
135	1	0
136	2	0
143	0	1
150	1	1
176	2	0
<b>Total</b>	<b>14</b>	<b>2</b>

Source: WTO database, organized by College of Law – University of Florida

Table IV- 9 reveals that all of the completed cases in this database met the time deadline established by the DSU for the appeal pro-

37. DSU, *supra* note 16, at art. 16.4.

38. DSU, *supra* note 16, at art. 17.5.

39. DSU, *supra* note 16, at art. 17.14.

40. DSU, *supra* note 16, at arts. 16.4, 17.

cess. If the point in analysis is the length of time of the average WTO dispute resolution, using the data gathered, it is possible to reach two conclusions. First, the DSB is generally not efficient in meeting the established deadline for the time between the request for consultations and release of the panel's or Appellate Body's adopted final report—the mean amount of time was 672 days, while the DSU mandates no more than 468 days for the process. On the other hand, the DSB does appear to be effective in meeting the timeline for the period between issuance of an appealed panel report and approval of the Appellate Body report—all cases have been handled in less than the DSU timeline of 180 days.

## V. NAFTA CHAPTER 19 - ANTI-DUMPING AND COUNTERVAILING DUTIES

### A. *First Things*

NAFTA Chapter 19, specifically Article 1904, establishes an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases (hereinafter AD/CVD), with review by independent binational panels.<sup>41</sup> NAFTA requires member states to comply with panel conclusions and prohibits individual state judicial review once a state requests a NAFTA Chapter 19 panel review.<sup>42</sup> These binational panels consist of "private trade law experts chosen by the two countries involved in the dispute, instead of the traditional review by national courts."<sup>43</sup> Upon a request for a binational panel each party must appoint two panelists within thirty days; then within fifty-five days of the request for a panel, the parties must agree on the fifth panelist.<sup>44</sup> Involved parties select the panelists "on the basis of their objectivity, reliability, sound judgment, and general familiarity with international trade law."<sup>45</sup>

A party state may challenge a final AD/CVD determination under normal judicial review procedures within the NAFTA state if neither government requests a panel within thirty days after receiving notice of the determination.<sup>46</sup> However, if a member

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41. North American Free Trade Agreement art. 1904(1), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

42. NAFTA, *supra* note 41.

43. Stephen Powell & Mark Barnett, *The Role of United States Trade Laws In Resolving the Florida-Mexico Tomato Conflict*, 11 FLA. J. INT'L L. 319, 355 (1997).

44. NAFTA, *supra* note 41, annex 1901.2(2)-(3).

45. NAFTA, *supra* note 41, art. 1904.4, 1904.11, & 1904.12(a)

46. *Id.*

state request a binational panel determination, NAFTA will compose the panel upon the NAFTA Secretariat's filing of a Request for Panel Review on behalf of the state seeking the review.<sup>47</sup> In Mexico, the Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales makes the dumping, subsidy, injury determinations, and requests the binational panel determination with the NAFTA Secretariat.<sup>48</sup> For the USA, the Department of Commerce, International Trade Administration makes the dumping and subsidy determinations "while the United States International Trade Commission conducts injury inquiries."<sup>49</sup> Parties may appeal the dumping, subsidy and injury determinations of the investigating authorities in Mexico to the Tribunal Fiscal de la Federación and in the United States to the Court of International Trade.<sup>50</sup>

Individual USA and Mexican nationals may continue to take complaints to their respective national court systems or, instead, may initiate Chapter 19 procedures upon request by an entity that could sue in its national courts.<sup>51</sup> Thus, private companies with standing to challenge an antidumping and countervailing duty determination in the national courts may entirely bypass judicial review by selecting Chapter 19's binational panel system.<sup>52</sup> The binational panels determine whether the investigating authority properly applied its AD/CVD laws.<sup>53</sup> NAFTA creates no substantive law relating to AD/CVD, but rather relies on the importing nations' AD/CVD duty laws when making legal determinations.<sup>54</sup> Therefore, panels base decisions solely on the record created dur-

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47. *Overview of the Dispute Settlement Provisions*, NAFTA SECRETARIAT, <http://www.nafta-sec-alena.org/en/view.aspx?x=226> (last modified Mar. 3, 2009).

48. *Overview of the Dispute Settlement Provisions*, *supra* note 47.

49. *Id.*

50. *Id.*

51. *Id.*

52. Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, C.D. HOWE INSTITUTE No. 168, Sept. 2002, at 1.

53. *Id.*

54. See Stephen Powell, *Expanding the NAFTA Chapter 19 Dispute Settlement System: A Way to Declaw Trade Remedy Laws in a Free Trade Area of the Americas?*, 16 L. & BUS. REV. AM. 217, 221 n.13 (2010) ("To protect against a challenge that foreign panelists not appointed by the President would be exercising 'significant authority pursuant to the laws of the United States,' Buckley v. Valeo, 424 U.S. 1, 126, 140-141 (1976), in violation of the Appointments Clause of the U.S. Constitution, art. II, sec. 2, cl. 2, the NAFTA incorporates national AD/CVD laws of the Parties, present and future. The U.S. position in the case of such a challenge would be that binational panels are implementing international law. See art. 1904.2 and Statement of Administrative Action, H.Rule 3450, 103rd Cong., Sec. 101, (1993).").

ing the administrative process, on the standard of review, and the general legal principles applicable to the country's courts.<sup>55</sup> The standard of review varies based on the respondent's legally enacted standard of review. The USA follows the standard set in § 516A(b)(1)(A) of the Tariff Act of 1930 and in the case of the Mexico the standard set in Article 238 of the Federal Fiscal Code (Código Fiscal de la Federación).<sup>56</sup>

The tribunal's decisions must obtain a majority vote based on the votes of all members of the panel.<sup>57</sup> The panel then issues a binding "written decision with reasons, together with any dissenting or concurring opinions of panelists."<sup>58</sup> Although "not bound to follow panel decisions as precedent, [national courts] are encouraged by national implementing legislation to view panel decisions as persuasive authority."<sup>59</sup> Parties may not appeal binational decisions to their respective national courts or create legislation overturning the decisions.<sup>60</sup>

However, an "extraordinary challenge procedure" exists whereby a state party to the dispute may seek review upon a finding of gross misconduct, bias, or serious conflict of interest of a panel member.<sup>61</sup> Additionally, a party may obtain such review through allegations that the final determination departs from the rules of procedure or that the panel exceeded its power, authority or jurisdiction and that such actions affected the final determination.<sup>62</sup> In such instances, NAFTA composes a panel of three members, usually former judges, to review and make a determination of the allegations.<sup>63</sup>

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55. NAFTA, *supra* note 41, at art. 1904(2).

56. NAFTA, *supra* note 41, annex 1911 "standard of review."

57. NAFTA, *supra* note 41, annex 1901.2(5).

58. NAFTA, *supra* note 41, annex 1901.2(5), 1904.9.

59. Edward D. Re, *International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law*, 40 ST. LOUIS U. L.J. 1091, 1092 (1996).

60. NAFTA, *supra* note 41, arts. 1904.11, 1903.1(b).

61. NAFTA, *supra* note 41, art. 1904(13).

62. *Id.* See David Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 L. & POL'Y INT'L BUS. 297, 308 n.43 (1998) ("Para. 5 provides in pertinent part that 'An involved Party [the government] . . . shall on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request a review.' In other words, when one of the private interested parties requests a panel review, the government (involved Party) must implement the request. In contrast, in para. 13, there is no mandatory role for the private interested parties; the government (Party) decides whether to lodge an extraordinary challenge.").

63. NAFTA, *supra* note 41, at art. 1904(13); Gantz, *supra* note 62.

As of January 1, 2010, twenty-eight recorded cases exist under NAFTA Chapter 19 between the USA and Mexico.

TABLE V-01 – COMPLAINANTS AND RESPONDENTS UNDER CHAPTER 19

Complainant v Respondent	Frequency	Percent
Mexico v. USA	17	60.7
USA v. Mexico	7	25
Canada v. Mexico	2	7.1
Mexico v. Canada	2	7.1
<b>Total</b>	<b>28</b>	<b>100</b>

TABLE V-02 – CASES BETWEEN USA AND MEXICO ISSUED UNDER CHAPTER 19 AND ANALYZED IN THIS PAPER

Case	Frequency	Percent
OCTG (AD)	2	8.33
Bovine (AD)	1	4.17
Cement (4th AR)	1	4.17
Cement (5th AR)	1	4.17
Cement (6th AR)	1	4.17
Cement (7th AR)	1	4.17
Cement (9th AR)	1	4.17
Cement (AD)	1	4.17
Cookware (9th AR)	1	4.17
Cookware (AD)	1	4.17
Corn Syrup (AD)	1	4.17
Cut-to-Length Plate (AD)	1	4.17
Flat Coated Steel (AD)	1	4.17
Flowers (AD)	1	4.17
Gray Portland Cement (AD)	1	4.17
Leather Wearing (CVD)	1	4.17
OCTG (4th AR)	1	4.17
OCTG (5 yr)	1	4.17
Polystyrene (AD)	1	4.17
Sodium Hydroxide (CVD)	1	4.17
Stainless Steel Sheet and Strip (5yr)	1	4.17
Steel Pipe (AD)	1	4.17
Urea (AD)	1	4.17
<b>Total</b>	<b>24</b>	<b>100</b>

*C. Timeline of Binational Panel Determinations*

NAFTA Chapter 19 cases begin with an initial petition by the complainant requesting a binational panel to resolve the dispute.<sup>64</sup> Following the date of publication of the final determination in the official journal of the importing Party, the claimant must request a panel in writing within thirty days.<sup>65</sup> Therefore, claims arising under Chapter 19 may come forth only after a primary decision in the matter. In the case of final determinations not published in the official journal of the importing Party, the importing Party must immediately notify the other involved Party of such final determination where it involves goods from the other involved Party.<sup>66</sup> The other involved Party may request a panel within 30 days of receipt of such notice.<sup>67</sup> The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision.<sup>68</sup> Where the panel remands a final determination, the panel is asked to establish as brief a time as reasonable for compliance with the remand.<sup>69</sup> NAFTA designed the rules to result in final decisions within 315 days of the date on which a Party requests a panel.<sup>70</sup> See Table V-03.

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64. NAFTA, *supra* note 41, art. 1904(1).

65. NAFTA, *supra* note 41, art. 1904(4).

66. *Id.*

67. *Id.*

68. NAFTA, *supra* note 41, art.1904(8).

69. *Id.*

70. NAFTA, *supra* note 41, art. 1904(14).

TABLE V-03 – IDEAL TIMELINE FOR A NAFTA CHAPTER 19  
PANEL REVIEW UNDER THE RULES OF PROCEDURE<sup>71</sup>

Rule 34	Request for Panel Review filed	Day 0
Rule 39	Complaints to be filed	Within 30 days after Request for Panel Review
Rule 40	Notices of Appearance to be filed	Within 45 days after Request for Panel Review
Annex 1901.2(3)	Panel Selection to be completed by the Parties by	Day 55
Rule 41	Final Determination, Reasons, Index and Administrative Record to be filed	Within 15 days after filing of Notice of Appearance
Annex 1901.2(3)	Parties to select 5th Panelist by	Day 61
Rule 57 (1)	Briefs by Complainants to be filed	Within 60 days after filing of Administrative Record
Rule 57(2)	Briefs by Investigating Authority or Participants in support to be filed	Within 60 days after Complainants' Briefs
Rule 57(3)	Reply Briefs to be filed	Within 15 days after Authority's Brief
Rule 57(4)	Appendix to the Briefs to be filed	Within 10 days after Reply Briefs
Rule 67(1)	Oral Argument to begin	Within 30 days after Reply Briefs
Article 1904.14	PANEL DECISION DUE	315 days after Request for Panel Review

Regarding the length of time for USA-Mexico AD/CVD cases between the date of Request for Panel Review and the date that the tribunal issued a final panel decision, on average, the tribunal took 1,029 days to reach its final decision. From time of request for panel review, the binational process took 1,282 days to reach a final determination. No case met the required NAFTA deadline of dispute panel resolution within 315 days of after Request for Panel Review. The data also illustrate a 276-day gap between the date the binational tribunal issues a final decision and the date that the NAFTA Secretariat terminates the panel upon completion of its work, as noted below. This is time for the administrative agency to implement the remand and for the binational panel to approve the results.

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71. Overview of the Dispute Settlement Provisions, *supra* note 47.

TABLE V-04 – AVERAGE TIME TO COMPLETE PRINCIPAL  
PHASES OF CHAPTER 19

Mean Time	Number of Cases	Minimum	Maximum	Mean	Std. Deviation
Between the request for panel and the final decision	21	363	2599	1029	630
Between the request for panel and the date that the case terminated	24	363	2760	1282	741
Between the final decision and the date that the case terminated	21	0	1151	276	322

The average time between request for panel review and issuance of a final decision is more than one thousand days. *See* Table V- 05. Considering that NAFTA prescribes 315 days to reach a final determination, the data show that NAFTA lacks the ability to conclude cases under Chapter 19 within the 315 day requirement. The following table provides greater detail with respect to compliance with the initial panel decision by the administrative agency.

TABLE V-05 – DECISION OF BINATIONAL PANELS ISSUED  
UNDER CHAPTER 19 BY LENGTH OF TIME TO REACH  
FINAL DECISION<sup>72</sup>

Description of the Panel Decision	Mean Time between Panel Request and Case Termination	Number of Cases
Panel remanded the case to the Investigating <sup>†</sup> Authority.	2028	2
Panel ordered partial remand and affirmed some <sup>†</sup> of the issues.	1676	1
Panel unanimously remanded the Agency's <sup>†</sup> Determination.	1578	3
Panel unanimously affirmed in part and remanded <sup>†</sup> in part the Agency's determination.	1543	5
Panel upheld the Final Determination in part and <sup>†</sup> remanded in part.	1320	1
Panel decided that it lacked competence to review <sup>†</sup> the final determination.	1260	1
Panel unanimously affirmed the agency's <sup>†</sup> determination.	1253	2
Data about the panel were not available	1137	2
Panel unanimously affirmed the Commission's <sup>†</sup> Review Determination.	1120	1
Panel, with one partial dissent, remanded the <sup>†</sup> Agency's determination.	1010	1
Panel unanimously remanded the determination <sup>†</sup> to the agency twice.	1000	1
Panel affirmed the final determination	643	1
Panel unanimously affirmed, with one partial <sup>†</sup> dissent, the Agency's determination.	575	1
Panel unanimously, with one concurring opinion of two panelists, affirmed in part and remanded in <sup>†</sup> part, the agency's determination.	527	1
Panel remanded the Final Determination to the <sup>†</sup> Administrative Authority.	363	1
<b>Total</b>	<b>1282</b>	<b>24</b>

As the chart makes clear, categorization of the panel process after the initial decision is difficult.

72. NAFTA Chapter 19 creates the following rule for affirming, remanding, and denying a final determination: "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it." NAFTA, *supra* note 41, art. 1904.8.

A number of factors explain, although they do not justify, the extraordinary delays in reaching the end of binational panel litigation. Most are beyond control of the panels themselves. As noted, panelists are chosen *ad hoc* for each request for panel review among private individuals supposedly schooled in international law, preferably international trade law. During the early years, such individuals were few in number, which caused substantial delay in panel selection. Another reason, one endemic to an *ad hoc* system, is that a panelist, once chosen, may discover, upon further study of the pleadings, a conflict of interest with respect to one or more issues in the case<sup>73</sup>. The pool of panelists is composed primarily of practicing attorneys, among whom a conflict is always possible.

Sometimes governments delay appointment of panelists for political reasons (usually trade-related), in much the same way a U.S. Senator may block all judicial appointments until the administration takes action on a personal imperative. Recognizing that such delays are contrary to the objectives of Chapter 19 will not prevent them from recurring, often accounting for hundreds of days in establishment of a panel.

While the treaty provides substantial time for the panel to deliberate and issue its decision and for the administrative agency to comply with any remand instructions, in fact, the remand procedure has demanded far more time than anticipated for both of the USA and the Mexican authorities. Apparently, no one anticipated that two and sometimes three remands would be necessary to force compliance with the panel's holdings, even though such a situation is not uncommon in at least USA courts. More troubling

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73. Peter D. Ehrenhaft, *Remedies Against Unfair International Trade Practices*, in 1 L. INT'L TRADE sec. 16.26 (2011), available at [https://web2.westlaw.com/result/default.wl?cfid=1&mt=LawSchool&origin=Search&sri=70&sskey=CLID\\_SSSA81203211017108&query=%22CONFLICT+OF+INTEREST%22+%26+%22NAFTA+CHAPTER+19%22&method=TNC&db=TP-ALL&rlt=CLID\\_QRYRLT27827211017108&rltdb=CLID\\_DB1187211017108&service=Search&eq=Welcome%2fLawSchool&rp=%2fWelcome%2fLawSchool%2fdefault.wl&srch=TRUE&vr=2.0&action=Search&sv=Split&fmqv=s&fn=\\_top&utid=1&rs=LAWS2.0](https://web2.westlaw.com/result/default.wl?cfid=1&mt=LawSchool&origin=Search&sri=70&sskey=CLID_SSSA81203211017108&query=%22CONFLICT+OF+INTEREST%22+%26+%22NAFTA+CHAPTER+19%22&method=TNC&db=TP-ALL&rlt=CLID_QRYRLT27827211017108&rltdb=CLID_DB1187211017108&service=Search&eq=Welcome%2fLawSchool&rp=%2fWelcome%2fLawSchool%2fdefault.wl&srch=TRUE&vr=2.0&action=Search&sv=Split&fmqv=s&fn=_top&utid=1&rs=LAWS2.0); also available as SMO 53-ALI-ABA 93, sec. 5(b)(2), see [https://web2.westlaw.com/result/default.wl?rs=WLW11.07&cnt=DOC&srch=TRUE&cfid=1&method=TNC&service=Search&sri=70&fn=\\_top&sskey=CLID\\_SSSA533201717108&n=1&fmqv=s&action=Search&origin=Search&vr=2.0&rlt=CLID\\_QRYRLT438181717108&query=%22CONFLICT+OF+INTEREST%22+%26+%22NAFTA+CHAPTER+19%22&mt=LawSchool&rlti=1&db=TP-ALL&rp=%2fWelcome%2fLawSchool%2fdefault.wl&rltdb=CLID\\_DB703051717108&eq=Welcome%2fLawSchool&utid=1&sv=Split](https://web2.westlaw.com/result/default.wl?rs=WLW11.07&cnt=DOC&srch=TRUE&cfid=1&method=TNC&service=Search&sri=70&fn=_top&sskey=CLID_SSSA533201717108&n=1&fmqv=s&action=Search&origin=Search&vr=2.0&rlt=CLID_QRYRLT438181717108&query=%22CONFLICT+OF+INTEREST%22+%26+%22NAFTA+CHAPTER+19%22&mt=LawSchool&rlti=1&db=TP-ALL&rp=%2fWelcome%2fLawSchool%2fdefault.wl&rltdb=CLID_DB703051717108&eq=Welcome%2fLawSchool&utid=1&sv=Split); Leon E. Trakman, *Resolving Trade Disputes: Learning From The Nafta 12*, available at

has been the open defiance by agencies in both countries in the most hotly contested disputes.

## VI. THE CASE OF MERCOSUL

### 1. Background

Argentina, Brazil, Paraguay, and Uruguay, through the 1991 Treaty of Asunción, devised a Regional Trade Agreement, MERCOSUL,<sup>74</sup> in an attempt to liberalize trade in South America through the tariff-free circulation of goods and services.<sup>75</sup> Bolivia, Chile, Colombia, Ecuador, and Peru hold associate membership allowing the States to join individual free trade agreements within MERCOSUL.<sup>76</sup> Venezuela is apparently on the path of integration into the agreement with a recent agreement in Paraguay.<sup>77</sup>

The Treaty of Asunción calls for the coordination of each Member State to pass appropriate legislation in the pertinent areas of MERCOSUL to harmonize each State's trade policies. The Member States assume the Protocol of Brasilia,<sup>78</sup> establishing arbitration procedures, and the Protocol of Ouro Preto,<sup>79</sup> implementing the governing body of MERCOSUL. Although the Treaty of Asunción provides some basic dispute resolution guidelines, the Protocol of Brasilia implements a more comprehensive dispute resolution system through the Common Market Group<sup>80</sup> (hereinaf-

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74. See MERCOSUR, <http://www.MERCOSURRule.org.uy/> (last visited April 20, 2011) (providing a general historical background of the Treaty of Asunción); *Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, SICE FOREIGN TRADE INFORMATION SYSTEM, <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp> (last visited April 20, 2011) (translating the Treaty of Asunción into English).

75. Treaty Establishing a Common Market, Arg.-Braz.-Para.-Ura., Mar. 26, 1991, 30 I.L.M. 1041 (1991), available at <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp> [hereinafter Treaty of Asunción].

76. MERCOSUR, *Common Market of the South – Profile*, BBC NEWS (Jun. 16, 2010, 14:38 GMT), <http://news.bbc.co.uk/2/hi/americas/5195834.stm>.

77. *Paraguay Finally Says 'Aye' to Venezuela's Mercosur Full Membership*, MERCO PRESS (Dec. 13, 2010, 23:26 UTC), <http://en.mercopress.com/2010/12/13/paraguay-finally-says-aye-to-venezuela-s-mercosur-full-membership>.

78. Protocol of Brasilia for the Solution of Controversies, Dec. 17, 1991, 36 I.L.M. 691, 693, available at [http://www.sice.oas.org/trade/mrcsr/brasilialp/brasilialp\\_e.asp](http://www.sice.oas.org/trade/mrcsr/brasilialp/brasilialp_e.asp) [hereinafter Protocol of Brasilia].

79. Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR, Dec. 17, 1994, 34 I.L.M. 1244, available at [http://www.sice.oas.org/trade/mrcsr/ourop/ourop\\_e.asp](http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp) [hereinafter Protocol of Ouro Preto].

80. As the executive branch of MERCOSUL, the CMG consists of four members and four alternates from each country representing the public bodies of the Ministry

ter CMG). The CMG holds the authority to resolve disputes, however, if the CMG fails to resolve the dispute the Protocol calls for the creation of an Ad Hoc Court, to hear and rule on the States dispute.<sup>81</sup> In recognition of the need to “guarantee the correct interpretation, application and enforcement of the fundamental instruments of the process of integration and the regulations of MERCOSUL, in a consistent and systematic way,” the Protocol of Olivos constructs a Permanent Review Court with the authority to review holdings of the CMG and Ad Hoc Courts.<sup>82</sup>

### *B. MERCOSUL Structure, Jurisdiction, and Forum Selection*

MERCOSUL consists of several governing bodies: the Common Market Council (hereinafter CMC),<sup>83</sup> the CMG, the MERCOSUL Trade Commission,<sup>84</sup> the Permanent Review Court,<sup>85</sup> the Joint Parliamentary Commission,<sup>86</sup> the Economic Social Con-

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of Foreign Affairs, the Ministry of Economy, or the Central Bank. CMG duties consist of monitoring compliance with the treaty, taking steps to enforce the holdings of the Council of the common market, proposing measures to further liberalize trade, coordinate macroeconomic policies and negotiate agreements with third-parties, and to draw up programs of work to ensure progress towards the formation of the common market. Treaty of Asunción, *supra* note 75, at art. 13.

81. The Protocol of Brasilia Ch. 2 Art. 2-3, *available at* [http://www.sice.oas.org/trade/mrcsr/brasilvia/pbrasilvia\\_e.asp#CHAPTER\\_II\\_\\_](http://www.sice.oas.org/trade/mrcsr/brasilvia/pbrasilvia_e.asp#CHAPTER_II__) (last visited Aug. 14, 2010).

82. Olivos Protocol for the Settlement of Disputes in Mercosur, Preamble, Feb. 18, 2002, 42 I.L.M. 2 (2002)[hereinafter Olivos Protocol].

83. As the highest governing body, the CCM is responsible for the “political leadership of the integration process and for making the holdings necessary to ensure the achievement of the objectives defined by the Treaty of Asuncion.” Treaty of Asunción, *supra* note 75. Additionally the CCM’s duties consist of formulating policies that promote the building of a common market, assuming the legal personality of MERCOSUL, negotiating and signing agreements on behalf of MERCOSUL with third countries and international organizations, ruling on proposals submitted by the CMG, and clarifying the substance and scope of its holdings. As with the CMG, the CCM’s holdings bind State parties.

84. The MERCOSUL Trade Commission assists the CMG in policing the realization of MERCOSUL trade policy. *See* Protocol of Ouro Preto, *supra* note 79, at art. 16-21.

85. Olivos Protocol, *supra* note 82.

86. The MERCOSUL Parliament replaced the Joint Parliamentary Commission. *See* <http://200.40.51.218/SAM/GestDoc/PubWeb.nsf/Normativa?ReadForm&lang=ESP&id=DB44183BFF1899F90325760800546686&lang=>. Available only in Spanish or Portuguese.

sultative Forum,<sup>87</sup> and the MERCOSUL Secretariat.<sup>88</sup> Only the first four MERCOSUL organs hold the decision making power.<sup>89</sup> MERCOSUL maintains two separate jurisdictions; labor dispute jurisdiction<sup>90</sup> and jurisdiction over causes of action between Member States.<sup>91</sup> Since no court holdings exist in the labor dispute jurisdiction, this paper will focus on MERCOSUL's jurisdiction over Member States.

The Protocol of Ouro Preto establishes jurisdiction over causes of action between Member States, a Member State and a private party, and those involving private parties domiciled in a Member State.<sup>92</sup> Member States retain the right to mutually choose the forum in which to bring the dispute.<sup>93</sup> Once the Member States begin a cause of action in one forum, the parties may not submit the same cause of action in another forum.<sup>94</sup> No requirement exists in MERCOSUL demanding that States resolve disputes within the dispute resolution system of MERCOSUL, thus this potentially weakens MERCOSUL's authority over Member States.<sup>95</sup>

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87. Composed of representatives of the social and economic sectors of the Member States, the Economic Social Consultative Forum guarantees the participation of the civil society in the integration process of MERCOSUL initiatives. Protocol of Ouro Preto, *supra* note 79, art. 28-30.

88. The Secretariat's principal functions include safeguarding documents and information on the activities of MERCOSUL, rendering operational support and services for the other agencies, and publishing the Official Bulletin of MERCOSUL. Nádia de Araújo, *Dispute Resolution in MERCOSUL: The Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25, 31-32 (2001).

89. Protocol of Ouro Preto, *supra* note 79, art. 2.

90. Common Market Group, *Normas Generales Relativas a los Funcionarios de la Sam*, art. 56, MERCOSUR/GMC/RES No. 42/97 (Sept. 5, 1997), available at <http://www.mercosur.int/show?contentid=3091>.

91. Protocol of Ouro Preto, *supra* note 79, art. 43.

92. Araújo, *supra* note 88, at 36.

93. Olivos Protocol, *supra* note 82, art. 1(2).

94. *Id.*

95. Mario Viola de Azevedo Cunha, *The Judicial System of MERCOSUR: Is There Administrative Justice?*, THE INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, Nov. 2007, available at <http://www.iilj.org/GAL/documents/cunha.pdf>. "The [Protocol of Olivos] contains explicit provisions regarding the need for selecting the forum before which the conflicts will be settled. The Protocol of Brasilia Protocol did not account for this aspect, which, for example, has permitted that in light of the application of antidumping measures by Argentina regarding the importation of Brazilian poultry, Brazil first raise the complaint with Argentina within the scope of the Protocol of Brasilia and then, not having had its expectations satisfied, it raised the issue to the World Trade Organization's (WTO) Dispute Settlement Body. With respect to this, the Protocol of Olivos establishes that if a controversy can be submitted either to the controversy resolution system of

*C. Dispute Resolution by the Common Market Group*

Annex III of the Treaty of Asunción requires direct negotiations between disputing parties before submitting the dispute to the CMG.<sup>96</sup> This Annex grants the CMG 60 days to decide the matter, after which, the CMG's holding binds all State parties.<sup>97</sup> However, if the CMG fails to reach a resolution, the CMG turns the matter over to the CCM to adopt relevant recommendations of the CMG.<sup>98</sup> Thus, the Treaty of Asunción limits conflict resolution to inter-party negotiations and submittal of the issue before the CMG for a resolution.

Ruling on only nine cases over the past nineteen years, the CMG's rulings consist of anti-dumping, lack of incorporation of MERCOSUL rules, MERCOSUL trade safeguards, and tariff restrictions. A majority of the disputes—seven out of the nine—involve Argentina as the complainant or respondent and five of the nine disputes involve both Argentina and Brazil. The available data reveals only the types of measures challenged and the nature of the final resolution of the dispute. No data exist as to the length of time that the CMG takes to arbitrate a dispute. The specificity of each subject in the disputes, accompanied with the State legislation at issue, prevents the compilation of an effective summary in terms of decision and implementation. However, because data are not publically available concerning MERCOSUL decisions, we have constructed a composite of the main issues in each of the nine cases in an attempt to tease conclusions therefrom.

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MERCOSUL or to that of the WTO, the plaintiff state must select one of these mechanisms, permanently waiving access to the other forum." CELINA PENA & RICARDO ROZEMBERG, *MERCOSUR: A DIFFERENT APPROACH TO INSTITUTIONAL DEVELOPMENT* 10 (FOCAL 2005), available at <http://www.focal.ca/en/publications/203-policy-papers-a-briefs-2005>.

96. Treaty of Asunción, *supra* note 75, Annex III(1).

97. Protocol of Ouro Preto, *supra* note 79.

98. Treaty of Asunción, *supra* note 80, Annex III(1).

TABLE VI-01 - DISPUTES SETTLED UNDER THE CMG  
ARBITRATION SYSTEM BY COUNTRIES INVOLVED  
IN DISPUTE

Complainant v. Respondent	Frequency
Brazil v. Argentina	2
Argentina v. Brazil	3
Argentina v. Uruguay	1
Uruguay v. Argentina	1
Uruguay v. Brazil	1
Paraguay v. Uruguay	1

Argentina not only is the most litigious of the Member States, accounting for 44 percent of the cases (4/9), but it is also the most often sued country, serving as respondent in one-third of cases (3/9). Argentina and Brazil have been on one side or the other in more than half of the total cases (5/9, 55 percent)—no surprise given their competitive trade history as the largest MERCOSUL Members. Surprisingly, the smallest Member, Uruguay, has been involved as complainant or respondent in almost half of the cases (4/9, 44 percent). Paraguay has kept its head low with its involvement in just over 10 percent of cases (1/9).

TABLE VI- 02 – SUMMARY OF DISPUTES UNDER THE CMG  
ARBITRATION SYSTEM

Type of Dispute	Countries Involved	Description of Dispute	Laws at Issue
Anti-Dumping	Brazil v. Argentina	The CMG determines that no specific MERCOSUL norms regulate antidumping within MERCOSUL intra-zone commerce. Thus, the CMG decides in favor of Argentina on the basis that the internal Argentine measures as apply at the domestic level do not constitute a violation of the rule imposing the free circulation of goods within MERCOSUL. Consequently, the CMG holds that the challenged resolution complies with MERCOSUL law.	Resolution 574 of 2000 from the Ministry of Economy establishing the Argentine antidumping export measures for poultry meat coming from Brazil.
Lack of Incorp. of MERCOSUL Rules	Argentina v. Brazil	The CMG confirms Brazil's obligation to incorporate the CMG's Resolutions into its internal legal system. The CMG grants Brazil 120 days to comply with the holding.	Group Resolutions Nos. 48/96, 87/96, 14/96, 156/96, and 71/98

Type of Dispute	Countries Involved	Description of Dispute	Laws at Issue
<b>Safeguards</b>	Argentina v. Brazil	Argentina questions four Brazilian internal measures in reference to pork meat export and Brazilian subsidies for Brazilian pork producers.	Law No. 8.171 of January 17 of 1991 and Inter-ministry Letters No. 657 of 1991 and No. 182 of August 22 of 1994 from the Brazilian government regarding the application of the Corn Public Stocks System; Law 9.198 of June 1 of 1991 which enacted the Exports Financing Program (PROEX)
<b>Safeguards</b>	Brazil v. Argentina	The CMG defines the term "controversy" according to international law principles (using ICJ Reports). The CMG holds that the Resolution 861 of 1999 incompatible with Annex IV of the Treaty of Asunción and with general MERCOSUL rules. CMG orders its revocation. The award establishes a period of 15 days for the parties to comply with the holding.	Resolution 861 of 1999 from the Ministry of Economy and Public Works and Services, which establishes annual quotas on cotton textiles from Brazil
<b>Safeguards</b>	Argentina v. Uruguay	The CMG orders Uruguay to eliminate the tax benefits of Law 13.695 and complementary decrees regarding industrialized wool products exports to MERCOSUL Member States. The CMG orders Uruguay to revoke the measure within fifteen days from the date of the award.	Law 13.695 of October 24, 1968 "Stimulus System for Wool Industrialization" and complementary decrees of Uruguay
<b>Tariff Restrictions</b>	Argentina v. Brazil	Argentina claims that non-automatic import licenses or import licenses subject to conditions that Brazil imposes amounts to non-tariff restrictions affecting the reciprocal commerce of the Treaty of Asunción.	Letters No. 37 of December 17, 1997 and No. 7 of February 20 of 1998 from the Department of Foreign Trade Operations (Departamento de Operaciones de Comercio Exterior (DECEX) of the Secretariat of Foreign Commerce (Secretaría de Comercio Exterior (SECEX), which according to Argentina provides for the application of restrictive measures on the reciprocal trade between Argentina and Brazil.
<b>Tariff Restrictions</b>	Uruguay v. Argentina	The CMG determines that the Argentine Resolution (without distinguishing which resolution in particular) violates MERCOSUL rules and impedes the free access of Uruguayan bicycles to the Argentinean market. The CMG orders its revocation and grants a period of 15 days to comply.	Resolutions 335 of 1999, 857 of 2000, 1044 of 2001, 1004 of 2001 and 1008 of 2001 from the Federal Administration of Public Revenue
<b>Tariff Restrictions</b>	Uruguay v. Brazil	The CMG declares on January 9, 2002, that the Brazilian legislation affecting preexisting commercial intra-zone exchange violates MERCOSUL law. The CMG gives Brazil sixty days to comply.	Resolution No. 8 of September 25 of 2000 from the Secretariat of Foreign Commerce of the Ministry of Development, Industry and Foreign Trade (SECEX

Type of Dispute	Countries Involved	Description of Dispute	Laws at Issue
<b>Tariff Restrictions</b>	Paraguay v. Uruguay	Uruguay's domestic laws regarding the application of the "Internal Specific Tariff" and the method of calculating the tariff constitute trade discrimination and violate MERCOSUL rules. The CMG orders Uruguay to stop the discrimination against imported cigarettes from Paraguay.	Uruguay's domestic laws regarding the application of the "Internal Specific Tariff" and the method of calculating said tariff.

#### *D. Dispute Resolution by the Ad Hoc Court*

Adopted concurrently with the Treaty of Asunción, the Protocol of Brasilia<sup>99</sup> grants further dispute settlement by allowing the formation of an Ad Hoc Court if parties first meet the Annex III requirements of (1) negotiating a settlement<sup>100</sup> and (2) submittal of the dispute to the CMG and the CMG's failure to reach a conclusion on whole or part of the matter.<sup>101</sup> Parties to the dispute may submit the cause of action to the Administrative Secretariat of MERCOSUL who will then immediately notify the other States party to the dispute and the CMG of the cause of action.<sup>102</sup> Each MERCOSUL State must maintain a list of ten nominated arbitrators to constitute an Ad Hoc Court.<sup>103</sup> The Court will consist of three arbitrators and one alternate.<sup>104</sup> Upon submission of an issue to an Ad Hoc Court, each disputing State must elect one arbitrator from the State's list of ten arbitrators.<sup>105</sup> Together the disputing States must then agree on a third arbitrator to preside over the dispute.<sup>106</sup> The responsibilities of the Ad Hoc Court include (1) resolving controversies between the States or individuals of the States, (2) dictating temporary injunctions or orders, (3) clarifying the issues of the dispute, (4) resolving differences over the implementation of the judgment, and (5) pronouncing the compensatory measures States must take and any other award to the harmed party or parties.<sup>107</sup>

99. Protocol of Brasilia, *supra* note 82. The Olivos Protocol amended and added additional provisions regarding the Ad Hoc Courts.

100. Protocol of Brasilia, *supra* note 78, at art. 2-3.

101. *Id.* art. 4-6.

102. *Id.* art. 7.

103. *Id.* art. 10.

104. *Id.* art. 9.

105. *Id.*

106. *Id.*

107. *Introducción*, MERCOSUR, [http://www.MERCOSURRuleint/t\\_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6](http://www.MERCOSURRuleint/t_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6) (last visited Aug. 18, 2010).

TABLE VI-03 – DISPUTE RESOLUTION AND AD HOC COURT  
PROVISIONS, PROCEDURES, AND TIMELINE ACCORDING  
TO THE PROTOCOL OF BRASILIA AND THE  
PROTOCOL OF OLIVOS.

Provision	Procedure	Timeline
<b>Protocol of Brasilia Chapter IV, Art. 7</b>  NOTIFICATION OF INTENT TO SUBMIT DISPUTE TO AD HOC COURT	If State parties fail to resolve the dispute through negotiations or the aid of the CMG, then any of the State Parties to the controversy may resort to the arbitral procedure.  The Secretariat notifies the other Members party to the controversy and the CMG.  Secretariat conducts an Ad Hoc Court.	
<b>Protocol of Brasilia Chapter IV, Art. 9</b>  COMPOSITION OF COURT	Secretariat composes <i>ad Hoc</i> court of 3 arbitrators. Each Party to the controversy designates 1 arbitrator. The third arbitrator, not a national of the Parties, is designated jointly presides.	State parties <b>name the arbitrators</b> at the end of <b>15 days</b> from the Secretariat's notifications.
<b>Protocol of Brasilia Chapter IV, Art. 10</b>  LIST OF ARBITRATORS	Each Member creates a list of 10 arbitrators. Member States may elect arbitrators from this list and must communicate any changes of the list to the Secretariat.	
<b>Protocol of Brasilia Chapter IV, Art. 12</b>  FAILURE TO SELECT THIRD ARBITRATOR	If State parties fail to agree on the selection of a third arbitrator within the <b>time limit in Article 9</b> (15 days), the Secretariat will designate the arbitrator by lottery from among a list of 16 arbitrators named by the CMG.	
<b>Protocol of Brasilia Chapter IV, Art. 14</b>  THIRD PARTIES	If two or more State parties maintain the same position in a dispute, parties will unify their representation and designate one arbitrator jointly.	Parties must designate arbitrator jointly within <b>15 days</b> .
<b>Protocol of Brasilia Chapter IV, Art. 18</b>  INJUNCTIONS	The Ad Hoc Court may issue temporary injunction orders upon a showing of immediate irreparable harm.	
<b>Protocol of Brasilia Chapter IV, Art. 19</b>  CONTROLLING LAW	Arbitral Court will decide the controversy based on the Treaty of Asuncion, other agreements, the decisions of the CCM, the resolutions of the CMG, as well as on relevant principles and decisions of international law.	
<b>Protocol of Brasilia Chapter IV, Art. 20</b>  ARBITRAL AWARD		The Ad Hoc Arbitral Court must issue its holding within <b>60 days</b> , which may be extended for an additional <b>30 days</b> , from the time the President of the Court accepts his or her designation.
<b>Protocol of Brasilia Chapter IV, Art. 21</b>  COMPLIANCE WITH COURT HOLDING	Decisions of the Ad Hoc Court bind all parties to the dispute	Parties must <b>comply with the holding</b> of the Court within <b>15 days</b> , unless the Court affixes a different time limit.

Provision	Procedure	Timeline
<b>Protocol of Brasilia Chapter IV, Art. 22</b>  CLARIFICATION OF HOLDING	During the clarification procedure the Ad Hoc Court may suspend the holding until the Court issues a clarification of the holding.	State parties may request a clarification of the holding within <b>15 days</b> of its issuance. The Court must respond within <b>15 days</b> .
<b>Protocol of Brasilia Chapter IV, Art. 23</b>  FAILURE TO COMPLY WITH HOLDING	If a Party fails to comply with Court holding, the other Parties may adopt temporary compensatory measures, such as the suspension of concessions to encourage compliance.	Harmed State party may not use compensatory measures until 30 days after the issuance of the holding or clarification of the holding.
<b>Protocol of Olivos Chapter VIII, Art. 29</b> COMPLIANCE WITH COURT		Award must be complied with <b>within 30 days after its notification</b> or within the period established by the Court
<b>Protocol of Olivos Chapter VIII Art. 30</b> DISCREPANCY AS TO THE ENFORCEMENT OF THE AWARD	If the State benefiting from the award considers that the measures adopted by the other party are not in compliance, it notifies the Ad Hoc Arbitral Court or Permanent Review Court.	Notification must be <b>within 30 days after the adoption on measures</b> .  The Court must decide the matter <b>within 30 days from the notification</b> .
<b>Protocol of Olivos Chapter IX Art. 31</b>  COMPENSATORY MEASURES	If an involved State does not totally comply with the award within one year, the other State may implement temporary compensatory measures tending to attain compliance with the award.	The award must be complied with <b>within one year from the day following the period established by the corresponding Court, or in lieu of this period, the following day after 30 days from the award notification</b> .  The State implementing the temporary compensatory measures must notify the other State <b>at least 15 days before their implementation</b> .
<b>Protocol of Olivos Chapter IX Art. 32</b>  CHALLENGING OF COMPENSATORY MEASURES	The State against whom temporary compensatory measures are implemented may challenge them if it considers that it satisfactorily complied with the award	Challenge must be made <b>within 15 days</b> after the other State notified the temporary compensatory measures implementation.  The corresponding Ad Hoc Arbitral Court must decide the matter within 30 days after its constitution.

Provision	Procedure	Timeline
<b>Protocol of Olivos Chapter XI, Art. 39, 40, 41</b>  PRIVATE PARTY COMPLAINTS	Natural persons and Private companies affected by legal or administrative measures taken by a Member State in violation of the Treaty of Asuncion may file a complaint before the National Section of the CMG of the State where they reside.	If the claim is not solved by consultations <b>within 15</b> after the complaint notification, the National Section may transfer the claim directly to the CMG
<b>Protocol of Olivos Chapter XI, Art. 42</b>  INTERVENTION OF THE CMG AND GROUP OF EXPERTS REPORT	The CMG may reject the complaint or immediately convene a group of experts who should then issue a report regarding the validity of the complaint.	The report from the group of experts must be issued within a period <b>not to exceed 30 days</b> following their designation.
<b>Protocol of Olivos Chapter XI, Art. 44</b>  EXPERT REPORTS	If the Group of Experts unanimously determines in its report the validity of the complaint made against a State Party, any other State Party can then demand the adoption of corrective measures or the annulment of the disputed measure. If Group of Experts' report is not unanimous, the CMG must immediately conclude the complaint procedure.	If this demand is not met <b>within a 15 day period</b> , the demanding State may then proceed directly to the arbitral procedure.

The Protocol of Brasilia includes the requirements of Annex III of direct negotiations for a maximum period of fifteen days and arbitration by the CMG, but also provides a provision establishing an Ad Hoc Court to rule on a dispute at the request of State parties.<sup>108</sup> The data available show that Ad Hoc Courts resolved ten Member State disputes since 1991. As with the CMG cases, Argentina was party to a majority of the disputes (Table VI-04, 7/10, 70 percent). In addition, a majority of the disputes again concern tariff restrictions (Table VI-05, 5/10, 50 percent).

TABLE VI- 04 – COUNTRIES PARTY TO THE DISPUTE  
SETTLEMENT UNDER THE PROTOCOL OF BRASILIA

Countries Party to the Dispute	Number of cases
Argentina v. Brazil	3
Brazil v. Argentina	2
Uruguay v. Argentina	1
Uruguay v. Brazil	2
Paraguay v. Uruguay	1
Argentina v. Uruguay	1
<b>Total</b>	<b>10</b>

108. See Protocol of Brasilia, *supra* note 78, arts. 3, 7.

TABLE VI- 05 - TYPE OF DISPUTES AT ISSUE UNDER THE  
PROTOCOL OF BRASILIA

Type of case	Frequency
Tariff Restrictions	5
Safeguards	3
Anti-dumping	1
Lack of Incorporation of MERCOSUL rules	1
<b>Total</b>	<b>10</b>

For several of the cases, information exists as to the date the court's president received the dispute, the date MERCOSUL formed the court, and the date that the dispute ended. Using this information, we can analyze the length of time of each phase of the dispute process. However, in half of the disputes no information exists as to when the president received the dispute. Therefore, the time calculations of these cases consist only of the date MERCOSUL formed the court and the date the dispute ended. On average, the dispute resolution process takes 141 days to obtain a decision. Cases concerning the implementation of MERCOSUL trade safeguards take approximately 100 more days to resolve than the average.

TABLE VI- 06 – LENGTH OF TIME BETWEEN CONSTITUTION OF  
THE AD HOC COURT AND END OF DISPUTE BY  
MEASURE CHALLENGED

Type of Dispute	Mean Time	Number of Disputes
Anti-dumping	75	1
Lack of Incorporation of MERCOSUL rules	113	1
Safeguards	240	3
Tariff Restrictions	101	5
<b>Total</b>	<b>141</b>	<b>10</b>

### *E. Dispute Review by the Permanent Review Court*

The 2002 Protocol of Olivos embraces additional dispute resolution procedures then that of Annex III, the Protocol of Brasilia, and the Protocol of Ouro Preto. The Protocol sets up a review of CMG and Ad Hoc Court holdings through the formation of the Permanent Review Court that consists of three arbitrators; one from each disputing MERCOSUL State and a third arbitrator decided upon jointly. Any party utilizing the Ad Hoc Court or CMG arbitration may submit a motion to review a holding within

15 days of the judgment. The Permanent Review Court must limit its holding to the issues addressed by the CMG and Ad Hoc Court's original holding.<sup>109</sup> The holding of the Permanent Review Court binds all State parties, preventing parties from any further appeal of the holding.<sup>110</sup>

TABLE VI- 07 –PERMANENT COURT OF REVIEW OF  
PROVISIONS, PROCEDURES AND TIMELINE

Provision	Procedure	Timeline
<b>Protocol of Olivos</b>  <b>Ch. 7 Art. 17</b>  MOTION FOR REVIEW		Parties must file motion for review within <b>15 days</b> of Ad Hoc Court holding.
<b>Protocol of Olivos</b>  <b>Ch. 7 Art. 18</b>  COMPOSITION OF PERMANENT REVIEW COURT	Permanent Review court to consist of 5 arbitrators. One from each of the four original MERCOSUR States and a fifth decided upon jointly. Each State shall nominate 2 arbitrators to compose the list from which the fifth arbitrator is chosen.	The arbitrator and alternate may serve for a 2-year term and such position is renewable up to 2 more terms. The fifth arbitrator is to serve a non-renewable 3-year term.
<b>Protocol of Olivos</b>  <b>Ch. 7 Art. 20</b>  OPERATION OF THE COURT	When the dispute includes only two State parties then the Court shall consist of three arbitrators; one chose from each disputing party State and a third decided upon jointly.  When the dispute involves more than two State parties then the Court will consist of five arbitrators.	
<b>Protocol of Olivos</b>  <b>Ch. 7 Art. 21</b>  REPLY TO THE MOTION TO REVIEW	The other party to the dispute may reply to the motion for review.	The Permanent Review Court shall decide on the motion within <b>30 days</b> . The Court may decide to extend the 30-day term by <b>15 days</b> .
<b>Protocol of Olivos</b>  <b>Ch. 7 Art. 22</b>  SCOPE OF THE HOLDING	The Permanent Review Court may confirm, modify or revoke the holdings of the Ad Hoc Arbitration Court.  The holding of the Permanent Review Court shall be final and shall prevail over the holding of the Ad Hoc Arbitration Court.	

109. Olivos Protocol, *supra* note 85, art. 17, 22. In addition to providing review, the Permanent Review Court may give advisory opinions and review disputes causing irreparable harm in exceptional cases as dictated by the CCM. *Id.* art. 24.

110. *Id.* art. 23.

Provision	Procedure	Timeline
<b>Chapter VII, Art. 23</b>  DIRECT ACCESS TO THE PERMANENT REVIEW COURT	After direct negotiations and/or CMG resolution, the parties may expressly agree to submit the dispute directly and with no other recourse to the Permanent Review Court, which would have then the same competence as the ad Hoc arbitral Court. The award of the Permanent Review Court is mandatory and final.	
<b>Protocol of Olivos Chapter VIII, Art. 28</b>  REQUEST FOR CLARIFICATION	Any of the involved parties may request the Clarification of the Permanent Review Court awards.	Clarification may be requested <b>within the 15 days following the award notice.</b>  The Court must issue its holding <b>within 15 days following the clarification request</b> and may grant an additional period for compliance with the award.
<b>Protocol of Olivos Chapter VIII, Art. 29</b>  COMPLIANCE OF PERMANENT REVIEW COURT AWARDS		Awards must be complied with within the period established by the corresponding Court. In lieu of this period, the award must be complied with <b>within 30 days after its notification.</b>
<b>Protocol of Olivos Chapter VIII Art. 30</b>  DISCREPANCY AS TO THE ENFORCEMENT OF THE AWARD	If the State benefited from the award considers that the measures adopted by the other party are not in compliance with it, it must notify the respective Ad Hoc Arbitral Court or Permanent Review Court.	Notification must be <b>within 30 days after the adoption on measures.</b>  The respective Court must decide the matter <b>within 30 days from the notification.</b>
<b>Protocol of Olivos Chapter IX Art. 31</b>  COMPENSATORY MEASURES	If an involved State does not totally comply with the award within one year, the other State may implement temporary compensatory measures tending to attain compliance with the award.	The award must be complied with <b>within one year from the day following the period established by the corresponding Court, or in lieu of this period, the following day after 30 days from the award notification.</b>  The State implementing the temporary compensatory measures must notify the other State <b>at least 15 days before their implementation.</b>
<b>Protocol of Olivos Chapter IX Art. 32</b>  CHALLENGING OF COMPENSATORY MEASURES	The State against whom temporary compensatory measures are implemented may challenge them if it considers that it satisfactorily complied with the award	Challenge must be made <b>within 15 days</b> after the other State notified the temporary compensatory measures implementation.  The corresponding Permanent Review Court must decide the matter within 30 days after its constitution.

Because the Protocol of Olivos also addresses the Protocol of Brasilia procedures of Ad Hoc Court arbitration and so few cases exist, we decided to construct qualitative rather than quantitative tables. Hence, Table VI- 08 summarizes the awards of a dispute between Uruguay and Argentina concerning the prohibition of

used tires and a dispute between Uruguay and Argentina concerning Argentina's omission in adopting appropriate measures to promote free trade.

TABLE VI- 08 –DISPUTE, PROCEDURES, AND TIMING

Type of Dispute	Previous Procedures	Date Proceedings Began	Additional Procedures	Year the Dispute Ended
<b>Argentina Prohibition of the Importation of Remolded Tires</b>	In 2004 Uruguay requests the commencement of direct negotiations with Argentina. The MERCOSUL Secretariat gives notice of the request on December 6, 2004.  On February 23, 2005, after failing to come to an agreement, Uruguay notifies the MERCOSUL Secretariat the request for Arbitral Procedure under Chapter VI of Protocol of Olivos.	July 26, 2005 The Administrative Secretariat forms the Ad Hoc Court.		October 25, 2005 The Court extends the period to issue the award for 30 additional days
<b>Argentina's Failure to Adopt Measures Promoting Free Trade</b>		June 21, 2006 The Administrative Secretariat forms the Ad Hoc Court.	Argentina requests the review procedure before the Permanent Review Court challenging the designation of the third arbitrator. On July 6, 2006, the Permanent Review Court issued Award N°. 2/2006 holding the request for review inadmissible.	September 6, 2006 The Court extends the period to issue the award for 30 additional days

On the other hand, Table VI- 09 presents findings regarding three disputes settled before the Permanent Review Court. Two of the disputes in this table are the same as disputes recorded in Table VI-08. Hence, failure to resolve a dispute in Ad Hoc Court arbitration will receive a second opportunity for resolution in the Permanent Review Court.

TABLE VI- 09-CASES SETTLED BEFORE THE PERMANENT REVIEW COURT

Type of case	Previous Procedures	Year that the case started	Year that the dispute ended
AWARD N° 1/2005 Ad Hoc Court to decide the review procedure requested by Uruguay against the Ad Hoc Arbitral Court's Award dated October 25, 2005 regarding the <b>Argentine Prohibition of the Importation of Remolded Tires</b>	On October 25, 2005 the Ad Hoc Arbitral Court decides the case against Uruguay.	November 9, 2005 Uruguay requests the review proceeding	December 20, 2005 The Permanent Review Court revokes the October 25, 2005 award from the Ad Hoc Arbitral Court
AWARD N° 2/2006 Court to decide the review procedure at the request of Argentina in regards to the Ad Hoc Court's decision of June 21, 2006 in the case of <b>Argentina's Failure to Adopt Measures Promoting Free Trade between Argentina and Uruguay</b>	On June 21, 2006 the Secretariat forms the Ad Hoc Court to decide the case of between Argentina and Uruguay. Argentina challenges the designation of the third arbitrator requesting a review proceeding.	June 29, 2006 Argentina requests the review proceeding before the Permanent Review Court challenging the designation of the third arbitrator.	July 6, 2006 the Permanent Review Court holds that the request for review is inadmissible.
AWARD N° 1/2007 Court to decide whether the compensatory measures in the case of the <b>Argentine Prohibition of the Importation of Remolded Tires</b> requires excessive measures.	On December 20, 2005 the Permanent Review Court repeals the Ad Hoc Court award of October 25, 2005 and orders Argentina to comply with its award.  On January 13, 2006 the Court rejects a Request for Clarification.  On April 17, 2007 Uruguay imposes compensatory measures against Argentina pointing Argentina's failure to comply with the award.	May 3, 2007 Argentina asks the Permanent Review Court to determine the proportionality of the compensatory measures with Uruguay.	June 8, 2007 Permanent Review Court upholds the compensatory measures.

Type of case	Previous Procedures	Year that the case started	Year that the dispute ended
AWARD N°1/2008 Discrepancy regarding compliance with Award N°1/05 initiated by Uruguay (Art. 30 Protocol of Olivos)"	<p>On January 13, 2006 the Ad Hoc Court rejects a Request for Clarification</p> <p>On April 17, 2007 Uruguay imposes compensatory measures against Argentina pointing to Argentina's failure to comply with the award.</p> <p>On June 8, 2007 the Court upholds the compensatory measures. (Award N° 1/2007)</p> <p>Argentina enacts Law N° 26.329 modifying the MERCOSUL conflicting law, Law N° 25.626. Uruguay considers that this new law fails comply with Award N° 1/2005 and initiates this proceeding under Chapter VIII, Art. 30 of the Protocol of Olivos</p>	<p>February 23, 2005 Uruguay notifies the MERCOSUL Secretariat its intention to initiate the Arbitral procedure.</p> <p>April 25, 2008 President of the Permanent Review Court assembles the Court.</p>	<p>April 25, 2008 The Permanent Review Court decides that the new Law 26.329 fails to comply with the Award N° 1/2005 and orders its revocation or modification.</p> <p>Additionally, the Court authorizes Uruguay to maintain the compensatory measures until Argentina complies with the award.</p>

The existing state of MERCOSUL prevents the regional trade agreement from enforcing the rule of law among its Member States. The lack of transparency, or in the instant case, lack of publication of laws and cases, obscures the process by which States may obtain proper relief and by which MERCOSUL may hold States accountable for possible malfeasances. The very few dispute resolution cases of MERCOSUL creates very little court precedent and possibly indicates the unwillingness of Member States to use the dispute resolution system of MERCOSUL. Finally, MERCOSUL lacks the power to order compliance with MERCOSUL regulations, but rather must rely on its Member States to enforce rulings that have found their laws or measures invalid.

Even though we require further information to determine whether MERCOSUL Member States turn to MERCOSUL dispute resolution systems rather than to WTO dispute resolution systems, and the trends in one direction or another, other conclusions arise from the collected data. The cases in Table VI-09 illustrate that some State laws, regulations, administrative procedures, and company standards can and do contradict MERCOSUL requirements. MERCOSUL requires Member

States to publish all acts affecting trade and an annual report of the adoption of new regulations, but the publications create a financial burden that few States follow.<sup>111</sup> Additionally, while MERCOSUL dispute bodies adhere to precedent in their legal analysis,<sup>112</sup> the lack of resolved cases and lack of information regarding Member State regulations inhibit the transparency of MERCOSUL and, rather than promote free trade, hinder free trade.<sup>113</sup>

Without consistent MERCOSUL decisions, MERCOSUL leaves Member States in the dark as to the manner in which MERCOSUL courts may rule and may restrain Member States from selecting MERCOSUL as a forum to resolve disputes. In addition, MERCOSUL's failure to record properly the dates of Member State actions prevents a complete analysis of the fulfillment of MERCOSUL time requirements. This includes missing data concerning when the President of the ad hoc court obtains a case and the dates and duration of arbitration. Without this information, analysts cannot determine whether MERCOSUL adheres to the rule of law by fulfilling treaty time requirements.

MERCOSUL Members maintain the power to implement temporary compensatory measures against other Member States, however, the MERCOSUL body maintains no such power.<sup>114</sup> Enforcement of MERCOSUL decisions thus lies directly with the Member States.<sup>115</sup> Without this individual capacity, MERCOSUL's inability to properly enforce decisions prevents MERCOSUL from requiring the implementation of holdings and ultimately the rule of law. With a lack of transparency, poor records, and weak enforcement power, MERCOSUL lacks the ability to uphold the rule of law in South America.

## VII. CONCLUSIONS AND RECOMMENDATIONS

Our was to construct an empirical data array that might portray a broader and deeper picture of trade dispute settlement cases involving Latin American countries, with particular regard

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111. Montevideo Protocol on Trade in Services of MERCOSUR art. VIII, Dec. 15, 1997, available at <http://www.cvm.gov.br/ingl/inter/MERCOSUL/montv-e.asp>.

112. Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. DAVIS J. INT'L L. & POL'Y 255, 289 (2008).

113. Gabriel Gari, *Regional Integration: Comparative Experiences: Free Circulation of Services in MERCOSUR: A Pending Task*, 10 LAW & BUS. REV. AM. 545 (2004).

114. Olivos Protocol, *supra* note 82, art. 32.

115. Protocol of Ouro Preto, *supra* note 79, art. 37-40.

to their relevance to the complex task of managing the rule of law. We have addressed a variety of cases under the 3 dispute settlement systems described below.

Name	Entered into force	Members	Type of dispute settlement permitted
WTO	1995	153 countries - all LA and USA	Any dispute that originates from a complaint by a Member country that another Member has created a trade policy or taken an action that violates a WTO agreement
NAFTA	1994	United States, Canada, and Mexico	Investor-state claims; trade remedy challenges; financial services disputes; general disputes claiming agreement violation
MERCOSUL	1991	Argentina, Brasil, Paraguay, and Uruguay	Any dispute that originates from a complaint by a Member country that another Member has created a trade policy or taken an action that violates the MERCOSUL agreement

With respect to WTO dispute settlement, our first finding was that for cases involving a Latin American country (74, see Table VI- 01), most (44, or 60 percent) involve the USA as respondent or complainant (Table VI- 02). More often than not (54 of 74, or 73 percent), the USA is respondent (Table VI- 03). In addition, the USA has been involved in more cases involving another LA Member than any single LA country (Table VI- 01). The peak year for such cases was 2000 (13 cases) and the numbers have been decreasing since that time, down to two cases in 2007 (Table VI- 02).

We also found that although Members may choose to resolve their dispute by agreeing under DSU art. 25 to submit the matter to binding arbitration, that process has not yet been used. Therefore, Members have requested arbitration only in the post-decision phase of a case that was initiated in the usual manner by a request for consultations under DSU art.4.

In respect to the type of measure challenged, we can assert that most of the contested government actions are taxes and regular tariffs (30 of 74, or 41 percent, see Table VI- 05). Safeguard measures were a close second at 24, about 32 percent), with the count for AD/CVD cases being 27 percent (20 of 74). It is also important to note that a case involving taxes and regular tariffs is the type of case, which is less likely to be settled prior to a panel decision than the trade remedy challenges. A notable number of "trade remedy" cases (safeguard and AD/CVD) end with a mutu-

ally agreed upon solution prior to panel decision (15 of 74, or 20 percent, see Table VI- 06).

Using the data we gathered from the WTO, it was possible for us to measure the time between the request for consultations and adoption by the DSB of the final decision of the panel or Appellate Body. Using this information, we could conclude that the timelines prescribed by the DSU often are not met. The mean time for these cases is 672 days (Graph IV-01), although the DSU prescribes 468 days for this phase. On the other hand, when the focus is on appealed cases only, we observed that all cases met the time deadlines prescribed by the DSU (Table VI- 09).<sup>116</sup>

There can be many reasons for delays in the decisions of the initial panel, including that most panelists do not reside in Geneva, the place where all meetings between the panel and the parties, and among the panelists, are held and where the panel's appointed lawyer and economist from the Secretariat are located. Coordinating the calendars of three busy panelists from multiple countries with differing languages is a daunting task for the Secretariat.

It has been the experience of the authors that trade negotiators are compelled to agree to unrealistically short deadlines for panel decisions. In order to convince industry leaders whose companies will be most affected by panel decisions that dispute settlement under a trade agreement is an improvement on litigation or arbitration methods otherwise available to resolve commercial disputes, the decision process must be squeezed to an absolute minimum. The price, however, as shown by our research, is that in the real world, *ad hoc* panels cannot function under these inordinately short deadlines. We find some panels brazenly announcing that their decision will be delayed for 3 months, 6 months, or even

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116. In light of the AB's procedures, we could expect that the AB would more easily meet its deadlines. This is because the Appellate Body's permanent structure has permitted establishment by its Secretariat of a rigorous procedure in which its legal division assigns an attorney to a challenge from the time a Member files a request for establishment of a panel. This attorney tracks the case through its stages of written and oral submissions, the panel's preliminary report to the parties, and the panel's final report. In other words, by the time a party appeals, the AB already has outlined an approach to the panel's report that will then be reviewed and decided by the three AB members appointed to the appeal. Interview with Debra Steger, Former Chief Legal Advisor to the Appellate Body (Feb. 12, 2001). Initial panels, on the other hand, are *ad hoc* entities with a varied composition that may not even include a lawyer (the USA insists that at least one lawyer be chosen for any panel in which it is a primary party). While many officials in the WTO Mission or in the capitals of the Members are reappointed to multiple panels over time, this familiarity with the process has not apparently improved panel efficiency.

longer.<sup>117</sup>

No procedure in the DSU permits this kind of self-award of additional time, but the parties and the WTO Secretariat accept such delay as a necessary part of the process. They look the other way, in other words, to recurring violations of treaty deadlines. We recognize that panels are well justified in utilizing such extreme measures. The complexity of cases is rising in a non-linear curve as the Appellate Body settles the interpretation of provision after provision in the WTO Agreements, leaving only the more difficult aspects of WTO treaty language for panels to engage. Moreover, given the lack of consultation time after the panel is formed, parties sometimes initiate delays by the panel to provide breathing space to explore settlement possibilities.

Should we be surprised, then, when losing respondents treat the DSU requirements for implementation of panel and AB decisions as mere guidelines instead of international obligations?<sup>118</sup> Should we be surprised when we see the most developed WTO Members simply ignoring a challenge altogether, that is, not even conceding the jurisdiction of the WTO dispute settlement system over a measure inarguably within WTO purview?<sup>119</sup> Should we be surprised when losing Members delay implementation of panel findings of violation for years?<sup>120</sup>

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117. Most recently, the WTO panel considering US allegations that European subsidies to Airbus violate the WTO Subsidies Agreement summarily announced in December that its report would be delayed for six months until June 2010. Pilita Clark, *Airbus Fears Delay to Boeing Report*, FINANCIAL TIMES (Dec. 20, 2009), <http://www.ft.com/cms/s/0/8e491306-edaa-11de-ba12-00144feab49a.html?catid=46&SID=google>.

118. Ten years after the EU Member States refused to approve importation from the USA and Canada of meat treated with growth hormones, a position found contrary to WTO rules in Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS4848/AB/R (Jan. 16, 1998). The USA and Canada still are imposing financial retaliation against EU imports.

119. In response to the EU's challenge to USA legislation that imposed a secondary boycott on companies related to Cuban companies that benefited from nationalization of the property of USA citizens, the USA announced that it "would not show up" for proceedings because its expanded embargo affected its essential national security, which it claimed were exempt from WTO purview under Article XXI of the GATT. See Request for the Establishment of a Panel by the European Communities, *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/2 (Oct. 4, 1996); Alan S. Alexandroff & Rajeev Sharma, *The National Security Provision: GATT Article XXI*, in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1577 (Patrick F.J. Macrory et al. eds., 2005).

120. In response to the Appellate Body's finding that distributing anti-dumping duties collected at the border to USA companies harmed by the dumping violated the WTO Anti-Dumping Agreement, the USA Congress repealed the legislation in 2006.

Based on our findings, we could predict that access by LA countries to WTO dispute settlement procedures against alleged violations by the USA will continue to decrease. Armed with an expert staff of trade lawyers in several agencies,<sup>121</sup> the USA is both a formidable opponent and a reluctant loser. Even in cases in which the LA country scores an enormously important victory, such as the change in Members' understanding of the WTO Agreement on Agriculture represented by the *US-Cotton Subsidies* decision,<sup>122</sup> USA compliance has been so slow and begrudging that even a large country such as the complainant here, Brazil, must question whether the massive outlays of attorneys' and other experts' fees have been justified.<sup>123</sup> Perhaps this is unjustifiably flippant, but the *Cotton* case showed, on one hand, that David can indeed slay Goliath and, on the other, that Goliath seems to have as many lives as a cat.

As to NAFTA Chapter 19 disputes, the most striking data are contained in Table V-04. Not only has no case involving Mexico

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Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act (Byrd Amendment)*, WT/DS217/234/AB/R (Jan. 16, 2003). However, transitional provisions have resulted in payouts continuing to this day. See Peter Morton, *Byrd Amendment Finally Bites the Dust*, NATIONAL POST (Oct. 1, 2007), <http://network.nationalpost.com/np/blogs/fpposted/archive/2007/10/01/byrd-amendment-finally-bites-the-dust.aspx>. The tax breaks given by the USA to exports dates to the 1980s as a means to equalize tax rebates given by the EU to its exports. Several challenges by the EU to serially-amended USA legislation culminated in a \$4 billion win by the EU in the 2002 case of *United States—Tax Treatment for "Foreign Sales Corporations"*. Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW (Jan. 14, 2002); see Tim Josling, *WTO Dispute Settlement and the EU-US Mini Trade Wars: A Commentary of Fritz Breuss*, 4 J. OF INDUSTRY, COMPETITION AND TRADE, BANK PAPERS 337, 342–43 (2004).

121. USA Department of Commerce attorneys from the Office of Chief Counsel for Import Administration litigate AD/CVD cases in the WTO and in regional trade agreement dispute settlement systems (notably, NAFTA chapter 19) and assist Department of Justice attorneys in AD/CVD suits filed in the USA federal courts. Attorneys from the Office of General Counsel of the USA's International Trade Commission conduct the USA case when the injury determination of an AD/CVD case is challenged, and also litigate safeguard measures in USA courts.

122. Panel Report, *United States—Subsidies on Upland Cotton*, WT/DS267/R (Sept. 8, 2004).

123. After 3 years of informal negotiations and WTO maneuvering with the USA to obtain compliance with the decisions of the panel and the Appellate Body that had been adopted by the DSB in March 2005, Brazil finally triggered establishment of an arbitration panel to approve Brazil's proposed financial retaliation against other USA exports to Brazil, a challenge in which Brazil in large part prevailed. Panel Report, *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW (Dec. 18, 2007), *aff'd in part*, Appellate Body Report, *United States— Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (Jun. 2, 2008). The battle of the arbitrators continues.

and the USA met the treaty deadline of 315 days (far from it, the mean being 1,282 days), but nearly as much time is absorbed in remand proceedings after the panel's final decision is issued (279 days on average) as the treaty anticipates for the entire dispute settlement process. Strictly from a rule of law perspective, taking an average of two and one-half years longer than required by a binding international treaty, whatever the reason, shows an astounding with basic due process entitlements. While complying with deadlines, as compared with the panel's reaching well reasoned decisions, may seem of a lesser priority, we would posit that much else that has gone awry in the NAFTA Chapter 19 process is explicable from this revealing start.

As with the WTO data, delaying justice to the parties seems not to trouble the NAFTA Parties, as none has been heard to complain or to promise tighter enforcement of the treaty obligations. We cannot confidently draw conclusions about MERSOCUL dispute resolution because of the difficulty in teasing data out of the scarce resources available. However, Table VI-06 suggests a vigorous process that averages but 141 days from start to finish, with AD/CVD and tariff cases taking far less time (75 and 101 days, respectively), with the substantial extra time for safeguards cases (240 days) expanding the mean.

#### VIII. LEGISLATIVE CHANGES AFFECTING CIVIL SOCIETY

Legislation in LA countries in the midst of this swirl of dispute panel jurisprudence has been far more supportive of the rule of law than the record of ignored treaty deadlines would predict. We identified recent laws in nine LA countries that require transparency and accountability in government rulemaking.

Country	Law and year enacted
Argentina	Decree 1172 of December 4, 2003, Access to Public Information; Law of Fiscal Responsibility, Law 24156 of Financial Administration and Systems of Public National Sector Control; and Decree of Regulation of Public Offering Transparency No. 677 of 2001 <sup>124</sup>
Brazil	Fiscal Responsibility Law (LRF), of May 2000 <sup>125</sup>
Chile	Law of Transparency No. 20.285, enacted on August 11, 2008 <sup>126</sup>
Honduras	Decree No. 170-2006 of Transparency and Access to Public Information, published on December 30, 2006 <sup>127</sup>
Mexico	Federal Law of Transparency and Access to Governmental Public Information, published on June 11, 2002 <sup>128</sup>
Nicaragua	Law No. 662 of Transparency for Nicaraguan Governmental Entities and Companies, enacted on June 24, 2008 <sup>129</sup>
Panama	Law No. 6 of January 22 of 2002, providing for transparency in regulations in public management <sup>130</sup>
Peru	Law N° 27806 of Transparency and Access to Public Information, enacted on August 2, 2002 <sup>131</sup>
Uruguay	Law No. 18.381 of Access to Public Information, published on November 7, 2008 <sup>132</sup>

These laws, dating from 2002 to 2008 (most in the latter two years), and thus coincident with the reported decisions, make explicit what Professor Powell argued was an incidental impact of regional trade agreements and their dispute settlement systems.<sup>133</sup> The early Mexican law has the broadest reach<sup>134</sup> and Brazil's opens only banking transactions, but each works toward managing the rule of law by requiring transparency, accountabil-

124. *Acerca del Gobierno*, Argentina (April 9, 2011), <http://www.argentina.gov.ar/argentina/portal/paginas.shtml?pagina=308>.

125. Hélio Tollini, *Social Control and Transparency in Brazil*, Índice de Transparencia (April 9, 2011), <http://www.indicedetransparencia.org.br/?p=857>.

126. *Law of Transparency No. 20.285*, Library of Congress of Chile (April 9, 2011), <http://www.bcn.cl/ley-transparencia>.

127. *Decree No. 170-2006 of Transparency and Access to Public Information*, ONCAE HondurCompras (April 9, 2011), <http://www.hondurcompras.gob.hn/Info/LeyTransparencia.aspx>.

128. *Federal Law of Transparency and Access to Governmental Public Information* (April 9, 2011), [http://www.funcionpublica.gob.mx/leyes/leyinfo/ley\\_lftaipg2002.htm](http://www.funcionpublica.gob.mx/leyes/leyinfo/ley_lftaipg2002.htm).

129. Law No. 662 of Transparency for Nicaraguan Governmental Entities and Companies (April 9, 2011), [http://legislacion.asamblea.gob.ni/Normaweb.nsf/\(\\$All\)/C34AD5893B7AFF9E06257508005C5EB6?OpenDocument](http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/C34AD5893B7AFF9E06257508005C5EB6?OpenDocument).

130. [http://www.setransparencia.gob.pa/documentos/Ley\\_6\\_Transparencia.pdf](http://www.setransparencia.gob.pa/documentos/Ley_6_Transparencia.pdf).

131. Law No. 27806 of Transparency and Access to Public Information (2002), [http://www.transparencia.org.pe/documentos/ley\\_27086.\\_ley\\_de\\_transp.acceso\\_informacion\\_publica.pdf](http://www.transparencia.org.pe/documentos/ley_27086._ley_de_transp.acceso_informacion_publica.pdf).

132. <http://www.redipd.org/documentacion/legislacion/uruguay-iden-idphp.php>.

133. See Powell, *supra* note 3, at 97.

134. Eric Heyer, *Latin American State Secrecy and Mexico's Transparency Law*, 38 GEO. WASH. INT'L L. REV. 437, 439 (2006).

ity, and due process by governments. These laws make obligatory what before were the unwritten and indirect effects of implementation of the agreements themselves. They promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process of rulemaking, improvements that, taken with transparency and accountability, are key elements of democratic governance and, in turn, the rule of law. As the Inter-American Court of Human Rights put it:

[F]reedom of Expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>135</sup>

We find these results even more compelling in verifying our hypothesis in light of the fact that the studied challenges, after all, are about technical trading measures, not matters of constitutional court importance, such as an effort by an authoritarian ruler to extend the term of the presidency. For example, concerning Argentina's success in overturning Brazil's ban on importation of used tires,<sup>136</sup> Brazil simply repealed the measure banning retreaded tires. While this step alone will not likely affect many people or companies not engaged in producing or distributing retreaded tires, except perhaps in the cost of such tires in the marketplace, Brazil's further legislation in support of open governance will indeed have broader impact on its civil society.

We would also point to multiple root causes for these new laws, including increased participation in the global market on all levels. Nonetheless, from the nature of the disputes studied and of the laws enacted to open governmental regulatory processes, we are confident that trade dispute settlement systems were an important underpinning for their passage. These transparency laws are part of what we have styled "managing the rule of law," by which we refer to the arduous process of strengthening the

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135. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 70 (Nov. 13, 1985).

136. Appellate Body Report, *Brazil – Measures Affecting Imports Of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007).

infrastructure of democratic governance to withstand any threat to its continuance.

## Comment

Zachary D. Kaufman\*

### I. INTRODUCTION

Thank you to Shawn, Nanci, and the rest of the Editorial Board of the *Inter-American Law Review* for hosting this important conference that highlights a crucial and timely topic, “The Impact of Regional Trade Agreements on Human Rights and the Rule of Law.” It is an honor to speak here today along with my distinguished co-panelists, Dean Claudio Grossman, Professor Stephen Powell, and Patricia Camino, and our moderator, Harout Samra.

The article by Professor Powell and Dr. Ludmila Mendonça Lopes Ribeiro, “Managing the Rule of Law in the Americas,” provides a comprehensive and valuable background to global (GATT and WTO) and regional (NAFTA and MERCOSUL/MERCOSUR) trade regimes concerning North and South America. The authors help demystify these institutions by describing their histories, compositions, structures, and procedures. The article also presents and then examines a clear hypothesis: “trade dispute settlement contributes to management and perfection of the rule of law in support of democratic governance for civil societies in Latin America.”<sup>1</sup>

Much of the article focuses on data analysis, such as the number of cases before a dispute settlement system and their parties, issues, winners, losers, and timelines. This in itself is a significant contribution. But it left me eager for even more examination and explanation of that data. I would thus like to spend my limited time proposing a future research agenda using this article as a starting point.

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1. Stephen Powell & Ludmila Mendonça Lopes Ribeiro, *Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, MERCOSUL, and NAFTA Dispute Resolution on Civil Society in Latin America*, 42 INTER-AM. L. REV. 2, 197 (2011).

## II. FUTURE RESEARCH AGENDA

Avenues for future research include the following topics: further primary research, causation versus correlation, identities of parties and panelists, regions beyond the Americas, politically-motivated cases, institutional proliferation, and a policy proposal concerning "extraordinary delays" in bi-national panels. I consider each in turn. These avenues of research involve trade, comparative area studies, U.S. foreign policy, and multilateralism.

### A. *Further Primary Research*

In some cases, Professor Powell and Dr. Ribeiro proffer well-informed theories for various phenomena based on available data. For example, the authors observe a relatively high rate of settlement prior to the issuance of a WTO panel decision. The authors then postulate that the reasons for this trend include a combination of a desire to avoid potentially adverse holdings, a lack of confidence in the quality of dispute resolution, and political motivations.<sup>2</sup> Future research, through interviewing the parties themselves and analyzing the relevant countries' internal documents, should be undertaken to support or refute those theories, and to uncover other—and perhaps the real—reasons for such settlement.

### B. *Causation Versus Correlation*

Professor Powell and Dr. Ribeiro argue that there is issue linkage between the rule of law by which Latin American countries operate at home and abroad. Specifically, the authors contend that participation in regional trade agreements and their dispute settlement systems have, in part, caused greater rule of law in the home country.<sup>3</sup> While it is true that a high degree of

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2. *Id.* at 210-211.

3. Professor Powell and Dr. Ribeiro argue that there is "an incidental impact of regional trade agreements and their dispute settlement systems." *Id.* at 249. The authors go on to observe:

Recent laws in nine [Latin American] countries . . . work[] toward[] managing the rule of law by requiring transparency, accountability, and due process by governments[.] [T]hese laws make obligatory what before were the unwritten and indirect effects of implementation of the agreements themselves. They promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process of rulemaking, improvements that, taken with transparency and accountability, are key elements of democratic governance and, in turn, the rule of law.

*Id.* at 250.

correlation exists between these two phenomena, future research could explore whether the causality indeed runs in the direction the authors theorize. We might find, instead, that improvements in the rule of law domestically over the past two decades in several Latin American countries have contributed to—and perhaps themselves even caused—these countries' greater participation in regional trade agreements and their dispute settlement systems.<sup>4</sup> Alternatively, we might find that rule of law domestically and abroad are mutually reinforcing and have bolstered one another over time and issue area, or that the rule of law in each case is strengthened by some third factor, such as economic development. Whatever the case, the authors should also account for the fact that, in some parts of Latin America, observance of the rule of law domestically may have decreased, not increased.<sup>5</sup>

### C. *Identities of Parties and Panelists*

As much as Professor Powell and Dr. Ribeiro state that the identity of the parties before the WTO can help predict the nature of a dispute settlement case,<sup>6</sup> can the identities of panelists on the Appellate Body help predict the outcome of the case?<sup>7</sup> After all, the composition of, for example, the U.S. Supreme Court, shifts over time, becoming more liberal or conservative on particular issues, and thus impacting the outcome of cases before the Court.<sup>8</sup> Presumably, the WTO's Appellate Body also shifts its politics—and corresponding decision-making—depending on its changing composition over time. However, unlike members of the U.S. Supreme Court, all of whom are American, members of the WTO's Appellate Body are of various nationalities, complicating their personal,

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4. On recent developments in the rule of law in Latin America, see, e.g., LINN HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA (2007); RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (Pilar Domingo & Rachel Sieder eds., 2001).

5. See, e.g., WILLIAM C. PRILLAMAN, THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW (2000).

6. Powell & Ribeiro, *supra* note 1, at 211 (“[K]nowing only the countries involved has predictive value as to the type of measure likely to be under review.”).

7. In their description of the WTO dispute resolution system, the authors note that the WTO's Appellate Body, which is composed of seven permanent members serving four-year terms, breaks into panels of three members to hear appeals. *Id.* at 220. This is similar to U.S. circuit courts, in which the larger body breaks into three-member panels to hear appeals, but dissimilar to the U.S. Supreme Court, on which all nine permanent members serving life terms hear appeals, except in certain limited situations.

8. See, e.g., Tonja Jacobi, *Competing Models of Judicial Coalition Formation and Case Outcome Determination*, 1 J. LEGAL ANALYSIS 411 (2009).

predictive politics.<sup>9</sup> Is it also possible that, as in the U.S. court system,<sup>10</sup> knowing the identity of the members of the precise panel of the WTO's Appellate Body they would come before could be a factor in driving parties to settle their disputes before advancing to a panel hearing?

#### *D. Regions Beyond the Americas*

The article, by design, focuses on the Americas.<sup>11</sup> Future research should consider cases of other regions. Are the linkages that exist in the Americas between trade and the rule of law the same as elsewhere in the world? Why or why not?

Sub-Saharan Africa, for example, has (1) relatively higher levels of corruption, (2) relatively weaker levels of the rule of law domestically and regionally, and (3) relatively weaker but in some cases older regional trade agreements and dispute resolution systems, such as the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of West African States (ECOWAS).<sup>12</sup> How do these and other political, economic, social,

9. The seven current members of the WTO's Appellate Body are nationals of Belgium, China, Japan, Mexico, the Philippines, South Africa, and the United States. See World Trade Org., WTO Dispute Settlement—Appellate Body Members, [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) (last visited Sept. 10, 2011). Past members of the WTO's Appellate Body have been nationals of Australia, Brazil, Egypt, Germany, India, Italy, Japan, New Zealand, the Philippines, the United States, and Uruguay. *Id.*

10. See, e.g., Samuel P. Jordan, *Early Panel Announcement, Settlement, and Adjudication*, 2007 BYU L. REV. 55, 55-58 (2007) (noting that, in order to address “a well-publicized caseload crisis,” some U.S. federal appellate courts have experimented with, *inter alia*, announcing the composition of appellate panels well in advance of oral argument, under the theory that the litigants’ assumption—correct or not—that panel composition permitted prediction of the outcome “might lead some parties to settle their claims to avoid certain panels”); Richard L. Revesz, *Litigation and Settlement in the Federal Appellate Courts: Impact of Panel Selection Procedures on Ideologically Divided Courts*, 29 J. LEGAL STUD. 685, 686 (2000) (noting that “[o]ne of the reasons for the D.C. Circuit’s adoption of its practice [of announcing the composition of its panels before the parties have prepared and filed their briefs] in 1986 was its belief that, because litigants perceived the court as ideologically divided, the early announcement of the composition of the panel would increase the settlement rate and reduce the adjudicatory burden on the court”); R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105, 1174 (2004) (arguing that allowing “parties to know panel membership months in advance would increase both the time and the cost-incentives to settle the appeal”).

11. The article acknowledges that the authors’ theses were tested within the context of a particular region and a single set of trade agreements. Powell & Ribeiro, *supra* note 1, at 200.

12. In comparison to the WTO, NAFTA, and MERCOSUL/MERCOSUR, which all

cultural, and historical factors contribute to disparate relationships and outcomes between trade and the rule of law?

### *E. Politically-Motivated Cases*

Professor Powell and Dr. Ribeiro note that countries sometimes bring complaints before the WTO for purely political purposes.<sup>13</sup> The authors' observation concerns issue areas beyond trade. Indeed, one of the primary reasons the United States has not joined a different, but parallel international regime, the International Criminal Court (ICC), is out of fear that politically-motivated cases might be brought against the United States and its allies.<sup>14</sup> Advocates of greater multilateralism in world affairs may want to consider proposing reforms to the WTO dispute resolution process that would penalize or otherwise inhibit purely political complaints. If such complaints continue, one risk is that some countries will be reticent to use the WTO. Additionally, critics of, for example, the ICC will garner more ammunition in their battle against the court by pointing to the WTO as a similarly global forum in which politicized cases are brought.

### *F. Institutional Proliferation*

The authors document multiple trade agreements in the Americas and a preference among some Latin American countries for using regional trade dispute settlement systems over a global one.<sup>15</sup> Taken to its logical extreme, what are the implications of the continued proliferation of regional trade dispute systems (that make rules and set precedents) around the world? Can such proliferation (instead of focusing on the more global WTO) lead to

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became operational in the 1990s, SADC, COMESA, and ECOWAS can trace their roots to the 1970s and 1980s.

13. Powell & Ribeiro, *supra* note 1, at 209 (“[A] certain number of requests for [WTO] consultation [which is akin to a complaint] will have been filed only for political effect. For example, a [WTO] Member may need to placate a domestic industry bedeviled by imports or the Member may be placing a marker for on-going or future negotiations.”).

14. Harold Hongju Koh, U.S. Dep’t of State Legal Adviser & Stephen J. Rapp, U.S. Ambassador-at-Large for War Crimes Issues, Special Briefing on U.S. Engagement with the International Criminal Court and the Outcome of the Recently Concluded Review Conference (June 14, 2010), [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm) (Koh stated: “We’ve had a concern in the past that the prosecutor of the ICC could make—could undertake politically motivated prosecutions, could perhaps come after Americans who were engaged in protecting people from atrocity instead of emphasizing those that were committing the crimes.”).

15. Powell & Ribeiro, *supra* note 1, at 198 (observing “the trend toward increased litigation before regional trade panels rather than the WTO”).

the inconsistent development of certain rules, practices, and international law, and perhaps other inefficiencies, as is feared with the proliferation of ad hoc war crimes tribunals (instead of focusing on the more global ICC)?<sup>16</sup> If so, how can this potential problem be managed through formal institutional designs and modifications and/or informal behavioral solutions?

*G. Policy Proposal Concerning "Extraordinary Delays" in Binational Panels*

I would like to end with a policy proposal based on the article. Most of the factors Professor Powell and Dr. Ribeiro identify for the "extraordinary delays" in Binational NAFTA panel litigation concern the appointment of panelists, whether the legitimate or politicized delay in identifying candidates, or conflicts of interest that arise once candidates are selected.<sup>17</sup> In order to begin to address these problems, might one remedial measure be to reconsider the selection process for panelists? Instead of having panelists chosen ad hoc for each request for panel review, could panelists be assigned for multi-year terms, much like members of the WTO's Appellate Body?<sup>18</sup> Moreover, NAFTA could maintain a roster of alternate or substitute panelists who could fill in for those panelists whenever a conflict of interest is identified. These proposals, which share some commonalities with the method by which MERCOSUL/MERCOSUR member states maintain a list of arbitrators to constitute an Ad Hoc Court,<sup>19</sup> could speed litigation, further professionalize the NAFTA trade dispute resolution system, and reduce start-up costs that currently occur each time new panelists need to be chosen.

Once again, I thank you for the privilege of joining my distinguished co-panelists and moderator here today.

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16. See Zachary D. Kaufman, *The Future of Transitional Justice*, 1 ST. ANTONY'S INT'L REV. 58, 73 (2005) ("There currently exist several war crimes tribunals . . . and . . . it is possible that despite the advent of the ICC, more will be established. The simultaneous operation of multiple, unconnected international, hybrid, and domestic war crimes tribunals may lead to the development of conflicting international criminal law.").

17. Powell & Ribeiro, *supra* note 1, at 226.

18. *Id.* at 203.

19. *Id.* at 228.

## QUESTION-AND-ANSWER

### Question:

In the United States, we have recently seen the success of coalitions of workers in obtaining increases in wages by leveraging the public relations policies of large corporations such as Whole Foods and Taco Bell. Do you think it is possible to promote human rights and protect workers by continuing to leverage the image and branding of international corporations?

### Professor Kaufman:

Thank you for raising this issue. Corporate Social Responsibility is self-consciously a relatively new field,<sup>20</sup> but one that should concern us all.

There have certainly been campaigns through which the public—often a coalition of social, political, student, worker, and religious groups—has successfully applied pressure to a multi-national corporation to improve its human rights policies. For example, members of the apparel and footwear industries, such as Nike and the Gap, changed some of their policies in the 1990s after a public outcry over their practice of employing child laborers and maintaining “sweatshop” conditions in their overseas factories.<sup>21</sup>

One situation in which such civil society initiatives can be complicated is when goods produced and sold lawfully are subsequently used for nefarious purposes. For example, immediately before the 1994 Rwandan genocide, the Hutu-led government imported an enormous number of machetes from China.<sup>22</sup>

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20. See, e.g., THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (Andrew Crane et al. eds., 2008).

21. John H. Cushman Jr., *Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES, May 13, 1998, at D1; Steven Greenhouse, *Anti-Sweatshop Movement is Achieving Gains Overseas*, N.Y. TIMES, Jan. 26, 2000, at A1.

22. ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 127 (1999) (“Requests for import licenses from January 1993 through March 1994 show that 581,000 kilograms of machetes were imported into Rwanda . . . . Assuming the average weight of a machete to be one kilogram, this quantity would equal some 581,000 machetes or one for every third adult Hutu male in Rwanda.”); LINDA MELVERN, CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE 56 (2004) (“It was during 1993 . . . that a project began to import into Rwanda a huge number of machetes and other agricultural tools. . . . These tools came into the country under government import licenses headed ‘eligible imports’. The overwhelming majority of the tools were imported from China. As an illustration of the sheer volume involved, the total number of machetes imported in 1993 weighed 581.175 kilos and cost US\$725.669: there was an estimated one new machete for every third male in the country.”); Mark Doyle, *Ex-Rwandan PM Reveals Genocide Planning*, BBC News, Mar. 26, 2004, <http://>

Machetes are, of course, a legitimate and widely used agricultural tool, including throughout Rwanda and the rest of sub-Saharan Africa. However, machetes can also be used to slaughter people. Indeed, the stockpiling of machetes in Rwanda was a significant portion of the planning and preparation for—and perpetration of—the genocide. The question here is: To what extent should a manufacturer be aware of and responsible for the way in which its goods are not only produced, but also ultimately used? In this case, does China bear any responsibility for the fact that its machetes were used to massacre almost a million Tutsi and moderate Hutu in 1994? And, if so, how can and should China be held accountable?

Another complication of such civil society initiatives is that some corporations and governments may be less susceptible—or even immune—to campaigns to publicly “name and shame” them for their policies and practices. A downside of globalization and free trade is thus that markets can be flooded with goods and services that are exploitative, discriminatory, or otherwise harmful in any number of ways. Concerned governments, inter-governmental agencies, watchdog groups, and the general public must be ever vigilant in monitoring such conduct and devising more effective strategies to identify and inhibit it.

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[news.bbc.co.uk/2/hi/africa/3572887.stm](http://news.bbc.co.uk/2/hi/africa/3572887.stm) (“[I]n 1993 the government of Rwanda imported, from China, three quarters of a million dollars worth of machetes. This was enough for one new machete for every third male.”).

## Comment

Dean Claudio Grossman\*

First of all, thank you for the generous introduction. I am honored to be here. It bodes well for the future of the legal profession to have students like you, who, in spite of the costs of legal education and the pressures of being a law student, make space to organize events that address key issues of our time. I salute your initiative and efforts. I am also honored to be in the company of such a distinguished group of professionals, and to have the opportunity to comment on some of the topics raised by the excellent contribution of Professor Powell.

Professor Powell's contribution opens up a dialogue between two communities that previously were largely separated (*i.e.*, human rights and trade), or perhaps between three communities if environmentalists are included. In my law school, I have spearheaded the initiative to create integrated sections in the first year of study. Reality does not present itself as cleanly and clearly as issues are presented in first-year courses such as civil procedure or torts. More often than not, reality more closely resembles a confused mass of data. Accordingly, some of us believe that it is important to develop an educational environment that allows students to capture the interconnectedness of different legal subjects, while at the same time understanding their theoretical underpinnings in a historical context. Needless to say, this is not an easy task, as it is not simple to break down artificial barriers that divide intellectual communities. Professor Powell's contribution

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\* Claudio Grossman, dean of American University Washington College of Law and the Raymond I. Geraldson Scholar for International and Humanitarian Law, is an expert on international law, human rights, and Inter-American affairs. Grossman was unanimously elected chair of the United Nations Committee against Torture in April 2008, where he has been a member since 2003 and previously served as vice chair (2003-2008). He is also a member of the Commission for the Control of Interpol's Files. Grossman served as president of the College of the Americas, an organization of colleges and universities in the Western Hemisphere, from November 2003-November 2007. Previously, he was a member of the Inter-American Commission on Human Rights from 1993-2001, where he served in numerous capacities including twice as its President (1996 and 2001) as well as the special rapporteur on the rights of indigenous populations and the special rapporteur on women's rights. He has participated in numerous on-site visits and election-observing missions in Eastern Europe, Latin America, and the Middle East. He has also worked on international legal issues with the United Nations and the International Human Rights Law Group (now known as Global Rights).

shows that trade is not only about trade, and human rights are not only about human rights, as those concepts are classically understood. Just recognizing this reality opens up opportunities for important dialogue.

My contributions to this panel are grounded in perspectives gained through my experiences on the United Nations Committee against Torture and, in particular, in this hemisphere as a former member and President of the Inter-American Commission on Human Rights.

In my opinion, we can identify three stages in the recent evolution of human rights in this hemisphere. Allow me to state, *ab initio*, that rather than three separate and sequential stages, these periods share overlapping elements and, in some instances, countries experience a predominance of certain aspects over others.

The first stage leading up to the 1970s was characterized by the presence of dictatorships or authoritarian regimes in virtually every country. These regimes pursued state policies of mass and gross violations of human rights. In that initial stage, the Inter-American system for the protection of human rights, *i.e.*, the norms and institutions developed under the aegis of the Organization of American States (OAS), had primarily one goal, which was to expose and denounce those regimes, largely through the mechanism of country reports. In that context, it was not feasible for democratic societies to conclude free trade agreements with such regimes. This dynamic demonstrates the connection existing between human rights and democracy, on the one hand, and trade on the other. It also underscores Professor Kauffman's earlier point about the link between internal and external elements that makes it possible for the negotiation and conclusion of free trade agreements. It would not be possible to have legitimate interactions, like those described by Professor Kauffman, with a dictator. During this first stage, the Inter-American system was, for example, denouncing the state practice of disappearances. The system's purpose was to expose this practice and create political conditions that would stop its occurrence and, at the same time, delegitimize its perpetrators.

The second phase, generally taking place during the 1980s, is characterized by the process of democratic transitions with elected governments. During this phase, for the Inter-American system, it was crucial to fight the legacy left behind by dictatorships and authoritarian governments. In this phase, the fight against impu-

nity was central to allow societies to address the mass and gross violations of human rights that had taken place, securing truth and justice for the victims and the population at large as well as holding the perpetrators accountable. Together with the fight against impunity, the Inter-American system also contributed through its petition system to the long process of building independent judiciaries, respect for freedom of expression and other hallmarks of democratic governance. The petition system allows individuals to bring their grievances before the Inter-American organs if the petitioners did not find satisfaction in the domestic setting. Free trade agreements, as Professor Powell stated, can contribute to processes of democratic transition and the strengthening of the rule of law because such agreements require increased transparency in administration and decision-making, and often provide opportunities to accede to international organs whose intervention could be triggered by individual actors.

The third phase, in which numerous countries of the region find themselves today, is characterized by the realization that democracy goes far beyond free elections. Democracy includes, among other important components, institutions and values, independent judiciaries, and a representative Congress that truly exercises its supervisory functions in a context of separation of powers. As importantly, democracy requires a vibrant and strong civil society where everyone counts. From that perspective, the struggle against poverty and discrimination of any kind, together with an environment of citizen security within the rule of law and the existence of real equal opportunities for all, becomes central. Free trade agreements can contribute to democratic development with, for example, provisions strengthening labor rights that include techniques such as collective bargaining. Programmatic norms or statements of principles can also provide opportunities for societal actors to press for the implementation of such norms.

Along this line of reasoning, even if the provisions do not include clearly-defined obligations or mechanisms of supervision, they can still potentially be used in societal debates. There is an additional value to the inclusion of labor and environmental provisions in free trade agreements even if they are only programmatic. They signal a progressive development challenging the notion that trade is only about trade narrowly construed. Numerous factors, indeed, impact trade, and legitimate claims could be made to include such topics in discussions regarding free trade agreements. One example is citizen security. Unlimited flow of illegal

weapons of different kinds could destabilize a developing society, creating an environment of generalized insecurity with multiple negative consequences including increased crimes and violence and a deterioration of the rule of law. This has obviously negative implications on economic development and trade, as well. As environmental and labor issues have been incorporated in trade agreements, space has been created to argue that topics such as citizen security, could also be considered in discussions surrounding such agreements. Unlimited expansion of topics, however, poses problems to the extent that such expansion could, due to the complexities of issues involved, render it increasingly difficult to conclude a free trade agreement.

Bearing this in mind, it is important to act reasonably in identifying the impact of new trade topics. The point here is that such a discussion is valid, and the development of criteria and principles in this area is legitimate. Perhaps a key factor here would be the impact that the free trade agreement would have in the lives of all inhabitants of a country. From this perspective, for example, using free trade agreements to persuade countries to forego protections under the international trade regime that had allowed them in crisis situations to access generic medicines, is arguably not in accordance with the purpose and principles of human rights law. This is particularly so when a developing country with weak institutional structures waives its rights under the international trade regime in an attempt to acquire legitimacy by becoming a partner to a free trade agreement.

To contribute to limiting or reducing the possibilities for such abuse, greater transparency and participation of different societal actors are required. In this context, the expertise and knowledge of non-governmental organizations that engage in transnational actions are very valuable.

Let me conclude my introductory comments by reiterating my opinion that there is a place for labor, environmental and other matters relevant to trade in free trade agreements. In today's interconnected world, links between regimes that were previously viewed as distinctly separate, *e.g.*, trade and human rights, are no longer perceived as such. Needless to say, bringing together these fields raises serious difficulties and complexities. For some of us, however, those challenges are not insurmountable obstacles.

## Comment

Patricia Camino\*

Thank you. I'm also very honored to be in front of these very intelligent and very experienced scholars. I think I'm going to add onto what Prof. Grossman has said. As everyone here has stated again and again, the link between trade and human rights is undeniable at this point. The recent increase and proliferation of Regional Trade Agreements has opened the door for an avenue to better integrate human rights and trade. Prof. Grossman was just saying that one of the important things that we should consider with regards to integrating human rights into trade agreements, is the strength of the participant. However, I also think it is important to take into consideration the type of human rights being evaluated: whether we are considering labor rights, environmental rights or indigenous rights. As with the participant, it can also be stated that there are different levels of strength among the different types of human rights. This also ties into what Prof. Rosen was saying in the beginning about the two different categories of human rights: the hardcore and softcore human rights. Let me explain. For example, when parties discuss the integration of labor rights, they are able to consider as a basis and as a parameter, the general core labor rights already established by the ILO convention.

However, in the environmental arena, as Prof. Powell questioned: "what are the core environmental rights?" There are no real core environmental rights established by any international organization. Part of the reason is that, Environmental protection, in contrast with labor rights, is a little bit more difficult to standardize. Moreover, in comparison with labor rights, the important environmental standards will differ with the issues of each country. I believe that this makes environmental protection a little bit more difficult to enforce. However, this contrast is what makes environmental protection a human right that is better suited to be addressed by regional trade agreements rather

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\* Ms. Camino earned her law degree at the University of Florida where she served as a competition member and President of the Philip C. Jessup Moot Court Team. As a competition member, Ms. Camino received the award for Fourth Best Overall Memorial in the Philip C. Jessup Southeastern Super Regional Moot Court Competition. Ms. Camino is currently an Associate at the law firm of Koch Parafinczuk & Wolf.

than the multilateral forum. In a regional trade agreement, environmental protection can be tailored to the issues of that country. It is especially true with those agreements that are actually regional in the sense that they are closer to each other – because these geographically close countries will have similar cultural issues, similar environmental issues, and similar ecosystems. Thus, there is a higher probability that they are going to reach some sort of consensus and that the actual human rights provisions in these agreements will have more practical significance. To conclude, the ability of a regional trade agreement to provide a better forum for human rights enforcement might differ with the type of human rights being considered.

Nevertheless, in a general sense, I believe that RTAs do provide a better and more efficient ways of integrating human rights. As I mentioned before, with RTAs, there is a higher probability of easier consensus, there are more similarities between the countries and, there are more opportunities for more tailored human rights standards. In addition, there is definitely a higher possibility of a means for enforcement. However, there are some issues that we do need to pay attention to now that so many RTAs are being negotiated – like for example inconsistencies with rules and procedures between several RTAs that one country has signed on to, and other similar issues that the ‘spaghetti bowl’ of RTAs is creating.