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I. INTRODUCTION

This paper will attempt to survey most of the important trading arrangements and treaties governing the expanding interdependence among the nations of the Latin American region and the United States. It will focus on the current mechanisms for the resolution of trade disputes between governments and will describe a clear evolution toward more binding and impartial systems which will help to accelerate the pace of reform and integration.[1]

The basic method for the resolution of trade disputes between nations is the use of consultations, negotiations, and political persuasion, in the absence of any agreement establishing a separate or alternative dispute settlement mechanism.[2] The intractable nature of many of these disputes and the inability to negotiate settlements has led to the development of several third-party mechanisms including mediation, conciliation, arbitration, referral to multilateral bodies, or more formal adjudication.[3]

The international trading system is based to a large extent upon the

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[1] This paper will not discuss the institutional and treaty framework for the resolution of commercial disputes. For information on the resolution of commercial disputes, see generally ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (1993); BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW, 253-409 (1991); and Daniel M. Kolkey, *Reflections on the U.S. Statutory Framework for International Commercial Arbitrations: Its Scope, its Shortcomings, and the Advantages of U.S. Adoption of the UNCITRAL Model Law*, 1 AM. REV. INT'L ARB. 491 (1991).

[2] JEANNE J. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE DISPUTE SETTLEMENT UNDER FREE TRADE AGREEMENTS AND THE GATT, 1 (1993) [hereinafter CRS].

[3] *Id.*

rules developed under the General Agreement on Tariffs and Trade (GATT).[4] The United States, Canada, Brazil, and Chile were original contracting parties to the GATT and many Latin American and Caribbean nations have undertaken the necessary commitments to accede to the treaty since 1948.[5] The GATT provides the fundamental mechanisms common to many nations in the Western Hemisphere for resolving trade disputes and therefore provides the context or framework for comparison with other trade agreements affecting the region. The improvements contained in the Dispute Settlement Understanding (DSU) of the Uruguay Round will enhance this current framework.

This comparison of trade agreements and dispute settlement mechanisms is important because Latin American and Caribbean nations are undergoing rapid political and economic transformations. In recent years, most governments in Latin America and the Caribbean (LAC) have made remarkable strides to open their economies and establish democratic institutions. The changes in LAC economic policies coincide with a renewed United States interest in increasing exports and investment in the area. The LAC region is of major economic significance to U.S. commercial interests. With an estimated Gross Domestic Product (GDP) in 1991 of $800 billion, the LAC region's economy is larger than the entire Southeast Asian market, over 60 percent greater than that of Canada (the number one U.S. export market) and more than three times larger than that of Eastern and Central Europe.[6] In 1991, U.S. exports to this region totaled $62 billion, while imports into the United States totaled $61.8 billion.[7] Recent evidence indicates regional and two-way trade in the LAC region is expanding rapidly as barriers to free trade are removed.[8] These developments have precipitated the negotiation and implementation of several agreements aimed at furthering the integration of trade and economic issues among the nations of the region, and, in some cases, improved dispute settlement mechanisms.

The negotiation of the North American Free Trade Agreement (NAFTA) between Mexico, Canada, and the United States[9] has been

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[4] JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1986 & Supp. 1992) (offers an excellent overview of the GATT).

[5] *See id.* at 64. Of the 115 Contracting Parties to the GATT, as of January 6, 1994, 27 are from the Western Hemisphere. Office of Multilateral Affairs, U.S. Department of Commerce, *GATT Membership*, URU. ROUND UPDATE, Jan. 1994, at 23.

[6] Statistics are drawn from the U.S. Department of Commerce publication, ENTERPRISE FOR THE AMERICAS FACT SHEET, SUPPLEMENTAL ISSUE, (Sept. 15, 1992) [hereinafter EAI brochure].

[7] *Id.*

[8] James Brooke, *Latin America's Regional Trade Boon*, N.Y. TIMES, Feb. 15, 1993, at D1.

[9] North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) [hereinafter NAFTA].

considered the first major step toward the achievement of a hemispheric system of free trade.[10] The Agreement, signed on December 17, 1992, by the Presidents of Mexico and the United States, and the Prime Minister of Canada, is a landmark attempt to remove barriers to free trade and expand markets on a continental basis.[11] The NAFTA, which entered into force on January 1, 1994, contains dispute settlement provisions which are modeled on the Canada-United States Free Trade Agreement (FTA),[12] but improves on the FTA systems in several ways. It is appropriate to review the dispute settlement experience under FTA and how that may apply to the NAFTA because these two agreements offer significant flexibility to the governments in resolving disputes and establish rigorous arbitral or quasi-judicial procedures for intractable disputes. These mechanisms may be ultimately applied to other nations in the region if LAC governments undertake an achievable series of reforms in order to receive a significant set of benefits through the possible negotiation of a hemispheric free trade agreement over the next decade.

The Bush Administration undertook to expand and improve the trade regime in the region through the Enterprise for the Americas Initiative (EAI).[13] The ultimate goal of the initiative is the conclusion of various bilateral and plurilateral agreements "to establish a free trade zone from Anchorage to Tierra del Fuego."[14] The EAI initiative led to the negotiation of "framework agreements" on trade and investment with most countries in the Western Hemisphere. The framework agreements provide a means to monitor trade and investment relations, hold consultations on specific issues, and work toward removing impediments to trade and investment flows. President Clinton has made positive pronouncements about the negotiation of further trade agreements with the nations of the region.[15]

Based upon a review of all of these agreements affecting trade in the region, one can conclude that there is discernable progress and movement by many of the governments to supplement or improve upon the mechanisms of negotiations and consultations by adding more formal third-party dispute settlement mechanisms. A closer examination of how these mechanisms operate may shed some light on how future agree-

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[10] 1992 TRADE POLICY AGENDA OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENT PROGRAM 68-69 (available from the Office of the U.S. Trade Representative).

[11] *See id.*; NAFTA, *supra* note 9 at 1-1.

[12] United States-Canada Free Trade Agreement Implementation Act of 1988, 19 U.S.C. § 2112 (West Supp. 1993) [hereinafter FTA].

[13] EAI brochure, *supra* note 6.

[14] *Id.*

[15] President-Elect Clinton and Mexican President Carlos Salinas, Press Conference at Austin, Texas (Jan. 8, 1993) (transcript on file at *Case Western Reserve Journal of International Law*).

ments will develop.

II. GATT AND THE URUGUAY ROUND

A. *Historical Background*

The point of departure for this exploration of trade dispute settlement must be the GATT. It is the most important multilateral trade agreement aimed at expanding international trade as a means of raising world welfare.[16] The term GATT also refers to the international organization that has been created to administer the agreement.[17] GATT rules reduce uncertainty in connection with commercial transactions across national borders by ensuring that exports from one country will be treated the same as goods produced in the importing country (non-discrimination and national treatment) and that GATT members will accord each other the most advantageous treatment for trade in goods as that accorded to any nation, most favored nation (MFN) treatment.[18]

As of January 6, 1994, 115 countries accounting for approximately 95 percent of world trade are contracting parties to GATT and some 29 additional countries associated with GATT benefit from the application of its provisions to their trade.[19] The agreement provides a framework within which international negotiations, known as "Rounds," are conducted to "create a package of reciprocal trade concessions from which all contracting parties feel they receive some benefit,"[20] such as the lowering of tariff and non-tariff barriers to trade. It also provides for a consultative mechanism and a panel arbitration process that may be invoked by governments seeking to protect their trade interests.[21]

Article II of the GATT contains the basic tariff obligations of the contracting parties and serves as the starting point for analysis of the GATT.[22] Each party agrees to charge a tariff which is lower than or equal to the amount specified in its schedule.[23] To enforce the basic tariff commitment, article I requires each contracting party to provide MFN treatment to all other GATT members, e.g. each contracting party will treat every other contracting party at least as well as it treats any

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[16] *See* General Agreement on Tariffs and Trade, Jan. 1, 1948, 55 U.N.T.S. 194 [hereinafter, GATT].

[17] *Id.* art. XXIX. *See also*, JACKSON & DAVEY, *supra* note 4, at 293.

[18] CARTER & TRIMBLE, *supra* note 1, at 483.

[19] Office of Multilateral Affairs, U.S. Department of Commerce, *supra* note 5, at 23.

[20] CARTER & TRIMBLE, *supra* note 1, at 494.

[21] GATT, *supra* note 16, art. XXIII.

[22] *Id.* art. II.

[23] *Id.*; JACKSON & DAVEY, *supra* note 4, at 395-96.

other government with regard to imports and exports of goods.[24]

Another central principle of the GATT is the national treatment obligation of article III which provides for internal taxation and regulatory treatment for imports from GATT members at least equal to the treatment of domestic goods.[25]

The Tokyo Round of negotiations, from 1973 to 1979, focused on reducing the impact of non-tariff barriers (NTBs) on international trade, which had become more important as tariffs had fallen. The Tokyo Round resulted in the issuance of a series of "Codes" regulating government actions involving subsidies, government procurement, customs valuation methods, technical barriers to trade, antidumping and countervailing duties, import licensing, aircraft sales, and the framework of the GATT.[26] These "NTBs are less quantifiable, and reductions in them are more complex to negotiate than reductions in tariffs."[27]

In response to changing world conditions, the recognition of the need to improve the institutional framework (including the mechanisms for the resolution of disputes), and the desire to expand GATT disciplines to financial services (such as banking, insurance, and law), foreign investment, intellectual property rights (such as patents, trademarks, and copyrights),[28] and barriers to trade in agriculture and textiles, the Uruguay Round of multilateral trade negotiations was initiated in September 1986.[29]

Originally planned to conclude by the end of 1990, and then by the end of 1992, the negotiations stalled over several major issues, the most divisive being agricultural subsidies, intellectual property rights, financial services, tariffs, and market access.[30] The participants were able to reach a series of interim agreements in April 1989 as a result of a review of the progress of the negotiations.[31]

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[24] GATT, *supra* note 16, art. I; JACKSON & DAVEY, *supra* note 4, at 395.

[25] GATT, *supra* note 16, art. III; JACKSON & DAVEY, *supra* note 4, at 483-84.

[26] *See* JACKSON & DAVEY, *supra* note 4, at 325-26. *See also* CARTER & TRIMBLE, *supra* note 1, at 493-99.

[27] CARTER & TRIMBLE, *supra* note 1, at 494.

[28] *Id.*

[29] *Id.* at 495. For a concise summary of the Uruguay Round, see JACKSON & DAVEY, *supra* note 4, Supp. at 3. For information on the current status of the negotiations, *see* GATT, *News of the Uruguay Round*; BNA, *International Trade Reporter* (published from July 4, 1984-); GATT, *GATT Focus*; Office of Mulitilateral Affairs, U.S. Department of Commerce, *Uruguay Round Update*; and other periodicals concerning international trade.

[30] CARTER & TRIMBLE, *supra* note 1, at 495.

[31] GATT, *Decisions Adopted at the Mid-Term Review of the Uruguay Round*, GATT FOCUS, May 1989, *reprinted in* 28 I.L.M. 1023 [hereinafter Uruguay Round Mid-Term]. *See also* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM, (1990).

The successful conclusion to the Uruguay Round on December 15, 1993,[32] will significantly alter the legal and institutional framework for the conduct of trade globally and in the hemisphere, since many Latin American and Caribbean governments have been active participants in the Uruguay Round.[33]

B. *GATT Dispute Settlement*

One of the incentives for the launching of the Uruguay Round was general dissatisfaction with the dispute settlement mechanisms.[34] The primary means for settling differences in the interpretation and application of the agreement are consultations between affected parties under article XXII.[35] Pursuant to the current procedures, which were clarified during the Tokyo Round and were substantially amended by the mid-term review of 1989,[36] contracting parties resort first to consultations and conciliation to resolve questions of nullification or impairment of benefits under the GATT, whether through violation of the GATT, non-violation of the GATT, or the existence of any other situation giving rise to nullification or impairment.[37]

If the parties cannot resolve the matter through consultations, a complaining party can request the establishment of a panel. The decision to form a panel is made by the consensus of the GATT Council, including all parties to the dispute. The panel, consisting of three or five members, receives written submissions from the parties, conducts hearings, meets to deliberate on the information submitted, and drafts a pro-

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[32] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. MTN/FA Dec. 15, 1993 [hereinafter Final Act] (final signing scheduled for April 5, 1994, at Marrakesh, Morocco).

[33] CARTER & TRIMBLE, *supra* note 1, at 494.

[34] *Id.* at 497.

[35] GATT, *supra* note 16, art. XXII.

[36] *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc. L/4907 (Nov. 28, 1979), *reprinted in* GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 210, 211-14 (26th Supp. 1978-1979) [hereinafter BISD]; *Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc. L/6489 (Apr. 12, 1989) [hereinafter *Dispute Settlement Improvements*], *reprinted in* BISD 61-67 (36th Supp. 1988-1989) (applied on a trial basis); Uruguay Round Mid-Term, *supra* note 31, at 1031 (1989). *See also* Ronald A. Brand, *Private Parties and GATT Dispute Resolution: Implications of the Panel Report on Section 337 of the U.S. Tariff Act of 1930*, 24 J. WORLD TRADE 5 (1990); Jeffrey M. Waincymer, *GATT Dispute Settlement: An Agenda for Evaluation and Reform*, 14 N.C. J. INT'L L. & COM. REG. 81 (1989).

[37] *See* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 33-43 (1975). *See generally* PURRE PESCATORE ET AL., HANDBOOK OF GATT DISPUTE SETTLEMENT, (1992).

posed report, with the assistance of the GATT Secretariat.[38]

Many disputes are resolved through negotiations, but if no solution is forthcoming, the panel's report is circulated and considered at a meeting of the GATT Council, which decides by consensus, including the disputing parties, whether to adopt the panel's report and recommendations. If the report is adopted, the burden is on the defendant party to either comply with the panel's recommendations or pay compensation to the complainant party. However, there is no set time frame for a losing party to come into compliance with the panel's report. The remedies for non-compliance are referral back to the contracting parties or retaliation through the suspension of benefits under the agreement, which must be approved by consensus of the contracting parties.[39]

The Uruguay Round negotiators have developed improvements to the GATT dispute settlement rules and procedures which were set forth in what has become known as the "midterm review."[40] The "improvements" in the midterm review seek to standardize the procedures for dispute resolution panels and working parties which are provided for in articles XXII and XXIII of the GATT.[41] These changes include "seemingly automatic establishment of panels, a stricter regime for appointing panel members, abandonment of a preference for governmental specialists over private individuals as panelists, and deadlines for the dispute settlement process."[42] To address complaints about "long delays in handling complaints," the period from a country's initial request for proceedings under article XXII or XXIII until the time the GATT Council makes a decision on the panel report "shall not, unless agreed to by the parties, exceed fifteen months." The improvements also explicitly recognize arbitration as an alternative means to the panel process for dispute settlement.[43]

It is valuable to compare the midterm review provisions and those proposed for disputes under agreements incorporated in the Final Act. Such disputes "would be resolved under a common set of procedures delineated in its 'Understanding on Rules and Procedures Governing the Settlement of Disputes.'"[44]

The DSU contains dispute settlement provisions which apply to

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[38] JACKSON & DAVEY, *supra* note 4, at 337-56, Supp. at 20.

[39] *See id.* at 337-55; GATT, *supra* note 16, art. XXIII.

[40] *Dispute Settlement Improvements*, *supra* note 36, at 61-67; *see also* Uruguay Round Mid-Term, *supra* note 31.

[41] GATT, *supra* note 16, arts. XXII-XXIII.

[42] CRS, *supra* note 2.

[43] CARTER & TRIMBLE, *supra* note 1, at 497.

[44] MTN/FA, 11-A2, Dec. 15, 1993 [hereinafter DSU]. *See generally* CRS, *supra* note 2.

disputes brought under Uruguay Round agreements.[45] While allegations must be based on GATT article XXIII:1, more specific dispute settlement provisions in individual agreements are to prevail over general provisions.[46] Under the DSU, each contracting party undertakes to "accord sympathetic consideration to and afford adequate opportunity for consultation."[47] Once a dispute moves from consultation to the settlement stage, strict time limits for each step govern.[48] If a request is made under article XXII:1 or XXIII:1, the contracting party to which the request is made shall reply to the request in ten days after its receipt. Consultations are to begin within thirty days. In cases of urgency, including those which concern perishable goods, efforts will be made to accelerate the proceedings.[49]

The disputing parties are encouraged to voluntarily settle the dispute themselves.[50] Disputants may call upon a third party to use its "good offices" to assist in resolving any negotiations.[51] The DSU also provides that panels may obtain technical advice from expert review groups.[52]

Expeditious arbitration by mutual consent of the parties is also encouraged in the DSU.[53] The parties shall abide by the arbitration award, with provision for compensation and suspension of concessions applying to such awards.[54]

Both the GATT and the DSU consider the rights of "multiple" and "third party" complainants, and have created mechanisms for their participation in current and past proceedings.[55] The DSU also makes a major change by providing for appeals of panel decisions for matters involving legal interpretation of the GATT, and issues of law covered in panel reports.[56]

The Dunkel Draft provides two automatic remedies for non-compliance: referral back to the contracting parties, or retaliation through the

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[45] DSU, *supra* note 44, at 1.1.

[46] *Id.* at 1.2. *See also* Alan F. Holmer & Judith H. Bello, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L LAW. 795 (1992).

[47] DSU, *supra* note 44, at 4.2.

[48] *Id.* app. 3, at 12.

[49] *Id.* at 4.8.

[50] *Id.* at 3.6.

[51] *Id.* at 5.1.

[52] *Id.* at 13.2, app. 4.

[53] *Id.* at 25.1.

[54] *Id.* at 22.1; CRS, *supra* note 2, at 20.

[55] DSU, *supra* note 44, at 9, 10; *Dispute Settlement Improvements*, *supra* note 36, at 64-65. *See also* CRS, *supra* note 2, at 14.

[56] DSU, *supra* note 44, at 17.6.

suspension of benefits under the agreement. While retaliation has only been applied once,[57] the threat of retaliation can be a credible means to force the resolution of otherwise intractable trade problems.[58] The DSU specifically sets forth that the contracting party must first seek to suspend concessions in the same sector as that in which the violation occurs. If this is not practicable or effective, the contracting party may seek to suspend concessions in other sectors under the same agreement; and if this not practicable or effective, the contracting party may seek to suspend concessions under another agreement.[59]

C. U.S.- EC Oilseeds Dispute

The longstanding dispute between the United States and the European Community (EC) over oilseeds exemplifies the usefulness of a threat of retaliation. It is also helpful to illustrate the operation of the GATT dispute settlement system when two major trading partners and several smaller economies are represented.

The Office of the United States Trade Representative (USTR) characterized the dispute as follows:

> On December 16, 1987, the American Soybean Association filed a petition under Section 302 of the Trade Act of 1974, alleging that the European Community's oilseed policies were denying the rights and benefits of the United States under the [GATT].
>
> On January 5, 1988, the U.S. Trade Representative initiated an investigation of these practices.
>
> After extensive consultations failed to resolve the dispute, the United States requested the establishment of a GATT dispute settlement panel.
>
> The GATT panel found [on December 14,] 1989, that EC oilseed production subsidies impaired benefits accruing to the United States under the duty-free tariff bindings on oilseeds granted by the EC to the U.S. under the GATT. The panel recommended that the EC conform its regulations to the GATT and eliminate the impairment of the tariff

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[57] Article XXIII has been applied to suspend concessions when the Netherlands complained of U.S. dairy import restrictions. JACKSON & DAVEY, *supra* note 4, at 334. *See also* Andreas F. Lowenfeld, *Doing Unto Others . . . The Chicken War Ten Years After*, 4 J. MAR. L. & COM. 599 (1973); Andreas F. Lowenfeld, *The Chicken War: A Postscript*, 5 J. MAR. L. & COM. 317 (1974); *European Community Restrictions on Imports of United States Specialty Agricultural Products: Hearings on H.R. 238 and H.R. 320 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 1st Sess. 95-34, 21 (1977).

[58] For a commentary on the diminished effectiveness of the threat of unilateral retaliation under section 301 see Holmer & Bello, *supra* note 46.

[59] *See generally* Final Act, *supra* note 32; DSU, *supra* note 44, at 22.3.

concessions.

On January 25, 1990, the GATT Council of Representatives adopted the panel report by consensus, and the EC representative confirmed the EC's intention to comply with the panel's recommendations. The EC advised that the necessary measures would be effective by the 1991 crop year.

The EC failed to take appropriate action for the 1991 crop year. On May 24, 1991, the EC advised that it would implement the panel's recommendations in a new oilseeds regime to be adopted by October 31, 1991, and that the reforms would apply to all oilseeds harvested during 1992 and thereafter.

After reviewing the proposed new regime, the United States concluded that the reforms would not comply with the panel's findings. The United States then proposed that the original panel be reconvened to consider whether or not the EC's proposed policy would implement the panel's findings.

On March 16, 1992, the reconvened panel released its report, which confirmed that the EC's new regime continues to impair the duty-free bindings on oilseeds.

The reconvened panel recommended that the Community act expeditiously to remove the impairment by either modifying its new support system or renegotiating its tariff concessions for oilseeds under Article XXVIII.

At the April 1992 GATT Council meeting the Community indicated that it was not yet prepared to agree to either course of action. Therefore, on June 12 the United States published a notice in the Federal Register asking for public comment on a proposal to increase duties on imports of EC goods into the United States.

At the June 1992 GATT Council meeting, the EC requested and received GATT authorization to renegotiate its tariff concessions on oilseeds under Article XXVIII:4 of the GATT.

The U.S. and the EC met four times under the terms of Article XXVIII:4. However, the EC failed to tender or accept any offer that would comply with its GATT obligations or compensate the United States for the continuing impairment.

At the September 1992 GATT Council meeting, the EC asked for a working party to review the Article XXVIII:4 negotiations. The U.S. and other oilseed exporters rejected the EC proposal because it would have resulted in further delay with no concrete result. At the same GATT Council meeting, the United States requested that the EC agree to binding arbitration to determine the amount of damage caused by the EC oilseed subsidies. The EC rejected the U.S. proposal.

Following the September GATT Council meeting, the U.S. negotiated intensively with the EC on the oilseeds issue. The EC still had

not found it possible to offer an acceptable solution.

At the November 4, 1992, GATT Council meeting, the U.S. reiterated its request for binding arbitration on the amount of damage and the EC did not respond favorably. The U.S. sought authorization by the GATT for a withdrawal of concessions . . . but the EC did not support a consensus in favor of such authorization.

The United States estimate[d] that the global damage caused by the EC's policies [was] approximately $2 billion; the U.S. industry loses approximated nearly $1 billion annually. The EC's estimate of global damage [was] less than $400 million.[60]

The USTR compiled a list of EC products which were to have increased duties imposed upon them. This list initially totaled approximately $2 billion, with the list to be reduced to $1 billion, for the imposition of increased tariffs on or after December 5, 1992.[61] The list consisted of products in the same oilseed sector as well as wine, perfume, tires, paper products, ceramic tiles, glassware, pipes, records, tapes, and furniture.[62]

This threat of retaliatory action caused an uproar on both sides of the Atlantic. For example, the increase in duty on white wine was to be nearly 200 percent.[63] Many U.S. merchants rushed to their congressional representatives seeking relief. They were advised to testify on the impact of such increased duties on their respective domestic industries at public hearings held by USTR, which are required under section 301.[64]

On November 20, 1992, the U.S. and EC agreed upon a settlement (the "Blair House Accord") satisfactorily resolving their differences on oilseeds. The USTR terminated its section 301 violation claim on December 4, 1992, but will continue to monitor EC compliance with the terms of the Blair House Accord under section 306.[65]

Under the Blair House Accord, the U.S. sought to limit the number of tons of oilseeds that the EC could subsidize, through limiting the amount of hectares of oilseeds that could be planted. This was in accordance with a solution that was proposed by France.[66]

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[60] Office of the United States Trade Representative, *Press Release, USTR Factsheet: Oilseeds*, Nov. 5, 1992 [hereinafter Oilseeds Factsheet].

[61] *Id.*

[62] *Id.*

[63] *See* USTR, *News Release: U.S. to Withdraw Trade Concessions in Oilseeds Dispute with E.C.*, Nov. 5, 1992 [hereinafter Oilseeds News Release].

[64] *Id.*

[65] *See* Frances Williams, *EC Near Oilseeds Accords With Small Exporters*, FIN. TIMES, Dec. 4, 1992, (World Trade News) at 7.

[66] *Id.*

It is interesting to note that Brazil and Canada also made submissions in the dispute. Brazil asserted, "that for foreign competitors the Community market had shrunk because of increased EEC production encouraged by subsidies and that exporters faced artificial disadvantages in relation to domestic producers because of the preferential absorption of their output."[67] Canada stated that their rapeseed market was impacted by EEC subsidies, particularly of oil and meal producers. European end-users of rapeseed were dependent on domestically produced rapeseed purchases to qualify for the subsidy. Canada asserted that this practice was clearly inconsistent with national treatment obligations under article III:4 of the GATT.[68]

The relative economic and political size of the contracting party opponents in a GATT dispute is an important factor when reviewing how dispute settlement mechanisms affect Latin American and Caribbean countries. In the oilseeds dispute, the final agreement reached by the U.S. and the EC differed substantially from the opening positions of either disputant. The smaller countries involved in the matter have not concluded GATT article XXVIII compensation negotiations with the EC.

D. Australia-U.S. Sugar Dispute

An example of a GATT dispute settlement involving a large economy and several smaller economies will illustrate another typical situation involving LAC governments. In June 1988 Australia held consultations with the U.S. in regard to its restrictions on imports of sugar, particularly for the purpose of establishing the United States' justification under GATT for its current sugar import regime.[69] Argentina, Brazil, Colombia, and Nicaragua were among the "interested third parties" that made submissions to the panel.[70] The facts of the dispute were as follows:

In 1949, the United States negotiated and included in schedule XX tariff concessions on raw and refined sugar subject to a provision relating to title II of the Sugar Act of 1948 (Sugar Act) or substantially equivalent legislation.[71] Title II of the Sugar Act required the Secretary of Agriculture "to establish quotas on the importation and domestic production of sugar on the basis of his yearly determination of the amount of sugar needed to meet consumers' requirements in the conti-

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[67] GATT, *Canada/European Communities Article XXVII Rights*, GATT Doc. DS12/R, (Oct. 16, 1990), *reprinted in* BISD 80, 121 (37th Supp. 1989-90) (awarded by the Arbitrator).

[68] *Id.* at 122.

[69] *United States Restrictions on Imports of Sugar*, GATT Doc. L/6514 (June 22, 1989), *reprinted in* BISD 331 (36th Supp. 1988-1989).

[70] *Id.* at 338-41.

[71] *Id.* at 332.

nental United States."[72]

This provision was "enlarged to authorize the President of the United States to proclaim a rate of duty and quota limitation on imported sugars if the Sugar Act or substantially equivalent legislation should expire . . . ."[73] The Sugar Act expired in 1974, and was not replaced with substantially equivalent legislation.[74] Instead, the President, by proclamation, established an import quota program which was reestablished in 1982, whereby the size of the global import quota was "allocated between the different supplying countries according to their past performance during a previous representative period."[75] Australia's market share of the total U.S. import sugar market declined from 8.3 percent in 1982 to 7.9 percent in 1988.[76] The primary arguments of the Parties were summarized as follows:

> Australia asked the Panel to find that the import restrictions on sugar implemented by the United States were contrary to the provisions of Article XI:1 and qualified neither for the exceptions provided for under that Article, nor for those provided under any other relevant provision of the General Agreement and also that these restrictions constituted, *prima facie*, a case of nullification or impairment of Australia's rights under the General Agreement. Australia noted that the United States did not justify these restrictions in terms of Section 22 of the Agricultural Adjustment Act (of 1933) as amended, or any other measure. Specifically, Australia noted that the Section 22 Waiver did not permit the imposition of fees and quotas simultaneously, nor did it permit quotas to be set at less than 50 percent of the level of imports during a previous representative period . . . .
>
> The United States maintained that the import restrictions subject to Australia's complaint were administered pursuant to a negotiated tariff concession, and thus pursuant to provisions which were an integral part of the General Agreement. On this basis, the United States asked the Panel to reject Australia's complaint.[77]

Argentina and Brazil argued that the basic purpose of the concessions granted to the United States were to create stable conditions of competition, primarily aimed at alleviating an emergency situation creat-

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[72] *Id.*

[73] *Id.*

[74] *Id.* at 333.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 334 (abstracts of the primary arguments of Australia and the U.S. appear in their entirety).

ed by the instability of world market prices.[78] Argentina lost nearly $200 million annually from 1981-1987, while Brazil's decline in exports of sugar to the United States went from 1 million short tons in the early 80's to 15,300 short tons in 1988.[79]

Colombia blamed the restrictive quotas for the impairment it suffered in the world sugar market.[80] Nicaragua concurred with Australia's argument that the United States' actions constituted a restriction within the terms of article XI:1, and that the value and scope of the United States' concessions could be viewed as an outright prohibition of sugar imports.[81]

Canada made a submission to the dispute, asserting that it suffered a nearly 66 percent drop in sugar exports to the U.S. as a result of the duties and quotas program.[82] "Canada argued that these restrictions were contrary to Article XI and could not be justified under paragraph 2 of the Article,"[83] which allowed a combination of duties and quotas, and thereby was inconsistent with the General Agreement.

The panel found that the United States could not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of article XI:1.[84] The panel recommended that the contracting parties request that the U.S. either terminate these restrictions or bring them into conformity with the General Agreement.[85]

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[78] *Id.* at 338-39.

[79] *Id.*

[80] *Id.* at 340.

[81] *Id.* at 340-41. Professor Carter asserts that "difficult disputes often arise from the use of import (or other trade) controls for foreign policy purposes, such as the U.S. cutoff of the Nicaraguan sugar quota [for imports into the United States in 1983]."

[82] *Id.* at 339.

[83] *Id.*

[84] *Id.* at 341-44.

[85] For another example of large country versus small country GATT litigation, see *United States - Taxes on Petroleum and Certain Imported Substances* GATT, Doc. L/6175, (June 17, 1987), *reprinted in* BISD 136 (34th Supp. 1986-1987) (report of the Panel). Professor Jackson summarized the results of this case as follows:

> In 1986, the United States adopted a tax on petroleum for the purpose of financing pollution control measures, i.e. the so-called superfund for cleanup of waste disposal sites. The tax was set at 11.7 cents per barrel of imported oil and 8.2 cents per barrel of domestically produced oil. (The House of Representatives had originally proposed taxing oil at a higher rate than the Senate was willing to accept. The compromise was to tax only imported oil at the higher rate.) Following complaints by a number of countries, a GATT dispute settlement panel was established and concluded that the tax violated GATT's National Treatment Clause. However, the panel upheld a levy on imported products made from chemicals that would have

Professor Carter addresses the problems of the dispute settlement mechanisms of the GATT.[86] This analysis is particularly useful when applying the dispute settlement mechanisms to Latin American countries. He states:

> For an injured country, an even greater problem than the slow procedures is the relief available under GATT. The Contracting Parties are likely at most to authorize the injured party under Article XXIII to suspend the concessions it has granted the other country or suspend other obligations owed that country. This relief is limited, particularly when a country imposing the sanctions is willing to absorb some costs to carry out its foreign policy. The situation is especially unsatisfactory when the target country is much smaller that the country imposing the sanctions, because the small country's retaliation is unlikely to have any significant effect on the large country. For example, even if Nicaragua had been authorized to suspend offsetting concessions to the United States after the U.S. action on the sugar quota, this retaliation would have had an infinitesimal impact on the United States. Indeed, the United States itself later decided to cut off exports to, as well as imports from, Nicaragua.[87]

The General Agreement reflects the need for contracting parties to a dispute to determine the most just and efficient manner to settle it. The Dunkel Draft addresses many of the weaknesses in the present system. Presently, the contracting parties must adopt a panel report unanimously, which affords offending parties the option of blocking panel reports.[88] The Dunkel Draft allows the report to go into effect automatically, or the contracting parties must vote unanimously not to adopt the report.[89]

The limited ability of countries to enforce recommendations against other GATT members is addressed in the Dunkel Draft, which, "provides for automatic authorization to retaliate where the offending contracting party fails to implement a panel report in an agreed 'reasonable

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been subject to a tax in the United States on the grounds that the levy was a border tax adjustment permitted by GATT. The United States accepted the panel report and Congress set a uniform rate of 9.7 cents per barrel in the Steel Trade Liberalization Program Implementation Act, section 8, 103 Stat. 1891 (1989).

[86] CARTER & TRIMBLE, *supra* note 1, at 497. *See also* PESCATORE, *supra* note 37. *See generally* HUDEC, *supra* note 37, at 33-43.

[87] CARTER & TRIMBLE, *supra* note 1, at 497.

[88] CRS *supra* note 2, at 20-21.

[89] *Id.*

period' of time."[90] The Dunkel Draft also provides clearer timetables to alleviate the concerns about the current lack of established deadlines. When the final Uruguay Round text is approved and implemented, it will provide an objective, enforceable mechanism substantially better than that available today under the current agreement, which should lead to reduced trade tensions and more efficient handling of disputes.

III. LATIN AMERICAN AND CARIBBEAN ECONOMIC INTEGRATION EFFORTS

The governments of Latin America and the Caribbean (LAC) have been pursuing economic integration in the region for many years. These efforts have accelerated recently due to the increased participation of LAC governments in the Uruguay Round, the recognition that trade restrictions can inhibit economic growth, and the stated U.S. interest in establishing a hemispheric free trade arrangement.[91] A brief overview of some of the most important regional trade agreements and their dispute settlement provisions will provide some insight into the direction these integration efforts are taking.[92]

A. ALADI

In August 1980, ten nations of South America and Mexico signed the Treaty of Montevido,[93] which created the Latin American Integration Association (ALADI). This organization replaced the Latin American Free Trade Association.[94] The Montevideo Treaty's main purpose is to promote regional and subregional partial tariff preference agreements as a means to eventual multilateralization of mutual concessions.[95] Over

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[90] *Id.*

[91] Eduardo Gitli & Gunilla Ryd, *Latin American Integration and the Enterprise for the Americas Initiative*, 26 J. WORLD TRADE 25, 31 (1992).

[92] Due to the paucity of English language information on many of these agreements and arrangements, there may be some details which are omitted or mischaracterized in this section.

[93] Treaty of Montevido Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (entered into force Mar. 18, 1981) [hereinafter Treaty of Montevido].

[94] Report of Activities of the American Free Trade Association up to 31 December 1964, GATT Doc. L/2370 (Mar. 8, 1965), *reprinted in* 4 I.L.M. 682; *Program for Economic Complementarity and Integration*, Res. 100 (IV), L.A.F.T.A. Doc. ALALC/Resolutión 100 (IV) (Dec. 8, 1964), *reprinted in* 4 I.L.M. 761; *Final Act and Resolution of Meeting of Foreign Ministers of Latin American Free Trade Association Countries*, L.A.F.T.A. Doc. ALALC/RM/I/Acta Final (Nov. 6, 1965), *reprinted in* 5 I.L.M. 125; ALALC, *Protocol Establishing the Final Mechanism for the Settlement of Disputes with LAFTA*, SINTESIS MENSUAL, Oct. 1967, *reprinted in* 7 I.L.M. 747; *General Regulations Applicable to the Subregional Agreements Within LAFTA*, Res. 222 (VII), L.A.F.T.A. Doc. ALALC/ Resolución 222 (VII) (Dec. 17, 1967), *reprinted in* 7 I.L.M. 851.

[95] Gitli & Ryd, *supra* note 91.

100 such subagreements, known as "partial scope agreements," have been signed under ALADI.

The treaty creates an elaborate institutional framework with a Council of Foreign Ministers (Council); a Conference of Evaluation and Convergence (Conference), composed of plenipotentiaries; a Committee of Representatives (Committee), composed of permanent delegates; and a General Secretariat. The Council has some responsibility to hear and resolve matters referred to it by the other bodies, but dispute resolution specifically is mentioned only in the context of one of the functions of the Committee: to "propose formulas for resolving matters presented by the member countries, when it is alleged that some of the norms or principles of this Treaty are not being observed . . . ."[96] Regional and subregional agreements in the Americas have followed this pattern, with primary emphasis on tariff preferences, leaving settlement of disputes to resolution at a political level. With the promise of a hemispheric free trade area, steps to deepen integration within the ALADI framework have accelerated in the last few years. Many of the other agreements mentioned below specifically reference the treaty, although it has become somewhat cumbersome to operate within as the number of agreements has proliferated.[97]

B. MERCOSUR

On March 26, 1991, Argentina, Brazil, Paraguay, and Uruguay formed the Southern Common Market (MERCOSUR) through the Treaty of Asunción,[98] which was ratified within seven months. Potentially the most far-reaching of all the ALADI agreements, the treaty sets the ambitious goal of establishing a customs union and common market by the end of 1995.[99] This proposal has the potential to create the largest market in Latin America, approximately half the total economy in South America.[100]

MERCOSUR's goals go beyond the tariff preference agreements characteristic of previous Latin American integration schemes. It aims at the free circulation of goods, services, financial services, and workers among all the parties. In addition, members will coordinate macroeconomic and sectoral policies regarding exchange rates, trade, agriculture, transportation, and communications.

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[96] Treaty of Montevido, *supra* note 93, art. 35(m).

[97] Gitli & Ryd, *supra* note 91.

[98] Treaty of Asunción, Mar. 26, 1991, Arg.- Braz.- Para.- Uru., 30 I.L.M. 1041.

[99] *Id.* art. 1.

[100] Brooke, *supra* note 8.

The principal commitments concerning the trade in goods undertaken by the MERCOSUR governments include the reduction (*to zero*) of import duties for goods of the other parties by the end of 1994.[101] In the meantime, members are reducing import duties every six months according to a negotiated schedule that began on January 1, 1992 with a 47 percent reduction. Each member has a list of exceptions to the reduction of barriers, which will be reduced by 20 percent annually until eliminated in 1995. Another goal is to establish a common external tariff of about 35 percent by December 31, 1994 and to develop a new common rule of origin, under which an article will qualify as a MERCOSUR product if more than 50 percent of its value originates within MERCOSUR. MERCOSUR has shown early signs of success; trade between Brazil and Argentina jumped 50 percent in 1991.[102]

The institutional framework for MERCOSUR is headed by a Council of the Common Market which will provide political leadership and make decisions concerning the implementation and evolution of the common market.[103] A Common Market Group will monitor the implementation of the accord and enforce Council decisions. The trading partners will coordinate macroeconomic and sectoral policies regarding exchange rates, trade, agriculture, transportation, and communications.

Annex III of the Asunción Treaty pertains to dispute settlement. It provides for direct negotiations between parties to resolve disputes before they are referred to the Common Market Group.[104] If referred to that body, it must issue a report within 60 days of the referral, including any technical or expert advice.[105] If no resolution can be made at that level, the issue can be escalated to the Council of Ministers. This annex provides for a new system to be proposed and adopted before December 31, 1994.[106] On December 17, 1991, a Protocol was executed for the settlement of these disputes through arbitration.[107] It is useful to note that the primary mechanism for dispute resolution under MERCOSUR remains negotiation and consultation, but the addition of the new avenues of referral to the Common Market Group or to arbitration offer the possibility of more objective and efficient decisions if the mechanisms are utilized. It is too early to tell whether or not these

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[101] *Id.*

[102] *Id.*

[103] Treaty of Asunción, *supra* note 98, art. 9.

[104] *Id.* annex III, para. 1.

[105] *Id.*

[106] Brooke, *supra* note 8.

[107] Emilio J. Cárdenas, *The Treaty of Asunción: A Southern Cone Common Market (MERCOSUR) Begins to Take Shape*, WORLD COMPETITION L. & ECON. REV., June 1992, at 65, 73.

new possibilities will be realized.

C. *Andean Pact*

The Andean Pact was established in 1969 by the Cartagena Agreement[108] to promote economic integration and trade cooperation and development in the Andean countries of Colombia, Venezuela, Peru, Bolivia, Ecuador, and Chile.[109] The Andean Pact is a regional effort to build upon the commitments made in the LAFTA and ALADI agreements.[110]

The Andean Pact countries have now agreed to almost completely free intra-regional trade by the end of 1995. The declaration of Barahona,[111] signed in December of 1991, created an intra-Andean free trade area beginning January 1992 for Bolivia, Colombia, and Venezuela, and July 1992 for Ecuador and Peru.

Under the treaty, a common external tariff will apply on the basis of four tariff levels, 5, 10, 15 and 20 percent, (to be further reduced in 1994).[112] Bolivia may maintain its levels of 5 and 10 percent. Tariff treatment for agricultural products will be defined in the framework of a common agricultural policy. With respect to automobiles, Colombia, Ecuador, and Venezuela will adopt a common external tariff with a maximum limit of 40 percent until January 1, 1994, when it will be reduced to 25 percent, (Colombia has already reduced its tariff to 35 percent). Certain exemptions from the common external tariff will apply to products not produced in the Andean region.

A joint commercial and industrial policy is aimed at removing all obstacles to integration by 1995. A directly elected Andean Parliament with two scheduled summit meetings per year will be created by the end of 1992.[113] In addition, the Andean Pact governments have pledged to create a social fund for rural areas and to develop common approaches to farming, research, cultural, social, and health policy, foreign policy, and the fight against narcotrafficking. Finally, the new trade partners have invited Mexico, Chile, MERCOSUR, and the rest of the hemisphere to negotiate with the Andean region as a bloc.[114]

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[108] *See Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol*, 28 I.L.M. 1165 (1989) [hereinafter Cartagena Agreement].

[109] U.S. DEPARTMENT OF COMMERCE, GUIDEBOOK TO THE ANDEAN TRADE PREFERENCE ACT 51 (1992) (Chile withdrew in 1976).

[110] *See* Cartagena Agreement, *supra* note 108, at 1171.

[111] *Id.* app. H.

[112] Andean Group: Commission Decision 324 — Common External Tariff Liberation Program and Incentives for Intrasubregional Exports, 32 I.L.M. 211 (1993).

[113] *See* Cartagena Agreement, *supra* note 108.

[114] *See* Alberto Arcbalos, *Historic Andean Pact in Critical Condition*, REUTERS BUS. REP.,

A separate treaty created the Court of Justice of the Cartagena Agreement.[115] This court is the highest legal authority for all Andean Pact matters and enjoys superior jurisdiction to the supreme courts of the respective members as to these matters.[116] This new system offers a considerably more rigorous approach to trade dispute settlement than those previously utilized in Latin America. The authors could find no cases which have been brought to this body to date. Whether such cases arise will be a measure of the government's willingness to be bound by multinational bodies, such as GATT, or a hemispheric free trade arrangement.

D. Caribbean Common Market

The Caribbean Economic Community (Caricom) was established on August 1, 1973, by the Treaty of Chaguaramas (Trinidad).[117] It is composed of English-speaking Caribbean nations: Antigua;[118] the Bahamas;[119] Barbados;[120] Belize;[121] Grenada;[122] Guyana;[123] Jamaica;[124] Montserrat;[125] St. Kitts-Nevis;[126] St. Lucia;[127] St. Vincent[128] and the Grenadines; and Trinidad and Tobago.[129] In late 1991, leaders agreed to a new deadline of January 1, 1994, for creating a customs union. Meanwhile, the deadline for implementing a common external tariff has been postponed for failure of some members to implement it.[130]

The common external tariff promises low rates of duty on imports that do not compete with goods produced within the community, but

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Aug. 22, 1992, *available in* LEXIS, Intlaw Library, Ilmtg file.

[115] Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, 18 I.L.M. 1203 (1979) [hereinafter Cartagena Court Treaty]. *See also* L. Weisenfeld, *Introduction to Agreement Text*, 28 I.L.M. 1233 (1989).

[116] Cartagena Court Treaty, *supra* note 115.

[117] Treaty Establishing the Caribbean Community, *opened for signature* July 4, 1973, 947 U.N.T.S. 17 (entered into force Aug. 1, 1973) [hereinafter Caricom].

[118] Antigua, ratified July 4, 1974. *Id.* at 18.

[119] Bahamas, ratified ___. *Id.* (exact ratification date not given).

[120] Barbados, ratified July 30, 1973. *Id.*

[121] Belize, ratified April 17, 1974. *Id.*

[122] Grenada, ratified April 17, 1974. *Id.*

[123] Guyana, ratified July 28, 1973. *Id.*

[124] Jamaica, ratified July 31, 1973. *Id.*

[125] Montserrat, ratified April 17, 1974. *Id.*

[126] St. Kitts-Nevis, ratified July 26, 1974. *Id.*

[127] St. Lucia, ratified April 17, 1974. *Id.*

[128] St. Vincent, ratified April 17, 1974. *Id.*

[129] Trinidad & Tobago, ratified July 30, 1973. *Id.*

[130] Unnamed Source, Department of Commerce, Office of Latin America, Caribbean Basin Division [hereinafter D.O.C. Source].

sets high rates on any imports likely to injure domestic industry.[131] Tariffs will range from 5 percent to 45 percent, replacing a structure where some tariffs are as high as 70 percent. The Caricom tariff structure remains significantly higher than that of its rapidly liberalizing neighbors in the LAC. There are indications that some members of Caricom may be considering a reduction in the common external tariff.[132]

Caricom is managed by the Conference of Heads of Government, the Common Market Council, and a Community Secretariat. The Conference sets the policies of the community by issuing directives and decisions, entering into treaties for the community, and managing the financial affairs of the organization. Any disputes over the interpretation or application of the agreement may be referred to the Council, an ad hoc tribunal, or the Conference.[133] The Council may enforce its decisions or those of tribunals by suspending benefits to offending states.[134] This mechanism is similar to GATT procedures, and will probably share some of its weaknesses, but it is a clear step beyond mere consultation and negotiation as a means to obtain redress in trade matters.

E. Central American Common Market

On July 15, 1991, the governments of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua agreed to establish a new Central American Common Market (CACM).[135] This effort supersedes an earlier attempt at integration which failed in 1969 due to El Salvador-Honduras hostilities.[136] In addition to the countries already included in the CACM, Panama is becoming more involved in regional integration efforts and may ultimately join in the CACM, even though it is not historically considered to be part of Central America.[137]

The CACM will create new tariff structures, including a common external tariff ranging from 5-20 percent in 1993. Costa Rica will phase in the maximum tariff rate in quarterly installments from March 1992 to June 1993. Over 1700 products will be traded duty-free among the five countries, comprising approximately 95 percent of all products traded

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[131] Caricom, *supra* note 117, art. XIV.

[132] D.O.C. Source, *supra* note 130.

[133] Caricom, *supra* note 117, art. XIV.

[134] *Id.* art. XI.

[135] Shelley Emling, *Central American Leaders Aim to Build Free Trade Bloc*, CHRISTIAN SCI. MONITOR, July 17, 1991, at 4.

[136] General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3. *See also*, EAI brochure, *supra* note 6.

[137] D.O.C. Source, *supra* note 130.

within the region. Eventually, the CACM partners also seek to establish free trade in services and the free movement of capital and labor. They will also establish a forum for consultation on external debt and external financing.[138] CACM disputes will be handled by consultation and negotiation in the absence of any third-party mechanisms or adjudicative bodies.

F. Mexico-Chile Free Trade Agreement

On September 22, 1991, the Presidents of Chile and Mexico signed a "Complementary Economic Agreement."[139] This free trade agreement was entered into within the ALADI framework.[140] Some of its inspiration may be attributable to the prospect of Mexico's entry into a North American Free Trade Agreement and Chile's interest in accelerating its own accession to a free trade agreement with the United States.

The agreement will eliminate all tariffs on most goods by January 1, 1996, with tariffs on a small group of sensitive products being phased down by January 1, 1998.[141] All non-tariff barriers will be removed beginning on January 1, 1992, with the exception of some measures covered by article 50 of the Treaty of Montevideo, (exceptions for public health and safety, war materials, national treasures, etc.).[142] Both countries will adopt "open skies" programs for air transportation and will eliminate sea transport reserve cargoes.[143] The two nations will accord each other MFN treatment of investments and will sign a double taxation treaty.[144]

The agreement contains a dispute settlement mechanism that is unique in Latin American trade agreements. It establishes a Commission to administer and supervise implementation of its commitments.[145] Article 33 provides for consultations about trade disputes before the Commission selects a five-member arbitration panel, composed of two members from each disputant and a chairman who is not a national of either party. The five arbitrators will be guided by such regulations as the parties agree to, and must render their resolution of the dispute within

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[138] *Id.*

[139] Complementary Economic Agreement Sept. 30, 1991 Chile-Mex. (on file at the Mexican Embassy).

[140] Treaty of Montevido, *supra* note 93.

[141] Complementary Economic Agreement, *supra* note 139, art. 3.

[142] *Id.* art. 2.

[143] *Id.* arts. 23-26.

[144] *Id.* arts. 21-22.

[145] *Id.* art. 33.

30 days of their selection (extendable by a like period of time).[146] Resolution of the dispute can include total or partial withdrawal or suspension of concessions, with revocation of the agreement for non-compliance as the primary means of enforcement. This mechanism appears to contain elements similar to the process elaborated in the Canada-United States Free Trade Agreement.

G. Mexico-Central American FTA and G-3

Meanwhile, Mexico has initiated negotiations with the Central American countries aimed at establishing free trade. An agreement to negotiate was announced recently.[147]

Venezuela and Colombia are also accelerating free trade negotiations with Mexico. On June 11, 1992, the Presidents of the so-called "Group of Three" (G-3) met and announced their commitment to signing a free trade agreement by the end of 1992. Mexican officials have stated, however, that Mexico would not sign a G-3 FTA until after completion of NAFTA.[148] At the same time that G-3 talks are accelerating, Chile has expressed an interest in entering into bilateral agreements with each G-3 member.[149]

The acceleration of the integration process and increasing intra-regional trade will in all likelihood lead to continuing reduction of trade barriers. As barriers fall, previously protected sectors in each country, on the one hand, and truly export-competitive sectors still encountering trade restrictions in export markets, on the other hand, will bring pressure to bear to seek "political" solutions to trade problems. Long-term success of these agreements hinges upon whether they yield more objective, less political dispute settlement procedures resulting in enforceable decisions which are politically acceptable to the parties.

IV. NORTH AMERICAN FREE TRADE AGREEMENT

The successful negotiation and implementation of the Canada-United States Free-Trade Agreement (FTA) helped entice Mexico to undertake economic reforms in order to qualify for preferential trading status under a similar arrangement. In turn, as discussed below, the promise of a hemispheric free trade area based upon the FTA and the recently concluded North American Free Trade Agreement (NAFTA) has become the

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[146] *Id.*

[147] *Digest*, WASH. POST, Aug. 21, 1992, (Financial Section) at F2. *See also* EAI brochure, *supra* note 6.

[148] Department of Commerce, Office of Latin America.

[149] *Id.*

central element of U.S. trade policy in the Western Hemisphere. The FTA's dispute settlement mechanisms have been included, with some improvements in the NAFTA. If further trade agreements are concluded with other nations of the hemisphere then the experience under FTA will be indicative of what can be expected under NAFTA.

A. *Experience Under the Canada-United States Free Trade Agreement*

One of the more ambitious initiatives launched under the GATT[150] during the past decade was the negotiation of the FTA. After lengthy negotiations from 1985 to 1988, and following considerable political debate in both countries, it entered into force on January 1, 1989.[151] The Agreement established a free trade area including all territories of the United States and Canada, the largest such trading zone at the time.

The FTA is a comprehensive agreement which among other things: eliminates all tariffs on bilateral goods trade over a ten-year period; reduces non-tariff trade barriers; establishes principles for the conduct of bilateral trade in services for the first time in an international agreement; establishes rules for the conduct of bilateral investment; resolves many outstanding bilateral trade issues; enhances the national security of the two countries; facilitates business travel; assures secure energy supplies; and, establishes an expeditious and effective binational dispute settlement system.[152]

B. *FTA Dispute Settlement Mechanisms*

Article 1802 of the FTA creates the Canada-United States Trade Commission (Commission), headed by the cabinet officials responsible for international trade. The Commission oversees the implementation, application, and elaboration of the FTA. The Commission is also responsible for the resolution of disputes which arise over the interpretation of the agreement.[153] The focus in article 1802 is on dispute avoidance through consultation and negotiation between the parties.[154]

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[150] GATT permits contracting parties to form free trade areas or customs unions irrespective of their MFN obligations, so long as the arrangements cover "substantially all trade" between the parties. GATT, *supra* note 15, art. XXIV.

[151] IVAN BERNIER & BENOÎT LAPOINTE, FREE TRADE AGREEMENT BETWEEN CANADA AND THE UNITED STATES ANNOTATED 1 (1990) [hereinafter FTA ANNOTATED].

[152] *See* James R. Holbein et al., *Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Laws*, 26 INT'L LAW. 873 (1992); Andreas F. Lowenfeld, *Binational Dispute Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269.

[153] FTA, *supra* note 12, art. 1802. *See also* FTA ANNOTATED, *supra* note 151 at 427.

[154] FTA, *supra* note 12, art. 1807. *See also* FTA ANNOTATED, *supra* note 151, at 434.

Article 1807 permits five-member panels of experts to render advisory opinions and recommendations for settlement of disputes referred by the parties. The parties agree upon the terms of reference, select the binational panel and chairman, and agree upon a timetable for the conduct of the panel review. The parties normally follow the deadlines established in article 1807 and the procedures outlined in the *Model Rules of Procedure for Chapter 18 Panels*[155] which provide for written submissions, oral argument, an initial report, comments by the parties, and a final report, normally within 120 days of the formation of the panel.[156] After five years, five disputes have reached the stage of binational panel review under this article.[157]

Article 1806 requires binding arbitration of "safeguards" issues under chapter 11 and permits referral of any other dispute to binding arbitration, "on such terms as the Commission may adopt."[158] Safeguards are measures imposed by one nation to control the flow of imports from another nation or nations which are a cause of substantial injury to the domestic industry of the importing nation.[159] To date, no panels have convened under article 1806.

The Binational Secretariat, a unique organization created by article 1909 of the FTA, administers the system of panel review procedures to settle disputes arising under both chapters 18 and 19 of the agreement.[160] The Secretariat has U.S. and Canadian Sections which act as "mirror-images" of each other. The Secretariat's initial mandate is for five years, extendable by two years,[161] pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade by a working group on

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[155] Model Rules of Procedure for Chapter 18 Panels; United States - Canada Free Trade Agreement, 54 Fed. Reg. 14372 (1989).

[156] *Id.* at 14373; FTA, *supra* note 12, art. 1807; FTA ANNOTATED, *supra* note 151, at 434.

[157] In the matter of: *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, United States-Canada Free Trade Agreement Binational Panel Review [hereinafter U.S.-Canada FTA Panel] Panel No. CDA-89-1807-01 (Oct. 16, 1989); In the matter of: *Lobsters from Canada*, U.S.-Can. FTA Panel, Panel No. USA-89-1807-01 (May 25, 1990); In the matter of: *Article 304 and the Definition of Direct Cost of Processing or Direct Cost of Assembling*, U.S.-Can. FTA Panel, Panel No. USA-92-1807-01 (June 8, 1992); In the matter of: *The Interpretation of and Canada's Compliance With Article 701.3 With Respect to Durum Wheat Sales*, U.S.-Can. FTA Panel, Panel No. CDA-92-1807-01 (Feb. 8, 1993); Puerto Rico Regulations on the Import, Distribution, and Sale of Ultra-High Temperature Milk from Quebec, U.S.-Can. FTA Panel, Panel No. USA-93-1807-01 (June 3, 1993).

[158] FTA, *supra* note 12, art. 1807. *See also* FTA ANNOTATED, *supra* note 151, at 434.

[159] JACKSON & DAVEY, *supra* note 4 at 538.

[160] *See* exchange of letters between John Crosbie, Canadian Minister for International Trade and Clayton Yeutter, U.S. Trade Representative (Dec. 29, 1988 and Jan. 2, 1989) (on file with the *Case Western Reserve Journal of International Law).*

[161] FTA, *supra* note 12, art. 1906. *See also* FTA ANNOTATED, *supra* note 151, at 459.

subsidies created by article 1907.[162]

Article 1904 provides for review by five-member panels of experts, primarily lawyers familiar with international trade law, of antidumping duty (AD), countervailing duty (CVD), and material injury determinations made by one party respecting goods of the other party.[163] Both countries retain their respective unfair trade laws and the cases are reviewed under the domestic law of the country whose agency made the determination under review.[164] Agency determinations made as a result of investigations as well as those made in periodic reviews of existing AD/CVD orders may be reviewed by binational panels. Detailed guidance for the conduct of these panel reviews is provided in the *Article 1904 Panel Rules*.[165] Forty-nine panel reviews have been requested under article 1904.[166]

As a safeguard against impropriety or gross panel error that could threaten the integrity of the process, article 1904 also provides for an "extraordinary challenge procedure."[167] When a Party to the agreement alleges that:

> (a)(i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct;
> ii) the panel seriously departed from a fundamental rule of procedure, or
> iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and
> b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational

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[162] This working group agreed to coordinate efforts in the Subsidies Working Group of the Uruguay Round as the most effective means to achieve the goal of the FTA. When the Uruguay Round stalled, the negotiations to create a NAFTA began and the working group focused on the trilateral aspects of subsidies and dumping. Although the NAFTA does not provide for this working group, the Free Trade Commission established a new working group on these issues at a ministerial on January 14, 1994. *See* INSIDE NAFTA, Jan. 26, 1994, at 10.

[163] FTA, *supra* note 12, art. 1904. *See also*, FTA ANNOTATED, *supra* note 151 at 446.

[164] FTA, *supra* note 12, art. 1904; FTA ANNOTATED, *supra* note 151, at 446.

[165] Article 1904 Panel Rules, 53 Fed. Reg. 53212 (1988), *amended in* 54 Fed. Reg. 53165 (1989), *amended and republished in* 57 Fed. Reg. 26698 (1992), *amended and republished in* 59 Fed. Reg. 5982 (1994).

[166] Notices of requests for panel review, decisions of panels, and completions of panel review are published in the *Federal Register* (published 1936-) and the *Canada Gazette* (published 1970-). Full texts of decisions are available from the Binational Secretariat, on some computer legal services, and in NORTH AMERICAN FREE TRADE AGREEMENTS (James R. Holbein & Donald J. Musch eds., 1993).

[167] FTA, *supra* note 12, art. 1904.13, annex 1904.13. *See also* FTA ANNOTATED, *supra* note 151, at 451, 476.

panel review process,[168] then the aggrieved Party may appeal a panel's decision to a three-member committee of Canadian and U.S. judges or former judges. The committee must make its decision whether to affirm, remand, or vacate the panel's decision typically within 30 days of its establishment.[169]

Two Extraordinary Challenge Committees have been established at this juncture,[170] one to review the second panel decision in the matter of *Fresh, Chilled and Frozen Pork from Canada*,[171] and the other to review both the May 19, 1992, and the October 30, 1992, panel decisions in the matter of *Live Swine from Canada*.[172] In the pork litigation, the binational panel remanded the U.S. International Trade Commission's final determination of the existence of a threat of material injury to the Commission for further action in two successive decisions. In response to the panel's second decision, the Commission, in a three-member plurality decision, reversed its earlier affirmative finding and issued a negative determination.

The United States requested the formation of an Extraordinary Challenge Committee alleging that the panel had committed five errors in its decision. The Committee found that the request failed to cross the threshold for review of panel decisions set out in article 1904 and affirmed the panel decision, thereby leaving the negative injury determination effective.[173]

The Request for an Extraordinary Challenge Committee in the swine litigation was filed on January 21, 1993, alleging that the binational panel "seriously departed from a fundamental rule of procedure or manifestly exceeded its powers, authority or jurisdiction" in four instances in its two decisions.[174] Subsequently, three of the four grounds for challenge were dropped. The Committee affirmed the panel decision and offered several important observations about the appropriate roles for

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[168] FTA, *supra* note 12, art. 1904.13.

[169] FTA ANNOTATED, *supra* note 151, at 476.

[170] In the matter of: United States-Canada Free Trade Agreement Binational Panel Review [hereinafter U.S.-Can. FTA BPR], *Fresh, Chilled or Frozen Pork from Canada*, Panel No. ECC-91-1904-01USA (June 14, 1991); In the matter of: U.S.-Can. FTA BPR, *Live Swine from Canada*, Panel File No. ECC-93-1904-01USA. Copies of the committee decisions are available from the Binational Secretariat. For an extensive commentary on the pork litigation, see Lowenfeld, *supra* note 152, at 302.

[171] In the Matter of: *Fresh, Chilled, or Frozen Pork from Canada*, Panel No. USA-89-1904-11 (Feb. 12, 1991) (on file at the Binational Secretariat).

[172] In the matter of: *Live Swine from Canada*, Panel No. USA-91-1904-03 (May 19, 1992 & Oct. 30, 1992) (on file at the Binational Secretariat).

[173] U.S.-Can. FTA BPR, *supra* note 170, at 327.

[174] *See Live Swine*, *supra* note 172.

Extraordinary Challenge Committees, binational panels, and the investigating authorities whose determinations are reviewed by panels.[175]

The benefits of this unique chapter 19 system for review of AD/CVD determinations include more rapid review than is typical in U.S. or Canadian courts and more certainty of results.[176] In U.S. and Canadian court proceedings, the court decision may be appealed to an appellate court after months or years of litigation, prolonging the period for which deposits of customs duties are collected and held.[177] Under the FTA, most panels have completed action in less than two years, including all actions on remand by the administering agencies, and appeal can be made only to Extraordinary Challenge Committees at the request of one of the parties to the agreement, not one of the participants in the litigation itself.[178] This is a significant improvement in the efficiency and speed of dispute settlement. It has also been argued that binational panels of five experts will frequently bring broad experience and working knowledge of the domestic trade laws to the process, which should result in high quality decisions based solidly upon the domestic law applicable to the proceeding.[179]

The last procedure permitted by the FTA is the review of statutory amendments of either country's unfair trade laws (especially the antidumping and countervailing duty statutes) by five-member binational panels under article 1903.[180] Such panels are to issue declaratory opinions on whether the amendments are consistent with the GATT and the FTA.[181] The panel may recommend modifications of a non-conforming statute which the parties will then discuss in consultations.[182] Procedures to guide the panel's confidential deliberations over a ninety-day period are provided in article 1903.2.[183] This procedure has not been utilized by either party.

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[175] Decision, April 8, 1993. Copies are available from the Binational Secretariat. *See also* Extraordinary Challenge Committee Rules, 53 Fed. Reg. 53212 (1988), *amended and republished in* 59 Fed. Reg. 5910 (1994).

[176] Gary H. Horlick, *The U.S.-Canada Free Trade Agreement and GATT Disputes Settlement Procedures, the Litigant's View*, 26 J. WORLD TRADE 5 (1992).

[177] *Id.*

[178] *Id.* at 11.

[179] Lowenfeld, *supra* note 152. *See generally* Horlick, *supra* note 176 at 10.

[180] FTA, *supra* note 12, art. 1903. *See also* FTA ANNOTATED, *supra* note 151, at 445.

[181] FTA, *supra* note 12, art. 1904; FTA ANNOTATED, *supra* note 151, at 446.

[182] FTA, *supra* note 12, art. 1903.1; FTA ANNOTATED, *supra* note 151, at 446.

[183] FTA, *supra* note 12, art. 1903.2; FTA ANNOTATED, *supra* note 151, at 446.

C. *NAFTA General Provisions*

The United States and Mexico signed a framework agreement in 1987, leading to the negotiation of a free trade agreement four years later. On August 12, 1992, the Governments of the United States of America, the United Mexican States, and Canada completed negotiations on the proposed NAFTA. A final text was signed on December 17, 1992.[184] After a bitter fight in Congress, all three nations developed implementing legislation and regulations to permit entry into force of the NAFTA on January 1, 1994.[185] The agreement will be more comprehensive than the FTA, including elimination of many tariffs on the date of entry into force and all remaining tariffs within five, ten, or fifteen years,[186] depending upon the sensitivity of the industry or sector. The agreement addresses rules of origin to ensure that only the three parties benefit from the agreement.[187] Trade in goods will be facilitated by significant improvements in market access and extension of most favored nation treatment beyond the national level to provincial and state measures, a significant expansion of rights beyond the MFN obligation of GATT.[188] Significant commitments by the parties to control customs administration will ensure compliance with the rules of origin and help guarantee that market access commitments are enforced.[189]

Special rules will govern such sensitive sectors as textiles and apparel,[190] agriculture,[191] energy and basic petrochemicals,[192] as well as automotive goods.[193] The NAFTA also includes significant provisions affecting trade in services,[194] financial services,[195] investment,[196] government procurement,[197] technical standards,[198]

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[184] NAFTA, *supra*, note 9.

[185] *See*, Trade Agreement Negotiation Authority of 1988, Pub. L. No. 100-418, 102 Stat. 1126 (codified as amended at 19 U.S.C. §§ 2902-2903 (1991) (extending fast track authority).

[186] NAFTA, *supra* note 9, annex 302.2.

[187] NAFTA, *supra* note 9, ch. 4.

[188] NAFTA, *supra* note 9, annex 201.1. *See* chapter 3, *National Treatment and Market Access for Goods* for other specific commitments concerning such market access matters as user fees, duty drawback, and temporary entry of goods.

[189] *Id.* ch. 5.

[190] *Id.* annex 300-B.

[191] *Id.* ch. 7.

[192] *Id.* ch. 6.

[193] *Id.* 300-A.

[194] *Id.* ch. 12.

[195] *Id.* ch. 14.

[196] *Id.* ch. 11.

[197] *Id.* ch. 10.

[198] *Id.* ch. 9.

phytosanitary regulations,[199] telecommunications,[200] competition policy,[201] temporary entry of business persons,[202] intellectual property,[203] emergency actions (safeguards),[204] the environment,[205] and includes dispute settlement provisions modeled on the FTA.[206]

The FTA will be suspended except that some chapters are incorporated by reference into NAFTA. The U.S. and Canadian governments have exchanged letters to permit chapter 19 to remain in effect as to all active panel disputes and extraordinary challenge proceedings flowing from those disputes. In addition, the Parties agreed to abide by the FTA as to certain matters under chapter 18, article 401, annex 401.6, and annex 1404(A).

D. NAFTA Dispute Settlement Provisions

The NAFTA dispute settlement provisions closely parallel the provisions of the U.S.-Canada FTA, but also offer several innovations in the areas of investment and environmental issues.[207]

Chapter 19 of the NAFTA provides for review of antidumping and countervailing duty final determinations by panels of experts drawn from an agreed roster developed by the signatories.[208] The roster shall include sitting or retired judges to the fullest extent possible, a departure from the FTA, where most of the roster has been composed of lawyers familiar with or practicing international trade law. The time limitations imposed by article 1906 of the FTA are eliminated in the NAFTA.

A new process for safeguarding the panel review system has been added to chapter 19 to permit review by three-member special commit-

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[199] *Id.* ch. 7, sec. B.

[200] *Id.* ch. 13.

[201] *Id.* ch. 15.

[202] *Id.* ch. 16.

[203] *Id.* ch. 17.

[204] *Id.* ch. 8.

[205] *Id.* ch. 1.

[206] *See id.* chs. 19-20; *Description of the Proposed North American Free Trade Agreement*, prepared by the Governments of Canada, the United Mexican States, and the United States of America, Aug. 12, 1992 (on file with the U.S. Trade Representative).

[207] For a comprehensive review of NAFTA dispute settlement see, Gary N. Horlick and F. A. DeBusk, *Dispute Resolution Under NAFTA: Building on the FTA, GATT and ICSID*, J. WORLD TRADE, Feb. 1993.

[208] *See* NAFTA, *supra* note 9, annex 1901.2. *See also* Article 1904 Panel Rules, 59 Fed. Reg. 8686 (1994). For an analysis of the pre-NAFTA state of the unfair trade laws in Mexico and the U.S., see Stephen J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. 177 (1990).

tees of allegations of one party that another has interfered in the proper functioning of the panel system.[209] If a special committee makes an affirmative finding, the parties will either negotiate a solution or the complaining party may suspend the operation of the chapter, subject to retaliatory suspension by the offending party.

The extraordinary challenge procedures of the FTA, discussed supra, have also been included in the NAFTA with two important changes.[210] The first change affects one of the grounds for bringing a challenge, i.e. a panel decision may be challenged if, "the panel manifestly exceeded it powers, authority or jurisdiction set fourth in this Article, *for example by failing to apply the appropriate standard of review.*"[211] This inclusion of an example of the type of error for which a panel decision may be challenged could help clarify the intent of the parties in future disputes and ensure the appropriate application of the challenge procedure. The second change is procedural, lengthening the time for the issuance of committee decisions from 30 days to 90 days.[212]

The general dispute settlement provisions provided in chapter 20 of the NAFTA closely track chapter 18 of the FTA, but expand the scope of action somewhat.[213] Chapter 20 creates a Free Trade Commission to oversee the implementation, elaboration, and operation of the agreement, including resolution of disputes and supervision of all committees and working groups created under the agreement.[214] The Secretariat which administers the panel review system will become a permanent, trilateral organization with slightly broader authority to assist the Commission.[215]

An important addition to NAFTA is an article authorizing the parties to use alternative dispute settlement mechanisms including good offices, conciliation, mediation, and expert advice.[216] Another improvement over the FTA is the addition of scientific review boards which may be convened by panels or the parties to provide written reports on factual issues to assist panels in rendering decisions.[217] These panels will be particularly important in the environmental area because such issues will be reviewable under chapter 20.

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[209] *See*, NAFTA, *supra* note 9, art. 1905. *See also* Article 1905 Special Committee Rules, 59 Fed. Reg. 8714 (1994).

[210] NAFTA, *supra* note 9, art. 1904. *See also* Extraordinary Challenge Committee Rules, 54 Fed. Reg. 8702 (1994).

[211] NAFTA, *supra* note 9, art. 1904.13(a)(iii) (emphasis added).

[212] *See id.* annex 1904.13(2).

[213] *Id.* ch. 20.

[214] *Id.* art. 20-1.

[215] *Id.* art. 20-1.

[216] *Id.* art. 20-5 to 20-7.

[217] *Id.* art. 20-11.

Other changes from the FTA include the addition of financial services issues, under article 1415, which were excluded from binational panel review in the FTA, within the coverage of chapter 20.[218] In addition, binding arbitration, provided by article 1806 of the FTA but never utilized by the parties, has been eliminated from the NAFTA.[219] Reverse panel selection is provided for in article 2011 in that the disputing parties each select two members of a panel from the other country and the chair is decided jointly and may be from the third NAFTA partner.[220]

Article 707 creates an Advisory Committee on Private Commercial Disputes regarding Agricultural Goods to provide recommendations for the development of systems for the prompt and effective resolution of phytosanitary and other agricultural disputes. Article 2022 creates a similar Advisory Committee on Private Commercial Disputes.

There are some exceptions to the chapter 20 dispute settlement mechanisms. The most important are the chapter 19 system for review of AD/CVD determinations discussed supra and the provisions of chapter 11 on investor-state discussed infra. In addition, chapter 5 provides for review and appeal of determinations of origin and advance customs rulings by at least one level of administrative officials above the official making the ruling or determination, followed by judicial or quasi-judicial review under the domestic law of the importing Party of the administrative review.[221]

Another exception is contained in article 804 which provides that, "no Party may request the establishment of an arbitral panel under Article 2008 (*Request For an Arbitral Panel*) regarding any proposed emergency action." This provision does not, however, exclude the formation of a panel *after* an action has been taken to adjudicate the proprietary of the action and its nullification or impairment of benefits conferred under the agreement, nor does it prevent consultations and the formation of expert groups by the Commission to assist in reviewing the process of finding injury and safeguard matters regarding emergency action.

As in the FTA, the regulation of government procurement[222] establishes a bid challenge procedure which is expected to function independently from the chapter 20 system.[223] Provision is made in article 1016(3) for the retention of reports by procuring entities for use by the

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[218] *See id.* art. 14-10.

[219] FTA, *supra* note 12, art. 1806; FTA ANNOTATED, *supra* note 151, at 433.

[220] *See* NAFTA, *supra* note 9, at 20-8 to 20-9.

[221] *Id.* art. 5-10.

[222] *Id.* art. 8-4.

[223] *Id.* art. 10-17.

parties, if necessary, under chapter 20, indicating that the procurement process and bid challenge system as applied by the Parties may be reviewed by panels.

The NAFTA does not permit dispute settlement panels to review individual determinations made by the appropriate authorities under chapter 16, relating to temporary entry for business persons.[224] However, it may be possible for a Party to request a panel under article 2007 on behalf of an individual business person who has exhausted administrative remedies in such matters and can allege a pattern of practice by the competent authority.[225]

Chapter 11 on investment sets up a separate arbitral mechanism with reference to the World Bank's International Centre for the Settlement of Investment Disputes (ICSID),[226] and the Rules of the United Nations Commission for International Trade Law (UNCITRAL Rules),[227] for the arbitration of investment disputes between a party and an investor of another party. However, disputes concerning the operation of Chapter 11 are probably reviewable under article 2007. Chapter 11 will help ameliorate the effects of the Calvo Doctrine, which has served as an impediment to investment in Mexico and much of Latin America.[228]

The Calvo Doctrine is embodied in article 27 of the Mexican Constitution and various laws of the United Mexican States.[229] The doctrine provides that foreigners are not entitled to any rights or privileges that are not available to the nationals of a country. Therefore, foreigners must submit any claims involving property in a country, or transactions

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[224] *Id.* arts. 10-16(3), 16-6.

[225] *Id.*

[226] Convention on Multilateral Settlement of Investment Disputes, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

[227] U.N. GAOR, 31st Sess., Supp. No.17, at 34, U.N. Doc A/31/17 (1976).

[228] For a brief analysis of the efficacy of ICSID dispute settlement, see Horlick & DeBusk, *supra*, note 207.

[229] Article 27 of the Mexican Constitution provides:

> Only Mexicans by birth or naturalization and Mexican corporations have the right to acquire ownership of lands, waters, and the appurtenances, or to obtain concessions for working mines or for the utilization of waters or mineral fuel in the Republic of Mexico. The nation may grant the same rights to aliens, provided they agree before the Ministry of Foreign Relations to consider themselves Mexicans in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto, under penalty, in the case of noncompliance, of forfeiture of the property so acquired.

Constitución Politica de los Estados Unidos Mexicans, art. 27 (1976). *See generally* DONALD R. SHEA, THE CALVO CLAUSE 5-6 (1955).

in that country, to the jurisdiction of its national courts and waive protection of their own country's laws.

The Calvo Doctrine has been accepted in most Latin American jurisdictions and has acted as an impediment to business transactions, investment, and commercial relationships for many years.[230] However, both chapter 11 and article 2022 of the NAFTA encourage the use of arbitration and alternative dispute resolution for international commercial disputes, which may indicate an improved outlook for the settlement of disputes through arbitration and other accepted international norms and mechanisms.[231]

Another significant departure from the FTA in NAFTA is the creation of an Advisory Committee on Private Commercial Disputes to help the parties, "encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area."[232] Article 2022 specifically references the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (known as the New York Convention),[233] and the *Inter-American Convention on International Commercial Arbitration*, which may significantly assist new exporters from all three nations to include appropriate arbitration clauses in contracts with NAFTA customers, avoiding lengthy and expensive judicial procedures to enforce contract rights, and to obtain binding decisions under the treaties from qualified and impartial arbitrators.[234]

Some key questions remain about the potential clash of the application of civil law by panelists from a common law tradition and vice versa. In the modern world of law and business, this problem should not become a major impediment to the success of this mechanism, since many lawyers practicing in the area of international trade are familiar with commercial law in both civil and common law jurisdictions. For example, lawyers in Louisiana and Quebec have successfully juggled the competing demands of two systems of law, so this is not an insurmountable problem. Lawyers are likely to have sufficient background and experience to properly apply the law of any party to a dispute arising under the agreement. Whether the proper application of the

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[230] *See generally* James W. Weller, Note, *International Parties, Breach of Contract, and the Recovery of Future Profits*, 15 HOFSTRA L. REV. 323 (1987).

[231] NAFTA, *supra* note 9, ch. 11, art. 20-22.

[232] *Id.* art. 20-2.

[233] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1959, 21 U.S.T. 2519, 330 U.N.T.S. 3; P.L. 91-368; 9 U.S.C. 201-208 (1970).

[234] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, SEN. TREATY DOC. NO. 97-12, O.A.S.T.S. 42, 14 I.L.M. 336. The United States became a signatory to this agreement on Oct. 27, 1990.

AD/CVD statutes will create special problems remains to be seen, particularly because Mexico must create new systems to comply with treaty obligations.

This set of mechanisms appears to be well-suited to substantially improve the business climate throughout the Latin American and Caribbean region as other governments seek to accede to the hemispheric free trade regime envisioned in the Enterprise for the Americas Initiative. The NAFTA appears to go farther toward promoting objective, quasi-judicial, rigorous, and enforceable mechanisms for trade dispute resolution than any other agreement. It will serve as the standard against which other systems are measured for the foreseeable future.

V. U.S. TRADE INITIATIVES IN THE WESTERN HEMISPHERE

Seizing on the liberalization trends in the region, President Bush announced the Enterprise for the Americas Initiative (EAI) on June 27, 1990.[235] The EAI reflected the Administration's interest in finding ways for many LAC countries to manage their international debt burdens and to provide an alternative to drug-reliant economies.

The stated objective of EAI was to strengthen LAC economies through the three "pillars" of support for trade liberalization, assistance in creating open investment climates, and reduction of official debt to the United States. The EAI promised market access, financial and technical resources, and debt reduction opportunities to countries that liberalized their trade and investment regimes, maintained sound economic policies conducive to investment and competition, and managed their international debt obligations responsibly.

The announcement stated that the ultimate goal of the initiative was the conclusion of various bilateral and plurilateral agreements "to establish a free trade zone from Anchorage to Tierra del Fuego."[236] This element, while only a long-term strategy objective, marked a significant departure from the unilateral preference approach that otherwise has characterized U.S. relations with Latin America and the Caribbean.[237] It

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[235] OFFICE OF THE U.S. TRADE REPRESENTATIVE, 1992 TRADE POLICY AGENDA AND 1991 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 29 (1992) (on file at office of the U.S. Trade Representative). *See also* President Bush's address on "Enterprises for the Americas" Proposal and Accompanying White House Fact Sheet, Released June 27, 1990, DAILY REP. EXECUTIVES (BNA) DER No. 125, at M-I, (June 28, 1990).

[236] EAI Brochure, *supra* note 6.

[237] Both the Caribbean Basin Initiative (CBI), first proposed in 1982 by President Reagan, and the Andean Trade Initiative (ATI), announced in 1990, are unilateral trade preference programs intended to stimulate investment and diversify the export bases of developing countries in the hemisphere. The Caribbean Basin Economic Recovery Act (CBERA), 19 U.S.C. §§ 2701-2707 (1983), (CBI's authorizing legislation providing for certain permanent unilateral and prefer-

has provided the greatest incentive to countries in the region to liberalize their economies and hasten their own regional integration efforts.

On numerous occasions President Clinton expressed his commitment of expanding hemispheric free trade. He has talked about his desire to develop deeper trading links with all the democracies and free market economies in the region. In his remarks to the *Wall Street Journal* last October, Clinton stated that, "plainly NAFTA could lead the way to a new partnership with Chile, with Argentina, with Colombia, with Venezuela, with a whole range of countries in Latin America who have embraced democracy and market economics."[238]

The process for entering into free trade agreements is currently under review. In theory, there are several possibilities for concluding such an agreement, including accession to the present NAFTA, negotiating bilateral agreements, or a plurilateral agreement with a regional grouping. Several recent press reports indicate that the U.S. government has not reached a consensus on what path to follow.[239]

The NAFTA Implementation Act requires the U.S. Trade Representative to report to Congress by May 1, 1994, countries that have made progress in opening their markets to U.S. markets and the further opening of whose markets has the greatest potential to increase U.S. exports. Based on that report, the President must report by July 1, 1994, to Congress the countries with which the U.S. should seek to negotiate free trade agreements.

If free trade agreements are negotiated with other LAC countries, the U.S. will probably demand a minimum package of commitments reflected in the NAFTA. Aside from the elimination of all tariffs and non-tariff barriers to trade in the area, the package would need to include provisions on insurance, investment, government procurement, intellectual property rights protection and enforcement, and investment in natural resources and resource-based products. Operational, technical, and security rules such as dispute settlement provisions, rules of origin, public health and safety standards, safeguards, and restraints on government

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ential trade and tax measures for 24 eligible Caribbean Basin countries and territories). The centerpiece of the ATI, the *Andean Trade Preference Act*, went into effect on December 4, 1991, for a period of ten years and greatly resembles the CBERA. It applies to Colombia, Bolivia, Ecuador, and Peru. Both programs provide exceptions to duty free treatment for articles of significant export interest to many countries in the region: textile and apparel products, petroleum, canned tuna, footwear, certain leather goods, and certain watches and watch parts. Andean Trade Preference Act of 1991, 19 U.S.C. § 3201 (1992) [hereinafter ATPA].

[238] President Bill Clinton, Remarks to the Wall Street Journal's Annual Conference on the Americas (Oct. 28, 1993), *in* FED. NEWS SERVICE, Oct. 29, 1993 (*available in* LEXIS, News Library, Curnws File).

[239] *See* INSIDE NAFTA, Jan. 12, 1994, Jan. 26, 1994, and Feb. 3, 1994.

actions such as subsidies, state trading, balance of payments restrictions, and use of foreign exchange restrictions and controls will also be necessary.[240] Finally, the issues of environment and worker's rights will also need to be addressed.

The U.S. Government has indicated generally what factors will be considered in determining which countries meet the appropriate conditions to enter into a free trade agreement with the United States. A country or group of countries would be expected to have the institutional capacity to fulfill the long-term, serious commitments involved; to be committed to a stable macro-economic environment and market-oriented policies before negotiations begin; and to show commitment to the multilateral trading system.[241] Another indication of a country's willingness to seriously undertake the extensive reforms necessary for expanding free trade is respect and enforcement of intellectual property rights (IPR) legislation.

In the meantime, pursuant to EAI, the U.S. has signed seventeen framework agreements on trade and investment, fourteen bilateral and two regional, covering thirty-two countries: Colombia,[242] Ecuador,[243] Chile,[244] Honduras,[245] Costa Rica,[246] Venezuela,[247] El Salvador,[248] Peru,[249] Panama,[250] Nicaragua,[251] Guatemala,[252] the South

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[240] *See* EAI Brochure, *supra* note 5.

[241] *See* EAI brochure, *supra* note 9.

[242] Agreement Between the Government of the United States of America and the Government of Columbia Concerning a United States-Columbia Joint Commission on Trade and Investment, July 17, 1990 (on file at the U.S. Trade Representative).

[243] Agreement Between the Government of the United States of America and the Government of Ecuador Concerning a United States-Ecuador Council on Trade and Investment, July 1990 (on file at U.S. Trade Representative).

[244] Agreement Between the Government of the United States of America and the Government of the Republic of Chile Concerning a United States-Chile Council on Trade and Investment, Oct. 1, 1990 (on file at U.S. Trade Representative).

[245] Agreement Between the Government of the United States of America and the Government of the Republic of Honduras Concerning a United States-Honduras Council on Trade and Investment, Nov. 1, 1990 (on file at the U.S. Trade Representative).

[246] Agreement Between the Government of the United States of America and the Government of the Republic of Costa Rica Concerning a United States-Costa Rica Council on Trade and Investment, Nov. 29, 1990 (on file at the U.S. Trade Representative).

[247] Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela Concerning a United States-Venezuela Council on Trade and Investment, Apr. 8, 1991 (on file at the U.S. Trade Representative).

[248] Agreement Between the Government of the United States of America and the Government of the Republic of El Salvador Concerning a United States-El Salvador Council on Trade and Investment, May 13, 1991 (on file at the U.S. Trade Representative).

[249] Agreement Between the Government of the United States of America and the Government of Peru Concerning a United States-Peru Council on Trade and Investment, May 16, 1991 (on file at the U.S. Trade Representative).

[250] Agreement Between the Government of the United States of America and the Government

American Common Market (MERCOSUR: Argentina, Brazil, Uruguay, Paraguay),[253] the Caribbean Common Market (Caricom: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago),[254] the Dominican Republic,[255] and Surinam.[256] Mexico[257] and Bolivia[258] had signed framework agreements before EAI was announced. Thus, the U.S. has framework agreements in place with all LAC countries except Haiti and Cuba.

The framework agreements are generally similar. Each establishes a Trade and Investment Council (TIC), and the annex to each describes the immediate action agenda of trade and investment issues, which varies by country. Private sector consultations are encouraged. While the agenda and frequency of the TIC meetings are currently under review and subject to change in the post-NAFTA environment, in the past the TICs have met at least annually at mutually agreed upon times and locations. Their objective was to exchange information on trade and investment relations, to hold consultations on specific issues, and to work toward removing impediments to trade and investment flows. While either side can raise any issue for consultation, the frameworks do not bind signatories to implement specific trade liberalization commitments.

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of the Republic of Panama Concerning a United States-Panama Council on Trade and Investment, June 27, 1991 (on file at the U.S. Trade Representative).

[251] Agreement Between the Government of the United States of America and the Government of the Republic of Nicaragua Concerning a United States-Nicaragua Council on Trade and Investment, June 27, 1991 (on file at the U.S. Trade Representative).

[252] Agreement Between the Government of the United States of America and the Government of the Republic of Guatemala Concerning a United States-Guatemala Council on Trade and Investment, Oct. 2, 1991 (on file at the U.S. Trade Representative).

[253] Agreement Among the Governments of the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, the Oriental Republic of Uruguay, and the Government of the United States of America Concerning a Council on Trade and Investment, June 1991 (on file at the U.S. Trade Representative).

[254] Agreement Between the Government of the United States of America and the Caribbean Community (Caricom) Concerning a United States-Caricom Council on Trade and Investment July 27, 1991 (on file at the U.S. Trade Representative).

[255] Agreement Between the Government of the United States of America and the Dominican Republic Concerning a United States-Dominican Republic Council on Trade and Investment, Dec. 13, 1991 (on file at the U.S. Trade Representative).

[256] Agreement Between the Government of the United States of America and Surinam Concerning a United States-Surinam Council on Trade and Investment, Sept. 1, 1993 (on file at the U.S. Trade Representative).

[257] Dec. 9, 1987, U.S.- Mex., SEN. TREATY DOC. NO. 13, 100th Cong., 2d. Sess. (1988).

[258] Agreement Between the Government of the United States of America and the Republic of Bolivia Concerning a United States-Bolivia Council on Trade and Investment May 8, 1990 (on file at the U.S. Trade Representative).

In practice, the TICs have focused on such specific issues as tariff treatment of agricultural and industrial products, technical standards, and intellectual property rights. They have also served as fora to discuss loosely defined criteria for free trade agreements and to coordinate countries' GATT strategies and positions.[259]

There are no specific dispute settlement mechanisms outlined in these agreements, but the consultation provisions and regular meetings of the Trade and Investment Councils provide an enhanced opportunity for LAC countries to engage in constructive dialogue to reduce trade tensions. These framework agreements serve as vehicles for opening markets and developing closer ties. They are perceived as stepping stones to hemispheric free trade.[260] However, many countries are not politically or economically prepared for entering into free trade negotiations for some time due to the inability to undertake the comprehensive reforms necessary to negotiate such agreements. In the meantime, these agreements serve as forums for reducing trade and investment barriers and resolving trade irritants through discussion and cooperation.

In a remarkable reversal of policy, due at least in part to these trade initiations, several LAC countries have moved to sign bilateral investment treaties (BITs) with the United States. BITs are in force with Argentina, Grenada, Panama, Ecuador, and Jamaica, and a signed (but not yet ratified) agreement exists with Haiti. As of January 1994, the U.S. was holding active negotiations with Bolivia, Costa Rica, Colombia, Venezuela, and Chile. Serious talks with other LAC countries have also taken place. BITs extend national treatment to foreign investment, proscribe performance requirements, free investment-related transfers, set forth recognized standards of international law for expropriations, and, especially important in the LAC, grant investors access to international arbitration through such international bodies as the International Centre for the Settlement of Investment Disputes (ICSID).

LAC countries' willingness to negotiate BITs with the U.S. is an indication of the extent to which their outlook on investment by foreign companies has changed. The Argentine government's signing of a BIT with the U.S. in 1991 was historic. Agreeing to submit disputes with foreign investors to international arbitration amounted to a renunciation of the Calvo Doctrine of sovereignty[261] in its nation of origin, and generally is consistent with LAC countries' increasing disposition to resolve international disputes through referral to third parties.

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[259] EAI Brochure, *supra* note 6.

[260] *Id.*

[261] For a discussion of the Calvo clause *see* SHEA, *supra* note 229.

VI. SUMMARY AND CONCLUSIONS

The current climate of liberalization and the rapid expansion of free trade areas and customs unions throughout the Americas requires efficient, fair, and accessible mechanisms for the adjudication and final resolution of disputes. A shift is underway from dispute management and conflict avoidance through consultative mechanisms and negotiations to more binding systems involving third party intercession or use of nongovernmental experts to assist the parties to trade agreements to settle difficult issues.

The next decade will see continued expansion of the global rules governing trade through the Uruguay Round. The more rapid, certain, and enforceable mechanisms established by the FTA, NAFTA, or the Mexico-Chile FTA should result in more stable trading environments in the Western Hemisphere. Within that global framework, the preferential programs of developed countries, such as GSP and CBI, may become irrelevant as duties fall in response to expanding regional integration and reduction of tariff and non-tariff barriers.

The integration of Latin American economies and the probability of coordinated economic and trade policies will likely result in increasingly potent negotiating power. This, in turn, may result in a continuing series of treaties to foster international trade in the region. With improved market access for goods and services from each country to all other countries in the region, improved rules for investment, and better protection of intellectual property rights, the overall business climate is likely to continue to improve in the hemisphere. The expansion of trade and business relationships will foster a self-reinforcing need for improved dispute settlement systems which are efficient, impartial, speedy, and enforceable.