Northwestern Journal of International Law & Business

Volume 17
Issue 1 *Winter*

Winter 1997

Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?

Cherie O'Neal Taylor

Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?

*Cherie O'Neal Taylor**

The goals of NAFTA regarding the FTAA are modest. The United States is not interested in a customs union but in a free trade agreement. It wants to stay within Article XXIV, not seek the harmonization of social or political systems or even legal regimes.

Charlene Barshefsky
–Acting United States Trade Representative

MERCOSUR does not have the luxury to develop its architecture . . . MERCOSUR has difficulty with setting up institutions with bureaucratic content. The political will does not seem to be there. The environment is contradictory to the 1950's institutionalism of Europe.

Marcos Castrioto de Azambuja
–Ambassador of Brazil to Argentina.**

I. INTRODUCTION

An economic integration arrangement between nations cannot exist without the creation of the necessary institutions. Any free trade, customs union or common market agreement[1] must have, at a

* Associate Professor of Law, South Texas College of Law, J.D. 1983 University of Georgia; LL.M. 1990 Georgetown University. The author would like to express special thanks to her research assistant Simon B. Purnell for his research and translation efforts on this article.

** The quotations came from presentations made by the indicated speakers at the ASIL Annual meeting on March 29, 1996, as loosely transcribed by the author.

1 These three forms of economic integration are the most commonly represented among existing arrangements. See GATT ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 858-72 (1995) [hereinafter GATT ANALYTICAL INDEX], for a complete listing of the free trade and common market agreements reported to the GATT as of 1993. The GATT, in Article XXIV, recognizes two forms of regional economic arrangements that constitute exceptions to

minimum, political institutions and a dispute settlement mechanism. The political institutions are necessary to allow the countries to reach decisions about how to implement the treaty obligations and objectives and to oversee that implementation. The dispute settlement mechanism is needed to resolve disputes that may arise over the meaning and application of the agreement's legal obligations and objectives. A dispute settlement mechanism is crucial to the viability of an economic integration arrangement because the traditional method by which states resolve disputes is through negotiations.[2] Since not all negotiations lead to politically acceptable solutions for the disputing countries, some conflicts would never be resolved unless they turned to a form of third-party dispute resolution.

The goal of this article is to examine why regional economic integration arrangements create and deploy certain types of dispute settlement systems. In order to evaluate dispute settlement systems, it is necessary to consider them in context. The best designed system may not be the most complex or most powerful. Instead, it may be the one which contributes most to the achievement of the agreement's objectives.[3] A well designed dispute settlement system will inevitably be responsive to, and reflective of, the economic goals being sought (the depth of economic integration desired by the participating countries), the political constraints (limitations imposed by the governments or domestic politics of the participating countries), as well as perceptions about the proper role of international institutions, particularly dispute settlement mechanisms. Each of these factors must be considered when examining the structure of a dispute settlement mechanism and how it operates, or was intended to operate, within the integration arrangement. By comparing two systems, it may be possible to arrive at some conclusions about whether different dispute settlement sys-

---

the general GATT obligation of most favored nation – free trade areas and customs unions. Most existing regional economic agreements are notified to the GATT (now WTO) as free trade areas or common markets. The customs union, as defined by Article XXIV, has, to date, generally been a stage of integration on the way to a common market. One of the standard descriptions of free trade areas, customs unions and common markets explains that:

> In a free trade area, tariffs and quantitative restrictions between the participating countries are abolished, but each country retains its own tariffs against nonmembers. Establishing a customs union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with nonmember countries. A higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished.

BELA BALASSA, THE THEORY OF ECONOMIC INTEGRATION 2 (Lloyd Richards ed., 1962).

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

3 Michael Reisman & Mark Weidman, *Contextual Imperatives of Dispute Resolution Mechanisms*, J. WORLD TRADE, June 1995, at 5, 10.

tems can further the integration process either by spurring or deepening it.

The two dispute settlement mechanisms chosen for examination here are the system set up by the North American Free Trade Agreement (NAFTA)[4] and the interim dispute settlement system of the MERCOSUR.[5] Both the NAFTA and the MERCOSUR are the dominant regional economic integration agreements on their respective continents. Each agreement is relatively new and rapidly evolving.[6] The participating countries in both integration arrangements have expressed an interest in ultimately joining the two systems into one free trade area, the Free Trade Area of the Americas (FTAA).[7] Despite these surface similarities, the integration arrangements represented by the NAFTA and the MERCOSUR are drastically different. The NAFTA is a free trade agreement between two developed coun-

4 North American Free Trade Agreement, Dec. 17. 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (containing chs. 1-9), 32 I.L.M. 605 (containing chs. 10-22) [hereinafter NAFTA]. Some of the dispute settlement mechanisms of NAFTA are found in several chapters of the agreement: Chapter 11 (settlement of disputes between a party and an investor of another party), Chapter 19 (review and dispute settlement in antidumping and countervailing duty matters), and Chapter 20 (institutional arrangements and dispute settlement procedures). The other two NAFTA dispute settlement mechanisms are contained within the two supplemental agreements negotiated after the NAFTA text on labor and environmental issues. *See* North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., art. 29, 39 I.L.M. 1499, 1509-10 [hereinafter NAALC]; North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., art. 24, 32 I.L.M. 1480, 1490-91 [hereinafter NAAEC].

5 MERCOSUR is the short form of the *Mercado Comun del Sur* (Common Market of the South). The interim dispute settlement system for MERCOSUR is contained in the Brasilia Protocol. Protocolo de Brasilia Para la Solucion de Controversias [Protocol of Brasilia for the Solution of Controversies], Dec. 17, 1991, 6 Inter-Am. Legal Mat. 1 (Simon Purnell trans., 1996) (on file with the author) [hereinafter Brasilia Protocol].

6 NAFTA entered into force on January 1, 1994. Prior to the formation of NAFTA, which was accomplished by joining Mexico with Canada and the United States, the United States and Canada had been involved in a bilateral economic integration arrangement. *See* Free Trade Agreement, Jan. 2, 1988, Can.-U.S., 27 I.L.M. 281 [hereinafter CFTA]. MERCOSUR entered into force in 1992 following the adoption of the Treaty of Asuncion in 1991. Treaty Establishing A Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041 [hereinafter Treaty of Asuncion]. MERCOSUR is still in the transition period on the way to the formation of the common market. *See id.* art. 18, at 1048; Protocol to the MERCOSUR Agreement, Dec. 17, 1994, Arg.-Para.-Uru., preamble, *available in* LEXIS, Intlaw Library, BDIEL File [hereinafter Protocol of Ouro Preto]. Both economic integration arrangements are illustrations of "open regionalism." The participating countries in NAFTA and MERCOSUR contemplated expansion of each arrangement (by adding other countries or groups of countries) almost from the moment they began.

7 *See* Steven Greenhouse, *U.S. Plans Expanded Trade Zone*, N.Y. TIMES, Feb. 4, 1994, at D1 (stating that Clinton Administration is drafting plan that would create a Western Hemisphere free trade zone in 10 to 15 years).

tries and a developing country.[8] The MERCOSUR is a common market agreement between four developing countries of varying size and economic strength.[9] These descriptions alone highlight the dissimilarities in the economies and economic goals of the two integration arrangements. There is more involved in an economic integration relationship than economic issues. Political constraints as well as each arrangement's approach to institution building have as much to do with the structure of the NAFTA and the MERCOSUR dispute settlement systems as do their economic goals. What follows is an attempt to examine and compare the two dispute settlement systems.

The structure and operation of a dispute settlement system can not be examined without analyzing the overall design, jurisdiction, scope, the enforcement mechanism and the legal status of decisions. Each of these aspects of a dispute settlement system offers different types of evidence about the role dispute settlement plays in economic integration arrangements. The design of the dispute settlement system can reveal much about the power the participating countries give its institutions to interpret and create law in aid of the integration process. The jurisdiction of a dispute settlement system offers insight into how far the economic arrangement is allowed to intrude into the domestic legal systems of the participating countries. Analyzing the scope of the dispute settlement system can yield information about how large a role the rule of law plays in the integration relationship. Whether a dispute settlement system provides for real enforcement of its decisions answers questions about whether or how much political power the participating countries are willing to cede to a suprana-

---

8 At the time of the NAFTA negotiations, the per capita gross domestic products for the United States and Canada were between U.S.$20,000 to $25,000, while Mexico was at $5,000. CONGRESSIONAL BUDGET OFFICE, A BUDGETARY AND ECONOMIC ANALYSIS OF THE NORTH AMERICAN FREE TRADE AGREEMENT 3 (1993) [hereinafter CBO Study]. In addition to the income disputes, Mexico also lags behind the United States and Canada in market size, infrastructure, and worker education. U.S. INT'L TRADE COMM'N, PUB. NO. 2596, POTENTIAL IMPACT ON THE U.S. ECONOMY AND SELECTED INDUSTRIES OF THE NORTH AMERICAN FREE-TRADE AGREEMENT, ch.1, at 12-15 (1993) [hereinafter ITC NAFTA Report].

9 The MERCOSUR countries are all much less developed than the United States. *See generally* Joseph Grunwald, *Hemispheric Economic Integration? Some Reflections*, 526 ANNALS 135, 141 (March 1993); Emilio Cardenas, *Treaty of Asuncion*, FLA. J. INT'L L., Spring 1992, at 105, 106 [hereinafter Cardenas] (stating that "MERCOSUR per capita income is $2,400 United States dollars per year"). Of the four countries, Brazil is clearly the dominant power. Brazil has 77% of the total MERCOSUR GNP, Argentina has 20%, Uruguay has 2% and Paraguay has less than 2%. *Id.* at 108 ("so you have one big country and a medium sized country with bigger incomes, and two small countries that basically are looking for an expanded market as a tool to improve their own development efforts"). Within the MERCOSUR, Uruguay and Paraguay are regarded as the countries which require additional time to make the required trade liberalization efforts. *See* Treaty of Asuncion, *supra* note 6, art. 6, at 1046.

tional authority. Finally, a review of the legal status of a dispute settlement system's decisions can answer whether or not the countries intend to use the system to create law.

II. Structure and Operation of the Dispute Settlement Mechanisms

A. The Design and Use of NAFTA and MERCOSUR Dispute Settlement Systems

The NAFTA dispute settlement system is a decentralized system. The NAFTA has five major mechanisms devoted to resolving disputes associated with the free trade arrangement. There is a main dispute settlement mechanism provided for all general disputes arising under the terms of the NAFTA (Chapter 20).[10] In addition, the NAFTA dispute settlement system consists of four separate, although similarly modeled, dispute settlement mechanisms for the review of antidumping and countervailing duty determinations (Chapter 19),[11] for investment disputes (Chapter 11)[12] and for labor and environmental disputes (the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Economic Cooperation (NAAEC)).[13] Each one of these mechanisms establishes a legal process by which the proper complainant can bring a case against an offending party.

The NAFTA dispute settlement system was not completely designed from the ground up. The main dispute settlement mechanism of the Chapter 20 and the Chapter 19 mechanism for reviewing antidumping and countervailing duty determinations came from the U.S.-Canada Free Trade Agreement (CFTA) which entered into force in 1988. Chapter 20 of the NAFTA is a reformulated version of Chapter 18 of the CFTA.[14] Chapter 19 of the NAFTA duplicates on a tri-

---

10 NAFTA, *supra* note 4, ch. 20, at 693-99.

11 *Id.*, ch. 19, at 682-93.

12 *Id.*, ch. 11B, at 642-47.

13 NAALC, *supra* note 4, arts. 27-41, at 1509-13; NAAEC, *supra* note 4, arts. 22-36, at 1490-94.

14 NAFTA Statement of Administrative Action, Sept. 13, 1993, *available in* LEXIS, Intlaw Library, NAFTA File, at 176 [hereinafter NAFTA Adm. Action Statement]; Harry B. Endsley, *Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution*, 18 Hastings Int'l & Comp. L. Rev. 659, 676 (1995) [hereinafter Endsley]. The basic changes in Chapter 20 of NAFTA from Chapter 18 of the CFTA were: (1) the provisions for the use of alternative dispute settlement mechanisms such as good offices, conciliation and mediation, as well as expert advice and scientific review boards (arts. 2007, 2014, 2015); (2) the elimination of binding arbitration; and (3) a method of selection of panel members that results in each side choosing the panel members of another country (art. 2011). Endsley, *supra*, at 676.

lateral basis the procedures established under Chapter 19 of the CFTA.[15] The three other dispute settlement mechanisms in the NAFTA system were added to the NAFTA or attached as supplements to deal with special issues that arose during the NAFTA negotiations.[16] The Chapter 11 process was patterned after the investor/host state dispute settlement mechanism established in U.S. bilateral investment treaties[17] to cover disputes that were expected to arise from exploitation of the increased access to investment provided for by the terms of the NAFTA. The NAALC and NAAEC were negotiated after the completion of the NAFTA negotiations as supplemental agreements to cover the trade-related impact of the free trade arrangement on the labor and environment of the participating countries.[18]

The decentralized NAFTA system operates by channeling certain types of trade conflicts into the appropriate specialized dispute settlement mechanism of limited jurisdiction and limited powers. Each dispute settlement mechanism consists in large part of *ad hoc* arbitral panels which issue reports to the disputants. The Chapter 20 mechanism is overseen by the central NAFTA institution, the Free Trade Commission.[19] It is authorized not only to resolve disputes but also to supervise the implementation of the agreement and to oversee the work of committees and working groups established under the agreement. The Free Trade Commission plays an oversight role and is involved in the conciliation process that proceeds the establishment of an arbitral panel. The Chapter 20 arbitral panels are actually adminis-

---

15 NAFTA Adm. Action Statement, *supra* note 14, at 164.

16 The Chapter 11 dispute settlement mechanism was added to deal with U.S. concerns that investors should have adequate access to dispute resolution regarding investment claims. NAFTA Adm. Action Statement, *supra* note 14, at 124-27. The NAALC and NAAEC were negotiated because then newly elected President Clinton had promised during the 1992 election campaign that he would not submit NAFTA to Congress without agreements on the labor and environmental impacts of NAFTA on the United States. Governor Bill Clinton, Expanding Trade and Creating American Jobs, Address Before North Carolina State University (Oct. 4, 1992), *in* 23 ENVT'L 683, 685 (1993) (stating that the United States must continue to pursue the protection of workers and the environment on parallel tracks with NAFTA); Harry Bernstein, *Clinton's NAFTA Endorsement*, L.A. TIMES, Oct. 13, 1992, at D3 (Gov. Clinton endorsed the NAFTA text but argued for the negotiation of supplemental agreements).

17 NAFTA Adm. Action Statement, *supra* note 14, at 124 ("This mechanism is patterned after the investor-state dispute settlement mechanisms of the standard U.S. bilateral investment treaty and permits an investor to submit its claim to binding arbitration under internationally-accepted rules.").

18 *Summary descriptions of NAFTA Supplemental Accords issued by U.S. Trade Representative Mickey Kantor, Aug. 13, 1993*, 10 Int'l Trade Rep. (BNA) No. 33, at 1385, 1390 (Aug. 18, 1993).

19 NAFTA, *supra* note 4, art. 2001(2), at 693.

tered by the NAFTA Secretariat.[20] The Secretariat, comprised of three sections, one in each of the NAFTA member states, also administers the Chapter 19 binational dispute panels and extraordinary challenge committees. Although these major dispute settlement mechanisms share this institutional supervision, the panel reports of the two arbitral processes are given different legal effect. The Chapter 20 panel reports have no direct effect on the domestic law or agencies of the state parties.[21] A Chapter 19 panel report is binding and serves as a replacement for domestic judicial review of antidumping or countervailing duty administrative determination.[22]

The Chapter 11 investor-state dispute mechanism provides for *ad hoc* binding arbitration under three alternative sets of arbitral rules.[23] No institutional oversight by a NAFTA organ is necessary, although the state parties are required to maintain a roster of suitable arbitrators.[24] The NAALC and NAAEC both have ministerial level councils and working secretariats to oversee the operation of arbitral panels set up by the terms of the two agreements.[25] Any arbitral panel report issued by either supplemental agreement only makes findings and recommendations leaving the two countries to adopt a "mutually satisfactory" action plan to address any particular labor or environmental problem.[26] The NAALC and NAAEC give the arbitral panel reports some legal effect. If the parties to a labor or environmental dispute fail to agree on an action plan or implement that action plan within a certain period of time, the panel may reconvene and approve the action plan, establish a plan consistent with the law of the offending state or impose a monetary assessment.[27]

Of the five dispute settlement mechanisms, only Chapter 19 and Chapter 11 produce arbitral reports with true binding effect. Differential treatment is provided for these two mechanisms because each has limited scope compared to the other three mechanisms. For example, any NAFTA-based trade conflict can be raised under Chapter 20. Similarly any aspect of domestic enforcement of labor or environ-

---

20 *Id.* art. 2002(3)(b), at 693.

21 *See* NAFTA Adm. Action Statement, *supra* 14, at 182 ("It bears repeating that panel reports presented under Chapter Twenty have no effect under the law of the United States.").

22 Endsley, *supra* note 14, at 669.

23 NAFTA Adm. Action Statement, *supra* note 14, at 124, 127.

24 *Id.* at 127.

25 NAALC, *supra* note 4, arts. 27-30, 37, at 1509-10, 1511; NAAEC, *supra* note 4, art. 33, at 1492.

26 NAALC, *supra* note 4, art. 38, at 1511; NAAEC, *supra* note 4, art. 33, at 1492.

27 NAALC, *supra* note 4, arts. 39-40, at 1511-12; NAAEC, *supra* note 4, arts. 34-35, at 1492-93.

mental legislation that is trade-related can come under scrutiny under the NAALC and NAAEC.

If the results of the operation of the CFTA dispute settlement system is added to that of the NAFTA, an interesting pattern of how the system has been used develops. The Chapter 20 dispute settlement system has to date issued only six panel reports.[28] The most recent case, the first brought under the NAFTA, has issued an interim Chapter 20 panel report that was expected to become final in November of 1996.[29] The Chapter 19 mechanism has handled eighty disputes from 1988 to 1996,[30] being used thirteen times more often than the Chapter 20 process. Of these eighty disputes, seventeen were terminated by the participants.[31] The remainder of the Chapter 19 disputes were completed by the issuance of panel determinations or remain active.[32] None of the matters considered under the NAALC or NAAEC has yet reached the panel level.[33]

---

28 The five panel reports currently available are: (1) *Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Panel No. CDA-89-1807-01, 1989 FTAPD Lexis 6 (Oct. 16, 1989), *available in* LEXIS, Intlaw Library, USCFTA File; (2) *Lobsters From Canada*, Panel No. USA-89-1807-01, 1990 FTAPD Lexis 11 (May 25, 1990), *available in* LEXIS, Intlaw Library, USCFTA File; (3) *Treatment of Non-Mortgage Interest Under Article 304*, Panel No. USA-92-1807-01 (June 8, 1992), *reprinted in* NORTH AMERICAN FREE TRADE AGREEMENTS, DISPUTE SETTLEMENT, BINDER NO. 2, BOOKLET B. 17 (James R. Holbein & Donald J. Musch eds., 1994); (4) *Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*, Panel No. USA-93-1807-01, 1993 FTAPD Lexis 18 (June 3, 1993) *available in* LEXIS, Intlaw Library, USCFTA File [hereinafter *U.H.T. Milk from Quebec*]; (5) *The Interpretation of and Canada's Compliance With Article 701.3 with Respect to Wheat Sales*, Panel No. CDA-92-1807-01 (Feb. 8, 1993), *reprinted in* NORTH AMERICAN FREE TRADE AGREEMENTS, DISPUTE SETTLEMENT, BINDER NO. 2, BOOKLET B. 18 (James R. Holbein & Donald J. Musch eds. 1994). The sixth panel report has not yet become final.

29 The sixth case was brought by the United States and involved a claim that the higher-level tariffs that Canada began to apply in January of 1995 on poultry, eggs, barley (and products made of them) as well as dairy products violated NAFTA obligations to eventually phase out all tariffs between the Countries. *NAFTA Chapter 20 Panel Selected in Farm Tariff Flap With Canada*, 13 INT'L TRADE REP. (BNA) 104 (Jan. 24, 1996). *NAFTA Panel Rules Against U.S. in Row over Canadian Tariffs on Dairy Imports*, 13 INT'L TRADE REP. (BNA) 1159 (July 17, 1996); *Glickman Says U.S. will Examine Options, Legal Remedies in NAFTA Farm Ruling*, 13 INT'L TRADE REP. (BNA) 1214 (July 24, 1996). The sixth panel report has not yet been finalized because the parties have continued to make submissions. *NAFTA Dairy Panel Final Report Delayed Again*, 13 INT'L TRADE REP. (BNA) 1492 (Sep. 25, 1996).

30 NAFTA SECRETARIAT, U.S. SECTION, STATISTICAL SUMMARY OF DISPUTE SETTLEMENT PANELS UNDER THE NAFTA AND THE CFTA 1 (Feb. 5, 1996).

31 *Id.* at 1-2.

32 NAFTA SECRETARIAT, U.S. SECTION, STATUS REPORT OF FTA AND NAFTA: ACTIVE DISPUTE SETTLEMENT MATTERS 1-3 (Feb. 5, 1996).

33 There have been no NAFTA party requests for an arbitral panel to date under the NAALC or NAAEC. The U.S. National Administrative Office (NAO) under the NAALC has accepted two submissions from private parties but did not take either to the panel level. *See* Joaquin F. Otero, *The North American Agreement on Labor Cooperation: An Assessment of its*

These patterns of use yield no conclusive evidence about the role played by the dispute settlement mechanisms within the free trade arrangement. The NAFTA is not yet a fully realized free trade arrangement. The complete elimination of all tariffs between the United States, Canada and Mexico, the major element of the integration arrangement, has not yet been achieved.[34] Whether the general dispute settlement system under Chapter 20 will be invoked more frequently depends on (1) how the NAFTA plays out on the ground once the arrangement is fully operative and its economic impact on each country is more clearly felt and understood, and (2) whether the NAFTA parties make a strong effort to closely adhere to their NAFTA obligations[35] and to refrain from taking actions which upset the overall balance struck in the arrangement. The use of the Chapter 20 dispute settlement mechanism will also always depend on whether or not the NAFTA parties prefer to make use of the WTO dispute settlement system.[36]

The heavier use made of the Chapter 19 dispute settlement mechanism, thus far, underscores the fact that one of the most contentious trade issues between the NAFTA parties is the use by each country of unfair trade statutes aimed at dumping and government subsidies. It is unclear whether the best designed and efficiently run dispute settlement mechanism can do much to alleviate the "unfair trade" problem. The Chapter 19 dispute settlement mechanism was initially put in place in the CFTA as a temporary dispute settlement mechanism. Chapter 19 was created as a procedural solution for defusing political

First Year's Implementation, 33 COLUM. J. TRANSNAT'L L. 637, 654-61 (1995). *See also* Craig L. Jackson, *Social Policy Harmonization and Worker Rights in the European Union: A Model for North America*, 21 N.C.L. INT'L L. & COMM. REG. 1, 48-56 (1995). The Commission on Environmental Cooperation established under the NAAEC can receive, under Article 14, complaints by individuals or non-governmental organizations arguing that a NAFTA party is failing to enforce its environmental law effectively. The CEC can then investigate and determine whether or not the NAFTA party should respond. To date, the CEC has decided that the two petitions filed with it should not go any further. *See, Lumber Measures Didn't Result in failure to Enforce Laws, NAFTA Commission Rules*, 13 INT'L TRADE REP. (BNA) No. 7 (Jan. 3, 1996).

34 NAFTA, *supra* note 4, art. 302, at 300, Annex 302.2, at 309-11. The phase-out of all tariffs is to be complete by January 1, 2008.

35 Canada and Mexico have recently requested consultations with the United States, the first step under Chapter 20, over the Helms-Burton legislation aimed at Cuba. One of the reasons Canada is pressing the issue is because it sees the U.S. action as a unilateral attempt to force its views on the other NAFTA parties. *U.S. Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 INT'L TRADE REP. (BNA) No. 12, at 476 (Mar. 20, 1996).

36 NAFTA itself recognizes that the participating countries have a choice of forum option in certain kinds of cases. *See generally* NAFTA, *supra* note 4, art. 2005(1), at 694 and text *infra* pp. 39-41, 47. In addition, the NAFTA parties may prefer the WTO system for various reasons. *See infra* note 174-87 and accompanying text.

disputes over unfair trade actions because the United States and Canada were unable to agree on a substantive legal determination about how to operate a free trade area while simultaneously bringing such actions.[37] Chapter 19 moved unaltered[38] in design from the CFTA to the NAFTA and has continued to be used as the three governments have failed to reach any negotiated understanding about how to resolve this problem.[39]

The MERCOSUR has not yet established a permanent dispute settlement system. In 1991, Brazil, Argentina, Uruguay and Paraguay entered into a regional economic integration agreement that declared as its purpose the establishment of a common market.[40] The Treaty of Asuncion, however, was not drafted with a great deal of specificity regarding the institutional framework for the integration arrangement or the rights and obligations created for the parties, the very provisions necessary to explain how countries would achieve the common market. From the wording of the key institutional provisions of the treaty, it is clear that it was designed as a transition agreement meant to be supplemented by later agreements which would actually provide the details of the structure of the MERCOSUR and how the common market would come about.[41] The Treaty of Asuncion, therefore, established only a skeletal framework for the necessary institutions. Seven articles of the treaty describe the two political institutions that were supposed to administer and implement the treaty during the

---

37 M. Jean Anderson and Jonathan T. Fried, *The Canada-U.S. Free Trade Agreement in Operation*, 17 CAN.-U.S. L. J. 397, 408 (1991). According to Anderson:

> Chapter 19 came about in an unusual way. As Mr. Fried indicated, the subsidies issue was, potentially, a deal breaker; and it nearly broke the deal. . . .[T]he two governments did not set out to negotiate a dispute settlement system. Rather, they sought to negotiate subsidies, countervailing duties, antidumping and other unfair trade practices.
>
> The Chapter 19 system was in some respects accidental; a result of the fact that the United States and Canadian governments were politically unable at the time to risk the domestic political reactions they anticipated to a subsidies agreement.

Id. at 408.

38 NAFTA Adm. Action Statement, *supra* note 14, at 164.

39 NAFTA did establish a working group that was to make recommendations by the end of 1995 about reforming the antidumping and countervailing duty laws. No real progress was made on these issues. Canada continues to believe that the use of these unfair trade statutes has corrosive effects on the operation of NAFTA. *See Trade Remedy Laws Are Impediments to Full NAFTA Access, McLaren says,* 12 INT'L TRADE REP. (BNA) 730 (Apr. 18, 1995). *See also* Charles M. Gastle, *Policy Alternatives for Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanism,* 26 LAW & POL'Y INT'L BUS. 735, 819-20 (1995) [hereinafter *Alternatives for Reform*].

40 Treaty of Asuncion, *supra* note 6, art. 1, at 1044-45.

41 *Id.* arts. 3, 5, 9, 16, at 1045-48.

transition period (1991-1994), the Council of the Common Market and the Common Market Group.[42]

The Treaty of Asuncion offered even less guidance on the issue of dispute settlement. According to Article 3 of the Treaty, the parties were charged with adopting a permanent system for the settlement of disputes at some time during the transition period on the way to the common market.[43] Annex III of the Asuncion Treaty reiterated that requirement and also charged the Common Market Group of the MERCOSUR with proposing to the countries a system for the settlement of disputes that would operate during the transition period.[44] The first decision of the chief political organ of the MERCOSUR, the Common Market Council, was to approve the interim dispute settlement system proposed to it.[45] The Brasilia Protocol to the treaty establishes a dispute settlement system that was to remain in force until the permanent dispute settlement system for the common market was set up.[46]

Following the Brasilia Protocol, the next major MERCOSUR agreement adopted was the Protocol of Ouro Preto.[47] Completed in 1994, the original ending date for the transition period of the MERCOSUR, the Protocol of Ouro Preto created the permanent political institutions of the MERCOSUR[48] and extended the transition period for the economic integration process to 2006.[49] The Protocol of Ouro Preto, however, did not contain the permanent dispute settlement system envisioned by the Treaty of Asuncion. Instead, the Protocol of Ouro Preto incorporates the interim dispute settlement system[50] and recommits the MERCOSUR parties to the negotiation

---

42 *Id.* arts. 9-18, at 1047-48.

43 *Id.* art. 3, at 1045.

44 *Id.* Annex III, at 1059.

45 *See* Thomas Andrew O'Keefe, *An Analysis of the MERCOSUR Economic Integration Project From a Legal Perspective,* 28 INT'L LAW. 439, 445 (1994) [hereinafter *MERCOSUR Analysis*]. The Brasilia Protocol was later ratified by the legislatures of all the MERCOSUR parties and entered into effect in 1993. *Id.*

46 *See* Protocol of Ouro Preto, *supra* note 6, at art. 44. The Treaty of Asuncion actually contemplated that the permanent dispute settlement system would be established by the end of the original transition period (Dec. 31, 1994). Treaty of Asuncion, *supra* note 6, at art. 3.

47 Protocol of Ouro Preto, *supra* note 6.

48 *Id.*, arts. 1-33.

49 *Id.*, art. 44; Thomas Andrew O'Keefe, *The Prospects of MERCOSUR's Inclusion into the North American Free Trade Agreement (NAFTA),* 8 INT'L L. PRACTICUM 5, 6 (1995); Horacio D. Bercun, *Solucion de Controversias: Control de Supranacionalidad Normativa [The Solution of Controversies: Control of Supranational Norms],* LA LEY, June 15, 1995, at 3 (Simon Purnell trans., 1996) (on file with the author).

50 Protocol of Ouro Preto, *supra* note 6, art. 43.

of a permanent dispute settlement system.[51] In addition, the Protocol specifies that one of the two political institutions, the MERCOSUR Trade Commission, will have the authority to consider trade complaints referred to it by the national sections of the commission.[52] These complaints can come from the MERCOSUR state parties or citizens of the MERCOSUR states.[53] The Protocol of Ouro Preto thus clarifies the dispute settlement process for trade complaints initiated by individuals (natural or legal) as well as governments.

Whether a complaint comes from a state party or an individual, it may ultimately be resolved by arbitration in the MERCOSUR system.[54] The process that must be followed to obtain an arbitral decision on a complaint, however, varies based upon the status of the initiator of the complaint.[55] State parties are required to go through direct negotiations and a conciliation process prior to invoking the right to a three member arbitral panel.[56] Individual complaints, which must be presented by the respective state government of the individual to the appropriate MERCOSUR institution, have to proceed to an administrative review.[57] If the administrative review fails to produce a consensus view on the claim or the offending state fails to comply with the recommendation issued by the appropriate authority, the representative complainant state can then turn to arbitration.[58] The arbitral process established under the Brasilia Protocol produces decisions that are final and binding.[59] There is no right to appeal an adverse panel decision, but the parties are allowed to seek a clarification of the panel decision or an interpretation from the panel on how to comply with the arbitral ruling.[60]

---

51 *Id.* art. 44. Before the common external tariff convergence process is complete, the states parties shall review the present MERCOSUR dispute settlement system with a view to adopting the permanent system referred to in paragraph 3 of Annex III to the Treaty of Asuncion and Article 34 of the Brasilia Protocol.

52 *Id.* art. 21 and Annex.

53 *Id.* art. 21 and Annex art. 1.

54 Brasilia Protocol, *supra* note 5, ch. IV, at 1-2.

55 The Brasilia Protocol established two different paths for complaints by states parties (chs. II-IV) and complaints by private parties (ch. V). The Protocol of Ouro Preto retained the distinction. Protocol of Ouro Preto, *supra* note 6, at Annex.

56 Brasilia Protocol, *supra* note 5, art. 9 (1), at 1.

57 *Id.* ch. V, arts. 25-32, at 2-3 for complaints about general MERCOSUR obligations. Protocol of Ouro Preto, *supra* note 6, at art. 21 and Annex for complaints relating to MERCOSUR trade policies.

58 Brasilia Protocol, *supra* note 5, art. 7, at 1.

59 *Id.* art. 21, at 2.

60 *Id.* art. 22, at 2.

The dispute settlement system under the Brasilia Protocol has never been used. All disputes between the MERCOSUR governments have thus far been handled by political negotiations and apparently without disrupting the integration arrangement.[61] As with the NAFTA, this lack of use can be partly ascribed to the fact that the system has been operative only since 1993. Similarly, the lack of use may come from the fact that the MERCOSUR is an integration arrangement in transition. The MERCOSUR arrangement has reached the free trade area[62] and is working towards the convergence of the common external tariff[63] which would make it a customs union. The MERCOSUR to date has made only small steps towards the formation of the common market.[64]

The design of the NAFTA and the MERCOSUR dispute settlement systems appears to be quite similar. Neither integration arrangement establishes a supranational institution, such as a court, authorized with the power to resolve disputes. Instead of an adjudicatory institution, the NAFTA and the MERCOSUR have put into place dispute settlement processes that culminate in arbitral panels and panel rulings. For the major trade disputes – those going to the meaning and application of the agreement's obligations – both systems emphasize negotiated solutions rather than adjudication.[65] If the

61 There have been issues that would drive most countries to use a dispute settlement mechanism. In 1995, Brazil took action to limit automobile imports by increasing tariffs on them to 70%. Brazil not only took this action against countries outside the MERCOSUR but also failed to exempt Argentine vehicles. Other countries threatened action before the WTO. *WTO's MERCOSUR Working Party Sidesteps Dispute over Brazil's Auto Import Quota*, 20 INT'L TRADE REP. (BNA) 1678 (Oct. 11, 1995). Argentina, by contrast, negotiated with Brazil and the two countries settled the matter. Even more recently, Japan asked for formal consultations under the WTO dispute settlement system regarding the auto policy. *Japan Seeks WTO Talks on Brazilian Auto Policy*, 13 INT'L TRADE REP. (BNA) 1280 (Aug. 7, 1996). Brazil's President Cardoso has joked that the automobile dispute "was a small matter settled over a lunch." *South America Getting Together*, THE ECONOMIST, June 29, 1996, at 65.

62 The greatest progress made by the MERCOSUR parties has been towards removing all barriers to trade among the member states, but in 1994 the MERCOSUR countries agreed that full implementation of the free trade zone would not occur until 1999 for Argentina and Brazil and 2000 for Uruguay and Paraguay. Thomas Andrew O'Keefe, *The Prospects for MERCOSUR's Inclusion into the North American Free Trade Agreement (NAFTA)*, 8 INT'L LAW PRACTICUM 5 (Spring 1995) [hereinafter *MERCOSUR Prospects*] (According to O'Keefe, "the vast majority of goods are now traded among the four duty-free effective January 1, 1995.").

63 *See* Protocol of Ouro Preto, *supra* note 6, at Preamble, art. 44

64 *MERCOSUR Prospects*, *supra* note 62, at 6 (MERCOSUR has not yet dealt at all with the issue of free movement of labor and "the level of coordination of policies that has been achieved to date among the MERCOSUR countries with respect to such things as macroeconomic and exchange rate policies has been minimal at best.") *Id.*

65 *Compare* Chapter 20 of NAFTA, *supra* note 4, arts. 2006-07, at 694-95 *with* Brasilia Protocol, *supra* note 5, arts. 2-6, at 1.

parties fail to negotiate a solution, each agreement also provides for administrative conciliation designed for avoiding the panel process and any panel determination.[66]

Apart from these basic design similarities, however, the two dispute settlement systems are quite different. The NAFTA system is actually a collection of different *ad hoc* dispute settlement mechanisms, most of which are not intended to issue binding determinations, thus leaving the NAFTA parties to resolve the dispute through negotiations. The MERCOSUR dispute settlement system does not yet have a determined design. However, the interim system, which may or may not create the basis for the permanent system, is a unified system. Moreover, the MERCOSUR system has little administrative structure, but it does give the *ad hoc* arbitral panels set up under the terms of the Brasilia Protocol the power to produce binding determinations.

It is possible to attribute the differences between the two systems to the very different way each system's participating countries have dealt with three factors – their economic goals, the political constraints they faced in attempting to enter into a larger economic unit and the way in which they understand dispute settlement itself. It is much more difficult to account for the overall design similarity between the systems of two such different economic integration arrangements – the avoidance of institutionalism and the preference for political resolution of disputes.[67]

The NAFTA and the MERCOSUR have widely divergent economic goals, at least with regard to the relationship being created between the core member states.[68] The NAFTA aims only at creating a

---

66 NAFTA, *supra* note 4, art. 2007, at 695; Brasilia Protocol, *supra* note 5, arts. 4-6, at 1.

67 *See supra* text at pp. 875-63 and accompanying notes. *See generally* Maria Haines-Ferrari, *MERCOSUR: A New Model of Latin American Economic Integration*, 25 CASE W. RES. J. INT'L 413, 425 (1993) [hereinafter Haines-Ferrari] ("[T]he Treaty of Asuncion lacks not only a coherent comprehensive normative body, but it also lacks a fully developed institutional structure capable of remodeling municipal legislation in order to ensure (throughout the MERCOSUR area) unhindered movement and non-discriminatory access to the development of economic activities by citizens of any Member State.") *Id.*

68 MERCOSUR is attempting to achieve a common market among Brazil, Argentina, Paraguay and Uruguay, but it has also actively pursued joining MERCOSUR to other countries through free trade area agreements. MERCOSUR has already signed a framework agreement for this type of relationship with the European Union. *EU, MERCOSUR Nations to Sign Cooperation Accord in Madrid*, 12 INT'L TRADE REP. (BNA) 2070 (Dec. 31, 1995). The MERCOSUR countries joined Chile to MERCOSUR through a free trade agreement in June of this year. *Chile, MERCOSUR Nations to Sign Free Trade Agreement on June 25*, 13 INTL'L TRADE REP. (BNA) 514 (Mar. 27, 1996) (most of the tariffs will be lowered within fifteen years); David Pilling, *Bolivia to Sign Free Trade Pact with Mercosur*, FIN. TIMES, June 26, 1996, at 5.

GATT-consistent free trade arrangement.[69] The MERCOSUR's declared purpose is to establish a common market.[70] The economic integration goals of the NAFTA, if limited only to GATT requirements for a free trade arrangement, are modest. To benefit fully from a free trade agreement, a member country only has to eliminate trade restrictions vis-à-vis the other member states of the arrangement. GATT-consistency is achieved if all members of the arrangement eliminate all duties and any other restrictions on "substantially all trade."[71] The member states of a free trade agreement do not have to treat non-members alike.[72] As a result, each state can retain its own

---

69 NAFTA, *supra* note 4, art. 101, at 297. "The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area." There were similar provisions in the CFTA and the Israel-U.S. Free Trade Agreements. *See* CFTA, *supra* note 6, art. 101, at 293.

70 Treaty of Asuncion, *supra* note 6, art. 1, at 104-5.

> This common market shall involve:
> • The free movement of goods, services and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures;
> • The establishment of a common external tariff and the adoption of a common trade policy in relation to third States or groups of States, and the coordination of positions in regional and international economic and commercial forums;
> • The coordination of macroeconomic and sectoral policies between the States Parties in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications and any other areas that may be agreed upon, in order to ensure proper competition between the States Parties;
> • The commitment by States Parties to harmonize their legislation in relevant areas in order to strengthen the integration process.

Id.

71 Article XXIV of the GATT defines a free trade area as one in which:

> 5(b) [W]ith respect to a free-trade area . . . the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area . . . shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area . . . .
> (8) For purposes of this Agreement:
> . . . .
> (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce . . . are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

General Agreement on Tariffs and Trade, art. XXIV(5) (b), (8) (b), *opened for signature* Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT], *reprinted as amended in* 4 BASIC INSTRUMENTS AND SELECTED DOCUMENTS [B.I.S.D.] at 42-43 (1969). Nothing in the Article XXIV requirements for free trade areas suggests that the participating countries have to share law-making in any area. Instead the requirements are limited to the coordinated elimination of trade barriers.

72 Article XXIV of the GATT on free trade areas and customs unions offers countries which comply with its requirements an exception to the GATT obligation of Most Favored Nation (MFN) (Article I). Technically, the GATT (now the WTO) was supposed to sanction only those regional agreements which satisfied Article XXIV. In reality, the GATT approved or did not disapprove of almost all regional arrangements reported to it. *See* Kenneth W. Dam, *The*

tariff schedule and the power to alter it as long as it does not increase its tariffs following the formation of the free trade area.[73]

A review of the NAFTA reveals that it does not require the states to take any steps towards positive integration, such as the adoption of harmonized legislation.[74] Many of the free trade arrangement goals are actually met by border measures (the phasing out of tariffs) or the elimination of other non-tariff barriers to trade. For all other matters, a NAFTA member state must now follow the same international trade obligations it would otherwise assume under the most recent version of the GATT.[75] At the time it was negotiated, the NAFTA actually covered areas that were not yet within the GATT system. Even after

---

GATT in *Law and International Economic Organization*, at 275-76. *See also* Robert E. Hudec, *Discussion on GATT's Influence on Regional Arrangements in* NEW DIMENSIONS IN REGIONAL INTEGRATION 154-58 (1993).

73 *See* Article XXIV, *supra* note 71.

74 A distinction has been suggested for different types of integration efforts. Negative integration by countries would involve the removal of discrimination in national economic rules and policies under joint and authoritative surveillance. Positive integration would involve the transfer of "public-market-rule-making and policy-making powers from the participating politics to the union level." JACQUES PELKMANS, THE INSTITUTIONAL ECONOMICS OF EUROPEAN INTEGRATION, 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE 318, 321, 340-41 (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986) [hereinafter PELKMANS].

75 At the time NAFTA was being negotiated, it was actually more expensive than the existing GATT rules. When the Uruguay Round was limping along in the early 1990's, the United States continued pushing its goal of getting disciplines over other sectors of trade – like services – or trade-related problems like intellectual property or investment, covered by its regional trade policy of entering into free trade agreements.

Although FTAs, like the GATT, may once have been interpreted as addressing mainly tariffs or other border measures between countries, today multilateral . . . and bilateral agreements address a wide range of non-tariff matters. Existing United States' FTAs with Israel and Canada extend to services, investment and intellectual property rights protection, areas which have yet to be subject to multilaterally agreed rules. ITC NAFTA Report, *supra* note 8, at xix.

Now that the Uruguay Round has been passed and the NAFTA member countries are members of the WTO, each of the countries would be subject to all the multilateral covered by the *Marrakesh Agreement Establishing the World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA (Apr. 15, 1994) [hereinafter *WTO Agreement*]. *The Final Act* is *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (GATT Secretariat, Geneva Apr. 14, 1994) [hereinafter *The Final Act*]. Those agreements include: General Agreement on Tariffs and Trade 1994; Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of the GATT 1994; Agreement on Pre-shipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; and Agreement on Safeguards. The other major agreements are the General Agreement on Trade in Services (GATS), Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs); and Agreement on Establishing the Trade Policy Review Mechanism. *WTO Agreement, supra*, List of Annexes, at xx.

the completion of the Uruguay Round, the NAFTA still has provisions which provide greater access to investment markets than the GATT and some provisions with regard to environmental, health and safety standards that urge parties to seek to approximate their regulations.[76] But even in these remaining GATT plus areas, the NAFTA does not require the member states to adopt common or harmonized standards but instead to apply their national standards on a non-discriminatory basis.[77]

The level of economic integration being sought by participating countries inevitably has consequences upon the level of institutionalism chosen for the economic integration agreement. The elimination of trade barriers necessary for a free trade area can be achieved by a group of countries with a minimum of institutional structures.[78] The NAFTA has no need for political institutions with supranational authority since the integration arrangement does not contemplate any ongoing need to legislate to achieve its goals. The minimalist approach to institutionalism could therefore be applied as well to the dispute settlement system. The result is the type of decentralized and *ad hoc* dispute settlement mechanisms that exist in the NAFTA.

The economic integration goals of a common market are much more extensive.[79] The constituent members of such an arrangement not only eliminate all internal barriers to trade but begin to adopt a common commercial policy when they agree to establish a common

---

76 Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917, 936 (1992).

77 *See generally* NAFTA, *supra* note 4, arts. 712, 1703, at 377-78, 671.

78 In order to put a free trade area in place, the member countries have to agree to a schedule for the removal of tariff and non-tariff barriers. There is no obligation, however, to work on common policies. JOHN LAMBRINIDIS, THE STRUCTURE, FUNCTION AND LAW OF A FREE TRADE AREA 7 (1965) (free trade areas "preserve most of the national prerogatives for independent action") [hereinafter LAMBRINIDIS]. The European Court of Justice confronted the difference between free trade areas and customs unions when reviewing the dispute settlement provisions of the European Economic Area agreement and found the EC to be pursuing purposes beyond economic relations and that its "rules on economic freedoms are merely the means to achieve these objectives." Kurt Reichenberg, *The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues*, 4 TULANE J. INT'L & COMP. L. 63, 87 (1995).

79 *See* Treaty of Asuncion, *supra* note 4, art. 1, at 1044-45 which sets out all of the aspects of a common market according to MERCOSUR states. According to economists, a true common market involves the free intra-union movement of all factors of production, abolition of all restrictions and harmonization in banking laws, mergers, bankruptcy, the formation of a common competition policy and aid for industry. PELKMANS, *supra* note 74, at 332-33. *See also* Jaime de Melo et al., *The New Regionalism: A Country Perspective in* NEW DIMENSIONS IN REGIONAL INTEGRATION 159, 176 (Jaime de Melo & Arvind Panagariya eds., 1993).

external tariff.[80] If the participating member states seek the free movement of goods, services, labor and capital[81] that are the essential elements of a common market, they must go on to develop common trade and commercial policies which every member state would have to implement properly.[82] The depth of legislative coordination required to achieve these economic goals would appear to require the member states of a common market to cede large portions of sovereignty to an institutional structure capable of not only implementing such integration but also policing whether member states follow through with their obligations.[83] Without a strong institutional structure a common market could only be created by countries capable of achieving a political consensus on the content and implementation of each common commercial policy.[84]

The MERCOSUR has been designed to reflect its member states' desire to achieve economic integration through political cooperation

---

80 LAMBRINIDIS, *supra* note 78, at 6. Members of a customs union by initial commitments to a common commercial policy have, at the earliest moment, taken an immediate step toward policy integration. [This step] makes it easier for them to supplement rules on free movement of goods with effective rules in free movement of capital, services, persons, and to supplement rules of competition with the harmonization of social, monetary, economic and other policies, designed to bring about an equalization of cost elements in production and to minimize the benefits which large markets are expected to yield." *Id.*

81 *See supra* note 2.

82 It is not enough for the countries forming an economic integration arrangement to set out goals or even to pass legislation that would achieve those goals. There must be some way to ensure that the participating countries actually adopt the common market legislation and implement it within their country. MERCOSUR's decision to leave all decision-making on a member state consensus level and the absence of a central adjudicative authority could mean that implementation will be difficult to complete. Any member state which does not apply the proper new measures will, in effect, be creating a barrier to trade within the common market. During the European integration process, there were periods in which the member states could not agree on EC Commission proposals and the ECJ instead had to lead the process by issuing decisions that at least struck down barriers to trade. *See* William J. Davey, *European Integration: Reflections on its Limits and Effects*, 1 IND. J. GOBAL LEGAL STUD. 185, 198 (1993) [hereinafter Davey]; Martin Shapiro, *The Globalization of the Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 52 (1993).

83 According to Pelkmans there are certain "institutional properties of integration." These include, among others:

1) a treaty which contains "stringent commitments with respect to the *transfer* of certain economic functions to central public agents and the constraint of some national instruments."

2) rather sophisticated modes of judicial review. "A central court is more likely to be established the more ambitious the integration venture is, especially in a larger group."

PELKMANS, *supra* note 74, at 322-23.

84 Given the many trade and economic policies the parties have to decide upon together if the economic integration arrangements lack a central and powerful institutional body devoted to integration there must be a substitute. The only substitute is member state cooperation on the creation of the common policies and complete adherence by each member state to the common policies (i.e., by putting them into place within the country).

rather than institutionalism. The Protocol of Ouro Preto did develop a detailed institutional structure for the MERCOSUR. The Protocol establishes a Common Market Council, a Common Market Group and a MERCOSUR Trade Commission[85] each of which is given power to make legislative decisions that are declared by the Protocol to be binding on the member states.[86] Nevertheless, the institutions are not given supranational authority. Several articles of the Protocol of Ouro Preto clearly indicate that the MERCOSUR institutions will make decisions only on a consensus basis,[87] and the state parties are required to take all measures necessary to secure compliance with the MERCOSUR decisions.[88] The states are, therefore, responsible for

85 The Council of the Common Market (CCM) is the highest organ of MERCOSUR and responsible for all of the political decisions necessary to establish the common market. The CCM is comprised of the Ministers of Foreign Affairs or the Ministers of Economy of each MERCOSUR State. Protocol of Ouro Preto, *supra* note 6, arts. 3, 4. The CCM is thus charged with supervising the implementation of the Treaty of Asuncion, its protocols and associated agreements, formulate the policies necessary for building a Common Market, ruling on proposals for MERCOSUR decisions submitted to it by the Common Market Group and to clarify the substance and scope of MERCOSUR decisions. *Id.* art. 8. The Common Market Group composed of representatives from the Ministries of Foreign Affairs, Economy and the Central Banks are supposed to draft the MERCOSUR decisions and propose them to the CCM as well as take the measures necessary to enforce the decision adopted by the CCM. *Id.* arts. 11, 14. The Common Market Group is also empowered to conduct (within the limits provided by the CCM) MERCOSUR trade negotiations with third countries or groups of countries. The MERCOSUR Trade Commission is required to assist the Common Market Group by monitoring the application by the Member States of the common trade policy instruments of MERCOSUR. This puts the MERCOSUR Trade Commission in charge of dealing with the common external tariff and all trade and customs matters. *Id.* art. 19. In addition to these duties, the MERCOSUR Trade Commission is also supposed to consider complaints referred to it by the National Sections of the Commission that come from Member States or individuals. *Id.* art. 21, Annex.

In addition to the organs, MERCOSUR also establishes a Joint Parliamentary Commission comprised of members of the respective national parliaments. The Joint Parliamentary Commission is meant to act as a liaison group between the national parliaments and the MERCOSUR institutions in order to speed up passage of MERCOSUR decisions within the Member States as to "assist with the harmonization of legislation, as required to advance the integration process." *Id.* art. 25.

86 All rulings of the Council of the Common Market take the form of decisions binding upon the State Parties. *Id.* art. 9. The decisions of the Common Market Group, called resolutions, are also binding on the MERCOSUR parties. *Id.* art. 20. The legislation produced by the MERCOSUR Trade Commission, on issues connected to the administration and application of the common external tariff and common trade policy, are directives and are also binding in nature. *Id.* According to Article 42, all decisions of MERCOSUR organs are binding and when necessary must be incorporated in the domestic legal systems. *Id.*

87 *Id.*, art. 37. "The decisions of the MERCOSUR organs shall be taken by consensus and in the presence of all the State Parties."

88 *Id.*, art. 38. The States Parties undertake to take all measures necessary to ensure, in their respective territories, compliance with the decisions adopted by the MERCOSUR organs provided for in Article 2 of this Protocol.

incorporating the MERCOSUR decisions into their own legal systems.[89]

Even if a common market can be achieved through political cooperation of the member states rather than led by a supranational authority, an economic integration arrangement requires some type of dispute settlement system. A dispute settlement system is always envisioned as part of any arrangement because the member countries foresee that there will be a political break down – that not all conflicts will be resolved by negotiations. The question then becomes which form the dispute settlement system should take. Given the lack of supranational institutions for the creation of the MERCOSUR law, the absence of a supranational dispute settlement institution is not surprising. Creating a powerful judicial institution for an arrangement designed to have minimal political institutions might even create an asymmetrical arrangement – a common market in which the court had more power than the political institutions. Moreover, the attempt to achieve a common market without supranational institutions devoted to the achievement of economic integration also placed the MERCOSUR well within the tradition of past Latin American integration efforts.[90]

The MERCOSUR nations are actually attempting to create an economic integration arrangement which lacks a fully developed constitutional framework.[91] The Treaty of Asuncion and the Protocol of

---

89 The Protocol does not put any time limitation on how quickly a State must incorporate MERCOSUR decisions into their domestic legal system. In an attempt to make sure implementation is uniform, however, the Protocol does set out a process for Member States to follow when MERCOSUR legislation is produced. *Id.* art. 42 (MERCOSUR decisions are to be "incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation."). The Member States of MERCOSUR are charged with implementing all decisions issued by the MERCOSUR institutions and reporting this to the MERCOSUR Administrative Secretariat. *Id.*, art. 40. When all the parties have incorporated the MERCOSUR legislation and the Administrative Secretariat has so informed, all parties the decisions will enter into force thirty days later. *Id.*

90 Most of the earlier Latin American economic integration arrangements, the Latin American Free Trade Area, its successor the Latin American Integration Arrangement, the Central American Common Market lacked supranational institutions for the creation of common legislation. *See generally* Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L. J. 127, 130-43 (1995) [hereinafter *Hemispheric Integration*]; Haines-Ferrari, *supra* note 67, at 413-19.

91 Neither the Treaty of Asuncion nor the Protocol of Ouro Preto can be called "constitution-like treaties." According to Professor Joel Trachtman, such a treaty exists when it provides the "bases for further legislation and adjudication." Such a treaty does "more than simply create substantive rules for application, but create[s] a method, beyond mere intergovernmentalism, for creating further substantive rules either through legislation or [sic] adjudication." Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L BUS. L. 33, 36 n.7 (1996).

Ouro Preto, by their terms, do not establish the MERCOSUR rights and obligations but instead set out integration goals.[92] The member states retain all the authority to define over time and on a consensus basis what the MERCOSUR will be. The exploratory nature of the MERCOSUR treaty commitments has undoubtedly affected the way the issue of dispute settlement has been handled.

The MERCOSUR's avoidance of institutions and its deliberate lack of precision about the legal rights being created leave it far apart from the only working model of a successful common market. The European experience has led to the widely shared perception that there must be institutions with "meaningful powers that have integration as one of their fundamental goals"[93] for market integration to occur. Europe had the necessary components in the European Commission and in the European Court of Justice (ECJ).[94] The European Commission pushed for integration and had achievement of that goal as its reason for existence.[95] The ECJ was designed to clarify the meaning of the treaty and enforce the treaty obligations and integration decisions reached by the Commission.[96] In the pivotal *Van Gend en Loos*[97] case, it was the ECJ that determined that the community constituted a "new legal order of international law for the benefit of which states have limited their sovereign rights."

If the economic goals of a common market would seem to dictate the need for a strong dispute settlement body, one with supranational powers, then why has that option not been pursued by the MERCOSUR countries? The absence of any supranational institutional bodies in the MERCOSUR can be traced both to political limi-

92 To illustrate this, compare the Treaty of Asuncion language about free movement of goods, services, labor and capital in Article I ("This common market shall involve: The free movement of goods and services and factors of production between countries through, *inter alia*, the elimination of customs duties and non-tariff restrictions on the movement of goods, and any other equivalent measures."), Treaty of Asuncion, *supra* note 6, at 1045, with provisions on these issues in the Treaty of Rome ("Freedom of movement for Workers shall be secured within the Community by the end of the transitional period."), Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 48, 298 U.N.T.S. 11, 36 [hereinafter Treaty of Rome]; "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings in particular companies or firms . . . ." *Id.* art. 52, at 37-38.

93 Davey, *supra* note 82, at 198.

94 Treaty of Rome, *supra* note 92, art. 155, at 71.

95 Davey, *supra* note 93, at 199.

96 Treaty of Rome, *supra* note 92, arts. 164-88, at 73-78; *See generally*, BERMANN ET AL., EUROPEAN COMMUNITY LAW 69, 166-76 (1993); Davey, *supra* note 93, at 200.

97 Case 26/62, *Van Gend en Loos v. Nederlandse Administraties der Belastinger*, 1963 E.C.R. 1, 2. *See also* Ernst-Ulrich Petersmann, *National Constitutions, Foreign Trade Policy and European Community Law*, 3 EUR. J. INTL'L L. 1, 15 (1992) [hereinafter Petersmann].

tations and perceptions about past Latin American integration efforts. The political limitations come from the domestic legal systems of the participating countries and the political realities of the MERCOSUR membership. Paraguay and Argentina have constitutions which recognize the possibility of supranational legal institutions.[98] Brazil and Uruguay, however, have constitutions that do not provide for the acceptance of MERCOSUR law.[99] The possibility exists that all the MERCOSUR countries may ultimately amend their constitutions to allow for a supranational legal order. To achieve some of the privatization goals set forth by the government, Brazil recently made major alterations to its constitution.[100] Even if the domestic legal limitations could be overcome, however, there remains the question of whether there is political power within the MERCOSUR group to force a constitutional change in any of the countries. Paraguay and Uruguay have such smaller markets and economic power that they cannot force

---

98 None of the MERCOSUR countries are monist states – states which allow international law to be incorporated without the need for domestic legislative action. Paraguay and Argentina, however, do recognize the possibility of a supranational legal order. *See MERCOSUR Analysis*, *supra* note 45, at 444 n.15 (concerning Paraguay); Horacio D. Bercun, *Las Asimetrias Juridicas en el Mercosur [The Legal Assymetries in MERCOSUR]*, IDEA, Aug. 1995, at 42. (Simon Purnell, trans., 1996) (on file with the author) (regarding Argentina). According to the Constitution of Paraguay:

> The Republic of Paraguay, on equal terms with other States, recognizes a supranational legal order that guarantees the validity of human rights, of peace, and justice, of cooperation and development, in political, economic, social, and cultural matters. Said decisions can only be adopted by an obsolute majority of each House of Congress.

PARA. CONST. art. 145, *quoted in* Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 603 n.36 (1995). According to the Constitution of Argentina the powers of Congress are:

> Approving integration treaties that delegate competency and jurisdiction to supranational organizations in equal and reciprocal terms, and that respect the democratic order and human rights. These standards have superior hierarchy to the laws. The approval of treaties with the states of Latin America will require an absolute majority of all members of each House. In the case of treaties with other states, the National Congress, with an absolute majority of members present in each House, will declare suitability of approving the treaty, which can only be approved with an absolute majority vote of all the members of each House, one hundred and twenty days after the declaration.

CONST. ARG. art. 75, cl. 24, *quoted in id. See also* Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 603 n.36 (1995), *citing* Nestor Pedro Sagues, *Los Tratados Constitutionales en la Reforma Constitucional Argentina [Constitutional Treaties in the Argentinian Constitutional Reform]* LA LEY, Nov. 1994.

99 *MERCOSUR Analysis*, *supra* note 45, at 444 n.15; *See also* O'Hop, *supra* note 90, at 173 (regarding Uruguay).

100 In 1995, the Brazilian Congress agreed to amendments to end the country's state monopolies over telecommunications, oil and mining. *The Fiscal Mire: Brazil (Economic Progress of President Fernando Henrique under Pressure)*, THE ECONOMIST, May 4, 1996, at 41. *See also* James F. Hoge, Jr., *Fulfilling Brazil's Promise: A Conversation with President Cardoso*, FOREIGN AFFAIRS, July/Aug. 1995, at 62 (Cardoso describing the constitutional changes that would be necessary to privatize).

action by the other two governments.[101] Similarly although Brazil's market size and power enable it to take actions which can negatively affect Argentina, it cannot force that country to take actions.[102] In addition to these political limitations, the participating MERCOSUR states have expressed a preference for minimal institutionalism over the establishment of a regional bureaucracy. The concern is that such a bureaucracy would not be closely linked to the political process in each country or the task of actually reducing trade barriers.[103]

There are only a limited number of ways in which countries negotiating an economic integration agreement could arrange to settle disputes – (1) by agreeing to handle all issues through negotiations; (2) by creating some form of third-party dispute resolution mechanism such as arbitration; or (3) by creating a court which would have the power to resolve disputes and issue decisions that would have legal effect in the domestic courts of the member states. No successful economic integration arrangement has followed the first model and most have eschewed the third one for political reasons. The exception is the European Community (EC) which did create a supranational court as a key structural element of the new system. Even the EC, however, had to cope with the phenomenon of creating a court for the community in an international treaty that "failed to declare clearly whether Community law would enjoy supremacy among the Member States."[104]

Most of the other economic integration arrangements have followed the second model and based their systems on ones which already existed. For the CFTA, the NAFTA's precursor, the model for a dispute resolution system was clearly the GATT dispute settlement system as it existed by the 1980's.[105] The GATT system had evolved quite significantly from its own beginnings in 1947.[106] Since the GATT was not a treaty designed to set up a multilateral institution, as

---

101 *See supra* note 9.

102 See *supra* note 61, for a discussion regarding the automobile dispute.

103 Frederick M. Abbott, *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration, in* WORLD TRADE ORGANIZATION SYSTEM 176-77 (1995) (the political power to actually make the trade policy changes necessary rests with the Executive branch in each MERCOSUR country).

104 Mauro Cappelletti and David Golay, *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration*, 261, 309 *in* 1 INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE (Mauro Capelletti, Monica Seccombe & Joseph Weiler eds., 1986) [hereinafter Cappelletti and Golay].

105 *See infra* text at 39-41 and accompanying notes.

106 *See generally* William J. Davey, *The WTO/GATT World Trading System: An Overview, in* 1 HANDBOOK OF WTO/GATT DISPUTE SETTLEMENT 13-77 (Pierre Pescatore et al. eds., 1996).

the Havana Charter for the International Trade Organization was, there was no institutional aspect to Article XXIII, the GATT provision devoted to dispute settlement. Once the GATT took on some institutional structure and began to employ Article XXIII to resolve disputes, it treated dispute resolution as a negotiating process. Over time the panel process was developed and panels began issuing decisions about the claims submitted to them.[107] It was this multilateral panel system with limited enforcement powers, not a fully developed dispute settlement body, that Canada and the United States looked to as the appropriate model and replicated, along with several improvements that the two countries considered necessary.[108]

The interim dispute settlement system of the MERCOSUR was similarly influenced by the design of the CFTA system.[109] Elements of the CFTA system, the first resort to consultations, followed by the use of *ad hoc* panels to resolve disputes are reflected in the Brasilia Protocol. The CFTA was apparently not the only model examined by the MERCOSUR negotiators. They also looked to the GATT dispute settlement system and to the one in the LAFTA arrangement.[110] The MERCOSUR did not completely duplicate any of these systems in creating the interim system it still retains. There are crucial differences between the CFTA system and the MERCOSUR system, for example, with regard to the binding nature of panel rulings as well as the scope of the jurisdiction of the dispute settlement system.

---

107 The early GATT dispute settlement system featured mediation like negotiations. Over time GATT developed the practice of submitting matters to panels of experts. OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL SYSTEM 77 (1987). *See also* Terence P. Stewart, *Dispute Settlement Mechanism, in* 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 2675-2720 (Terence P. Stewart ed., 1993) [hereinafter Dispute Settlement Negotiating History].

108 *See* U.S. Int'l Trade Comm'n, Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements, U.S.I.T.C. Pub. 1793 (Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 under Section 332(g) of the Tariff Act of 1930) (1985), at vi. The U.S. International Trade Commission studied the operation of the GATT dispute settlement system and noted that:

> [T]hree main problems with the GATT resolution process have been claimed: the time required to complete a case is too long; there are too many opportunities for the 'defendant' country to obstruct the process; and the complainant is often unable to ensure implementation of GATT decision, once reached.

Id. at v.

109 GARY CLYDE HUFBAURER & JEFFREY J. SCHOTT, WESTERN HEMISPHERIC ECONOMIC INTEGRATION 106 (1994)

110 Alejandro Pastori, *The Institutions of MERCOSUR: From the Treaty of Asuncion to the Protocol of Ouro Preto*, 6 Inter-Am. Legal Mat. (Nos. 3\4) 1, 2 (1994) [hereinafter *Institutions of MERCOSUR*]. The LAFTA dispute settlement system requires the countries to negotiate before invoking binding arbitration. Protocol Establishing the Final Mechanism for the Settlement of Disputes Within LAFTA, Sept. 2, 1967, *translation reprinted in* 7 I.L.M. 747, 747-49.

The delay by the MERCOSUR in adopting a permanent dispute settlement system may give the participating countries an opportunity to go beyond simply adapting a system developed for another economic integration relationship. The countries could perform an analysis of what the MERCOSUR dispute settlement system should be in order to facilitate the effective economic integration the countries so strongly desire. To date the MERCOSUR countries have found little consensus on what the appropriate system would be. At the time of the adoption of the Protocol of Ouro Preto, the MERCOSUR countries were unable to reach agreement on what kind of dispute settlement system to adopt[111] and, therefore, the Protocol simply retained the interim system. Three of the MERCOSUR parties had proposals for the design of the permanent dispute settlement system. The Uruguay proposal was to establish an independent institution with decision-making power.[112] The Argentine proposal would have established a consultative commission of jurists. Brazil wanted to retain the interim system established by the Protocol of Brasilia.[113] Only one of the proposals not adopted in 1994 would have provided the MERCOSUR with a different way of achieving its economic integration goals from that of its current system. The adoption of an independent institution with decision-making power suggested by Uruguay would have made the dispute settlement system itself, rather than political cooperation of the member states, the engine for the integration process. By contrast, the creation of a consultative commission of jurists as proposed by Argentina would have created the form of a "court" without any enforcement powers, thus leaving the member states with all of the power to resolve disputes. The limitations of the interim system have already been pointed out. The inability of the MERCOSUR parties to agree to any change in the current dispute settlement system means that the day of decision has only

111 The issue of the permanent dispute settlement system was on the agenda during the negotiations for the Protocol of Ouro Preto but was not resolved. Pastori, *supra* note 110, at 4, 7.

112 *Member Countries of MERCOSUR to Grant Legal Status to MERCOSUR Council*, BBC SUMMARY OF WORLD BROADCASTS, Oct. 11, 1994, available in LEXIS, World Library, BBCSWB File [hereinafter BBC SUMMARY]. The Uruguayan Proposal was close to what some commentators anticipated for MERCOSUR. *See Institutions of MERCOSUR*, *supra* note 110, at 4 ("It was clear that beyond any legal arguments on its convenience or timeliness, the creation of a Court of Justice appeared as a goal to be achieved in order to 'close' the circle in insuring legal certitude in the process.") *Id.* The Supreme Courts of Justice in each of the MERCOSUR countries have been meeting since 1991 to help develop a plan for a "judicial system for the market." Raul Annibal Etcheverry, *The MERCOSUR: Business Enterprise Organization and Joint Ventures*, 39 ST. LOUIS U. L. J. 979, 986 (1995).

113 BBC SUMMARY, *supra* note 112.

been postponed. The preference of Argentina and Brazil, the two dominant countries in the relationship, however, appears to be for minimizing the institutional structure and avoiding supranationality. If these views persist, then the MERCOSUR may end up with some variation on the interim system rather than a Court of Justice.

B. Jurisdiction: Standing to Pursue Complaints

It is impossible to assess the role played in an economic integration arrangement by a dispute settlement mechanism without reviewing its jurisdiction. There are two aspects to jurisdiction – the jurisdiction over persons (*ratione personae*) and over subject matter (*ratione materiae*). The NAFTA and the MERCOSUR treat the issue of jurisdiction over persons differently. In all of the dispute settlement mechanisms, except for Chapter 11, only the NAFTA parties can participate in the arbitral proceedings. Chapter 20 makes it clear that only the three NAFTA governments can initiate and pursue complaints within the NAFTA itself.[114] There is a limited form of indirect access granted to individuals (natural or legal) regarding the decision-making process of one NAFTA party, the United States, about whether it will initiate a NAFTA-based complaint. Under Section 301, the U.S. statute aimed at unfair trade actions by other countries which limit U.S. access to foreign markets, individuals are allowed to file petitions with the United States Trade Representative (USTR) about trade problems they encounter.[115] The USTR reviews these petitions and subsequently determines whether to pursue a case under the NAFTA dispute settlement system or the WTO system.[116] Under Chapter 19 the governments are also the only participants in the binational panel review. However, the citizens of the NAFTA parties do have a compulsory form of indirect access to the panel process. Any person otherwise entitled under the antidumping and countervailing

---

114 NAFTA, *supra* note 4, art. 2004, at 694.

115 Section 301 of the Trade Act of 1974, *as amended by* 19 U.S.C. §§ 2411-14 (1988 and Supp. VII 1995). Section 301 of the Trade Act of 1974 has actually been amended four times since 1974. *See* NAFTA Adm. Action Statement, *supra* note 14, at 182. Once the NAFTA enters into force, an interest person may file a petition with USTR requesting Section 301 in any case in which the person considers that another NAFTA government has failed to honor a provision of the Agreement or has caused the nullification or impairment of benefits that the United States could reasonably have anticipated under the Agreement. *Id.*

116 Trade Act § 301, *as amended by* 19 U.S.C. § 2412. NAFTA Adm. Action Statement, *supra* note 14, at 182-83. Although the USTR would pursue the case under Chapter 20, "[t]he USTR will seek information and advice from the private sector, including from the petitioner, if any, in preparing U.S. presentations for consultations and formal dispute settlement procedures." *Id.* at 183.

duty laws of its country to seek judicial review of such a determination can force its government to request Chapter 19 review of a particular administrative determination.[117] This provision of Chapter 19 means that the member governments are not the sole determinants of when dispute settlement is necessary. Nevertheless, the conducting of the review process in any dispute still falls to the government, and it is only the government that can pursue an extraordinary challenge to a panel ruling once it has been rendered.[118]

In the NAALC and the NAAEC, there is also no direct participation by individuals in the panel process,[119] although there is a certain level of access granted to the commissions for labor and environmental cooperation established under the agreements. Submissions can be made to the commission set up under each agreement by any non-governmental organization or person of a NAFTA country who asserts that a state party is failing to enforce its labor or environmental laws. Even within the supplemental agreements, however, the NAFTA parties make it easier for individuals to participate in one area - environment - as opposed to the other. In the NAALC, for example, the person or group is supposed to go to the National Administrative Office (NAO) its own government sets up under the terms of the agreement with its concerns.[120] The appropriate National Administrative Office is then supposed to perform an investigation about the issues raised in a complaint and determine whether or not to consult with another NAO or to suggest that the government seek consultations.[121] Under the NAAEC, by contrast, the Secretariat is charged directly with investigating private party complaints about a NAFTA party's failure to effectively enforce its environmental law and whether or not the submission merits a response from the state party.[122] If the Secretariat requests a response from the NAFTA gov-

117 NAFTA, *supra* note 4, art. 1904.5, at 683.

118 Since the Chapter 19 system serves as a replacement for domestic judicial review of the relevant unfair trade action, it had to be empowered to issue binding determinations. Once such power was given to Chapter 19 panels, however, the CFTA governments agreed that there should be some mechanism to check abuses of the panel system. Rather than create an appellate body, the governments agreed to the creation of an extraordinary challenge procedure. The extraordinary challenge procedure allows a party to request the formation of a three member committee to revise allegations of (1) panel misconduct; (2) panel departure from proper procedure; or (3) panel derogation from its powers or jurisdiction. The heated nature of antidumping and countervailing duty cases, as well as the novelty of the Chapter 19 process itself, led to the invocation of the extraordinary challenge procedure three times between 1991 and 1994.

119 NAALC, *supra* note 4, art. 27, at 1509; NAAEC, *supra* note 4, art. 24, at 1490.

120 NAALC, *supra* note 4, art. 16, at 1507.

121 *Id.*, arts. 21-22, at 1507-08.

122 NAAEC, *supra* note 4, art. 14 (1) and 14 (2), at 1488.

ernment that is the subject of the submission, that government is supposed to report about whether the matter is the subject of pending domestic proceedings or whether private remedies are available to the person or non-governmental organization which made the submission.[123]

Only the Chapter 11 dispute settlement mechanism allows for direct participation by individuals, without governmental involvement, in the arbitral proceedings.[124] A private investor can pursue a claim against a host government that has breached its obligations under Section A of Chapter 11.[125] The investor does not have to be a citizen of any NAFTA country but can be any enterprise with a significant business presence in any of the NAFTA countries.[126] Thus, the Chapter 11 mechanism allows not only private party redress but also the broadest possible redress for all private parties affected by the investment regimes of the NAFTA countries. The claims which entitle the investor to binding arbitration involve the most important claims that would arise out of an investment – including but not limited to government failure to provide national treatment, most favored nation treatment, and improper expropriation. The Chapter 11 mechanism provides for access to an arbitral panel if after six months the relevant government has not responded to an investor's notice of intent to submit a claim.[127] The private party must consent to the arbitration and waive the right to proceed in any domestic legal proceedings.[128] The NAFTA, however, provides for advance consent to such arbitration by the state parties to the free trade agreement.[129] The Chapter 11 mechanism is similar to the Chapter 19 process in that it serves as a replacement for a domestic judicial process.[130] The private party can pursue its own interests before the arbitral tribunal, and if it prevails, can then obtain a binding and enforceable award against the host state.[131]

The MERCOSUR interim dispute settlement system provides for claims by state parties as well as private parties (natural or legal persons). State party disputes are handled under the Chapters II-IV of

123 *Id.*, art. 14 (3), at 1488.

124 NAFTA, *supra* note 4, art. 1116, at 642.

125 *Id.* An investor can also submit a claim for arbitration if a NAFTA party has had a monopoly act in a manner inconsistent with the Party's obligation under Section A of Chapter 11.

126 *Id.* art. 1139, at 647 (definitions for investment and investor) and art. 117, at 643 (claim by an investor of a Party on behalf of an enterprise).

127 *Id.* art. 1120, at 643.

128 *Id.* art. 1121, at 643.

129 *Id.* art. 1122, at 644.

130 *See* NAFTA Adm. Action Statement, *supra* note 14, at 125.

131 NAFTA, *supra* note 4, art. 1136, at 646.

the Brasilia Protocol.[132] State parties are supposed to pursue complaints against one another by direct negotiations, then proceed to conciliation with the Common Market Group of the MERCOSUR which stands ready to offer a proposed solution and, finally, if the parties cannot agree to arbitral proceedings.[133] Private party claims are handled under Chapter V of the Brasilia Protocol as modified by Annex to the Protocol of Ouro Preto.[134]

A private party does not have direct access to the MERCOSUR dispute settlement system. The private party must present its claim to its own National Section of the Common Market Group or the MERCOSUR Trade Commission in different types of cases. What this means is that access to the dispute settlement process is channeled through the government of the private party's place of residence or center of business.[135] The private party must then proceed to persuade its own National Section of the basis for its claim against another MERCOSUR party.[136] It is up to the complainant National Section to determine whether or not to seek consultation with the National Section of the offending country or to submit its claim to the full Common Market Group or the MERCOSUR Trade Commission.[137] The real power to make a private claim actionable, therefore, rests with the government that is first approached with the problem. The National Section, and therefore the government, has complete discretion whether to proceed with the claim or to simply reject it.

Even if a private party claim is pursued, it must work its way through several layers of administrative review before it can be taken to arbitration. The purpose of these levels of review is an attempt to achieve a consensus decision by all the MERCOSUR states on how to resolve the complaint. If the National Section proceeds with a private party initiated complaint in the MERCOSUR system, the complaint will be considered by the full Common Market Group or the MERCOSUR Trade Commission, both of which are authorized to

132 Brasilia Protocol, *supra* note 5, arts. 2-24, at 1-2.

133 *Id.* arts. 2-3, at 1 (direct negotiations); arts. 4-6, at 1 (Common Market Group Intervention); arts. 7-22, at 1-2 (arbitration procedures).

134 *Id.* arts. 25-32, at 2-3 (administrative process); arts. 7-22, at 2-3 (if the claim goes on to arbitration). The Annex to the Protocol of Ouro Preto applies if a private party is complaining about issues relating to MERCOSUR trade policy (issues relating to the common external tariff or common trade policy instruments). Protocol of Ouro Preto, *supra* note 6, at Annex, art. 1.

135 Brasilia Protocol, *supra* note 5, art. 26 (1), at 3.

136 *Id.* art. 26 (2), at 3 ("The private parties must present the elements which will allow the referred National Section to determine the likelihood of the violation and the existence or threat of a prejudice.")

137 *Id.* art. 27, at 3; Protocol of Ouro Preto, *supra* note 6, at Annex, art. 2.

make a decision or refer the matter to a three member committee comprised of experts.[138] The committee is supposed to make findings and refer the matter back to the Common Market Group or the Trade Commission.[139] At this point the process differs based on whether the private party is pursuing a claim about trade matters before the MERCOSUR Trade Commission or some other claim of a MERCOSUR violation before the Common Market Group. If no consensus can be reached by the MERCOSUR Trade Commission on a trade complaint, the matter then goes up to the Common Market Group for a decision.[140] If the claim is justified, the offending State is supposed to comply with the recommended solution of the Common Market Group. Should the offending state fail to do so, the trade complaint can proceed to binding arbitration.[141] If the private party complaint based on some other MERCOSUR violation goes to the Common Market Group then that institution can require corrective measures or order the offending party to stop the questioned practice.[142]

The Brasilia Protocol stops well short of providing direct access to private parties to the MERCOSUR dispute settlement system. The jurisdiction of the mechanism is limited to private party cases a MERCOSUR government wants to support. Consequently a private party complaint about an individual citizen or company's problem with its own government will reach the MERCOSUR group only if the state is willing to bring a claim against itself. The jurisdictional limitation of the MERCOSUR system suggests that individuals are not perceived as having any rights under the Treaty of Asuncion and its protocols.

The NAFTA dispute settlement system was clearly designed to have limited jurisdiction. With regard to the major dispute mechanisms, there is no direct access by private parties. There is only compulsory indirect access in Chapter 19 and full access in Chapter 11 where the NAFTA dispute settlement mechanisms were designed to replace a domestic legal process. The NAFTA, by its terms, also makes the dispute settlement system of the free trade arrangement

138 Brasilia Protocol, *supra* note 5, arts. 28, 29, at 3; Protocol of Ouro Preto, *supra* note 6, at Annex, arts. 2, 3 (the experts in the process before the MERCOSUR Trade Commission are called a Technical Committee).

139 Brasilia Protocol, *supra* note 5, arts. 30, 32, at 3; Protocol of Ouro Preto, *supra* note 6, at Annex, art. 4.

140 Protocol of Ouro Preto, *supra* note 6, at Annex, arts. 5, 6.

141 *Id.* arts. 6, 7.

142 Brasilia Protocol, *supra* note 5, art. 32, at 3.

the only one with jurisdiction over the NAFTA complaints. The NAFTA parties are barred from providing a right of action under their respective domestic legal systems for NAFTA violations.[143] Given the integration goals of the NAFTA and the political constraint created by the member states' aversion to supranational institutions,[144] this jurisdictional constraint is not surprising. The limitation of jurisdiction to state parties is also in keeping with the extremely circumscribed authority of the other NAFTA institutions.

The MERCOSUR interim system is also one of limited jurisdiction. It allows for the participation by private parties in the initiation of a case but not for direct access by those parties to the binding arbitration that would get them actual redress for their grievances. The type of indirect access for individuals in the MERCOSUR more closely resembles that of citizen participation in the Section 301 process and in the system set up by the NAALC than anything else. The operative effect of this jurisdictional limitation is to deprive the MERCOSUR of the large body of private complaints such parties could bring that would expose and consequently end treaty violations or failure to implement treaty obligations.[145] To achieve the economic integration necessary for a common market, this jurisdictional restraint appears counterproductive if the MERCOSUR wants to achieve economic integration as rapidly as possible. Even if the MERCOSUR never creates a supranational adjudicatory body, it could still grant private parties some form of direct access to arbitral proceedings and thus establish them as extra level enforcement authority for the treaty obligations.

Unlike the NAFTA, the Treaty of Asuncion and its protocols do not contain a provision limiting cases based on treaty violations or obligations to the MERCOSUR dispute settlement system. The Supreme Court of Argentina has already considered its MERCOSUR obligations in the *Cafes La Virginia*[146] case in which it determined

---

143 NAFTA, *supra* note 4, art. 2021, at 698.

144 The United States has always been concerned about maintaining sovereignty. The United States has a "distrust of international supervision [that] is deeply embedded in our political tradition." Phillip R. Trimble, *International Trade and the "Rule of Law"*, 83 MICH. L. REV. 1016, 1026 (1985).

145 The experience of the ECJ suggests that some of the most important cases brought about a common market will be brought by citizens complaining that their government has failed to follow its treaty obligations. Institutions for International Economic Integration (comments at the conference by Ernst-Ulrich Petersmann, May 18, 1996).

146 Judgment of Oct. 13, 1994 [CSJN], C. 752.XXIII. *See also* Horacio D. Bercun, *Asimetrias, Supranacionalidad de Normas, Solucion de Controversias [Assymetries, Supranationality of Norm, Solution of Controversies]*, SOLUCION DE CONTROVERSIAS Y MEDIOS PARA LA RESOLU-

that MERCOSUR law has the same status as the Argentine Constitution. There is not a similar understanding, however, by the other MERCOSUR parties.[147] As a result, domestic litigation by private parties in the courts of the MERCOSUR countries about the meaning of MERCOSUR obligations cannot serve as a complete replacement for the MERCOSUR dispute settlement system.

C. Jurisdiction: Scope

To fully analyze the nature of a dispute settlement system, it is crucial to examine its scope or subject matter jurisdiction. What kind of disputes does the system entertain? Given the design of the NAFTA dispute settlement system, the answer to this question is a mixed one. Four of the five dispute settlement mechanisms have narrow subject matter jurisdiction. Chapter 19 and the dispute settlement mechanism under two supplemental agreements, the NAALC and the NAAEC, are limited to reviewing the internal law of the NAFTA parties. In Chapter 19 proceedings, the binational review panels are supposed to apply the standard of judicial review and the antidumping or countervailing duty law of the country that is the target of the complaint.[148] The NAFTA party's conduct is thus judged according to whether or not it followed its own law. If it did then the panel will uphold the administrative determination being reviewed. If it failed to do so, the panel will remand the decision to the relevant agency, usually with specific instructions.[149]

Similarly, if a complaint reaches the arbitral level under the NAALC or the NAAEC, it must involve allegations that the offending country has failed to enforce its own labor or environmental laws effectively.[150] The NAALC and the NAAEC provide an even smaller window for arbitral review than does Chapter 19. In Chapter 19, any particular antidumping or countervailing duty case could be examined for its compliance with the law of the administering country if it is challenged. In the supplemental agreements, not every action by the NAFTA parties relating to the labor or environment is subject to a

---

CION DE CONFLICTOS E INTERESES [Solution of Controversies and the Means for the Resolution of Conflicts and Interests] (symposium proceedings, Buenos Aires, Nov. 1995) (translation on file with author).

147 *Id.* According to Bercun a MERCOSUR treaty obligation can be left without effect by a conflicting domestic law that is passed later in Brazil.

148 NAFTA, *supra* note 4, art. 1904 (2), at 683.

149 *Id.* art. 1904 (8), at 683. *See also* Endsley, *supra* note 14, at 670 (describing how panels acted under the CFTA).

150 NAALC, *supra* note 4, art. 29 (1), at 1509; NAAEC, *supra* note 4, art. 24 (1), at 1490.

panel review. A country can only be found to violate the agreements if it has engaged in a course of violating its own laws, a "persistent pattern" defined under each agreement as "a sustained or recurring course of action or inaction."[151] The full reach of either supplemental agreement will only be established after a certain number of panel reports have been issued to provide an operative definition of a "persistent pattern."

The Chapter 11 dispute settlement mechanism is limited to complaints brought by an investor against a host state. Chapter 11 allows claims for direct injury to the investor or for indirect injury caused by injury to the investor's firm in the host country.[152] The type of complaints which can be raised by the investor involves any host state violation of the Chapter 11 substantive obligations – non-discriminatory treatment, freedom from performance requirements, free transfer of investment related funds and whether there has been an internationally "appropriate" expropriation.[153] The arbitral tribunals are to determine the issues in dispute in accordance with the NAFTA provisions and applicable rules of international law.[154] Any Free Trade Commission interpretation of a Chapter 11 provision (including exceptions) is also binding on the arbitral panel.[155] Not all investment disputes would actually be heard under Chapter 11. Exempted from the dispute settlement mechanism are any NAFTA party decisions to prohibit or limit investment due to national security concerns.[156]

Chapter 20 of the NAFTA contains the only dispute settlement mechanism with a broad scope. Except for matters committed to the other dispute settlement mechanisms, Chapter 20 is available for all disputes regarding (1) the interpretation or application of the NAFTA; (2) allegations that a measure taken by a NAFTA party is inconsistent with the agreement; or (3) allegations that a NAFTA party's action causes nullification or impairment of NAFTA benefits.[157] The three parts of the scope provision, Article 2004 of Chapter 20, reveal that the dispute settlement mechanism is meant to clarify the meaning of the agreement as well as establish whether or not a NAFTA party had acted improperly (*i.e.*, to act as a rule-enforcer). In the limited number of reports issued to date, the panels have been

151 NAALC, *supra* note 4, art. 49, at 1514; NAAEC, *supra* note 4, art. 45, at 1495.
152 NAFTA, *supra* note 4, arts. 1116-17, at 642-43.
153 *Id.* arts. 1102, 1103, 1106, 1109, 1110, at 639-42.
154 *Id.* art. 1131 (1), at 645.
155 *Id.* art. 1131 (2), at 645.
156 *Id.* art. 1138, at 647.
157 *Id.* art. 2004, at 694.

asked to resolve completely conflicting views held by the parties on the meaning and operative effect of several NAFTA provisions.[158] In one of the reports the panel reached what it described as a declaratory judgment about the meaning of the disputed provision (Art. 701.3) along with its recommendations of how the parties could resolve the dispute rather than conclude that the defending party had violated the relevant provision.[159]

A Chapter 20 panel could be convened to deal with almost any aspect of a NAFTA party's conduct that bears a relationship to the operation of the free trade area. The NAFTA party need not have taken action for a measure to come under scrutiny. Article 2004 expressly allows claims based on proposed as well as actual measures.[160] A complaining party also does not have to limit itself to complaints about another party's breach of a specific NAFTA obligation. A NAFTA party could be drawn into a dispute over a legislative measure or action not in itself violative of the NAFTA provisions but which had the effect of depriving the complaining state of a benefit it "could reasonably have expected to accrue to it" under the major chapters of the agreement.[161] The non-violation jurisdiction of the NAFTA is drawn from a similarly worded provision in the GATT.[162] Annex 2004 of the NAFTA does go beyond the text of the GATT, however, by incorporating in its text the reasonable expectation limitation on non-violation claims. That limitation on the acceptable

158 *See Treatment of Non-Mortgage Interest Under Article 304*, *supra* note 28, in which the United States and Canada argued about how Article 304 was to be interpreted. *See also The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Wheat Sales*, *supra* note 28, in which the panel report noted that "oral argument reflected very sharp differences between the Parties as to the meaning of Article 701.3."

159 *See The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Wheat Sales*, *supra* note 28.

160 NAFTA, *supra* note 4, art. 2004, at 694.

161 The Annex to Article 2004 explains that there can be nullification or impairment of a benefit under NAFTA by a measure that is not inconsistent with the Agreement. NAFTA, *supra* note 4, Annex 2004 (1), at 699. The same provision, however, makes it clear that it must be a benefit a NAFTA party reasonably could have expected. *Id.* NAFTA, however, does not define what would be a reasonable expectation thereby leaving that issue to Chapter 20 panels. Annex 2004, however, does place limits on what the NAFTA benefits can be nullified and impaired, *id.*, and limitations on this cause of action. *Id.* Annex 2004 (2), at 699. For example, NAFTA does not allow non-violation complaints about Chapter 11, the chapter dealing with investment. *Id.* Annex 2004(1), at 699.

162 GATT, *supra* note 71, art. XXIII: 1 (b). According to Article XXIII: 1 (b) a GATT benefit can be nullified or impaired by "the application of any measure, whether or not it conflicts with the provisions of this Agreement." *Id.*

breadth of non-violation claims[163] was developed in GATT jurisprudence by panel decisions that interpreted the non-violation provision.[164] One NAFTA panel report, *UHT Milk from Quebec*, was asked to consider as one of the alternative claims for review whether U.S. action to prohibit the sale of Canadian UHT milk in Puerto Rico nullified or impaired Canadian benefits without violating the NAFTA.[165] The panel ultimately resolved the case on the non-violation basis thus confirming the potential breadth of the scope of the NAFTA dispute settlement. The panel, however, did emphasize that the reference in the CFTA to the reasonable expectations of the parties, now reflected in Annex 2004 of the NAFTA, gave "special importance to that criterion or condition" and proceeded to use the issue of Canada's reasonable expectations under the facts of the dispute as a major determinant in making its finding of non-violation nullification and impairment.[166]

The Protocols of Brasilia and Ouro Preto provide the MERCOSUR dispute settlement system with a broad scope. Any dispute concerning the interpretation, application or non-compliance with (1) the Treaty of Asuncion (and its associated protocols); (2) decisions of the Common Market Council; (3) resolutions of the Common Market Group; and (4) directives of the MERCOSUR Trade Commission, can be considered by the system.[167] By its terms, the dispute settlement system is meant to resolve issues about how to interpret not only the common market agreements but also all MERCOSUR legislative efforts. In addition the language of Article 1 of the Protocols of Brasilia and Article 43 of the Ouro Preto Protocols empower the dispute settlement system to determine whether or not a state party is complying with all of its MERCOSUR obligations.[168] In making its determinations the arbitral panel is supposed to consider

163 Without a "reasonable expectation" limitation, the potential breadth of a non-violation theory would be amazing. The drafters of the GATT recognized how broad this scope would be and had lengthy discussions about whether to grant such power to the organization. *See* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 37-47 (2d ed. 1990).

164 The reasonable expectation limitation on GATT Article XXIII: 1 (b) was first established in the Unpublished Gatt Panel Report, *The Australian Subsidy on Ammonium Sulphate*, GATT/CP, 4/39, II/188, Apr. 3, 1950, *available in* LEXIS, Int'l Library, GATTPD File; *See also* GATT ANALYTICAL INDEX, *supra* note 1, at 611-14.

165 *U.H.T. Milk from Quebec*, *supra* note 28.

166 *Id.*

167 Brasilia Protocol, *supra* note 5, art. 1, at 1; Protocol of Ouro Preto, *supra* note 6, at art. 43. In this respect the interim dispute settlement system gives much more power than the ordinary international arbitral panel which would be limited to an examination of the instrument that established the panel.

168 *Id.*

the MERCOSUR treaty documents, MERCOSUR decisions and general principles of international law.[169] The MERCOSUR parties can give an arbitral panel even greater powers by agreeing to let it resolve a particular controversy according to equitable principles (*ex aequo et bono*)[170] rather than by strict application of the law.

The scope of the major NAFTA and MERCOSUR dispute settlement systems thus appear to be quite broad. The potential reach of each system, however, is clearly affected by the overall design of the integration arrangement and its economic goals and political constraints. The NAFTA could separate out certain types of disputes – on unfair trade laws, labor and environmental issues and investment issues – into separate dispute settlement mechanisms some of which have binding power because the parties had limited goals with respect to each. The specialized dispute settlement mechanisms were included into the CFTA and later the NAFTA either to resolve an impasse in negotiations to set up the free trade area (Chapter 19 Binational Reviews),[171] to satisfy a political demand of the dominant NAFTA state (Chapter 11),[172] or to gain political acceptance for the agreement domestically by the dominant NAFTA party (the NAALC and NAAEC).[173] By contrast, Chapter 20, the major dispute settlement mechanism, was given broad subject matter jurisdiction but limited effects for its decisions. The main dispute settlement mechanism

---

169 Brasilia Protocol, *supra* note 5, art. 19 (1), at 2.

170 *Id.*, art. 19 (2), at 2. The provision for the arbitral tribunal to resolve the case on equitable grounds comes from the world of private international commercial arbitration but also from the only international court. If a tribunal is authorized to reach a decision *ex aequo et bono* it generally means that the arbitrator is asked to apply something other than the strict letter of the law. *See* Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Ambiable Composition*, 12 B. U. INT'L L. J. 227, 234, n.26 (1994). The International Court of Justice has power to hear cases on this basis if the parties agree. Statute of the International Court of Justice, June 26, 1945, art. 38 (2), 59 Stat. 1055, 1060, T.S. No. 993. But the ICJ has never decided a case on that basis. Clearly, if the MERCOSUR parties agreed to use this procedure they would be giving an arbitration tribunal unfettered discretion in resolving the submitted dispute.

171 *See supra* text at 10 and accompanying notes.

172 The United States was interested in obtaining an investment section in NAFTA that would force Mexico to disavow the Calvo Doctrine, adopted by most Latin American countries, that all disputes involving investment by foreign parties would be treated the same as local disputes, *i.e.*, settled solely in local courts.

The United States did not really contemplate when it designed the Chapter 11B dispute settlement mechanism that it would be used against the United States. Gary N. Horlick, *Sovereignty and International Trade Regulation*, 20 CAN.-U.S. L. J. 57, 62 (1994). According to Horlick: "Now, of course, the United States only agreed to this because it knew perfectly well as trade negotiators always 'know', that in practice, Chapter 11 would apply only to Mexico." *Id.*

173 *See generally* C. O'Neal Taylor, *Fast Track, Trade Policy and Free Trade Agreements: Why the NAFTA Turned Into a Battle*, 28 GEO. WASH. J. INT'L L. & ECON. 1, 52 (1994).

can thereby only be used to clarify the meaning of the NAFTA provisions and to make recommendations that allow the parties to negotiate resolutions to their disputes.[174]

It is impossible to understand the NAFTA combination of broad scope and limited effect without examining NAFTA's connection to the GATT. Most of the major CFTA and NAFTA obligations were derived from the GATT and expressly mention this in relevant provisions.[175] During the negotiations for the CFTA the governments recognized that the GATT dispute settlement system could be used as the mechanism for resolving CFTA disputes.[176] The GATT system was rejected as the sole dispute settlement mechanism for the CFTA because the United States and Canada perceived it to be a flawed system.[177] The two countries, therefore, designed a "GATT-based regime with significant improvements, centered in Chapter 18" of the CFTA.[178] Canada and the United States, therefore, adopted the scope of the GATT dispute settlement provision and altered it to fit the CFTA. The CFTA parties then went on to improve the GATT system by (1) creating strict and shorter time limits on the procedures; (2) prohibiting a party from blocking the adoption of a report; (3) establishing the independence of panels since panel members were not government officials; and (4) making remedies more direct and effective (and binding if both parties chose binding arbitration).[179] Some type of CFTA dispute settlement system was also necessary because the free trade arrangement provided for rules regarding trade in services, the protection of intellectual property and investment areas

174 The effect of the Chapter 20 system is that the panels can issue only what amounts to advisory opinions. The non-binding nature means that the parties do not have to follow the guidance they receive.

175 Certain core CFTA and NAFTA provisions are (with limited exceptions) simply duplications of GATT concepts. For example, CFTA Article 407 and NAFTA Article 309, incorporates the GATT Article XI and its interpretative notes into the terms of each free trade agreement. The same treatment is given in NAFTA Article 301 which incorporates GATT Article III and its interpretative notes and Article 2011 (General Exceptions) which adopts GATT Article XX and its interpretative notes. As a result of this absorption of GATT disciplines and understandings the CFTA Chapter 20 panels were able to rely heavily on GATT panel decisions on each of these provisions. In two of the CFTA Chapter 20 panels all of the arguments centered upon the meaning of the GATT provisions. *See In the Matter of Canada's Landing Requirements for Pacific Coast Salmon and Lobsters from Canada, supra* note 28.

176 *See* Anderson & Fried, *supra* note 37, at 398.

177 Before the CFTA negotiations began the United States had already decided what it considered to be the flavor of the GATT dispute settlement system as part of its plan for seeking a reworking of the system during the Uruguay Round of GATT negotiations. *See supra* text at 24 and n.108. *See also* Anderson & Fried, *supra* note 37, at 398-400.

178 Anderson & Fried, *supra* note 37, at 400.

179 *Id.* at 402.

not yet covered by GATT disciplines. The NAFTA also contained these extra-GATT subject areas and expanded the investment chapter of the CFTA. Until the completion of the Uruguay Round and the establishment of the WTO dispute settlement system, the NAFTA therefore also needed its own dispute settlement system to cover complaints that might arise out of the new areas.

Even during the NAFTA negotiations, however, there was a recognition that the NAFTA parties might want to pursue their cases against each other in the multilateral forum rather than within the regional economic arrangement.[180] Article 2005 of the NAFTA clearly establishes that the Chapter 20 mechanism was not intended to be the exclusive forum for settling disputes between the parties. If a conflict arises between the NAFTA parties on any matter arising under both the NAFTA and the GATT (and other GATT agreements), it may be pursued in either forum.[181] The complaining party gets to choose the forum it prefers. During the operation of the CFTA and now under the NAFTA, the parties have made use of this choice of forum option on several occasions.[182] The potential for and use of this option means that the NAFTA and WTO dispute settlement systems will always be closely interrelated.[183]

The drafters of the NAFTA did make some crucial exceptions to the general provision allowing choice of forum. In order to obtain WTO review, a party must inform the third NAFTA party of its intentions.[184] If the third party wants to participate in the dispute proceedings under the NAFTA rather than the WTO, it can make the complainant consult with it over the issue of a single forum. Should the parties be unable to reach an agreement, the NAFTA dispute set-

180 NAFTA, *supra* note 4, art. 2005, at 694.

181 *Id.*

182 Both Canada and the United States filed cases against one another in the GATT dispute settlement system regarding sub-federal practices that each successfully argued violated Article III National Treatment obligations. *See* Canada: Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, GATT Doc. DS/17/R (Oct. 16, 1991) and United States: Measures Affecting Alcoholic and Malt Beverages, GATT Doc. DS/23/R (Mar. 16, 1992). Recently, the United States filed a request for consultations with Canada over the issue of its tax on periodicals that have split-runs which the United States argues violates Article III of the GATT. *See Kantor Asks for Consultations on Canadian Split-Run Tax Dispute*, BNA TRADE DAILY, Mar. 12, 1996; Paul Blustein, *U.S. Files Action Over Canadian Magazine Tax*, WASH. POST, Mar. 12, 1996, at C. A panel was established on June 19, 1996 to hear this dispute. World Trade Organization, Overview of the State-of-play of WTO Disputes (Oct. 4, 1996).

183 NAFTA panels will inevitably take up issues that may be similar to ones reviewed by the WTO system. There is some reason to be concerned about whether this will lead to unpredictability of the law.

184 NAFTA, *supra* note 4, art. 2005 (2), at 694.

tlement will be used.[185] Even more important for the potential effectiveness of the Chapter 20 process is the limitation placed on the choice of forum possibility when environmental issues are involved. If the responding party to a claim argues that its actions fall under Article 104, the NAFTA provision in which certain specified international environmental agreements trump the NAFTA, then the case must be heard by the NAFTA system.[186] Similarly, if the dispute concerns measures for protecting human, animal or plant life or which raises factual issues regarding the environment, health, safety or conservation, then the responding party can also force the case into the NAFTA system.[187]

The effect of all of these exceptions is to capture for resolution at the regional level some if not all of the most contentious trade disputes that would come from the operation of the free trade arrangement. If all three NAFTA parties are involved in a dispute, for example, it could become important for them to reach a quicker and perhaps negotiated solution in order to defuse tensions that might harm the free trade arrangement. Similarly, trade and environment issues have, in recent years, often been those which lead to the invocation of dispute settlement processes.[188] The responding party may more often than not prefer NAFTA state participation only regarding such disputes rather than multilateral participation on such sensitive domestic issues. Of the five NAFTA panel reports to date, three have involved issues relating to environmental matters (*Lobsters from Canada; Salmon from Canada*) and human health and safety (*UHT Milk*).[189]

Unlike the NAFTA, the MERCOSUR dispute settlement system has not only a broad scope but also decisions which are supposed to have, when issued, binding effect. The Brasilia Protocol, however, provides no guidance on how the MERCOSUR system, which would create *ad hoc* panel decisions, is supposed to play its role as an interpreter of the MERCOSUR law and rule enforcer. For example, there

185 *Id.*

186 *Id.* art. 2005 (3), at 694.

187 *Id.* art. 2005 (4), at 694. The NAFTA standards in some of these areas are higher than in the GATT and therefore the loss of the choice of forum assures that they cannot be avoided by going to the other system.

188 *See generally* DANIEL C. ESTY, GREENING THE GATT: TRADE ENVIRONMENT AND THE FUTURE 266-74 (1994) [hereinafter GREENING THE GATT], for a review of the more recent trade and environment cases involving the United States, Canada and Mexico in the GATT and in the CFTA.

189 *See* GREENING THE GATT, *supra* note 188, at 271-74; *Lobsters from Canada, Salmon from Canada, and U.H.T. Milk*, *supra* note 28.

is no explanation of the type of judicial review an arbitral panel is to engage in when requested to interpret the MERCOSUR legislation or how these interpretations will become part of the laws of the participating states.[190] As the MERCOSUR moves beyond the transition phase into tackling the aspects of positive integration required to achieve a common market, this limitation in the interim system will appear more obvious. Moreover, when an arbitral panel is established to settle a particular dispute, the Brasilia Protocol does not provide for true enforcement within the domestic legal system of the offending country.

In another contrast to the NAFTA, the MERCOSUR treaty documents do not mention the GATT or how the regional economic arrangement relates to it. This could suggest that the MERCOSUR arrangement was perceived of as a self-contained legal system or stands as another illustration of the scarcity of norms provided for in the Treaty of Asuncion and the Protocol of Ouro Preto.[191] In the scope provision of the Brasilia Protocol there is also no mention of GATT law – only "general principles of international law."[192] Finally, there is the absence of any provision in the Brasilia Protocol which restricts the state parties to resolving all trade complaints with one another to the MERCOSUR system. Given the transitional status of the integration arrangement, the emphasis on minimal institutionalism and the avoidance of the interim MERCOSUR dispute to date, it may be that the MERCOSUR parties would never contemplate turning to the GATT/WTO system. Multilateral oversight and potential participation of other countries in an intra-MERCOSUR disputes would undercut the political cooperation necessary to achieve its goal of economic integration by consensus.

---

190 Undoubtedly, the Brasilia Protocol lacks such provisions because it was conceived of as a temporary system meant to serve during the transition period only. During the initial transition period (1991-1994), MERCOSUR focused on the phasing out of the tariffs between member countries rather than creating the kind of legislation needed to create a common market. But the MERCOSUR parties did not become more concrete in their thinking on this issue when they extended the use of the interim system in the Protocol of Ouro Preto.

191 For example, The Treaty the Asuncion does contain a rational treatment clause (Article 7) and an MFN provision (Article 8 (d)). Treaty of Asuncion, *supra* note 6, arts. 7, 8 (d), at 1046. Article XI and Article XX that the United States and Canada thought necessary for the creation of a free trade agreement do not appear in the treaty or the Protocol of Ouro Preto.

192 Brasilia Protocol, *supra* note 5, art. 1, at 1. GATT law would not appear to fall within that definition. Generally, such a phrase is interpreted to cover the principles of interpretation in the Vienna Convention on Treaties.

D. Enforcement

An integral aspect of any dispute settlement mechanism is the provision it makes for enforcing decisions reached by the process. The NAFTA system employs several different methods for enforcing panel decisions. The Chapter 19 mechanism makes all panel reports binding on the relevant administering agency.[193] A panel report will thus either affirm the actions of the agency regarding an antidumping or countervailing determination or if a violation is found, make specific recommendations on how the agency should respond. There is no appeal process *per se,* but Chapter 19 does allow the establishment of an extraordinary challenge committee if a party does not believe that the panel process has operated properly.[194] The use of the ECC process three times since 1988 illustrates the inherently controversial nature of unfair trade actions between partners in an integration relationship. Despite the split along national lines in the most recent ECC decision, none of the reports have yet decided that the panel process was malfunctioning.[195]

The Chapter 11 mechanism provides for the issuance of binding arbitral decisions which can be enforced in the domestic courts of the NAFTA parties. The award an investor can win against a host state can include monetary damages or the restitution of property.[196] Each NAFTA state is required to provide for enforcement of an arbitral award within its territory.[197] If the disputing party fails to comply with an arbitral award, then the NAFTA party whose investor was involved in the proceeding may establish a panel under the Chapter 20 mecha-

193 NAFTA, *supra* note 4, art. 1904 (9), at 683.

194 *Id.* art. 1904 (11), at 683 (no appeal); art. 1904 (13), at 683, Annex 1904.13, at 688 (the availability of an extraordinary challenge procedure).

195 The three ECC cases were *Fresh, Chilled and Frozen Pork from Canada*, Panel No. ECC-91-1904-01 USA, 1991 FTAPD LEXIS 8 (Mar. 29, 1991); *Live Swine from Canada*, Panel No. ECC-93-1904-01 USA, 1993 FTAPD LEXIS 1 (Apr. 8, 1993); *Certain Softwood Lumber Products from Canada*, Panel No. ECC-94-1904-01 USA, 1994 FTAPD LEXIS 11 (Aug. 3, 1994). The most recent ECC procedure which ended with a decision in favor of Canada was split along national lines (the two judges in the majority were Canadian). There has been much discussion about the Softwood Lumber ECC case and whether or not its establishes the fact that the Chapter 19 process does not "work". Recent scholarly literature has been devoted to the issue of how to replace the Chapter 19 system. *See* Malcolm Richard Wilkey, *Introduction to Dispute Settlement in International Trade and Foreign Direct Investment,* 26 L. & POL'Y INT'L BUS. 613 (1995); Charles M. Gastle & Jean G. Castel, *Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases be Reformed in Light of Softwood Lumber III?*, 26 L. & POL'Y INT'L BUS. 823 (1995).

196 NAFTA, *supra* note 4, art. 1135, at 646.

197 *Id.* art. 1136 (4), at 646.

nism.[198] Chapter 11 also provides that a disputing investor may seek enforcement of an arbitration award under one of several international conventions; the ICSID convention, the New York Convention for the Enforcement of Arbitral Awards or the Inter-American Convention.[199]

The NAALC and the NAAEC dispute settlement mechanisms are designed to culminate with the parties reaching a mutual agreement on an action plan to resolve the dispute. If an action plan cannot be agreed upon or is not implemented within a certain time period, the panel may reconvene to approve the action plan (if one exists), establish an action plan consistent with the law of the offending party or impose a monetary assessment.[200] The monetary assessment was set at no more than $20 million (U.S. dollars) in the first year of the NAFTA and no greater than .007% of the total trade in goods between the two parties for all other years thereafter.[201] Canada agreed to enforce through its courts any monetary assessment made against it under either the NAALC or the NAAEC.[202] The United States and Mexico chose the suspension of NAFTA benefits – trade retaliation – as the appropriate response against them for their failure to pay the monetary assessment.[203] The level of monetary assessment provided under the agreements is not high enough to provide true incentive for a NAFTA party to comply.[204] The payment of the monetary assessment could, therefore, become the default position for a NAFTA party that did not want to implement an action plan under either supplemental agreement. Payment of the fine, for example, might be deemed preferable to either agreeing to or complying with a politically unpalatable action plan or facing trade sanctions.

The Chapter 20 dispute settlement mechanism also lacks what could be described as truly effective enforcement powers. The parties to a dispute are supposed to agree to a resolution of the dispute which

198 *Id.* art. 1136 (5), 646.

199 *Id.* art. 1136 (6), at 646.

200 NAALC, *supra* note 4, art. 39 (4), at 1512; NAAEC, *supra* note 4, art. 34 (4), at 1493.

201 NAALC, *supra* note 4, Annex 39 (1), at 1516 (Monetary Enforcement Assessments); NAAEC, *supra* note 4, Annex 34 (1), at 1496.

202 NAALC, *supra* note 4, Annex 41 A (2), at 1517; NAAEC, *supra* note 4, Annex 36 A (2), at 1497.

203 NAALC, *supra* note 4, art. 41, at 1512, Annex 41 B, at 1517; NAAEC, *supra* note 4, art. 36, at 1493, Annex 36 B, at 1497.

204 *See generally* COUNCIL ON INT'L AFFAIRS, N.Y. CITY BAR ASS'N, *Report on the North American Free Trade Agreement*, 49 N.Y. CITY BAR ASS'N REC. 146, 227-28 (1994); Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty Making*, 8 TEMPLE INT'L & COMP. L. J. 257, 269 (1994).

"normally shall conform" with the panel's report recommendations.[205] The preferred resolution of a dispute is non-implementation or removal of a non-conforming measure or a measure which has otherwise nullified or impaired a NAFTA benefit.[206] If the removal of the offending measure is not possible, the NAFTA allows compensation as the alternative resolution.[207]

The coercive element of Chapter 20 comes into play if the offending party does not reach a mutually satisfactory arrangement with the complainant. Under such circumstances the complaining party is authorized to suspend the NAFTA benefits of an equivalent effect until an agreement is reached.[208] NAFTA sanctioned retaliation is thus designed to be a temporary measure to push the recalcitrant party into settling the dispute. The retaliation under Chapter 20 is normally to be with regard to the same section or sector of trade as the complained of measure.[209] If such retaliation would not be practicable or effective, then the complaining party can select its own sector for retaliation.[210] Chapter 20 lessens the chance that any trade retaliation would be used as a punitive measure by establishing a panel to review allegations that the level of suspended trade benefits is "manifestly excessive."[211] Ultimately, the main dispute settlement system of the NAFTA rests upon consensual compliance and the power of retaliation. In this respect, the Chapter 20 NAFTA dispute settlement mechanism now has less power than the newly established WTO system. The WTO system, set up by the Understanding on Dispute Settlement,[212] makes all panel reports binding unless there is a consensus against adoption of the report.[213] A responding party that loses in a WTO panel has only two options – compliance or appeal of the legal issues to an Appellate Body.[214] If the Appellate body report affirms the panel decision the responding party is left to comply within a reasonable time or face WTO-authorized sanctions.[215] Although the ulti-

205 NAFTA, *supra* note 4, art. 2018 (1), at 697.
206 *Id.* art. 2018 (2), at 697.
207 *Id.*
208 *Id.* art. 2019 (1), at 697.
209 *Id.* art. 2019 (2) (a), at 697.
210 *Id.* art. 2019 (2) (b), at 697.
211 *Id.* art. 2019 (3), at 697.
212 Understanding on Rules and Procedures Governing the Settlement of Disputes, Appendix 1 A of WTO Agreement, *supra* note 75.
213 *Id.* art. 16.4.
214 *Id.* arts. 16 (appellate process), 3.4, 22.1 (the proper ways for a State to comply with the WTO panel determination of a GATT violation).
215 *Id.* art. 22.2.

mate element of coercion under the WTO system is the same as that of Chapter 20, the panel and its report take on a larger and more significant role in the multilateral dispute settlement system.[216] The WTO dispute settlement system is now clearly more adjudicatory in nature.[217] Consequently, a NAFTA party faced with the choice of forum and seeking a more clear cut legal resolution of the dispute may well pick the WTO system.[218]

The MERCOSUR dispute settlement system gives greater power to the *ad hoc* arbitral panels (or tribunals) than does the NAFTA system, including a power that is normally reserved to the courts or arbitral panels established in private commercial arbitration.[219] Once a MERCOSUR arbitral panel is selected to hear a particular dispute, it may dictate provisional relief during the pendency of the proceedings. To obtain such relief, a complaining party must prove that it suffers "grave and irreparable" damages owing to the practice of the offending country.[220] The arbitral panel is given complete freedom to determine whether and under what circumstances provisional relief is appropriate.[221] Any provisional relief granted must be complied with by the party in question until an arbitral ruling is reached.[222]

Once an arbitral decision is reached, it is binding and unappealable, although the parties can seek a clarification of the decision itself or the proper manner for implementing the decision.[223] The ultimate coercion in the MERCOSUR dispute settlement system, as in the

---

216 The panel in the DSU process will not only issue a report that is subject to virtual automatic adoption but it will also act to determine whether the respondent's measures actually comply with its recommendations (Art. 21.5) and what level of compensation is appropriate if the respondent chooses non-compliance (Art. 22.6).

217 *See generally* WTO/GATT Dispute Settlement, *supra* note 106, at 13-77; Miguel Montana i Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 142-46 (1993).

218 The CFTA did contain a provision that would have allowed the NAFTA parties to consent to binding arbitration. CFTA, *supra* note 6, art. 1806 (1), at 384-85. No panel was even convened under this provision by the United States or Canada. When the Chapter 20 process reformulated the option of binding arbitration was dropped. Binding arbitration would make the Chapter 20 panel reports carry more weight. But to be truly effective the binding arbitration would have to be required under all circumstances, not just when the parties consented. In effect, that is what the WTO's system now achieves.

219 The arbitrational tribunals (panels) established by the terms of the Brasilia Protocol are empowered to offer provisional relief. Brasilia Protocol, *supra* note 5, art. 18 (1), at 2. *See generally* D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection – Is the Tide About to Turn?*, 30 TEX. INT'L L. J. 71, 77-81 (1995).

220 Brasilia Protocol, *supra* note 5, art. 18 (1), at 2.

221 *Id.*

222 *Id.* art. 18 (2), at 2.

223 *Id.* art. 22, at 2.

NAFTA, is the adoption of trade retaliation. The MERCOSUR system does not provide for the panels to oversee the use of such measures. Instead the complaining party is left to resort to such measures if compliance is not forthcoming within a very short time frame.[224] The use of trade sanctions, in the form of the suspension of concessions, is meant to serve as a temporary measure to force compliance.[225]

As is the case with the WTO settlement system, the panel ruling plays the largest role in the MERCOSUR dispute settlement system. The panel rulings are declared to be binding and not subject to any political adoption by the MERCOSUR countries. This independence for the panel system, however, provides it with what could be too much power in certain circumstances. Under the Brasilia Protocol, the MERCOSUR system has no mechanism for handling bad or poorly reasoned panel decisions since there is no right to an appeal.[226] The panelists for the MERCOSUR arbitral tribunals are supposed to be jurists of recognized competence regarding trade and economic matters.[227] Any given tribunal will be selected by the traditional selection method used for arbitral tribunals[228] and each tribunal is supposed to create its own working procedures.[229] Therefore, there is nothing to guarantee that the arbitral reports will be of a consistent quality.

A comparison of the scope and operative effect of the dispute settlement systems in the NAFTA and the MERCOSUR reveals that the systems aim at different goals. Chapter 20 allows the NAFTA parties to seek a negotiated or compromised solution to almost any dis-

224 The offending MERCOSUR party is supposed to comply with a decision of an arbitration tribunal with fifteen days, unless the tribunal sets another time period. *Id.*, art. 21 (2), at 2. The failure to adhere to the tribunal's report exposes the offending party to the suspension of concessions. *Id.* art. 23, at 2.

225 *Id.*

226 The MERCOSUR provision allowing a panel to clarify its ruling will not solve the problem completely. It would be far more effective to have another level of review by legal experts. The Appellate Body of the new WTO system was designed to "solve" the problem created by a dispute settlement system which produces binding decisions. During the negotiations for the WTO Understanding on Dispute Settlement most delegations favored the creation of an Appellate Body level of panel review to alleviate the risks of "bad law" that might come from the virtually automatic adoption of panel reports. *See* Dispute Settlement Negotiating History, *supra* note 107, at 2726.

227 Brasilia Protocol, *supra* note 5, art. 13, at 2.

228 *Id.* art. 9, at 1. Under the Protocol each MERCOSUR State picks an arbitrator and the third arbitrator, who may not be a national of any of the States in the dispute, will be designated by mutual agreement between the parties. *Id.*

229 *Id.* art. 15, at 2.

pute that might arise under the terms of operation of the agreement. The non-binding nature of the panel reports places the weight of the dispute settlement process on the NAFTA parties to reach a negotiated solution to the dispute in order to avoid harming the integration arrangement. The MERCOSUR dispute settlement system, however, must have not only broad scope but also operative effect if it is to play any role in the integration effort. Since the MERCOSUR is attempting positive integration – in the creation of harmonized legislation on a wide array of issues – it must have some mechanism for interpreting that law. The MERCOSUR cannot simply rely on the parties to resolve their disputes. By definition if a dispute reaches the system it will be because the MERCOSUR parties could not reach a consensus on the meaning or operative effect of the MERCOSUR legislation or a country's compliance with it. The MERCOSUR needs, therefore, to have a neutral body for providing interpretation as well as enforcing the rule of law.

E. Legal Status of Decisions

A final aspect of any dispute settlement system that must be analyzed in order to assess the system's potential is the legal status given its decisions. In Chapter 19 proceedings, where the panel reports replace domestic judicial review, the panel reports review the antidumping or countervailing decision and uphold or remand the case before the panel. The panel reports therefore have legal effect only regarding the particular administrative determination issued. The panel reports do not have precedential value in the domestic legal systems of the participating countries.[230] The Chapter 11 mechanism is designed to resolve only the particular investor/host state dispute before it. The NAALC and the NAAEC panel reports are intended to be, like the Chapter 20 reports, recommendations for the participating states to use in order to resolve a labor or environmental conflict. Of the NAFTA parties, Canada alone did give the NAALC and the NAAEC panel decisions ordering a monetary assessment legal effect by allowing any such order to be enforced in the Canadian courts as an order of a court of superior jurisdiction.

Finally, a Chapter 20 panel report, even though it may include a finding that a party has acted inconsistently with NAFTA obligations, has no legal effect in the member countries. Nevertheless the Chapter 20 reports can clarify the meaning of NAFTA obligations and operate

230 *See* Endsley, *supra* note 14, at 670, 674.

as highly persuasive authority for future panels on similar NAFTA claims. In this respect, the NAFTA panel reports, like the GATT/WTO panel reports, will develop a kind of "operative precedent." Although no formal stare decisis concept exists in the GATT/WTO[231] or the NAFTA system, the disputants will come to rely on the prior panel reports in developing arguments and expect any panel to not depart too frequently from previous panels when resolving a dispute.

The arbitral tribunals in the MERCOSUR have jurisdiction over, and can issue binding decisions on, the MERCOSUR treaty and associated agreements and the MERCOSUR legislation. There is no process set forth by the Brasilia Protocol, however, by which an arbitral ruling can be taken to the courts or made part of the law of a MERCOSUR country. Therefore, although the MERCOSUR system could issue definitive decisions, they may not be integrated into the domestic legal systems. Without the concept of supremacy, the MERCOSUR law may not necessarily control how the MERCOSUR countries interpret the legal rights and obligations created by the economic integration arrangement. Given the nature of the MERCOSUR dispute settlement system – arbitration rather than a court – it is not surprising that the supremacy of the MERCOSUR law has not been established. Allowing arbitral tribunals the authority to make early and potentially important decisions about the MERCOSUR law, however, means that the MERCOSUR countries have committed themselves to turning over a great deal of authority to a small and constantly shifting group of jurists. If dispute settlement is invoked before the adoption of a permanent dispute settlement system or if the interim system becomes the permanent system, it is hard to imagine how the MERCOSUR law on the common policies issued by the MERCOSUR institutions can develop. According to the Protocol of Ouro Preto, the arbitral tribunal decisions are to be published, along with the MERCOSUR legislation, in the official MERCOSUR journal.[232] In this respect, at least, the arbitral rulings will become part of the MERCOSUR law as it grows. Nevertheless, a crucial aspect in the formation of a common market is monitoring whether member states actually implement and give effect to the common legislation. This job will inevitably fall to the domestic courts of the MERCOSUR countries which will need some guidance on the

231 The GATT/WTO system like most other countries and international law does not have a stare decisis concept. Testimony by John H. Jackson before the U.S. Senate Committee on Foreign Relations, June 14, 1994, on The World Trade Organization and U.S. Sovereignty, *reprinted in* 6 WORLD TRADE & ARB. MATERIALS 127, 132-33 (Sept. 1994).

232 Protocol of Ouro Preto, *supra* note 6, art. 39.

content and the place in the legal hierarchy of the MERCOSUR law.[233]

III. CONCLUSION

The NAFTA dispute settlement system does not really further the process of economic integration. Instead it was designed, as were the other NAFTA institutions, to keep all future efforts at integration beyond those set out in the agreement firmly within control of the member countries. To this extent the decentralized and non-coercive dispute settlement system is well-designed to serve the limited NAFTA objectives. It may even be well designed, particularly from the perspective of the United States, for further use in the FTAA. The general dispute settlement mechanism, Chapter 20, operates by issuing non-binding findings and recommendations to the disputants. Although a Chapter 20 panel can find a NAFTA country to be a NAFTA violator, it cannot force that country to alter its behavior. Thus the effectiveness of the NAFTA dispute settlement mechanism hinges on the willingness of the participating countries to cooperate on a settlement and thereby preserve the advantages of the free trade arrangement. Although the NAALC and the NAAEC expose matters to dispute settlement that have great domestic impact, neither agreement seeks to force changes in the legal regime governing labor rights or environmental protection of any participating state. The dispute settlement mechanisms established in each agreement may prove useful at some point in assuring that the NAFTA countries continue to adhere to their labor and environmental laws. Currently, however, the NAALC and the NAAEC appear to operate as forums for raising NAFTA-related issues and exchanging information about each country's legal regime in the labor and environmental areas. This process, and public participation in it, could ultimately persuade the countries to agree to adopt some harmonized legislation that would facilitate the smooth functioning of the free trade area. The operation of the Chapter 19 process could, if it continues to be controversial, breaks down or causes too large a disruptive effect on the arrangement, encourage the NAFTA countries to negotiate harmonized legislation to deal with dumping and subsidies. Even without these events some

233 Cappelletti and Golay, *supra* note 104, at 324 ("[T]he supremacy doctrine, coupled with the doctrine of direct effect, brings about a Community system of judicial review. All the many thousands of national judges in the now ten Member States are entitled, and indeed obliged, to control the conformity of national legislation to Community law and to deny application to the former whenever it is found violative of the "higher" Community law applicable in the case at hand.")

attempt at harmonization might occur once the NAFTA countries move closer to the reality of a greatly expanded free trade area in the form of the FTAA.[234]

The interim dispute settlement system of the MERCOSUR shows little potential for furthering the goal of economic integration set out in the Treaty of Asuncion. During the transition period, as the MERCOSUR countries were working towards the free trade zone and negotiating about the common external tariff, the inherent limitations of the sytem were not apparent. The MERCOSUR system during that phase was essentially a NAFTA Chapter 20 mechanism with teeth since it gave the arbitral panels the power to issue binding determinations. Now that the MERCOSUR countries are moving towards completion of the common external tariff and into the common market, they must begin to produce the common legislation necessary to allow the freedom of the factors of production and harmonize any legislation which would otherwise limit the effectiveness of the single market. The MERCOSUR countries appear committed to pursuing these activities with political institutions of limited power. Whether it is possible to consolidate these legislative efforts and ensure that they are properly implemented in each country without a powerful institution for dispute settlement is doubtful. Flaws in the interim system for assisting the creation of a common market are largely that its relationship to the domestic legal systems is not established (*i.e.*, lack of supremacy), and its structure is too informal (with no fixed group to review complaints or the MERCOSUR law). In addition, an arbitral system, even one which produces binding results, makes the ultimate enforcement of its decisions turn on the threat of retaliation. Even if the MERCOSUR countries were to accede completely with decisions issued by the arbitral tribunals this type of *ad hoc* dispute settlement may not fully commit the countries to completing the economic integration goal they have selected.[235] Since it is still a transitional arrangement, the MERCOSUR countries may find themselves willing to stop short of their original goal. The interim dispute settlement system could, as the NAFTA system does, adequately serve a free trade arrangement. Creating a common market, however, does appear

234 *See* Alternatives for Reform, *supra* note 39, at 783-94.

235 In order to achieve the economic integration of sovereign states, there needs to be the sense that the integration process is a stable one – one likely to succeed. According to Pelkmans, one of the requirements for this stability is the creation of a mechanism for avoiding reversibility. Pelkmans identified an effective court as the best mechanism for containing reversibility. PELKMANS, *supra* note 74, at 346-47.

to require the recognition that the member states will cede sovereignty to some institutions and create a new legal order.