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SETTLING TRADE DISPUTES AFTER THE URUGUAY ROUND. OPTIONS FOR THE WESTERN HEMISPHERE

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VALENTINA DELICH (FLACSO/ Argentina)

#10 - July 2000

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ABSTRACT

Changes in the multilateral trade dispute settlement (DS) system were heralded as a major achievement of the Uruguay Round. Certainly, tighter time-lines and more binding decisions have increased developing countries' use of the WTO's new DS system. At the same time, many countries have access to regional mechanisms for handling disagreements with other members of regional trade agreements and customs unions. This paper reviews the strengths and weaknesses of the new WTO DS system and compares it with the regional mechanisms created under the NAFTA, MERCOSUR and the Andean Community. Finally, it evaluates the options for DS within an eventual Free Trade Agreement of the Americas.

I. INTRODUCTION

An effective and efficient DS mechanism is generally recognized as fundamental to the international trading system. While trade negotiators may seek to achieve clear and fair rules with a broad degree of consensus and commitment, a DS system is needed to ensure commitments are honored. Eventually, DS mechanisms could compensate for areas of ambiguity in the rules.

In the early days of the GATT many differences were addressed through bilateral consultations. Over the years, however, this proved inadequate. In the 1970s and 1980s an increasing number of cases were brought before GATT panels, but with delays, different procedures for different issues, and particularly the ability of the defending country to block the panel findings, complainants lost heart in the system, and many countries did not even bother to contest cases.

It was therefore critical in the Uruguay Round that negotiators were assured that the time invested in developing new rules in several areas would not be wasted by a weak DS system -- the new rules needed to be more clearly enforceable. Other institutional and procedural changes, including the regular monitoring of member countries' trade policies and practices, were also important. But most observers have focussed on the WTO's new DS rules as being a major achievement of the Uruguay Round[1]. For smaller economies, which had made little use of the GATT DS system, the changes seemed particularly significant, although there were some concerns e.g. about the possibility of retaliation. One of the questions to be addressed in this paper is how far has the new DS system lived up to expectations, and especially to the expectations of the countries of the Americas.

Since the late 1980s, even while the Uruguay Round negotiations were underway, several regional trading arrangements were signed, such as CUSFTA in 1988, MERCOSUR in 1991 and NAFTA in 1992 and other revitalized such as the Andean Pact in 1987. Each of these has its own system for dealing with disputes. In fact, for Canada, a prime objective in the CUSFTA, once it was realized that the US would not agree to eliminating countervailing and anti-dumping duties within the FTA, was to secure a way to resolve disputes involving these duties that was speedier and more effective than in the GATT.

With the proliferation of regional mechanisms, another question is what are their relative strengths and weaknesses in relation to the WTO and what implications does experience with their use have for an eventual FTAA. If there is to be free trade within the hemisphere, what would be the most appropriate approach to DS?

The first section of this paper provides the background. It reviews the system as it evolved under the GATT, the reasons why radical changes were sought in the Uruguay Round, and the preliminary assessments of what was accomplished in the Round, i.e. the strengths and weaknesses of the WTO DS system before it began work. In doing so it notes key differences

1. For instance, Schott and Buurman (1994:172) give the DS agreement an 'A' grade.

between countries' positions and particularly the extent to which the countries of the Americas worked together on these issues.

n the second section we turn to the regional DS mechanisms which now exist within the Western Hemisphere, focussing on NAFTA, MERCOSUR and the Andean Community. After briefly describing their key elements, we review major similarities and differences between the DS mechanisms at the regional and multilateral levels.

Experience with the multilateral DS system and different regional mechanisms is reviewed in the third section. Here we analyze, in fairly aggregated terms, the numbers and kinds of disputes being brought for resolution by different categories of countries.

The final section review some of the strengths and weaknesses that have become apparent with the experience, and a number of proposals for change that are already on the table. It considers conclusions for changes in the WTO and existing regional DS systems, and possible directions for a hemispheric trade agreement, particularly from the perspective of Latin American countries. It also raises some broader questions about the costs and benefits of the WTO DS system, including the extent to which it strengthens or weakens regional integration efforts.

SECTION I
EVOLUTION OF DISPUTE SETTLEMENT IN THE GATT/WTO

A. THE GATT RULES. THEIR EVOLUTION AND NEGOTIATION IN THE UR

When the GATT was negotiated in 1947 was viewed as a temporary agreement, eventually to be subsumed by the International Trade Organization (ITO). Under the Havana Charter, the ITO would have allowed a ruling by the 18-member Executive Board to be upheld, modified or rejected by a majority of the full membership (Arts. 75, 94 and 95), with final recourse to the International Court of Justice for a binding advisory opinion (Stewart 1993:2672 and Havana Charter). Although initially similar references to binding arbitration by the International Court were included in the draft of the GATT, these were later dropped. The two principal Articles (XXII and XXIII) focussed on consultations and failing this approach the matter would be referred to the full membership (technically the contracting parties) for their investigation and recommendation. Initially disputes were referred to a working party, but from the early 1950s they were referred to a panel of experts (Stewart 1993:2676).

Few cases were brought before panels in the first 25 years. In the 1950s there were some 40 complaints and only 10 in the 1960s, and fewer panels.

A number of other modifications in practice or actual amendments to the rules were adopted in subsequent years, several at the request of developing countries.

Firstly, from 1958, third parties were allowed to participate in disputes -- i.e. countries with a significant interest in a case. Second, in 1966 special procedures were introduced for developing countries following discussions within the Committee on Trade and Development. These provided for the GATT Director-General to become involved in developed-developing country cases, and, if necessary, for expedited panel reviews and implementation of panel findings. But they did not go as far as Brazil and Uruguay, inter alia, had wanted; their joint proposal had included additional compensation for developing countries and automatic retaliation against developed countries whose trade practices violated the GATT (Stewart 1993:2678-9). Their concern about the need for the DS mechanism to directly address the unequal bargaining power of big and small economies was reflected in many subsequent proposals for reform.

Few cases were brought before panels in the first 25 years. In the 1950s there were some 40 complaints and only 10 in the 1960s, and fewer panels. Not once during this period did Canada use the consultation or DS provisions for any trade problems with the US. Hart (1998:111) argues that Canada preferred to solve problems bilaterally, using its 'special relationship' outside the GATT. Others, however, have interpreted this low usage of the GATT procedures as a weakness of the system, with many deterred by the failure of cases brought early in the 1960s to be resolved (notably the repeated retaliation involved in the EU-US chicken wars) (Stewart 1993:2680). In the 1960s Uruguay brought a number of complaints, 'a broad-scale attack' according to Dam (1970:361), challenging several developed countries' policies that had injured Uruguayan exports, even if they did not violate specific GATT rules[2]. The panel suggested the matters should be addressed instead by consultations (under Article XXII) 'thereby effectively deciding against Uruguay' (Dam 1970:362).

Beginning in the 1970s there was a proliferation in the number of countries using the GATT DS. The first case Canada brought on its own was in 1974 and concerned compensation for EU enlargement. Nonetheless there were frustrations as many smaller exporting countries were forced by larger importing countries to accept 'voluntary' restraint agreements or other grey-area measures, which were difficult to contest in the GATT. Many

2. Uruguay identified more than 500 such measures that restricted its access to these markets.

non-tariff measures were not covered by GATT rules, or else, as in the case of the restraints under the Multifibre Arrangement, were explicitly allowed.

During the Tokyo Round of negotiations (1973-79), Brazil played an active role in the Framework Group which, amongst other topics, discussed new rules for dealing with disputes. It sought rules which would redress the imbalance between developed and developing countries, notably greater involvement of the Director-General in such cases, mandatory prior notification of measures that would affect developing countries, and improved surveillance. The US supported an annual trade review of members' policies, tighter timelines for cases, a roster of governmental experts for consideration as panelists, although it opposed making notification mandatory. There were greater differences with the EU and Japan which considered it inappropriate to negotiate DS separately outside the other negotiating groups, and the EU opposed differential DS rules procedures for developing countries (Stewart 1993:2691).

In the end, the Tokyo Round produced both a new understanding on general DS cases as well as a variety of special rules under the various plurilateral codes. The understanding clarified in particular the work, procedures and composition of the panels. Panels were to include three to five members from governments not involved in the dispute; their reports were to be completed within two months for developing countries, but nine months for others. Their reports would be circulated first to the countries in the dispute and after a 'reasonable period' to all other members, and if approved, the offending measures were to be withdrawn within a 'reasonable time'. Examples of how the code rules differed from the more general rules were: requiring a minimum amount of consultations before proceeding to a committee review (subsidies), the use of a technical panel (customs valuation), quicker procedures for perishable products (standards). These special provisions were not available to countries that had not signed onto the codes, mostly developing countries.

Subsequently, in the 1980s, the number of disputes taken to the GATT rose sharply. This reflected the growth in protectionism, especially in the US and its insistence on taking unilateral action in areas over which the GATT had no jurisdiction (such as services). Countries like Canada which in the past had sought to deal with issues bilaterally, outside the GATT, now found it necessary to go for litigation in order to have disputes resolved (Hart 1998:163). A large number of cases were successfully resolved (19 of the 29 panels created from 1979 to 1986 produced reports which were adopted -- Stewart 1993:2733) suggesting that the GATT system could work to discipline trade, even in cases involving the US and the EU. Certainly one close observer argued that the increase in the number of cases was a sign of renewed confidence in the GATT, noting that, "There is no other international organization ... with such a large number and successful record of multilateral DS proceedings among states" (Petersmann 1988:61). Nonetheless there was general agreement about the need and scope for improvement in the DS process, in particular to give more precision to the rules. In addition, changes in the GATT's substantive rules were clearly needed.

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Repeatedly in the 1980s -- at the 1982 Ministerial Meeting, at Council Meetings in 1983 and 1984, in the Leutwiler Report of 1985 and in the 1986 Preparatory Committee -- several proposals were submitted (including some from Canada and Nicaragua) on ways to go beyond the Tokyo Round and strengthen the DS system -- such as creating a shortlist of panelists, encouraging the use of conciliation, tighter timelines for submitting documents to panels, surveillance or enforcement of compliance with panel rulings, and penalties for non-compliance.

When the Uruguay Round was launched in 1986, DS formed one of the 13 (later 15) topics for negotiation, with the aim of strengthening the rules and procedures and improving surveillance to ensure compliance:

> "In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the DS process, while recognizing the contribution that would be made by more effective and enforceable GATT rules and disciplines. Negotiations shall include the development of adequate arrangements for overseeing and monitoring of the procedures that would facilitate compliance with adopted recommendations." (GATT Ministerial Declaration 1986)

The need for reform had widespread support and although there were differences in overall approach and in a few areas of detail, changes to the DS procedures and increased surveillance of members' policies were amongst the 'early harvest' results of the Round, agreed in Montreal in December 1988 and implemented in May 1989. (The only other areas with some early results were tropical products, overall tariff cuts, and trade in services.)

The US favoured changes which would make panels virtually automatic and more legalistic (in particular through greater use of non-governmental experts) and also ensure that their findings were precedential. Hart (1998:164) notes that there had already been a shift to a more litigious approach in handling disputes, involving the presentation to panels of more legal arguments and an increase in the length of panel reports: "Before 1980, both GATT and national trade officials had strenuously, and proudly, resisted inroads by officials with legal training onto their turf. In the 1980s, the GATT established a legal division, and national officials learned to rely on their legal colleagues for advice in leading them through the new minefield of GATT-based litigation."

In contrast, both the EU and Japan sought changes to increase use of the consultation, conciliation and mediation aspects of the DS system.

Within the Americas, Argentina, Brazil, Canada, Jamaica, Mexico and Nicaragua were also quite active in the negotiations. Both Nicaragua and Brazil pressed for various measures to strengthen the special and differential treatment of developing countries. Jamaica advocated third parties be able to participate in cases involving grey areas. Argentina proposed banning disputants from the approval of the panel report. Mexico played a key role -- following informal consultations it drafted a comprehensive proposal which it hoped would be the basis of a consensus. At the same time a unanimous proposal was submitted by the De la Paix group (named after the hotel in Geneva where they first met) -- a 13-country coalition, which included Canada, Colombia, and Uruguay from the Americas.[3]

This group, which sought to bridge the differences between the developing country hardliners and the major powers, prepared a number of proposals on different issues during the negotiations. Its submission on DS included a tighter timetable for different stages of the process, using the director-general to resolve differences in panel selection, removing disputing countries' right to block any findings and introducing binding arbitration (Finlayson and Weston, 1990:32, 34).

As a result of these efforts, several changes were accepted and implemented in 1989 on a trial basis. These included:

- Specific time-lines for various stages of the dispute process with a total timelimit of 15 months from the initiation of consultations.
- Special (shorter) timelimits for cases involving perishable products.
- Longer time limits for some aspects of cases involving developing countries.
- Arbitration as an alternative to panels, especially in cases involving clearly defined issues.
- An expanded list of non-governmental experts for use on panels.

3. The Chair of the institutional working group was Ambassador Lacarte-Muró from Uruguay.

- Legal advice for developing countries involved in a dispute.
- Implementation of panel findings to be reviewed within six months.

In addition to strengthen the functioning of the GATT system, members agreed to introduce regular reviews of countries' national trade policies as well as a review of the overall trading system, biennial ministerial meetings and closer coordination with the IMF and the World Bank (GATT 1989:152-163).

Despite this progress, there were still disagreements on some key aspects of DS, which became the focus of the following two years of negotiation[4]. These included: the procedure for adopting a panel report, the timeline for its implementation, compensation and retaliation, unilateral measures, rules for 'non-violation' cases, and special treatment for developing countries.

Several proposals were advanced for dealing with panel reports. Most had still involved requiring a consensus for its adoption, though some excluded the disputants from the process. In 1989, the suggestions of a review stage (before presenting the report to the Council) and an appellate body generated new movement. Despite the additional time required for the review, estimated at about three months, it was generally accepted. Canada argued that once such a review was over, unless the findings were appealed, the report should be automatically accepted. The US proposed automatic adoption of a panel report unless it went to an appellate body, which would, in extraordinary circumstances, focus on narrow legal questions. Mexico suggested that any ruling by such a body should be binding. The idea was also endorsed by Canada, though others were concerned about the delay involved and the likelihood that this would become the rule rather than the exception. It was not until 1990 that the suggestion was made for panel reports to be considered adopted unless there was a consensus not to do so or one of the disputants appealed the findings.

Few of the suggestions for differential treatment of cases involving developing countries found widespread support.

Compliance with panel rulings was left undefined, i.e. it was to be 'prompt' although 'if it is impracticable to comply immediately .. the contracting party shall have a reasonable period of time in which to do so' (GATT 1989:158). In subsequent discussions Mexico proposed a two-year time limit (Stewart 1993:2767). Others argued that if an appeal found the defendant guilty then retaliation should be allowed automatically.

Another key development was the idea of a single or integrated DS system, raised by Canada in 1990, to govern disputes in all areas. This was linked to countries accepting all the GATT trade rules in a single undertaking and allowing cross-retaliation.

With respect to third party rights in dispute proceedings, an issue of potential interest to many smaller countries, questions focussed on the nature and extent of their involvement including whether they should have the same rights as the original respondents.

On cases involving non-violation, i.e. where trade is affected even if no GATT rules are broken, and which accounted for 1 in 10 cases addressed from 1948 to 1988 (GATT 1990:68), some countries argued for the same rights to DS. Others argued that the burden of proof should lie with the complainant, whereas in all other cases it lies with the defendant, and that cross-retaliation might be more appropriate. Another proposal was for the use of binding arbitration rather than full blown DS procedures.

Few of the suggestions for differential treatment of cases involving developing countries found widespread support. These ranged from having mediators considering developing countries' developmental needs, and having a review of bilateral solutions (e.g. resulting

4.
Although the negotiations as a whole continued until late in 1993, the bulk of the work on DS was finished and included in the draft final agreement produced in late 1991 (see GATT 1992).

from consultations) to ensure they meet the principle of special and differential treatment, to compensation rather than retaliation if the non-complying country is developing, and compensation in excess of injury where it is the affected country. Special treatment for least-developed countries was also raised, including the creation of a separate conciliation body for disputes involving them (GATT 1990:68).

B. THE WTO UNDERSTANDING ON NORMS AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

The final agreement on DS produced the following key results, in addition to endorsing those changes agreed in Montreal:

- Establishment of the Dispute Settlement Body (DSB).
- Automatic right to a panel unless rejected by consensus (Article 6.1).
- An opportunity for the disputants to review the panel's interim report -- if there are no comments this becomes the final report (Article 15).
- All panel reports, unless appealed by the disputants, would be adopted unless opposed by a consensus (Article 16).
- The creation of a standing appellate review body with seven members having expertise in law, international trade and GATT, broadly representative of the membership but not attached to any government, of whom 3 would sit on any single case. The appellate report would be issued in 60 days (or 90 days if necessary) and adopted in 30 days unless opposed by a consensus (Article 17).
- Panel reports are to be passed by the DSB within nine months from the formation of the panel, and appellate reports within 12 months from the same date (Article 20).
- Implementation of panel/appellate findings may be decided by binding arbitration and shall usually be within 15 months from their adoption. Should there be disagreement over the measures implemented, they shall be assessed by the original panel within 90 days (Article 21).
- If policy changes are not implemented and compensation not agreed, the complaining country may suspend equivalent concessions. In the first instance these should be in the disputed sector, but if not practicable or effective, they may be in other sectors under the same agreement. If 'the circumstances are serious enough' the suspended concessions may relate to another agreement. The suspensions will be approved by the DSB unless there is a consensus against them. If the affected country objects, the matter will be sent for arbitration by the original panel or by an arbitrator within 60 days, during which time concessions may not be suspended (Article 22).
- Countries agree to take any disputes relating to the agreements first to the WTO for resolution (Article 23).

Other elements of note were:

- Automatic right of a third party to make submissions and to see the disputants' submissions to the panel at its first meeting (but its rights would have to be pursued in a separate panel) (Art. 10).
- The possibility for panels to seek expert advice; for factual issues relating to scientific or technical issues, an advisory report may be requested from a group of experts which will exclude experts from the governments involved in the dispute and even non-governmental experts unless agreed by both parties (Article 13 and Appendix 4).
- Both panel deliberations and appellate proceedings are to be confidential and the opinions anonymous (Articles 14, 17:10-11).
- In cases of non-violation but involving nullification and impairment, countries must justify their complaints -- they will be the subject of a panel report, but the findings will not be binding, and they will usually focus on compensation rather than the removal of the measures (Article 26).

There were few specific references to developing countries, besides the following:

- A developing country may choose to follow the 1966 provisions (Article 3.12).

• During consultations the particular problems and interests of developing countries shall be given special attention (Article 4.10).
• In a case involving a developing and a developed country the former may request that at least one panel member be from a developing country (Article 8.10).
• The panel shall make explicit reference to how its report takes into account whatever differential and more favourable treatment for developing countries is included in the GATT/WTO provisions involved in the dispute (Article 12.11).
• In implementation of any measures following a panel ruling, particular attention should be given to developing country interests (Article 21.2).
• For disputes over the follow-up to panel findings where the complainant is a developing country, there shall be consideration of the economic as well as the trade impact of the measures in question (Article 21.7-8).
• In any case involving least-developed countries, others are expected to 'exercise due restraint' -- whether raising matters or asking for compensation/suspension of concessions. In addition they will be given assistance e.g. from the director-general in resolving disagreements persisting after consultations, by conciliation or mediation rather than through a panel (Article 24).

C. INITIAL REACTIONS TO THE WTO DS SYSTEM

Initial reactions to the Uruguay Round outcomes were generally favourable. Amongst the more critical points made were:

• The penalties remained weak (Whalley and Hamilton 1996). Although big countries like the US would not want to undermine credibility in the trading system by setting a bad example, it was not clear that the new rules would make them any more likely to comply with panel findings than in the past. Even if retaliation was more likely to be sanctioned, few countries would pose a credible threat. 'The WTO can reprimand but not severely punish violations by major trading powers' (Schott and Buurman 1994:130). Instead one suggestion was that the WTO ought to consider penalties against frequent violators i.e. withdraw its own license to retaliate if it failed to implement three panel reports in five years (ibid).
•The US would still be able to use section 301 (of the 1974 Trade Act) to initiate WTO cases, to implement retaliation first approved by the WTO, and for pursuing complaints in areas not covered by the WTO law.
• Questions about the capacity of the DSB to handle the large volume of complaints expected to result from the ambiguities and loopholes in the substantive rules.

Not only are the special and differential provisions limited in number, they are also much less effective than are the substantive rules to which developing countries subscribed in the Round. If any of the S&D provisions is not applied, the matter is unlikely to be pursued through the WTO DS system.

• Not only are the special and differential provisions limited in number, they are also much less effective than are the substantive rules to which developing countries subscribed in the Round. If any of the S&D provisions is not applied, the matter is unlikely to be pursued through the WTO DS system.
• For several areas (sanitary/phytosanitary measures, textiles/clothing, technical barriers to trade, dumping, customs valuation, subsidies/countervail, services) there are additional and special dispute provisions (Appendix 2) e.g. textiles and clothing disputes will first be taken to the Textiles Monitoring Body (TMB) for review, thereby extending the length of time for a dispute to be taken through all available WTO procedures.
• In the case of anti-dumping and countervailing duties, the DSB's powers were considerably weakened by limiting it to review the procedure rather than the substance of national investigations. 'Consequently, antidumping rules remain subject to discretionary

interpretation under domestic legislation. This is the greatest gap left by the Uruguay Round' (Tussie 1997:20).

- The applicability of the WTO dispute rules to the plurilateral agreements (dairy, beef, government procurement and civil aircraft) was to be determined by members of those agreements at a later date (WTO Agreement, Appendix 1).

TABLE 1. WTO DS PROCEDURES AND DEADLINES

STAGE	DEADLINE (DAYS*)	TOTAL TIME ELAPSED (MONTHS)
Consultations	60	2
Request for panel	25-60	3-4
Establishment of panel	30	4-5
Issuance of panel report	6-9 months	10-14
Adoption of panel report	60	12-16
If appealed:		
Decisions of appellate body report	60-90	14-19
Adoption of appellate body report	30	15-20
Compliance or compensation	'reasonable time'; usually <15 months	
If failure to comply/compensate:		
Request for retaliation	20	
Authorization of retaliation	30	
Final arbitration	60	

*Calendar days
Source: Schott and Buurman 1994: 127.

SECTION II
DISPUTE SETTLEMENT IN REGIONAL TRADE AGREEMENTS

We now turn to the regional DS mechanisms which exist within the Western Hemisphere, focussing on NAFTA, MERCOSUR and the Andean Community. After briefly describing their key elements, we review major similarities and differences between the DS mechanisms at the regional and multilateral levels.

A. CUSFTA/NAFTA: DS RULES

A critical reason for Canada to sign the Canadian-US Free Trade Agreement (CUSFTA) with the US in the late 1980s was a desire to reduce the possibility of disputes disrupting bilateral trade, and if disputes arose, that these would be dealt with effectively and more expeditiously than was possible in the GATT at that time.

Canada's primary interest in the NAFTA, on the other hand, was to ensure that its privileged position in the US market was not undermined, though of course improved access to the Mexican market subsequently gained some importance. In fact there was some concern that the NAFTA might weaken the DS mechanism, and terminate all efforts to reach an understanding on dumping and subsidies that would have eliminated the need for Chapter 19.

In the NAFTA, there are four different types of dispute resolution processes -- those relating to complaints by private investors (under Chapter 11), financial services (Chapter 14), anti-dumping/countervail (Chapter 19) and all other matters (Chapter 20). In addition, the so-called NAFTA side-agreements on labour and the environment have established procedures for dealing with certain trade-related disagreements in these areas.

If an investor from one of the NAFTA countries claims that another NAFTA government has failed to meet its obligations, then the investor may choose to pursue the matter by seeking

arbitration by the World Bank's International Center for the Settlement of Investment Disputes (ICSID) or under UN Commission for International Trade Law (UNCITRAL) rules. Alternatively the NAFTA allows the matter to be taken to the host country's domestic courts. Either way, the NAFTA countries have agreed to make the arbitration's awards enforceable in domestic courts.

In the case of financial services, a special roster of financial services experts will be used in the selection of panelists for resolution of a dispute.

For dumping and countervailing cases, instead of a company appealing a final determination to a domestic court (e.g. in Canada the Federal Court of Appeal or the Tribunal Fiscal de la Federación in Mexico), it may request its government to take the case to a binational panel review. The panel includes 5 people -- two selected by each country and the fifth jointly. Whereas under the CUSFTA these were to be drawn from a roster of experts in the area of international trade law and economics, in the NAFTA this was changed to a roster of 75 active or retired judges.

Once a panel has been requested, its final decision is to be reached within 315 days, following a strict timeline for the different stages (see Table 2). The panel will review the case against national standards rather than any trilateral standards. This means, in the case of the US, that the panel will consider whether the International Trade Agency, the Department of Commerce or the International Trade Commission determined the dumping/subsidizing injury or the duty according to US law and that there was substantial evidence to support the facts of the case. In Canada, the standard of review is considered higher, i.e. that the finding by Revenue Canada or the Canadian International Trade Tribunal is made with little regard to the evidence (Howse 1998:8). If it is found that national standards have not been applied, the panel will send the case back to the national authorities to be reconsidered -- it cannot order the duty to be removed or reduced (Howse 1998:5).

In cases of impropriety or gross error including the failure to apply the appropriate standard of review, an extraordinary challenge is allowed, in which three judges or former judges from a 15-person roster may review the findings. The scope for such a challenge is broader than under the CUSFTA which required that a panelist be considered guilty of gross misconduct, that the panel had not followed the basic procedures, or that it had exceeded its authority.

The committee may re-examine virtually the whole case -- the factual and legal analysis of the case -- and the time allowed for this was increased from 30 days under the CUSFTA to 90 days under the NAFTA. Finally, a three person special committee may review allegations that another country's laws have interfered with the functioning of the panel system (for example, that it has made it difficult for the panel to carry out its review of a final anti-dumping duty determination) (NAFTA Secretariat 1998).

Finally, for other cases, consultations to resolve differences in the first instance are to be handled through the various committees created under the agreements (Chapter 20). If these fail then the matter may be referred to an arbitral panel for review, whose recommendations will normally be expected to be followed (Lipsey 1994:111). The panel is composed of five members with experience in law, trade or other relevant matters, and selection is usually from a pre-agreed roster of 30 people nominated for renewable three-year terms. They are picked by a 'reverse selection' process i.e. one country picks nationals of the other and the chair is a national of the third country. The panel may ask a scientific review board to provide assistance in the form of a factual report. The third country may join the consultations if it has substantial interests in the matter, or else it may just attend hearings and receive others' submissions etc. The final report is due within some 160 days of the request for an arbitral panel.

If members are unable to agree over whether to resolve differences under the GATT/WTO or the NAFTA, then the dispute shall be settled under NAFTA (Article 2005). In cases

involving environmental agreements, sanitary and phytosanitary measures or standards, the defending country may choose to have the matter only considered within the NAFTA. In all other cases, once it has been directed to the NAFTA it can not then be submitted to the WTO and vice versa.

This paper does not address the issue of disputes between private parties. It is interesting to note, however, that a NAFTA Advisory Committee under Article 2022 was specifically tasked with considering 'the availability, use and effectiveness of arbitration and other procedures for resolution of private international commercial disputes in the free trade agreement' (1996:1). A preliminary report found that there was a wide range of arbitral institutions in all three countries and that four of these had created a hemispheric body, the Commercial Arbitration and Mediation Centre for the Americas, in December 1995, leading the committee to conclude that there was no need for the NAFTA governments to create a new organization in this area. On the other hand, the governments (or a NAFTA body) could usefully promote knowledge about arbitration and conciliation/mediation mechanisms etc especially amongst smaller businesses (1996:4).

TABLE 2. **NAFTA DISPUTE RESOLUTION PROCEDURES AND DEADLINES**

STAGE	DEADLINE (DAYS*)	TOTAL TIME ELAPSED (DAYS)
Chapter 19 -- Antidumping and Countervailing Duty Matters		
Request for panel review		0
Complaints filed	30	30
Notice of appearance filed	45 after request	45
Panel selection	55 after request	55
Final determination, reasons, admin. record etc filed	15 after notice	60
Complainants' brief filed	60 after admin record	120
Investigating authority briefs filed	60 after complainants' brief	180
Reply briefs filed	15 after authority briefs	195
Appendix to briefs filed	10 after reply	205
Oral arguments begin	30 after reply	225
Panel decision due		315
Chapter 20 -- Other Matters		
Consultations	30	30
Meeting of Free Trade Commission (cabinet level)	10	40
Request panel	30 days after commission meet	70
Third party may join as complainant	7 days from panel request	77
Parties agree on panel chair	15 from panel request	85
Establish terms of reference	20 from panel request	90
Panel selection	15 after chair	100
Initial written submission	10 days after panel selected	110
Written counter-submission	20 days after initial submission	130
Third party written submission	20 days after initial submission	130
List of those attending hearing	5 days before hearing	
Hearing held	to be determined by chair	
Supplementary written submission	10 days after hearing	
Request for scientific review board	15 days after hearing	
Initial report filed	90 days after panel selected	190
Comments on initial report filed	14 days after initial report	204
Final report	30 days after initial report	234

*Calendar days (NAFTA Article 201)
Derived from NAFTA Secretariat and Lipsey et al (1994:112-113)

B. NAFTA'S SIDE AGREEMENTS

Although the side-agreements are not strictly part of the NAFTA, they are considered here briefly as they have provided a regional framework for dealing with disputes in the areas of environment and labour. This has not been to the satisfaction of all groups, but it has reduced the use of unilateral mechanisms, and perhaps added some useful experience if the matters are to be addressed within the hemispheric or multilateral context.

Both agreements emphasize technical cooperation as a way of building understanding about various standards, the extent to which they are equivalent and the scope for upward harmonization. But the agreements provide for trade sanctions in only a few cases, and then it is only where a country is found repeatedly not to be implementing its national policies -- it will not be judged according to a NAFTA norm.

In the case of labour, once a government has decided to act on a complaint from a domestic source, it brings the matter for consultation by the council of labour ministers. If there is agreement to determine whether the matter is trade-related and falls into a shortlist of certain areas, it can be referred to an expert group for evaluation. For only three types of labour standard -- child labour, health and safety, and minimum wage -- can the matter be taken to an expert panel for review. If the panel find a persistent failure of the government in question to implement these labour standards, then the complaining party may take retaliatory action -- either withdraw trade privileges or, in cases against Canada, ask for a fine to be imposed.

For only three types of labour standard -- child labour, health and safety, and minimum wage -- can the matter be taken to an expert panel for review.

In the case of the environment, an environmental secretariat will consider cases brought directly by organizations or individuals. If there is persistent non-enforcement of national standards and is related to trade, an arbitral panel may investigate following agreement by two of the three countries. If the panel's findings are not acted upon, there may also be fines or trade sanctions.

When the CUSFTA and then the NAFTA were signed, they appeared to offer advantages over both the domestic review process and that available under the GATT, in terms of scope, timelines and effectiveness (binding DS of trade remedy cases). For instance, without remands the average review process in the US was 734 days, while in Canada the average was 462 days (Penner 1996:4-2). Some of these advantages were diminished with the new WTO rules (Lipsey 1994:129). Similarly there have been changes to shorten the time for domestic review procedures (Penner 1996:4-3).

C. INITIAL REACTIONS TO THE NAFTA DISPUTE SETTLEMENT MECHANISMS

Amongst other reactions at the time of signing the NAFTA were:

- Disappointment with the failure to create new trinational rules for dumping and countervailing duties, let alone to replace antidumping with competition law.
- Concern about the lengthening of disputes and the weakening of panel findings by allowing its reversal by an extraordinary challenge committee.
- Criticism of the requirement that Chapter 19 panellists be judges or ex-judges rather than non-legal experts (the evidence being that judges tend to defer to administrative agencies' judgement -- according to Boddez and Trebilcock cited in Lipsey 1994:130). In contrast, Chapter 20 panellists may have broader expertise -- in law, international trade, or other matters covered by the agreement (Article 2009).
- For cases involving environmental, sanitary or phytosanitary safeguards, it was thought

that some of the dispute rules might work against smaller countries like Canada and Mexico. For instance, the country whose standards are being challenged may limit the review to being considered under the NAFTA (Article 2005.3-4), and also 'a Party asserting that a sanitary of phytosanitary measure of another Party is inconsistent with this Section shall have the burden of establishing the inconsistency' (Article 723). Similar rules applied for standards (Article 914) whereas in the GATT the standards were looser, namely that the measures could cause a barrier (Lipsey 1994:132-3).

D. MERCOSUR'S DISPUTE SETTLEMENT RULES

The MERCOSUR DS system was set up by the Brasilia Protocol, signed in December 1991. It was supposed to be temporary until the negotiation of a new MERCOSUR institutional structure to deal with the custom union, which was supposed to become effective at the end of December 1994. However, the Ouro Preto Protocol of December 1994, which set out MERCOSUR's institutional structure , and came into force in mid-December 1995, ratified the system created under the Brasilia Protocol, adding new possibilities for dispute settlement.

The two protocols, considered together, provide four ways to deal with disputes: bilateral negotiations, consultations in front of the Trade Commission (a creation of the Ouro Preto Protocol), claims before the Trade Commission and the Common Market Group (CMG), and arbitration.

As for the type of conflicts, it must be noted that MERCOSUR's organs are inter-governmental and make decisions by consensus of all members, thus it is not possible to have a juridical conflict between a state and a MERCOSUR resolution since a country's presence and consent is required to pass each binding decision. In addition, states must always be part of the conflict, as conflict exclusively among individuals is governed by national laws. So the dispute procedures apply to conflicts between two states or between states and individuals or companies.

On the other hand, there may be a cost in that the pragmatism means the system lacks predictability.

As shown in Table 3 below, under the Brasilia Protocol, disputes are first the subject of direct negotiations for fifteen days, during which time the CMG is kept informed on the stage and result of negotiations. If an agreement is not reached, the countries involved may submit the dispute to the CMG, for a recommendation within 30 days. The CMG will hear all affected parties and eventually may ask for technical advice if necessary. The expenses of this process are shared equally between the disputants, unless the CMG determines otherwise.

If there is still a disagreement, the parties may go to binding arbitration. The Arbitration Tribunal is constituted ad-hoc each time a conflict needs to be addressed according to the nature of particular cases. Three arbiters consider each case, one from each of the countries involved and one from a third country, who acts as the President of the Tribunal. If necessary, the third arbiter will be chosen by the Administrative Secretariat from a previously created list of candidates. More than one state may hold the same position in a controversy, in which case they must unify their representation before the Tribunal.

If there is enough evidence to consider that the maintenance of the current situation will cause irreversible damages to one party, the tribunal may make an interim ruling to prevent this. Otherwise, the tribunal has 60 days to rule and settle the conflict, with an extra 30 days if needed. The judgement must be adopted by majority -- the votes are kept secret as are the details of any opposing views. The tribunal's decision is binding, with no scope for appeal, nor can the same issue be submitted for arbitration a second time.

The judgment must be honored within fifteen days, unless otherwise decided by the tribunal; also, the defending country may ask for clarification of the judgement. If it does not comply with the arbitration ruling within a reasonable period of time, then the other country is authorized to withdraw trade concessions or adopt temporary compensatory measures.

In cases involving natural and juridical individuals, Chapter V of the Brasilia Protocol requires a claim first to be submitted to the National Bureau (Sección Nacional) of the CMG in their respective country, along with the evidence to show that a state action has restricted, discriminated or allowed unfair competition contrary to the treaty. If the national bureau decides to take up the case, it may consult with the national bureau of the other country or else submit the matter to the CMG. In turn, the CMG, after an evaluation may reject the claim or call for a panel of experts to consider the case in 30 days and request the state to modify the rules or measures. If the country does not comply within 15 days, it is possible to go to arbitration directly, that is, avoiding direct negotiations and the procedure before the CMG.

In turn, the Ouro Preto Protocol created the Trade Commission, an inter-governmental organ to advise the CMG and take binding decisions by consensus (in case of disputes, the consent of the defending state is required). It includes four members for every country and four alternates, with each country deciding from which area of the government to take its representatives.

TABLE 3. **DISPUTE SETTLEMENT PROCEDURES IN MERCOSUR**

BRASILIA PROTOCOL	OURO PRETO PROTOCOL
▼	▼
Direct Negotiations (15 days to solve the conflict)	Consultations before the Trade Commission
	If this fails
	▼
	Claim before the Trade Commission
	If this fails
	▼
	Technical Committee (30 days)
	▼
	Trade Commission
	▼
	If this fails
	▼
Claim before the CMG (30 days to make a recommendation)	Claim before CMG (30 days)
▼	▼
Experts (30 days) (mandatory in cases initiated by individuals except where consensus not to do so)	
▼	
CMG	
If this fails	
Arbitral Tribunal (60-90 days to rule)	Arbitral Tribunal (following Brasilia Protocol)
▼	
Compliance (15 days)	
▼	
If no compliance : compensatory measures authorized	

Note: the pursuit of disputes through one protocol does not block the use of the other.
CMG: Common Market Group
TCM: Trade Commission of MERCOSUR

The Trade Commission handles consultations and claims, whether by a state or an individual (natural or juridical) and involving situations foreseen by the Brasilia Protocol (Articles 1 to 25) and related to the commission's area of expertise. Claims made to the commission can also be pursued subsequently through the CMG. After the matter is discussed at the first commission meeting, if no decision is reached it is submitted to a Technical Committee.[5] Within 30 days, the committee should issue its opinions (whether joint or individual if there is no agreement). If the Trade Commission cannot reach a consensus, it must submit an outline of the different positions on the subject to the CMG, which in turn has 30 days to decide on the matter. If the CMG, by consensus, agrees with the complainant, it will set a time by which the defending state must comply with its recommendations. If however there is still no consensus, the matter can be taken to the Arbitral Tribunal under Chapter IV of the Brasilia.

In summary, the system created for handling disputes under MERCOSUR is one with a lot of flexibility, whether in terms of the choice over the mechanism used. On the other hand, there may be a cost in that the pragmatism means the system lacks predictability -- the debate over a 'power-oriented' as opposed to a 'rule-oriented' system is similar to debates heard in the context of the GATT (see J. Jackson and K. Dam).

E. ANDEAN COMMUNITY DISPUTE SETTLEMENT RULES

Originally, disputes were handled through good will offices and negotiations by the Commission, an intergovernmental executive organ of the Andean Pact. If not satisfactorily resolved, parties could use the DS procedures set up in the Latin American Free Trade Association (LAFTA).[6] In 1979, the Andean Pact members created a permanent Court of Justice to "declare the community law, solve differences and interpret the Cartagena Agreement." However, the Court's working procedures were not approved until 1983, and it only began work in 1984.

In May 1987, through the Quito Protocol, members agreed to reform the institutional framework of the Andean Pact, including the Court. There were further institutional changes in 1996 through the Protocolo de Trujillo. The Andean Pact was renamed Andean Community (AC) and three new organs were established: the General Secretariat, the Andean Presidential Council and the Andean Foreign Relations Ministers Council. Finally, in 1999 the Cochabamba Protocol introduced new changes, giving the Court new functions, as arbiter for instance.

Two principles governing the AC legal system make its DS procedures quite different from those of NAFTA and MERCOSUR. First, AC norms have direct effect on a member's domestic legal system, i.e. they have full effect domestically without any individual government action. Second, the community law has supremacy over national norms; if there is a contradiction between a domestic and community norm, the latter prevails. In addition, the Court applies and interprets the community norms and may bind states without requiring their consent. Other than the Court rulings, the sources of community law are: treaties among AC members, decisions by the Foreign Relations Ministers Council and the Commission, and General Secretariat resolutions.[7]

AC norms have direct effect on a member's domestic legal system and the community law has supremacy over national norms.

The Court, based in Quito, Ecuador, consists of five judges, one national from every AC member (Bolivia, Colombia, Ecuador, Peru and Venezuela), elected for 6 years with reelection possible once. It has jurisdiction over cases involving nullification, non-compliance, and pretrial interpretation.

In cases of non-compliance, before a case goes to the Court, a mandatory administrative procedure has to be followed. The General Secretariat (GS) may initiate a case prompted

5. The Trade Commission has created nine technical committees: Tariffs and Custom Issues; Trade Norms; Public Policies that distort competitiveness; Competition Policy; Unfair Trade and Safeguards; Consumers Protection; Non Tariff Barriers; Automotive Sector; and Textile Sector.

6. When LAFTA was replaced by LAIA in 1980 (Latin American Integration Association), the LAFTA Dispute Settlement Protocol expired.

7. The AC organs with capacity to create community law are the Foreign Relations Ministers Council (It consists of the members' Foreign Affairs Ministers and can issue declarations and decisions. Its Decisions constitute community norms); the Commission: It is the most important legislative source of the AC. It consists of the members' Trade Ministers; and the General Secretariat: It is the executive organ and is formed by a Secretary General and three General Directors.

by its own research, or a request by member states or individuals. An "observation note" is sent to the member under investigation, setting out the details of possible non-compliance to which a response is required within a certain time. It may then issue a "non-compliance report" requiring prompt corrective action. The report may be appealed before both the Secretariat and the Court, but in the meantime, compliance with the report is required[8], failing which the Secretariat may take the matter to the Court.

Non-compliance concerns a member's failure to meet its obligations under the AC norms or to comply with a GS report.[9] The Court may order the suspension or restriction of AC benefits for the non-complying member.

Nullification concerns the legality of some community institutions' acts.[10] The Court investigates Commission decisions and GS resolutions considered to violate norms of the AC juridical system. Such cases may be brought by the Commission, the GS, individual members (but only from the member that had not voted in favor of the Commission decision being challenged), corporations or individual people directly affected by the AC norms.

Finally, pretrial interpretation by the AC Court may be sought by domestic courts in cases involving AC norms, as it is the only tribunal authorized to do this interpretation, which binds the domestic court.[11]

In terms of procedure, once the case is admitted the Court first notifies the defendant, who has 30 days to respond. A period may be allowed for producing evidence and for an audience with the parties, after which the Court has 15 days to rule. It may nullify a norm, decision or resolution. In cases of non-compliance, the Court will establish corrective measures to be taken by the defendant, from the day after the public reading of the ruling. Appeals are allowed for amendment, amplification, explanation and revision.

As we already noted, the Cochabamba Protocol gave new functions to the Court: to solve cases of AC organs' omissions or inaction when they are obliged to act; to work as arbiters when requested; and to look upon labour controversies within the AC organs and institutions. In addition, individuals can submit a case directly before the Court in cases of countries' non compliance and the ruling they obtain from the Court is a legal endowment to suit for the damages suffered as a consequence of the non-compliance in domestic courts.

One concern that has emerged is the overlapping juridical framework, including the dispute settlement system, which has emerged in the Andean region as AC members have negotiated agreements with other countries, as in the Group of Three (G3) – Colombia, Venezuela and Mexico. Any dispute between Colombia and Venezuela over issues covered by AC and G3 Treaty norms, will be settled in the AC Court using its norms, whereas disputes between them over exclusively G3 issues will be covered by the latter treaty, as will any dispute involving Mexico. Difficulties are anticipated as these systems are based on different legal traditions (Cárdenas, 1994).

In summary, under the Andean Community's dispute settlement system, member states have resigned their control over conflict resolution to the Court. The Court's jurisdiction is not consensual but compulsory and the process adjudicatory. An interesting characteristic is the General Secretariat's capacity to act without a member's request in order to protect and guarantee the Community's interest in members' compliance with community rules. This contrasts sharply with MERCOSUR where states have retained control by placing negotiation at the core of the system and only using arbitration as a last resort.

F. GENERAL OBSERVATIONS ABOUT SIMILARITIES AND DIFFERENCES

In terms of countries' "blocking power", the rules are very different. While the WTO is "automatic", giving little chance to countries to block the process, MERCOSUR is very flexible, giving member countries blocking power at every stage of the process (except the arbitral tribunal).

8.
If the member decides to appeal the report before the Secretariat, it must ask for a reconsideration. If it decides to appeal the report to the Court, it must do so through an action of nullification.

9.
Non compliance Action: Chapter III, Second Section, Articles 23-27, Treaty creating the Court of Justice.

10.
Nullification Action, Chapter III, First Section, Articles 17, 18, 19,20,21 and 22, Treaty creating the Court of Justice.

11.
Pretrial Interpretation: Chapter III, Third Section, Articles 28-31, Treaty creating the Court of Justice.

Another observation to be made is that while NAFTA has different processes according to the issue (i.e. if it is dumping, one kind of process, if investment, another), MERCOSUR does not make any difference according to the issue, whether in terms of process or timelines. The WTO's DS, in turn, is an unified system for all the issues covered by the Agreements.

Other points to note:

- Third party rights are more generous under NAFTA (for Chapter 20 cases) than under WTO.
- All procedures are relatively secretive, and do not disclose minority views, though the WTO panel reports are released more quickly than the NAFTA (10 days compared to 15).
- MERCOSUR's DS system is based on negotiation and with little legal enforcement procedures.
- NAFTA cases are speedier than WTO, and MERCOSUR's are even faster, once a case has entered into the tribunal pipeline.
- NAFTA uses judges for Chapter 19 cases, whereas for Chapter 20 panelists may have a broader range of skills, as they do for the WTO. MERCOSUR roster of arbiters is composed exclusively by lawyers.
- NAFTA panels allow for the inclusion of nationals from the countries involved in the case, whereas the WTO does not. MERCOSUR requires as the tribunal's arbiters one selected by each country from the roaster (nationals) and the third one can be from another country, even a non MERCOSUR member.

SECTION III
USE OF THE DIFFERENT DS MECHANISMS

We now review the use of the different regional and multilateral DS mechanisms. We present, in fairly aggregated terms, the numbers and kinds of disputes being brought for resolution by different categories of countries.

A. USE OF THE WTO DISPUTE SETTLEMENT SYSTEM

There has been a sharp increase in the number of cases brought for resolution, whether for consultation or for panel review; in the first five years of its existence (to September 2000), there were 204 complaints notified to the WTO (161 of which involved distinct matters). In addition, there are 19 active panels and 38 were solved using the system (WTO, September 2000).

A large number of developing countries have made use of the system to bring cases against developed countries as well as other developing countries. According to one view, this suggests that the new system provides greater equality of access than was available under the GATT (Brazil 1998). Many smaller countries have brought cases, and won, against larger trading partners, as illustrated by Costa Rica's case against the US on underwear. In terms of regional distribution, there were no cases brought by an African WTO member, though a few countries were involved as third parties (for example in the banana case against the EU and the shrimp case against the US), while South Africa was a defendant in a case brought by India. Table 4 shows that of the total number of complaints, 26% were brought by developing countries compared to 16% under the GATT. The bulk of developing country cases were against developed countries.

Overall, developed countries brought the most cases, and more than their share of world exports (see Table 4). The largest number of cases were still between developed countries (43% of the total); but it is the share of total cases which were brought by developed against developing countries that appears to have increased the most --from 10% in the GATT to 31% in the WTO. Over 40% of developed country cases were against developing countries, which is more than the developing countries' 27% share of developed countries' exports in 1998. Likewise for developing countries, their cases against developed countries were

higher than might have been expected (66% of all developing country complaints compared to 57% of developing country exports).

One interesting characteristic is the frequency with which a number of developed countries have brought the same or similar complaints against a single developing country – for instance, six countries brought separate cases against India's quantitative restrictions, four against Indonesia's measures concerning autos, and three countries against Brazil's auto investment regime. Developing countries have not coordinated their complaints in the same way (Michalopoulos 1999:134), though there are a few examples of groups bringing a case jointly against a defending country (as in the case of bananas and shrimps, for example).

TABLE 4. **WTO DISPUTES BY CATEGORY OF COUNTRY (JANUARY 1995- SEPTEMBER 2000)**

COMPLAINTS BY	DEVELOPED COUNTRIES	DEVELOPING COUNTRIES	TOTAL	%	(% OF WORLD IMPORTS, 1998)
Against:					
Developed countries	89	35	124	60%	(68%)
Developing countries	65	18	83	40%	(32%)
Total	**154**	**53**	**207**	**100%**	
%	74%	26%	100%		
For comparison:					
Share of GATT DS cases	84%	16%	100%		
(% of world exports, 1998)	(67%)	(33%)			

Note: Based on number of cases brought by each country
The EU and member countries are counted jointly
n.a. - not available
Derived from: WTO 2000 and Kuruvila 1997, and IMF Direction of Trade Statistics, 1999.

In terms of issues that have been raised and sectoral coverage, Table 5 shows that most cases involved antidumping and tariffs/quotas, followed by subsidies/countervail and TRIPs, while most (90 cases) concerned industrial products, followed by agriculture (56 cases). These numbers should not be given too much weight, however, given that as many as one third of all the cases were not easily classified in terms of the issues raised, while for a fifth more than one sector was involved.

TABLE 5. **WTO DISPUTES BY SECTOR AND AGREEMENT (JANUARY 1995 TO SEPTEMBER 2000)**

WTO AGREEMENT	AGRICULTURE/ FISH	OTHER GOODS	SERVICES	TOTAL	NOT SPECIFIED OR MORE THAN 1 CATEGORY
AD	11	18			29
Tariffs/Quotas	9	7		9	25
Subsidies	2	13		5	20
TRIPS	1	3		16	20
Safeguards	4	11			15
TBT/SPS	10	4			14
GATS			4		4
> one of the above, or other WTO Agreements	19	35	2	14	70
Total	**56**	**91**	**6**	**44**	**197**

Note: alcoholic beverages included under agriculture
Source: derived from WTO, Overview of the State-of-Play of WTO Disputes, 6 September 2000, consulted September 8, 2000.

By far the largest single user has been the US, bringing some 61 cases. The US has also been a leading defendant, with some 42 cases, and has been involved in many others as a third party. Second most active has been the EU (with 51 and 41 cases respectively), followed by Canada (10 and 16 – in addition Canada participated as a third party in 32 other DS matters).

It is not surprising, then, that most of the cases from 1995 to 2000 involved countries in the Western hemisphere in one way or another. Of the cases to date, some 43 (about 20%) have not involved the Western hemisphere at all, though even in some of these, they may have claimed third country rights.

It appears that there were a large number of cases in which both the complainant and the respondent were from within the Western hemisphere (see Table 6). For instance:

- Canada and the US
- Mexico and the US
- Guatemala and Mexico
- Peru and Brazil
- Venezuela and Mexico
- Venezuela and the US

For Latin America, there were 33 cases (counting each complainant country separately) in which they were involved as complainants and 43 as defendants. Brazil was the most implicated -- with 7 cases as complainant and 11 as defendant, followed by Argentina (2 and 12 respectively) and Mexico (6 and 5). Twelve other countries were also involved in cases either as complainants or defendants. Although it was most usual for countries to be involved in cases on an individual basis, there were various examples of joint complaints (e.g. Brazil and Venezuela against US gas standards; Argentina, Canada and the US with 3 others against Hungary's agricultural export subsidies, and the banana case with the US against the EU) and joint action as third parties (e.g. the US, Canada, Honduras and El Salvador in the cement case by Mexico against Guatemala).

By far the largest single user has been the US, bringing some 61 cases. The US has also been a leading defendant, with some 42 cases, and has been involved in many others as a third party. Second most active has been the EU (with 51 and 41 cases respectively), followed by Canada (10 and 16 – in addition Canada parti-cipated as a third party in 32 other DS matters).

Only one dispute was brought to the WTO by a MERCOSUR member against another; this involved a Brazilian complaint about an Argentine safeguard on textiles. After the favorable report for Brazil in the ATC Committee, Brazil brought Argentina before an arbitral tribunal in MERCOSUR, which ruled against Argentina.

In the case of the Andean Community, the relationship with the multilateral trading system is relatively recent with three of the five joining in the last decade – Venezuela and Bolivia in 1990 and Ecuador in 1995. Prior to the WTO's formation, there were two disputes brought to the GATT involving member countries. First, Colombia joined Brazil in its complaint about US tobacco import restrictions. Another complaint concerned the US embargo on Colombian and Venezuelan tuna, following amendment of the US Marine Mammal Protection Act, banning imports of tuna caught using the "encircling" method, that might entangle dolphins. The case was brought to the GATT by Mexico, with Colombia and Venezuela participating as interested parties.

Subsequently there have been various cases involving one or more AC members as complainants, notably the cases involving EU banana imports,[12] US gas standards and US safeguards on corn brooms. Two cases have involved them as defendants, Peruvian duties on Brazilian buses, and Venezuelan duties on oil tubes. Finally, the region was implicated in a Brazilian case against EU preferential tariff treatment of AC and CACM soluble coffee exports.

More generally, an important point to note here is that the region has displayed an active interest in the WTO's DS procedures with Venezuela and Colombia playing a key role in a proposal for the creation of a legal centre for developing countries, released in late 1998.[13]

TABLE 6. WTO DISPUTES BETWEEN WESTERN HEMISPHERE COUNTRIES

COMPLAITING COUNTRY	DEFENDING COUNTRY					
	US	Canada	Mexico	Brazil	Argentina	Other
US		**Periodicals; dairy (export subsidies, TRQs)**; *patent protection*	**AD (HFC syrup)**; GATS (telecomm. services); SPS/ TBT/ADD (live swine)	**TRIMs (cars-2 cases)**; TRIPs (patents); Customs/ ATC (minimum import prices)	***Specific duties on footwear, textiles*** etc.; safeguards (footwear); TRIPs (patents-2 cases)	Chile - alcohol tax
Canada	**CVD (Livestock); other measures (cattle, swine)**			***Export subsidies (aircraft)***		
Mexico	**AD —tomatoes**					**Guatemala - AD (cement)**; *Vzla - AD (oil tubular goods); Ecuador - AD (cement)*
Brazil	**(with Venezuela) - gas standards**	**Subsidies — aircraft**			**Safeguards (textiles)**	Peru - CVD (buses)
Argentina	TRQ (groundnuts)					
Other						
Chile	CVD (salmon) -					
Colombia	Safeguards (corn brooms)					*Nicaragua — tariffs*
Costa Rica	**Quotas (underwear)**					T&T - AD (spaghetti —2 cases)
Honduras						*Nicaragua — tariffs*
Venezuela	**(with Brazil) — gas standards**					

Derived from WTO (2000). Overview of the State-of-play of WTO Disputes. September 6, 2000, http://www.wto.org/wto/dispute/bulletin.htm, consulted September 8,2000.

Normal cases are under consultation
Bold italicized are settled without going to panel
Italicized cases are active (post consultations)
Bold cases are implemented

B. USE OF NAFTA

As in the case of the WTO, the large number of cases heard under the NAFTA DS is considered a measure of its success. Table 7 shows as many as 60 cases – including those that are both active and completed-- have been brought under Chapters 19 and 20 since the NAFTA came into being. The US has been the most involved as both complainant and defendant, while Canada came second as defendant and Mexico was second as complainant. The share of cases defended by all three countries is roughly proportionate to

12.
In fact, resolving the banana access issue may have been one of the reasons for Ecuador joining the WTO in 1995.

13.
An Advisory Centre on WTO Law. A Working Proposal developed by Bangladesh, Colombia, Hong Kong, China, The Netherlands, Norway, The Philippines, South Africa, Tanzania, Tunisia, Turkey, United Kingdom and Venezuela. October 1998. This would provide a range of legal services to developing countries (and economies in transition). User-fees would be charged on a sliding scale, partly subsidised by an endowment fund (US$9 million) and contributions for the first five years (totalling US$5 million), for which contributions are presently being sought from all countries. An agreement creating the Centre was signed by some 20 countries in Seattle in December 1999.

their share of intra-regional imports. For complaints, Mexico brought nearly twice as many complaints as might have been expected given its share of intra-regional exports, while both the Canadian and US complaints were somewhat less than might have been expected.

These procedures have been under review in various working groups created under the NAFTA. The NAFTA Trade Remedies Working Groups in 1997 made a proposal for the governments to increase notification of anti-dumping and countervail action, to make documents available to the public during the case, and where possible to make various changes in the calculation of dumping levels and the determination of injury. For instance, 'The Parties agree to rely on a company's financial statements as much as possible in determining profit for purposes of calculating dumping margins' (NAFTA Trade Remedies Working Groups 1997:3).

Only 4 of the 60 cases were under Chapter 20, and none involved the extraordinary challenge committee. The official Canadian government position is that the Chapter 19 process has worked well -- one study estimates that in 9 out of 14 cases, the duties were reduced following a binational panel review (Mercury cited in Howse 1998:6). Nonetheless the government still strongly advocates significant reform if not elimination of the trade remedy system within NAFTA. 'Despite the clear success of Chapter Nineteen under the FTA and the NAFTA, Canada continues to believe that the application of trade remedies has no place in a free-trade area' (Canada DFAIT 1997:3).

TABLE 7. **COMPLAINTS UNDER THE NAFTA DS (1994-MAY 2000)**

	COMPLAINTS BY					
AGAINST	**Canada**	**Mexico**	**US**	**Total**	**100%**	**(% share of intra-regional imports, 1998)**
Canada		2	14	**16**	27	(31%)
Mexico	3		8	**11**	18	(15%)
US	14	19		**33**	55	(54%)
Total	**17**	**21**	**22**	**60**	**100**	
100%	28	35	37	**100**		
(% share of intra-regional exports, 1998)	(35%)	(20%)	(45%)			

Source: NAFTA: A Partnership at Work, DFAIT June 1997, and NAFTA Secretariat, May 2000.

Procedures for dealing with investor-state disputes are not in the public domain, making it difficult to obtain information about the number of complaints that have been brought and resolved. Most of those shown in the table have been the subject of a NAFTA tribunal, though without any public hearings. By September 2000, of the ten complaints known to have been raised, one was resolved privately, and the rest were the subject of a NAFTA tribunal, with three decisions rendered.

C. USE OF MERCOSUR

By far the most active part of the MERCOSUR's procedures has been the consultation and claim process before the Trade Commission. Sensitive cases such as autos and sugar are being resolved through bilateral negotiations. Only three cases have been brought for arbitration (2 in 1999 and 1 in 2000).

TABLE 8. USE OF NAFTA DS

	1994	1995	1996	1997	1998	1999	2000
CASES UNDER CH. 19							
Initiated	9	10	5 --14 panel reviews administered in 9 mths of 1996/97	11	9	10	2
Concluded	None	7	8 panel decisions issued in 1996	3	4	6	
CASES UNDER CH. 20							
Initiated	None	One (agriculture)	11 consultations on 10 matters of which 1 went to arbitration	One (corn brooms)	2 (border trucking services and investment and bus services	None	
Concluded	None	None	One panel report issued (agriculture)	None	One panel report issued (corn brooms)	None	
CASES UNDER CH. 11*							
				Fuel additive – US case against Canada	Funeral homes – Canadian case against US; Metal waste – US case against Mexico; PCB waste – US case against Canada; Water -- US case against Canada	Lumber – US case against Canada; Gas additive – Canadian case against US	Postal services – US case against Canada

* cases are brought by investors against a government; two additional cases have involved Mexico
Sources: NAFTA: A Partnership at Work, DFAIT June 1997, NAFTA Secretariat, 2000, and various newspaper reports.

Note: In May 2000, there were 13 active cases under Chapter 19 and 20. The table does not include 17 cases which were terminated without any decision being issued, i.e. by consensus, by the parties, etc.

As Table 9 shows, the number of consultations has declined sharply, from as many as 128 consultations during 1995 to as few as 36 in 1999. One of the reasons might be a greater familiarity and understanding of the rules and workings of the customs union; in 1995 as many as 80% of the cases were settled after members provided the required information. At the same time, the share of cases satisfactorily concluded has fallen, with a growing number pending resolution. This reflects a lack of political will to deal with disagreements through the claims process.

One interesting feature is that in some cases there have been references to the GATT/WTO to justify the policies under investigation. For instance,

- In 1995: Argentina's paper imports from Uruguay and Brazil; Argentina's payments on textile exports.
- In 1996: Brazil's tire imports, and Argentina's system of duty drawbacks and other related policies.

TABLE 9. USE OF MERCOSUR'S DS SYSTEM						
	1995	1996	1997	1998	1999	TOTAL ALL YEARS
CONSULTATIONS IN THE MTC	**128**	**84**	**71**	**32**	**39**	**354**
Satisfactorily concluded./	121 (94%)	74 (88%)	52 (73%)	17 (53%)	2 (5%)	266
Unsatisfactorily concluded	7 (5%)	5 (6%)	8 (11%)	6 (19%)	1 (2.5%)	27
Pending	0	5 (6%)	11 (15%)	9 (28%)	36 (92%)	61
Claims before the MTC	-	1	2	3	1*	7
Claims directed to the CMG	-	-	2	3	1	7
Arbitral Tribunals	-	-	-	-	2	2

*This was the only claim not preceded by consultations.
Source: derived from the Actas de la Comisión de Comercio until March 2000.

• In 1997: two cases involving Argentina's anti-dumping duties on Brazilian exports and Brazil's restrictions on ammunition imports.
• In 1999: in an arbitration case, Brazil defended its computerized import licensing system on the grounds that it conformed with the WTO Import Licensing Agreement.
• In 2000: the arbitration case on textiles resulted from Argentine safeguard action applied under the ATC.

The number of consultations has declined sharply, from as many as 128 consultations during 1995 to as few as 36 in 1999.

In addition a number of consultations clearly could have been handled in the WTO. For instance in 1997, besides the cases noted above, others involved export credit incentives and fiscal incentives. This suggests that Brazil, Argentina and Uruguay have chosen to use the regional system for disputes that could have been brought to the world stage.

By far the largest initiator of consultations has been Argentina, as the above table shows; it has brought more than half of all cases, two-thirds of them against Brazil.

TABLE 10. CONSULTATIONS BEFORE THE MERCOSUR TRADE COMMISSION (95-99)					
	TO				
FROM	Argentina	Brazil	Paraguay	Uruguay	**TOTAL**
Argentina		134	15	37	**186**
Brazil	73		4	14	**91**
Paraguay	18	13		6	**37**
Uruguay	17	18	4		**39**
TOTAL	**108**	**165**	**23**	**57**	**352**

Source: derived from the Actas de la Comisión de Comercio until March 2000.

Note: some of the consultations were made jointly against the same country, while in other cases one country brought the same case against more than one other.

D. USE OF ANDEAN PACT

Between 1969 and 1979 the Andean Commission was in charge of negotiation, mediation and conciliation. Once the Court was in operation, "for several years, only the administrative step of the system was used: the Junta carried forward some non-compliance cases, some of which resulted in the issue of 'observation notes.' It was only in 1996 that the first case of non-compliance was submitted before the Court" (Lloreda Ricaurte, 1998).

As Table 11 shows, the pre judicial interpretation is intensively used in the Andean Pact dispute settlement system.

TABLE 11. **ANDEAN PACT DISPUTE CASES**

	Nullity Cases	Non- compliance Cases	Prejudicial Interpretation
1985	1	-	-
1986	2	-	-
1987	-	1[14]	1
1988	-	-	4
1989	-	-	6
1990	-	-	6
1991	-	-	3
1992	4[15]	-	3[16]
1993	-	-	7[17]
1994	-	-	10
1995	-	-	34
1996	1	3	33
1997	5	3	32
1998	3	10	45
1999	3	14	41
2000	6	17	51
TOTAL	**25**	**48**	**236**

Source: derived from information available at www.comunidadandina.org and information provided by the Court of Justice. Up dated until August 2000.

SECTION IV
EVALUATION AND CONCLUSIONS

We now turn to review some of the strengths and weak-nesses that have become apparent with the use and experience of dispute settlement mechanisms, and some of proposals for change that are already on the table.

A. EVALUATION OF THE WTO DS SYSTEM

In many respects the high hopes of the new DS mechanism appear to have been borne out in practice. As a Brazilian diplomat has noted: "There are count-less aspects of the DS understanding which could be the object of impro-vements, major or not. On the whole, however ... it is a well-conceived mechanism, which has worked well towards the fulfillment of the objectives of the WTO" (Brazil 1998). For its part, the Canadian government has stated that, "as a frequent user of the system, Canada believes the Dispute Settlement Understanding has clearly demonstrated its fundamental effectiveness and viability" (1999a:1) and in the course of the review due to end on July 31, 1999, Canada did not consider broad changes were needed.[18]

Experience with the DS mechanism has tempered the initial enthusiasm surrounding its introduction, and led to several suggestions for change. These address capacity, implementation and authority.

14.
The Court rejected the case arguing that the company - Alumnnio Reynolds - should litigate in the domestic court.

15.
Three of these cases were rejected. One, involving a Colombian national, was rejected without consideration of the substance because it concerned the Barahorna Act, which was outside the competence of the Court. Another was rejected as the claimant, a Colombian company, could not prove injury as a result of the norm in question. The third was rejected for the same reason.

16.
None of the three presentations were admitted by the Court because the norms had already been derogated from domestic courts.

17.
One petition was not admitted.

18.
The WTO DS rules were to be reviewed within four years of the WTO's initiation i.e. by January 1999 (Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes. GATT 1994:465). The review continued until July 1999 and informally thereafter. Some changes were to be considered for adoption at the Seattle Ministerial meeting but these were shelved when the meeting collapsed (Raghavan 2000).

CAPACITY

The DS mechanism may be in danger of overload without additional resources being made available at many levels. The number of disputes is projected to keep rising, particularly as developing countries' exemptions expire (e.g. for TRIPs and TRIMs) (Brewer and Young 1999:178). Also, submissions and reports are becoming more technical and lengthier than the 20-30 pages average under the GATT. As Planck-Brumback notes, "Panels are producing huge reports faster than the secretariat can translate and distribute them to all members... Panel reports of several hundred pages are being issued fortnightly faster than the trading community can understand" (1998:26). In response, the WTO Secretariat's capacity needs to be expanded.

Secondly, there is a need to expand the roster of panellists. With a growing number of countries involved in cases (as third parties if not directly) their nationals cannot be used as panellists. The increasing time involved in cases can place overwhelming demands on official representatives of smaller, developing country WTO members, who often have other non-WTO business in Geneva. One suggestion has been to create a permanent roster of panellists, as for the AB, although the latter has been criticized (see below).

The DS mechanism may be in danger of overload without additional resources being made available at many levels.

There is a more general concern about the capacity of developing countries, especially the poorer and smaller WTO members, to participate in DS. Questions have been raised about their capacity, whether as complainants to bring cases effectively, or as defendants to protect their interests, given the level of technical expertise required. Coupled with the tighter dispute process deadlines this has led to intensity of work which many governments are unable to meet.[19]

Even though technical assistance is available from the WTO Secretariat, it is seriously constrained, given the large number of cases now underway.[20] Moreover, most WTO technical assistance is not intended to provide counsel on specific cases so much as to advise on issues. In the majority of cases involving developing countries, external legal counsel has been sought from an international law firm or consultant at considerable cost (ACWL 1998:7). Initially there were worries about the need for governments to have their own lawyers to represent them; but this changed with the decision by the Appellate Body in one of the banana cases to allow the St. Lucia government to be represented by a private lawyer. [21]

In this respect, the Advisory Centre on WTO Law will play a useful role. At the very least, it could provide governments with an assessment of how to proceed with a case, thus reducing legal costs. It could advise member countries, particularly smaller ones, about the scope for economies through joint presentation of complaints, or through joint participation as third parties. Where private counsel is hired through the Centre, they could be required to go beyond the provision of legal advice to build up a precedent manual for use in future cases by the developing country government in question. [22]

The Centre might also consider helping private sector firms in developing countries to work with their governments to bring cases to the WTO (Horlick in Mavroidis et al, 1998). Enhancing the capacity within countries to deal with disputes domestically, whether through national (or even regional) judicial mechanisms or private arbitration, might also reduce the flow of cases to the WTO. Several donor countries have begun to provide trade-related technical assistance, some of which addresses DS, but there has been criticism of the amounts and effectiveness of the training on offer, particularly where it is managed bilaterally rather than through the WTO (Rajapathirana et al 2000).

19. In fact, Brazil has suggested that the timelines be changed from calendar days to working days to provide some breathing space (Brazil 1998).

20. The WTO's regular budget for TA is CHF 0.74mn and the Director-General has called for this to be raised to CHF 10 mn by 2003. In the meantime, the WTO has a trust fund for extra-budgetary contributions for TA.

21. This position was supported by Canada inter alia, despite opposition from the US. It could mean that any country will now be in a position to take on the USTR -- using US lawyers if necessary (provided they can afford them).

22. Kirsten Goodwin, Thomas & Davis, informal communication, Ottawa, March 25, 1999.

Capacity issues must also be considered in the discussion about opening up the DS process to non-state actors (whether NGO or private sector). In the interests of transparency, some have argued for the right to make submissions and even appear independently before panels. Others are concerned that this would accelerate still further the 'laissez-litigez' nature of the WTO DS (Ostry 1999:11, 17). It would also likely increase the costs to the WTO, the workload of the WTO panelists, and even extend the timetable of the panels (Canada 1999a:4). Without additional resources to cover training and other costs, southern groups would be unable to participate in a more open WTO, which would merely exacerbate its existing 'structural asymmetry' (Ostry 1999:12).

IMPLEMENTATION OF DSB'S RECOMMENDATIONS AND RETALIATORY MEASURES

While many panel and AB reports have been adopted on schedule, their findings have not been implemented as expeditiously as intended, and in some cases the delays in compliance have damaged trade irreversibly. As the Brazilian ambassador to the US has said: "...What should be tightened,... is the time frame for the implementation of recommendations and rulings, as well as surveillance of implementation.... Compared to the strictness of panel procedures, implementation stands out as the weak link in the mechanism."

Different parts of the WTO limit the scope for reversing trade restrictions. This is particularly the case with trade remedies; as noted by a Brazilian official, with respect to anti-dumping, "Article 2 of the Agreement allows ample margin for investigators to 'construct' the prices of the exporter under investigation. It is then often just a matter of torturing the numbers until they confess. Coupled with the standard of review laid down in Article 17:6 of the Agreement, it provides for a situation in which anti-dumping has been left basically at the discretion of the investigating authorities, with virtually no possibility for reinstatement under the DSU..." (Brazil 1998).

One problem is that neither the panel nor the AB is required to rule on remedial action nor a reasonable time for compliance, although they can make sugges-tions.[23] In some cases, arbitration has been used to determine that a reasonable time ranges from eight months to 15 months or so (Zuijdwijk 1999:2-3). There are also no clear procedures for a complainant's disagreement with a defendant's approach in complying with a panel's ruling. In a few instances, the offending policy has not been withdrawn, leaving complainants with retaliation as the only option. This in turn has raised questions about the appropriateness of proposed retaliatory measures, and whether they really provide a solution for smaller, undiversified economies.

Different parts of the WTO limit the scope for reversing trade restrictions.

In the bananas and culture cases, remedial action was taken which addressed the immediate concerns of the panel but at the same time new measures were introduced which did not improve the trade prospects for the complaining countries. It is unclear from Article 21.5 how such new measures should be reviewed, for instance whether by a new panel and then a new appeal, giving rise to the prospect of a never-ending dispute settlement process. Also unclear is the sequence for retaliation, i.e. whether a complaining country could request suspension of rights before a ruling is made on the consistency of the new measure (Herman cited in Canada 1999:3-1).

Finding appropriate measures for retaliation has been difficult for big countries like the US as well as for smaller countries like Ecuador, and in neither case does it appear that the initial damage has been offset.

In the banana case, the US has proposed to rotate punitive tariffs on EU products every six months under so-called 'carousel' legislation. The aim is to increase uncertainty for EU suppliers and thus the economic and political costs borne by the EU for its failure to comply

23.
Hoekman and Mavroidis (1999) note "it has become evident that the DSU has a potentially serious weakness in dealing with cases where it is alleged that the losing party has not implemented the panel's recommendation. Such cases can easily arise when panels limit themselves to standard recommendations to bring measures into compliance, or, alternatively, if a panel's suggestions are not interpreted as binding."

with the banana ruling. For Ecuador, however, its own economy was more likely to bear the brunt of high tariffs on EU products. It therefore sought a mixture of cross-retaliation (and was the first country to do so – in this case it sought non-enforcement of some EU IPRs) and cross-compensation outside the trade arena (i.e. additional financial assistance or even debt relief).

These examples illustrate the inability of the DS mechanism to restore a country's rights, if another country refuses to comply with DS rulings. While financial compensation may help to offset damages, the multilateralization of sanctions may be a more effective way of ensuring the offending policy is changed (Rodrik 1995; Bhagirath Lal Das in Raghavan 2000).

AUTHORITY

Several questions have been raised about the authority of the panels and the AB. Many panels have resulted in substantive interpretations of WTO agreements, which involve an expansion of WTO members' rights and/or obligations.[24] This is a departure from the traditional approach to rule-making, i.e. through multilateral negotiation.

Even if the countries involved can be satisfied, there is a question about how the interests of countries not involved in a dispute would be taken into account. One suggestion is that other countries be allowed to make submissions to the AB even if they had not previously registered a 'third-party' interest, though this might need to be limited to a certain length to control the AB's workload (Canada 1999:4). Another is that the results from a panel or AB should only apply in that case; more radically, where changes in rights and obligations are at stake, the matter should be brought to the General Council, for approval by official representatives of all member countries (Bhagirath Lal Das in Raghavan 2000).

Many panels have resulted in substantive interpretations of WTO agreements, which involve an expansion of WTO members' rights and/or obligations.

Others have argued that the decisions of the panels and AB might be more acceptable if their deliberations were more transparent, i.e. if the processes were open to the public, and even if the public were able to participate, e.g. through submissions. As mentioned earlier, however, this raises the issue of capacity – both the capacity of panels and ABs to cope with additional inputs, and the capacity of non-governmental groups in developing countries to participate in the same way that Northern NGOs and private companies would do.

Finally, there remains some doubt as to the US' commitment to the authority of the WTO's DS bodies. This stems from the continued existence of Section 301 legislation, and the administration's listing of countries under Section 301, even where they have not broken any WTO rules.

In sum, the evolution of the WTO's DS mechanism may have an impact on the upcoming negotiations in various ways. Not only will there be pressure to review some of the points raised above, but also worries about the DSB's capacity constraints may deter others from introducing new and complicated issues such as labour standards into the WTO agenda. At the same time, recognition of the overly legalistic approach of the WTO DS may deter these issues from being brought to the WTO, on the grounds that the WTO DS would be unable to address the more subtle and complex social policy issues involved (Ostry cited in Canada 1999).

24. In the words of one critic, 'unless actions are taken to limit the role of panels in reducing the rights of countries and increasing their obligations, it will strengthen social movements in the developing countries against the process of globalization and expansion of corporate rights'. Third World Economics. 16 - 31 May 2000, No. 233. p. 2.

B. EVALUATION OF THE NAFTA DISPUTE SETTLEMENT MECHANISMS

In general the NAFTA mechanisms appear to have been effective in resolving many disputes between the three countries. About a third of cases have been terminated before a decision was issued. In several anti-dumping cases, the panels have led to the reduction of duties. To date, none of the panels' binding decisions has been appealed to the

extraordinary challenge process; whereas there were three such challenges under the Canada-US FTA. But where decisions have been remanded to national authorities, this has caused delays. Delays have also resulted from the withdrawal of panellists, as well as lateness of depositions, motions and the filing of briefs and oral arguments. On average, though, the NAFTA mechanisms has produced findings more quickly than the national judicial review mechanisms.

There have been various criticisms of the NAFTA dispute machinery.

•In terms of technical capacity to bring a case, it has not been an issue in the same way as in the WTO, reflecting the more advanced state of trade law in the three member countries. Financial capacity can be a constraint, however, to the extent that the initial complainant (i.e. the firm which makes the request to the government to bring the case) often has counsel present throughout the case and has to pay for its own legal costs (US$200,000 to $600,000, according to some estimates cited in Howse, 1998:7).

There is some concern about the capacity of the panelists to fully analyze the facts of a case, from experts in trade law or economics, to judges or retired judges.

•The Chapter 19 process has not been able to overturn inappropriately applied ADD or CVD. Rather, if a panel finds the national law of the defendant country has been misapplied, it can only remand the case to the domestic agency to be reconsidered; it cannot order the duty removed (or lowered). The complainant may bring the case back (more than once) for further review if it is unhappy with the redetermination and this means the time-limit of 315 days may be exceeded. It is even possible that repeated remands can make a case last longer than if the complainant had used the US domestic challenge process i.e. the Court of International Trade (CIT), which is put at 734 days on average (Howse 1998:7)

The Chapter 19 process has not been able to overturn inappropriately applied ADD or CVD.

Some products have been the subject of several cases -- new complaints may be submitted leading to new investigations. Howse recommends that for such cases, it might be best for smaller countries to take a dispute to the WTO.

Another factor that may delay a case being settled is the broader scope for the extraordinary challenge committee, to examine both the factual and the legal analysis underlying a decision, which has led to an extension of the ECC process from 30 days under CUSFTA to 90 days under NAFTA.

• The limited authority of the binational panels, in that they can only review ADD/CVD within national laws where the standards of review are different, has led to an issue of asymmetry. Americans and Canadians do not have an equal opportunity to have findings reversed. Canadian law requires much greater errors for an agency's decision to be overturned with the result that Canadian complaints are more likely to be supported by a panel than is the case for the US. And the large share of rulings in Canada's favour has been heavily criticized by various groups in the US.

The ad hoc nature of panels means that their findings may be inconsistent. One option to increase coherence is to create a standing body, with the resources available for technical support. Another idea is to broaden the membership of the panels to avoid suggestions of national bias.

The issue of transparency and accountability of the NAFTA DS framework has been raised in Canada, partly in response to recent cases involving investor-state disputes that were candidates for arbitration under Chapter 11. In one involving a fuel additive, the Canadian government paid C$20mn. in compensation to a US company in return for it dropping its NAFTA challenge.[25] The fact that this was settled behind closed doors, as required under

25.
Countries in the light of the opportunities that the new commitments open up for the design of innovative export promotion policies.

the NAFTA, was widely criticized by the mainstream financial press as well as traditional NAFTA opponents. Similar concerns have been raised in the US and Canada, even when cases were taken to NAFTA tribunals.

Another issue is the frequency with which these cases have challenged national environmental legislation, and in ways that are not available to national companies, rather than expropriation of assets as originally anticipated. In response, the Canadian government has urged the US and Mexico to review the scope of Chapter 11, both to make it more public and to limit the scope of challenges.

Finally, it is important to note that there have been a number of disagreements, in particular between Canada and the US, that have not been addressed within the NAFTA DS framework, nor in the WTO. The governments and industries involved have chosen instead, in the case of politically sensitive issues (such as lumber, wheat and autos), to address these separately e.g. through bilateral agreements outside the NAFTA or a blue ribbon panel.[26] In some cases, e.g. wheat, bilateral discussions were agreed by the US following Canadian requests for WTO and NAFTA consultations (Canada 1999:24).

C. EVALUATION OF MERCOSUR DISPUTE SETTLEMENT MECHANISMS

There is clearly a need to amend the MERCOSUR DS system because:

- The number of consultations that were not concluded satisfactorily has been rising from year to year (with the exception of 1999, though in that year the share of cases pending resolution rose to 92% of cases brought for consultation).
- The share of cases pending resolution has also grown from year to year.
- Only a very few cases were taken beyond the consultations stage to become claims (seven out of a total of 354).
- The MERCOSUR Trade Commission does not consider consultations in plenary anymore, rather the Commission limits itself to receiving them and automatically passes them to a Technical Committee for consideration.
- The Technical Committee (formed by government officials) is almost never able to reach a joint opinion.
- The private sector is too excluded from the system. Their role is limited to presenting the claim, after which they can only lobby government officials.
- While there have been only three arbitral tribunals, two kind of problems have already emerged. First, because tribunals are ad hoc, there are divergent interpretations of the MERCOSUR norms. Second, the system does not allow for any kind of appellate action against the tribunal's findings (except for minor clarifications i.e. substantial aspects of the ruling cannot be reviewed).

There is clearly a need to amend the MERCOSUR DS system.

It is remarkable that there was so little use of the claims process, despite the large number of consultations that were not satisfactorily resolved. Also that only three arbitral tribunals were established, given that these are the only body able to dictate binding rulings.

It is clear that during the 1995-2000 period, governments have preferred to use diplomatic means –and even presidential intervention -- combined with a strategy of leaving consultations pending.

Among the options that countries could consider to strengthen the system – and making it more efficient -- are: the creation of an arbitral tribunal on a permanent basis and to give the private sector an opportunity to formally participate in the consultation stage.

26. See Weston (1996). In the case of lumber, however, Canada has recently decided to take the issue, which had led to its longstanding dispute with the US forest industry, for resolution by the WTO.

D. EVALUATION OF THE AC DISPUTE SETTLEMENT SYSTEM

In evaluating the role of the Court until 1995, some authors have stressed its under-utilization, arguing that it had been more of a presence than a real actor. This may have been due to an unspoken and unwritten commitment not to use the system, rather than because countries were complying with their regional commitments, as various facts suggest non-compliance was high (Aninat del Solar, 1992).

Others have remarked that the 1980s were a lost decade for economic integration in Latin America and especially in the Andean Pact -- deadlines to achieve a free trade area and customs union were not met, many exceptions were negotiated, and business people lost faith in the process. Confronted with a high rate of non-compliance, Andean Pact members agreed not to bring charges against each other (Cárdenas, 1994).

Judge Hurtado Larrea has noted the importance of economic crises in understanding the high rate of non-compliance cases. Until 1983, there were at least 92 cases. A moratorium was then declared for three months, and members involved in non-compliance cases were either to resolve the matter or submit the case to the Court. Even so, no member subsequently presented a non-compliance case until 1996.

With the new energy that has been injected into the integration process, as well as the recent reforms in the dispute settlement system, it is possible to see an increase in its use. However, it is too early to comment on it.

E. CONCLUSIONS

Experience, particularly with the WTO, underlines the importance of building national (or in the case of smaller countries this might be sub-regional) capacity to deal with trade disputes. The hemispheric integration process should ensure that resources are made available for this capacity-building.

In the first instance, there are a variety of domestic avenues that could be developed or strengthened for resolving trade disputes. One is through the use of alternative dispute resolution methods – i.e. outside national courts, let alone regional or even multilateral DS mechanisms. Another is the range of judicial or quasi-judicial mechanisms (for instance, in Canada, disputes over Canada's compliance with its public procurement obligations can be taken to the Canadian International Trade Tribunal).

A second area concerns the creation of advisory centres on international trade law – whether at the national, sub-regional or even regional level. These could be used to advise both private sector (and NGO) interests and governments about trade disputes and the best way of seeking redress, i.e. whether to seek remedial action nationally, regionally, hemispherically or through the WTO, and if so on what basis. There may also be a need for such centres to provide poorer, smaller countries in the hemisphere with the legal expertise needed to bring or defend cases. They could also be used to train judges, panellists and others involved in the adjudication of disputes.

Experience, particularly with the WTO, underlines the importance of building national (or in the case of smaller countries this might be sub-regional) capacity to deal with trade disputes.

The final design of the hemispheric dispute settlement system will depend upon the results of the FTAA negotiations, i.e. the scope and nature of trade commitments among its members. There is much to be said for adopting a system closer to the WTO model than those used in the regional agreements – i.e. one that is not supranational, and neither too rigid nor too flexible, but with a process of consultations, panels and an appellate body. Of

course, there are a number of improvements on the WTO process that could be adopted, in terms of transparency and greater clarity with respect to the process for compliance.

Finally, another issue to consider is that of subsidiarity – i.e. whether it makes sense to encourage, if not require, all intra-regional disputes to be taken to regional dispute settlement bodies, and hemispheric disputes to the FTAA DS body. This would reduce the burden of the WTO DSB. An alternative would be to introduce clearer rules to limit forum-shopping, for instance, to determine under what circumstances an intra-regional dispute could be taken to the regional, FTAA or WTO, and whether the WTO DSB could act as a court of appeal. In essence what is at stake here is the scope for 'nesting' of the different DSB arrangements.

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The Latin American Trade Network (LATN) began its activities in Apr 1998, with the support of the International Development Research Centr (IDRC) from Canada.

LATN is a network gathering scholars, academic institutions and interna tional organizations. Its main objectives are:

- To analyze the ongoing changes in international trade relations i response to the expansion of the trade agenda, the diversification of th negotiation fora and the growth of new coalitions
- To support the process of agenda-building and policy formulation i Latin American countries in light of the new trends of the internationa trade system
- To promote professional development and research capabilities in Lati American countries
- To strengthen institutional links and cooperation among the partici pating institutions with the aim of sustaining the long-term goals c the network

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