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Dispute Resolution under MERCOSUR from 1991 to 1996: Implications for the Formation of a Free Trade Area of the Americas

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By David Lopez[2]

I. Introduction.

In December 1994, meeting at the Summit of the Americas in Miami, the leaders of the thirty-four American democracies unanimously declared a commitment to complete a hemispheric free trade pact by 2005.[3] As they envisioned, this pact would produce a Free Trade Area of the Americas ("FTAA") stretching from Alaska to Argentina and encompassing over 800 million consumers.[4] Although by present appearances a fully negotiated FTAA may come to fruition later (by say 2010) rather than sooner (by 2005), a Western Hemispheric trading bloc nonetheless seems inevitable.[5]

1. I wish to thank Thomas O'Keefe, President, Mercosur Consulting Group; Professor Adriana Dreyzin de Klor, Faculty of Law and Social Sciences, Universidad Nacional de Córdoba, Córdoba, Argentina; Dr. Alejandro Ponieman, Director, Asociación Interamericano de Mediación, Buenos Aires, Argentina; and two political scientists, Professor John Bailey of Georgetown University and Professor Larry Hufford of St. Mary's University, for their helpful insights. This work is dedicated to my wife, Lilliana.

2. Associate Professor of Law, St. Mary's University School of Law. J.D., *cum laude*, Harvard Law School, 1988; B.S.F.S., *magna cum laude*, Georgetown University, 1985.

3. *See Americas Summit Leaders Back Historic Trade Declaration*, 11 Int'l Trade Rep. (BNA) 1915 (Dec. 14, 1994).

4. *See U.S. Exports to Western Hemisphere Could Reach $200 Billion Next Year*, 11 Int'l Trade Rep. (BNA) 1447 (Sept. 21, 1994). ("By the turn of the century, the hemisphere's population will approach 820 million, and gross profit could exceed $12 trillion.").

5. A meeting of high level trade officials from the American democracies, held in Cartagena, Columbia in March 1996, confirmed that such a pact will be reached but that 2005 appears to be an unduly optimistic deadline for completing negotiations. *See Americas Trade Meeting Makes Little Progress*, 4 LATIN AMER. L. & BUS. REP. Apr. 30, 1996, at 38.

The projected delay in finalizing the FTAA partially is attributable to disagreement among the American democracies over what is the best path toward an FTAA.[6] The United States, for example, has favored expansion of the North American Free Trade Agreement ("NAFTA")[7] on a country-by-country basis, beginning with Chile.[8] Unfortunately, Congress' refusal in 1995 and 1996 to grant fast-track authority to the Clinton Administration to negotiate Chile's accession to NAFTA reduced the Administration's ability to influence the FTAA process.[9] In contrast, Brazil, the undisputed economic powerhouse of South America,[10] prefers a very gradual approach based on negotiations dominated by NAFTA and a Brazil-centered, yet-to-be-created South American Free Trade Area ("SAFTA").[11] Brazil's position with respect to the FTAA process

6. *See Challenge to Americas Trade Pact is to Define Approach, Official Says*, 13 Int'l Trade Rep. (BNA) 893 (May 29, 1996). The routes to an FTAA most commonly discussed are hemispheric negotiations wherein each country is represented individually, country-by-country accession to a pre-existing trading group until such time as all American nations are included, and the formation of several regional trading blocs that later are linked together via bloc-to-bloc negotiations. *See FTAA Working Groups Prepare for Vice-Ministerial in Bogota*, 12 Int'l Trade Rep. (BNA) 2011 (Dec. 6, 1995); *Officials Expect FTAA Liberalization to be Less Than NAFTA, MERCOSUR Levels*, 12 Int'l Trade Rep. (BNA) 1641 (Oct. 4, 1995). These various paths are not entirely mutually exclusive. It is possible that the path actually taken to an FTAA will involve some combination of individual representation, accession, and bloc building.
7. North American Free Trade Agreement, Dec. 17, 1992, Can.- Mex. - U.S., 32 I.L.M. 296 (1993) [hereinafter NAFTA].
8. *See The Americas Drift Towards Free Trade*, ECONOMIST, July 8, 1995, at 35. [hereinafter *Americas Drift*].
9. *See No Chile Fast-Track Authority in '96, White House Advisor Says*, 13 Int'l Trade Rep. (BNA) 763 (May 8, 1996); *Intra-American Trade: Brazil Gets Its Way*, ECONOMIST, Mar. 30, 1996, at 45 [hereinafter *Brazil Gets Its Way*]. Fast-track authority permits the President "to submit legislation implementing trade agreements to Congress for a straight up or down vote after formal introduction." *Key Staffer Sees Fast-Track Extension in 1997 Regardless of Who Wins Election*, 13 Int'l Trade Rep. (BNA) 705 (May 1, 1996). Fast-track authority is crucial to NAFTA expansion because countries interested in acceding to NAFTA, such as Chile, simply will not devote much effort to negotiating with United States trade officials only to have such negotiations unraveled in piecemeal fashion by Congress. *See Americas Drift, supra* note 8, at 35; Howard LaFranchi, *Chile, the Slender Success Story, Hopes to Fatten on U.S. Trade Ties*, CHRISTIAN SCI. MONITOR 1, July 25, 1995, at 1, 7.
10. "Brazil is the largest nation in South America in terms of area, population and economy." *Brazil: September 1996*, National Westminster Bank Country Briefs, Sept. 1, 1996, at 1, *available in* WESTLAW, Allnews Database, 1996 WL 9686009. "By itself, Brazil accounts for 75% of the total MERCOSUR gross domestic product (GDP) and for 80% of its industrial manufactures." Luigi Manzetti, *The Political Economy of MERCOSUR*, 35 J. INTERAMER. STUD. & WORLD AFF. 101, 123 (1993-94).
11. *See* Michael Reid, *A Survey of MERCOSUR: And Now, the Hemisphere*, ECONOMIST, Oct. 12, 1996, at 27, 28 ("Though Brazil's diplomats talk less loudly than they used to of building a South American free-trade area that appears still to be the goal."); Reginald Dale, *Latin America Forges Ahead on Trade*, INT'L HERALD TRIB., July 16, 1996, at 11 ("Brazil prefers a slow move to hemispheric free trade so that it can build a South American Free Trade Area around Mercosur as a negotiating counterweight to NAFTA. In that way, Brazil hopes to be better able to resist the American demands and NAFTA disciplines that it finds objectionable.").

is grounded on the political reality that negotiating free trade via a massive Brazil-centered trading bloc rather than merely bilaterally with the United States will give Brazil far greater leverage.[12]

For the time being, Brazil is in the driver's seat in selecting the path to an integrated trading bloc for the Western Hemisphere. Thus, even assuming Congress grants fast-track authority for NAFTA expansion in 1997 or 1998 (as some in Washington expect[13]), it appears probable that the Western Hemisphere will be integrated for trading purposes primarily by linking a large northern trading bloc with a large southern trading bloc.[14] Whatever form the southern bloc or SAFTA ultimately takes, it is sure to be grounded on the Southern Cone Common Market ("MERCOSUR"). MERCOSUR is a nascent but unexpectedly successful customs union between Argentina, Brazil, Paraguay, and Uruguay that unites over 200 million potential consumers with a combined gross domestic product of nearly $1 trillion.[15] In 1996, MERCOSUR expanded by signing a free trade accord with Chile and was poised to merge with the five members of the Andean Pact.[16] It would be a mistake for North Americans to underestimate the power of MERCOSUR ("said to be one of the most dynamic trading blocs in the world"[17]) to direct the FTAA process.[18]

As representatives of the American democracies begin crafting an FTAA, dispute resolution will be central to the negotiations. The negotiators' ability to devise procedures that

12. *See* Michael Zamba, *With U.S. Hare Flagging in Trade Race, Latin American Tortoise is Catching Up*, CHRISTIAN SCI. MONITOR, Sept. 16, 1996, at 19. *Americas Drift*, *supra* note 8, at 35; *Brazil Gets Its Way*, *supra* note 9, at 45. Brazil's position clearly makes political sense. In dealing with developing countries, the United States historically has preferred bilateral trade negotiations precisely because its relative size and economic power enable it to extract greater concessions than otherwise would be possible in a negotiation involving relative equals. *See* Raymond Vernon, *The World Trade Organization: A New Stage in International Trade and Development*, 36 HARV. INT'L L.J. 329, 340 (1995).
13. *See, e.g., House Staffer Now More Optimistic on Fast-Track Compromise in 1997*, 13 Int'l Trade Rep. (BNA) 763 (May 8, 1996).
14. *See* Humberto Marquez, *Expansion of MERCOSUR Changes Negotiations for FTAA*, INTER PRESS SERVICE, July 12, 1996, *available in* WESTLAW, Allnews Database, 1996 WL 10768128; *U.S., Canada Will Talk with MERCOSUR with or without Mexico, Official Says*, 13 Int'l Trade Rep. (BNA) 1049 (June 26, 1996).
15. See *Why All the MERCOSUR Excitement?*, 4 MARKET LATIN AM., Sept. 1, 1996, at 1.
16. MERCOSUR was formed in March 1991. See Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041 (1991)[hereinafter Treaty of Asuncion]. The MERCOSUR-Chile free trade agreement officially entered into force on October 1, 1996. *See Chile's MERCOSUR Membership Takes Effect*, 13 Int'l Trade Rep. (BNA) 1576 (Oct. 9, 1996). The Andean Pact nations -- Bolivia, Columbia, Ecuador, Peru, and Venezuela -- announced in September 1996 that they had agreed to negotiate a free trade acccord with MERCOSUR. *See Chile Joins Southern Cone Common Market as Andean Nations Agree to Multilateral Free-Trade Negotiations with MERCOSUR*, NotiSur-Latin American Political Affairs, Oct. 4, 1996, *available in* WESTLAW, Latnews Database, 1996 WL 8089443.
17. Gabriel Escobar, *S. American Trade Bloc Expands and Prospers, Chile is Welcomed as Fifth Member*, WASH. POST, July 3, 1996, at A33.
18. *See* Robert S. Greenberger, *Latin Nations, Unsure of U.S. Motives, Make Their Own Trade Pacts*, WALL ST. J., Jan. 9, 1996, at A1 (explaining that it becomes harder for the United States to control the direction of free trade discussions as MERCOSUR grows).

will efficiently, effectively, and peacefully settle trade disputes between the member states will be crucial to the FTAA's success. In attempting to formulate such procedures, the negotiators will have several intriguing models from which to draw, including the dispute resolution systems of the European Community,[19] World Trade Organization,[20] and those of NAFTA and MERCOSUR.[21] In a companion piece to this Article, I described the dispute resolution experience under NAFTA during its first three years of existence.[22] The purpose of this Article is to compare the institutions, dispute resolution processes, and actual dispute resolution experience of MERCOSUR with those of NAFTA and to suggest a number of important implications of the comparison for dispute resolution in any future FTAA.

Part II of the Article opens by describing essential terms of the MERCOSUR agreements, the evolving character of MERCOSUR's institutional structure, and the ways in which that structure differs from NAFTA's institutional structure. Part III discusses the processes available under MERCOSUR for settling trade disputes between Brazil, Argentina, Paraguay, and Uruguay and identifies distinctions between those processes and NAFTA's dispute resolution systems. Part IV examines trade-related disputes that arose between the MERCOSUR parties as of September 1996 and explains the reluctance of the parties to formally subject such disputes to MERCOSUR's dispute resolution systems. Part IV also contrasts the MERCOSUR dispute resolution experience with that under NAFTA. Finally, Part V posits several key implications of the early dispute settlement experience under MERCOSUR for the proposed FTAA. According to this analysis, the FTAA negotiators ought to construct a phased-in dispute resolution system that initially relies nearly exclusively on high-level consultations and then, after time, makes available the use of multinational institutions and formal adversarial proceedings for the resolution of trade disputes.

19. The European Community is a formal customs union in which the fifteen member countries -- Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom -- have ceded some national sovereignty to supranational institutions, including the European Parliament, the European Commission, the European Council, and, most importantly for dispute resolution purposes, the European Court of Justice. *See* John P. Flaherty & Maureen E. Lally-Green, *The European Union: Where Is It Now?*, 34 DUQ. L. REV. 923, 958-72 (1996).

20. Inaugurated on January 1, 1995, the WTO consists of over 120-member countries and is responsible for implementing and enforcing numerous multilateral trade agreements including the General Agreement on Tariffs and Trade ("GATT"), the General Agreement on Trade in Services ("GATS"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"). *See* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1145; *see generally* Vernon, *supra* note 12.

21. Indeed, the American democracies already have begun the process of creating a multinational working group charged with identifying the dispute resolution mechanisms of the numerous trading arrangements extant in the Western Hemisphere. *See FTAA Ministers Agree to Establish a Dispute Settlement Working Group*, 13 Int'l Trade Rep. (BNA) at 510 (Mar. 27, 1996).

22. *See* David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L. J. 163 (1997).

II. The Purposes and Institutions of MERCOSUR.

MERCOSUR's objectives and organizational structure are governed by two agreements: the Treaty of Asuncion and the Ouro Preto Protocol. The Treaty of Asuncion (formally the "Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay") was signed in March 1991 and entered into force in November 1991.[23] The Ouro Preto Protocol (formally the "Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR") was signed in December 1994 but did not formally take effect until January 1996.[24]

A. MERCOSUR's Evolution Toward a Common Market.

For ease of analysis, commentators categorize the various trading blocs in the world according to each group's degree of economic integration. Ranging from lowest to highest degree of integration these are free trade zones, customs unions, common markets, economic unions, and federalized states having total economic integration.[25] In a free trade zone, the parties eliminate barriers to internal trade but retain separate tariff structures vis-a-vis outsiders.[26] A customs union is a free trade zone but with a common external tariff on goods imported from outsiders.[27] A common market contains the elements of a customs union plus the absence of restrictions on the internal movement of the factors of production.[28] An economic union "combines all the features of a common market and adds harmonization of the different macroeconomic policies of all the different member states."[29] Finally, total economic integration is the equivalent of a federal state, having unified economic and social policies and centralized, supranational entities whose decisions are binding on the participants.[30]

The formal goal of MERCOSUR is to create a common market.[31] This implies (1) 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

23. Treaty of Asuncion, *supra* note 16; Jorge Pérez Otermin, El Mercado Comun Del Sur: Desde Asunción a Ouro Preto, Aspectos Jurídicos-Institucionales 11 (1995).
24. Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR, Dec. 17, 1994, art. 1, 34 I.L.M. 1244, 1258 [hereinafter Ouro Preto Protocol]. Article 48 of the Ouro Preto Protocol provides that the accord shall not enter into force until "30 days after the date of deposit of the third instrument of ratification." The third instrument of ratification was deposited on December 15, 1995. Telephone Interview with Manual Olarreaga, Coordinator, MERCOSUR Secretariat (Oct. 8, 1996).
25. *See* Thomas A. O'Keefe, *An Assessment of Mercosur's Present Legal Framework and Institutions and How They Affect Mercosur's Chances of Success*, 6 Int'l L. Practicum 14, 14 (1993).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Treaty of Asuncion, *supra* note 16, art. 1. *See generally* Charles Chatterjee, *The Treaty of Asuncion: An Analysis*, 26 J. World Trade 63 (1992).

of goods," (2) 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," (3) the "coordination of macroeconomic and sectoral policies," and (4) a commitment "to harmonize" domestic law in relevant areas.[32] The path chosen by the MERCOSUR nations to reach this goal is to begin as a free trade area and evolve gradually into a customs union and, finally, into a full-fledged common market. To show the strength of their commitment to integration, the MERCOSUR parties originally pledged to form a common market by December 1994, less than four years after signing the Treaty of Asuncion.[33] Although a South American customs union did not come to pass by 1994, the MERCOSUR parties succeeded in forming a limited customs union by January 1, 1995.[34]

B. MERCOSUR'S EVOLVING INSTITUTIONAL STRUCTURE.

The Treaty of Asuncion is a framework document intended to guide the member states' evolution toward a common market over the course of a defined transition period.[35] For this reason the Treaty envisions that the institutional structure of MERCOSUR will transform over time, becoming increasingly sophisticated as the parties' economies become increasingly integrated.[36] In theory, MERCOSUR will utilize a different institutional structure as it moves from one stage of integration to another, from a free trade area to a customs union and, finally, to a common market.

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32. Treaty of Asuncion, *supra* note 16, arts. 1 & 5; Treaty of Asuncion, *supra* note 16, at Annex I: Trade Liberalization Programme.
33. *Id.* at art. 3. As one commentator explains:

> The decision to speed up integration was made for political reasons. From the very beginning, and quite understandably, there was considerable skepticism regarding the possibility of establishing a common market in such a short time. Yet, the very ambitiousness of the project was intended to demonstrate the seriousness with which the four presidents approached the task of regional integration. In turn, the deadlines were chosen in order to coincide with the end of the presidential terms of Menem, Collor de Mello, Rodríguez, and La Calle. In so doing, the outgoing presidents hoped to lock their successors into the integration process ....

Manzetti, *supra* note 10, at 106.

34. *See Latin America—Chile, Bolivia Seek Mercosur Entry; Other Developments,* WORLD NEWS DIGEST, Jan. 19, 1995, at 28 ("The customs union eliminated tariffs on more than 90% of goods traded among the four member nations and put in place common tariffs—averaging 12%—on imports from outside the trade bloc. Some 10% of goods were exempted from both the internal and the common external tariffs, but the exceptions were to be phased out no later than the year 2001."); Thomas A. O'Keefe, *Recent Developments in the MERCOSUR,* 3 LATIN AMER. L. & BUS. REP. 26, May 31, 1995, at 26 [hereinafter *Recent Developments*].
35. *See* Alejandro Pastori, *The Institutions of MERCOSUR: From the Treaty of Asuncion to the Protocol of Ouro Preto,* 6 INTER-AMERICAN LEGAL MATERIALS 1, 1 (1995).
36. *See* OTERMIN, *supra* note 23, at 18 ("El criterio imperante, pero no el único, fue el de no adelantarse a los tiempos, e ir por tanto creando las instituciones acompasadamente con las etapas del proceso de integración.").

1. The Free Trade Area Structure - November 1991 to December 1994.

The Treaty of Asuncion created three bodies—the Council of the Common Market, the Common Market Group, and an Administrative Secretariat—to administer and implement MERCOSUR from its inception to the end of 1994.[37] The Council is MERCOSUR's supreme institution.[38] It is composed of eight individuals, the ministers of foreign affairs and ministers of the economy of the four member states, and is responsible for MERCOSUR's "political leadership and for decision-making to ensure compliance with the objectives and time-limits set for the final establishment of the common market."[39]

MERCOSUR's sixteen-member Common Market Group ("CMG") consists of four representatives of each nation's ministry of foreign affairs, economic ministry, and central bank.[40] Its role is to monitor the member states' compliance with the Treaty, enforce decisions adopted by the Council, and formulate programs to ensure progress towards the goal of a common market.[41] In addition to their status as CMG members, the CMG representatives of each country constitute their respective country's National Section of the CMG.[42]

The Treaty of Asuncion created an Administrative Secretariat as an arm of the CMG.[43] The role of the Secretariat, which is located in Montevideo, is to maintain the CMG's documents, report on the CMG's activities, and otherwise support the work of the CMG.[44] From 1991 to 1994, the work of the Secretariat was substantially hampered by virtue of the fact that it was unfunded, leaving Uruguay to bear all of the Secretariat's start-up and operating expenses.[45]

The MERCOSUR parties expressly provided that all decisions of the Council and CMG are to be made "by consensus, with all States Parties present."[46] In this context, consensus does not necessarily require unanimity; rather, consensus exists in MERCOSUR so long as all parties are present and no party casts a negative vote, even if one or more of the participants abstains.[47]

2. The Customs Union Structure - January 1995 to the Present.

Technically, effective January 1, 1995, the Ouro Preto Protocol added three new bodies, the MERCOSUR Trade Commission, the Joint Parliamentary Commission, and the

37. Treaty of Asuncion, *supra* note 16, art. 9.
38. *Id.* at art. 10.
39. *Id.* at art. 10-11.
40. *Id.* at art. 13.
41. *Id.* at art. 13-14.
42. *See* OTERMIN, *supra* note 23, at 21.
43. Treaty of Asuncion, *supra* note 16, art. 15.
44. *Id.* at art 15; OTERMIN, *supra* note 23, at 26.
45. *See* OTERMIN, *supra* note 23, at 89 ("Durante estos tres años de vida transcurridos del Mercosur, la Secretaría ha funcionado sin un presupuesto, corriendo todos sus gastos de estructura y funcionamiento a cargo del Uruguay.").
46. Treaty of Asuncion, *supra* note 16, art. 16.
47. *See* OTERMIN, *supra* note 23, at 22 ("En el consenso, no es necesario que todos los miembros deban votar, puede haber quien se abstenga, bastando que no se oponga a la decisión a tomar."); Juan M. Vacchino, *Assessing Institutional Capacities, in* THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS 305, 318 (Peter H. Smith ed., 1993).

Economic and Social Consultative Forum, to MERCOSUR's pre-existing structure.[48] The Trade Commission consists of four representatives of each member state.[49] Like the Council and CMG, the Trade Commission possesses official decision-making authority. [50] The duties of the Trade Commission include monitoring the application of agreements respecting trade within MERCOSUR and between MERCOSUR and third-parties, policing compliance with the common external tariff, and performing other tasks related to MERCOSUR's common trade policies.[51] In addition, the Trade Commission may receive and consider complaints by a member state or private party that fall within the Trade Commission's "sphere of competence" and that are referred to it by one of its National Sections.[52] The Trade Commission is required to meet at least monthly as well as when requested by the CMG or any member state.[53]

The Joint Parliamentary Commission represents the national parliaments of the four MERCOSUR parties.[54] "It consists of sixty-four members, sixteen from each member country, who are appointed for periods of no less than two years by their respective national parliaments."[55] Its purpose is to accelerate the effectuation of decisions made by the MERCOSUR organs, assist in the harmonization of domestic laws, and act "as a conduit to national parliaments and to the people as a whole."[56]

The Economic and Social Consultative Forum ("ESCF") represents the "economic and social sectors" of each member state.[57] Its role is to advise the CMG on economic and social matters.[58]

In addition to supplementing MERCOSUR's institutional structure, the Ouro Preto Protocol accomplished several other critical objectives. First, it formally conferred "legal personality of international law" on MERCOSUR, authorizing it to "take whatever action may be necessary to achieve its objectives, in particular [to] sign contracts, buy and sell personal and real property, appear in court, hold funds and make transfers."[59] Second, the

48. Ouro Preto Protocol, *supra* note 24, art. 1; *see also* Ana Maria de Aguinis, *Can MERCOSUR Accede to NAFTA? A Legal Perspective*, 10 CONN. J. INT'L L. 597, 609 (1995).
49. Ouro Preto Protocol, *supra* note 24, art. 17.
50. *Id.* at arts. 2.
51. *Id.* at arts. 16 & 19.
52. *Id.* at art. 21. Just as the CMG representatives of each member state constitute that state's National Section of the CMG, the Trade Commission representatives of each member state are deemed to constitute that state's National Section of the Trade Commission. *Id.*
53. *Id.* at art. 18.
54. *Id.* at art. 22.
55. Vacchino, *supra* note 47, at 316; Ouro Preto Protocol, *supra* note 24, arts. 23-24.
56. Vacchino, *supra* note 47, at 317; Ouro Preto Protocol, *supra* note 24, art. 25.
57. Ouro Preto Protocol, *supra* note 24, art. 28.
58. *Id.* at arts. 29.
59. *Id.* at arts. 34-35. Prior to the Ouro Preto Protocol, MERCOSUR's legal capacity to enter international agreements with third parties was in question. *See* Pastori, *supra* note 35, at 3; Thomas A. O'Keefe, *Recent Developments in the Andean Pact Affecting North American Investors and Exporters*, 4 LATIN AM. L. & BUS. REP. , Feb. 29, 1996, at 24, 26. "Now, with the creation of the Customs Union (which implies among other things a common trade policy, a common external tariff and joint international negotiations) it is indispensable that this Customs Union be internationally responsible for the legal actions it carries out with third parties that are subjects of international law." Pastori, *supra* note 35, at 3.

Ouro Preto Protocol expanded the powers of the Council to include the power to "assume the legal personality of" MERCOSUR and to negotiate and sign agreements with third countries, groups of countries, and international organizations on behalf of MERCOSUR.[60] Further, the Ouro Preto Protocol clarified that the decisions of MERCOSUR's three primary institutions (the Council, CMG, and Trade Commission) "shall be taken by consensus and in the presence of all the States Parties" and "shall be binding upon the States Parties."[61] Article 42 of the Ouro Preto Protocol expressly states: "The decisions adopted by the Mercosur organs provided for in Article 2 of this Protocol shall be binding and, when necessary, must be incorporated in the domestic legal systems in accordance with the procedures provided for in each country's legislation."[62]

3. *The Common Market Structure*

Clearly, MERCOSUR's present structure does not include supranational institutions such as the European Council, Parliament, or Court of Justice.[63] Indeed, MERCOSUR's present institutions, with the exception of the Secretariat, consist of little more than formalized meetings of representatives from pre-existing agencies of each member state.[64] One commentator labels this an "intergovernmental structure," as distinct from a structure consisting of newly-created supranational institutions.[65] In theory, however, MERCOSUR's final institutional structure will include one or more permanent, independent bodies having supranational authority.

Recently, the member states agreed "in principle" to establish a MERCOSUR Court of Justice to adjudicate trade disputes but did not agree on the timing of its creation.[66] Brazil is the lone opponent to the Court's formation, arguing that "it is too early for such an institution to be created."[67] Apparently, it will be some time before MERCOSUR evolves into its final common market structure.

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60. Ouro Preto Protocol, *supra* note 24, art. 8 (III) & (IV).
61. *Id.* at arts. 2, 9, 15, 20, & 37.
62. *Id.* at art. 42.
63. *See* Manzetti, *supra* note 10, at 118.
64. As Professor Manzetti explains: "The path chosen so far has relied upon intra-governmental bodies and existing institutions, rather than new supra-governmental structures, to further its progress. The only permanent institution created to date is the Administrative Secretariat, located in Montevideo (Uruguay), whose primary task is to supply documents and information regarding new protocols and agreements to the member countries." Manzetti, *supra* note 10, at 117-18. According to Professor Abbott, the decision to provide a minimal institutional structure for MERCOSUR was deliberate and intended to avoid the creation of new "regional bureaucracies" of the type, officials thought, that partially were to blame for the failure of prior Latin American integration schemes. *See* FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 176-77 (1995).
65. *See* Vacchino, *supra* note 47, at 319.
66. *See MERCOSUR Countries to Establish Supranational Bank and Court*, 13 Int'l Trade Rep. (BNA) 980 (June 12, 1996).
67. *Id.*

C. COMPARISON TO THE PURPOSES AND INSTITUTIONS OF NAFTA.

In contrast to MERCOSUR's goal of forming a common market, the limited purpose of NAFTA is to create a free trade area composed of Canada, Mexico, and the United States. While it is true that NAFTA is comprehensive in the sense that it seeks to cover all trade between the three countries as well as related environmental and labor concerns, the Agreement's core purpose is to eliminate all tariffs and non-tariff barriers to trade between the three countries over a fifteen-year transition period.[68] NAFTA is not intended to produce a North American customs union, common market, or federalized state.[69]

Collectively, NAFTA and its sibling agreements—the North American Agreement on Environmental Cooperation ("Environmental Side Agreement")[70] and North American Agreement on Labor Cooperation ("Labor Side Agreement")[71] —create a tripartite system of institutions. The core institutions responsible for administering NAFTA are the Free Trade Commission and Secretariat.[72] The Commission, which is composed of cabinet-level officials of the NAFTA parties, is responsible for supervising the Agreement's implementation and resolving disputes concerning its interpretation or application.[73] The role of the Secretariat, which consists of a National Section office in each NAFTA country, is to supply administrative support to the Free Trade Commission.[74]

The North American Agreement on Environmental Cooperation is administered by the Commission for Environmental Cooperation ("CEC"), which consists of a Council, Secretariat, and Joint Public Advisory Committee.[75] The Environmental Council comprises cabinet-level officials of the three countries.[76] The Environmental Secretariat, which is based in Montreal, Canada, provides technical, administrative, and operational support to the Council.[77] The fifteen-member Joint Public Advisory Committee may advise the Council on "any matter within the scope" of the Environmental Side Agreement and "provide relevant technical, scientific or other information to the Secretariat."[78]

The North American Agreement on Labor Cooperation is administered by the Commission for Labor Cooperation ("CLC"), which consists of a Council and Secretariat, and National Administrative Offices ("NAOs") in each country.[79] The Labor Council comprises the labor ministers of the three NAFTA countries.[80] The Labor Secretariat, which is

68. NAFTA, *supra* note 7, art. 102(1)(a). Other related yet secondary trade goals of NAFTA include the promotion of fair competition, investment, and intellectual property protection. *Id.* at art. 102(1).
69. *See* GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 6-9 (1992).
70. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 [hereinafter NAAEC].
71. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter NAALC].
72. NAFTA, *supra* note 7, arts. 2001 & 2002. In addition, NAFTA provides for the creation of numerous committees and working groups. *Id.* at Annex 2001.2.
73. *Id.* at art. 2001(1)-(2).
74. *Id.* at art. 2002.
75. NAAEC, *supra* note 70, art. 8(1)-(2).
76. *Id.* at art. 9(1).
77. *Id.* at art. 11(5).
78. *Id.* at art. 16(4)-(5).
79. NAALC, *supra* note 71, art. 8.
80. *Id.* at art. 9(1).

based in Dallas, Texas, assists and supports the Council.[81] The NAOs, which are located in Washington, D.C., Mexico City, and Hull, Quebec, serve as points of contact with one another, with the Labor Secretariat, and with governmental agencies of the parties.[82]

The NAFTA institutions differ from those of MERCOSUR in a number of ways. First, NAFTA does not contemplate that its organizational structure is an evolving one, moving ever closer to a more integrated, supranational structure. In the decades to come, NAFTA's organizations may be displaced by new trinational or hemispheric entities but NAFTA is not a "framework" document and there is no provision in NAFTA or the side agreements for evolution to a higher form of economic integration. Second, no one institution is supreme as to all NAFTA-related matters. Clearly, the Free Trade Commission has ultimate authority with respect to matters within the Agreement; however, the Environmental and Labor Commissions are the governing bodies of their respective fields of competence.[83] There is no provision in the side agreements that allows the Free Trade Commission to trump decisions of the other Commissions. Third, NAFTA utilizes decentralized National Section offices of the NAFTA Secretariat, which each nation is responsible for funding, and separate Secretariats for each of the side agreements, whereas MERCOSUR utilizes a single Secretariat office (located in Montevideo), which Uruguay has had to struggle to fund on its own. Fourth, NAFTA has no analog to MERCOSUR's Joint Parliamentary Commission. This may be due, in part, to the fact that "harmonization of domestic laws" is an essential part of MERCOSUR's evolution toward a common market but is not formally a part of NAFTA's creation of a free trade area. Fifth, unlike the MERCOSUR Council, neither the Free Trade Commission nor any other official NAFTA-related institution has any authority to negotiate and sign agreements with non-NAFTA countries or groups, absent the independent approval of the three NAFTA partners.[84] Sixth, the decisions of NAFTA's institutions are not of the same legal effect as those of MERCOSUR's institutions. Whereas the Ouro Preto Protocol makes decisions by MERCOSUR organs "binding" and mandates that they be "incorporated in the domestic legal systems" of the member states, decisions of the NAFTA organs generally are not binding.[85]

NAFTA's institutional structure is similar to that of MERCOSUR in two major ways. First, determinations by the decision-making groups (i.e., the Free Trade Commission, Environmental Council, Labor Council, Council of the Common Market, CMG, and MERCOSUR Trade Commission) are to be made by "consensus." Second, neither NAFTA nor MERCOSUR currently possesses supranational authorities like those of the European Community. With the exception of the four Secretariats, which are wholly new agencies that are independent and, for the most part, active and functioning, the NAFTA and MER-

81. *Id.* at art. 13(1).
82. *Id.* at art. 16(1).
83. NAAEC, *supra* note 70, art. 10(1); NAALC, *supra* note 71, art. 10(1).
84. Of course, Mexico, Canada, and the United States have joined as "NAFTA" to attempt to invite non-NAFTA parties, such as Chile, to accede to the Agreement; however, this is the three partners acting together but not as a distinct "legal personality of international law" in the way MERCOSUR became entitled to act under the Ouro Preto Protocol.
85. Exceptions to this general principle include Chapter 19 binational panel decisions and Chapter 11 investment panel rulings, which are binding on the disputing parties. *See* NAFTA, *supra* note 7, at arts. 1904(9) & 1136(1).

COSUR institutions are more like formalized meetings of representatives from pre-existing governmental agencies.[86]

III. The Dispute Resolution Processes of MERCOSUR.

Just as MERCOSUR's institutional structure has evolved, so too has its dispute resolution system. The March 1991 Treaty of Asuncion created a temporary dispute settlement structure that the member states could use pending the creation of a second, more intricate dispute resolution system for use during the transition period, prior to the formation of the common market.[87] In December 1991, the four countries signed the Protocol of Brasilia for the Resolution of Controversies ("Brasilia Protocol").[88] The "transitional" dispute resolution mechanisms set forth in the Brasilia Protocol entered into force and displaced the Treaty of Asuncion's temporary system in April 1993.[89] Effective January 1995, the Ouro Preto Protocol augmented the Brasilia Protocol by introducing the MERCOSUR Trade Commission as an additional dispute resolution authority. The specific parameters of each of these dispute resolution structures is examined below.

A. MERCOSUR's Initial Dispute Resolution System - November 1991 to April 1993.

The temporary dispute resolution scheme set forth in the Treaty of Asuncion was in place in MERCOSUR from November 1991 to April 1993. This initial, extremely elementary system involved a three-step dispute resolution process for the settlement of disputes, beginning with "direct negotiations" between the disputing countries, leading to evaluation by the CMG, and, failing resolution at these early stages, to review by the Council.[90] Although the MERCOSUR countries did not set any time restriction on the duration of direct negotiations or Council review, the Treaty of Asuncion required the CMG to act within sixty days after receiving the dispute.[91]

The scope of the preliminary system was limited strictly to conflicts between the member states arising "as a result of the application of the Treaty."[92] No provision was made for the settlement of disputes between a member state and private party, a MERCOSUR institution and private party, a member state and a MERCOSUR institution, or exclusively between private parties.[93]

86. *See* Vacchino, *supra* note 47, at 321 (describing NAFTA's Free Trade Commission as an "intergovernmental" institution).
87. *See* Treaty of Asuncion, *supra* note 16, Annex III(2)-(3).
88. Protocol of Brasilia for the Resolution of Controversies, Dec. 12, 1991, 6 Inter-Am.Legal Materials 1 (1992) [hereinafter Brasilia Protocol].
89. Otermin, *supra* note 23, at 29 ("En consecuencia, el primer sistema ... rigió desde el 29 de noviembre de 1991 ... hasta que entrara en vigencia el Protocolo de Brasilia, 22 de abril de 1993...")
90. Treaty of Asuncion, supra note 16, Annex III(1).
91. *Id.*
92. *Id.*
93. *See* Otermin, *supra* note 23, at 30.

B. MERCOSUR'S TRANSITIONAL DISPUTE RESOLUTION SYSTEM - APRIL 1993 TO THE PRESENT.

The dispute resolution mechanism in effect in MERCOSUR since April 1993 provides for the resolution of two general types of controversies: those between member states ("government-to-government" or "public" disputes) and those between private firms or individuals and a member state ("private/public" disputes). Elements of this transitional system were drawn from a variety of pre-existing trade agreements, including those between the United States and Canada, Mexico and Chile, and other Latin American countries.[94]

1. Public Dispute Settlement.

Pursuant to the Brasilia and Ouro Preto Protocols, MERCOSUR's dispute resolution system may be invoked to attempt to resolve any controversy between the member states concerning the interpretation, application, or breach of the Treaty of Asuncion, its related accords, or any decision of the Council, CMG, or Trade Commission.[95] The precise dispute resolution procedures involved vary somewhat, depending on whether the matter at issue is within the Trade Commission's "sphere of competence."

A conflict that falls outside the Trade Commission's purview is subject to a three-stage dispute resolution process involving: (1) direct negotiations, (2) intervention by the CMG, and (3) binding arbitration.[96] The disputants are required to begin attempts toward settlement by means of direct negotiations.[97] Absent a mutually agreed upon extension, direct negotiations are not to last beyond fifteen days from the date on which negotiations were requested.[98]

If no resolution or only a partial resolution is reached in direct negotiations, any disputant may submit the controversy to the CMG.[99] No later than thirty days from the date of submission, the CMG is to evaluate the situation, giving the parties an opportunity to present their respective views, and make recommendations to resolve the dispute.[100] To avoid delay in situations in which it is difficult for the CMG to reach consensus, the Brasilia Protocol authorizes the CMG, at its discretion, to refer a dispute to a panel of three experts.[101] The experts are to be drawn from a pre-established roster of twenty-four persons of recognized competence in areas of possible controversy, each MERCOSUR country having named six persons to the roster.[102]

When neither direct negotiations nor CMG intervention resolves a public dispute, any disputant may notify the Administrative Secretariat of its intention to resort to arbitral proceedings.[103] Each controversy is to be assigned to an ad hoc arbitral tribunal com-

94. *Id.* at 31-32.
95. Brasilia Protocol, *supra* note 88, art. 1; Ouro Preto Protocol, *supra* note 24, art. 43.
96. Brasilia Protocol, *supra* note 88, chs. 2-4. *See also* OTERMIN, *supra* note 23, at 48-51.
97. Brasilia Protocol, *supra* note 88, art. 2.
98. *Id.* at art. 3(2).
99. *Id.* at art. 4(1).
100. *Id.* at arts. 4(2)-6.
101. *See* OTERMIN, *supra* note 23, at 49 ("Por ello aquí, como en otras oportunidades, se recurre al asesoramiento de expertos, de modo de obtener una opinión que no esté condicionada por el consenso.").
102. Brasilia Protocol, *supra* note 88, art. 30.
103. *Id.* at art. 7(1).

posed of three arbitrators.[104] Within fifteen days after the Secretariat has issued notice of the request for arbitration, the arbitrators are to be selected from a pre-formed list of forty qualified judges, each country having named ten judges to the list.[105] Each disputant designates one arbitrator and the third (who must not be a national of either disputant) is chosen by agreement of the first two designees.[106] The Brasilia Protocol guarantees the disputants full due process rights, permits each disputant to select its own counsel, and authorizes arbitral tribunals to issue provisional relief to maintain the status quo or prevent injury.[107]

Ordinarily within sixty days, and in no case longer than ninety days, the arbitral tribunal is to issue a written decision.[108] The decision shall be by majority vote, although the precise vote count for or against the decision is to remain confidential.[109] Decisions of the arbitral tribunals cannot be appealed and the disputants are obliged to respect them as being final.[110] The disputing parties are to comply with the tribunal's decision within fifteen days, unless the tribunal sets another time limit.[111] In the event a disputant fails to comply with a tribunal's decision within thirty days, the other disputant(s) may adopt "temporary compensatory measures," such as the suspension of trade concessions or other equivalent steps designed to obtain compliance.[112]

The dispute resolution process is slightly more complicated when a matter falls within the "sphere of competence" of the Trade Commission. In such cases, complaints are to be submitted by the complaining nation to its National Section of the Trade Commission which, in turn, tenders it to the Chairman of the Trade Commission.[113] At the next scheduled meeting of the Trade Commission, the commissioners are either (1) to make an immediate decision on the complaint or (2) refer it to a committee of experts for an opinion on the underlying question, following the receipt of which the commissioners are to rule on the complaint.[114] In the event consensus cannot be reached, the Trade Commission shall submit the complaint, the experts' opinion, and the "various alternatives proposed" to the CMG.[115] The CMG is required to rule on the complaint within thirty days thereafter.[116]

104. *Id.* at art. 9(1).
105. *Id.* at arts. 9(2)(I), 10 & 13.
106. *Id.* at art. 9(2)(I).
107. *Id.* at arts. 15-18.
108. *Id.* at art. 20(1). The Protocol specifies that the sources of law to be used by arbitrators in rendering decisions are the Treaty of Asuncion, its related accords, decisions of the Council, resolutions of the CMG, and applicable international law. *Id.* at art. 19.
109. *Id.* at art. 20(2).
110. *Id.* at art. 21(1). The parties to the Brasilia Protocol expressly acknowledged and assented to the authority of the arbitral tribunals to adjudicate controversies encompassed by the Protocol. *Id.* at art. 8.
111. *Id.* at art. 21(2).
112. *Id.* at art. 23.
113. Ouro Preto Protocol, *supra* note 24, at Annex, arts. 1-2.
114. *Id.* at Annex, arts. 2-4. The committee of experts is to take no more than thirty days to prepare and submit a joint opinion or set of conclusions to the Trade Commission. *Id.* at Annex, art. 3.
115. *Id.* at art. 5.
116. *Id.*

If either the Trade Commission or CMG rules that the complaint is justified, the offending country shall "adopt the measures approved" by the reviewing body.[117] In the event the offending country fails timely to comply with the ruling, the complaining nation may initiate arbitral proceedings as provided for other public disputes.[118] If neither the Trade Commission nor the CMG can reach the consensus necessary to rule on a complaint, the complaining nation likewise may resort to binding arbitral proceedings.[119]

2. Private/Public Dispute Settlement.

In addition to creating a regime for the resolution of government-to-government disputes, MERCOSUR provides for the settlement of certain disputes between private individuals and member countries.[120] A natural or legal person affected by a country's breach of the Treaty of Asuncion, its related accords, Council decisions, CMG resolutions, or Trade Commission directives may present a claim to the National Section of the CMG or Trade Commission of the country in which the person resides or has its business headquarters.[121]

In the event the question presented by a person is not already the subject of government-to-government dispute resolution proceedings and falls outside the "sphere of competence" of the Trade Commission, the National Section of the CMG receiving the claim may take it up "as its own" and either (1) contact the National Section of the alleged violator directly for purposes of discussing an immediate resolution or (2) raise the claim before the CMG.[122] In its first meeting following receipt of the claim, the CMG may reject the claim as being procedurally defective or may accept the claim and immediately refer it to a panel of three experts, which is to issue appropriate findings within thirty days after being assembled.[123] The panelists are selected by a vote of the CMG from the pre-formed roster of twenty-four experts mentioned previously.[124] The person asserting the claim and the country against which the claim is made are entitled to present arguments to the panel.[125]

If expert findings returned to the CMG verify the private party's claim, any member country may demand that the violator take corrective steps or annul the measure in ques-

117. *Id.* at art. 6.
118. *Id.* (referring to Brasilia Protocol, ch. IV).
119. *Id.* at art. 7.
120. Such private/public controversies are distinct from commercial disputes solely between private businesses from the MERCOSUR countries. Purely private disputes are handled outside MERCOSUR's structure through traditional litigation, arbitration, conciliation or mediation. *See* Juan C. Viterbori, *Solución de controversias en el sistema del Mercosur*, LA LEY, Jan. 27, 1995, at 1, 2.
121. Brasilia Protocol, *supra* note 88, arts. 25-26(1); Ouro Preto Protocol, *supra* note 24, art. 43.
122. Brasilia Protocol, *supra* note 88, art. 27; Pastori, *supra* note 35, at 2. A matter initially discussed with the National Section of the alleged violator that is not resolved by consultation within fifteen days may, thereafter, be raised before the CMG. Brasilia Protocol, *supra* note 88, art. 28.
123. *Id.* at art. 29.
124. See text accompanying note 102, *supra*. The Brasilia Protocol stipulates that at least one of the three panelists must be a person who is not a national of either the alleged violator or country which sponsored the claim. Brasilia Protocol, *supra* note 88, art. 30(1).
125. *Id.* at art. 29(3).

tion.[126] If that demand is not met within fifteen days, the country making the demand may resort directly to the arbitral proceedings created for resolving government-to-government disputes.[127]

If a private/public controversy falls within the authority of the Trade Commission, the private party submits its complaint to the appropriate National Section of the Trade Commission.[128] Thereafter, dispute resolution proceeds in the same manner described for public controversies within the Trade Commission's "sphere of competence."[129]

C. COMPARISON TO THE DISPUTE RESOLUTION PROCESSES OF NAFTA.

NAFTA's three primary accords—the NAFTA itself, the Environmental Side Agreement, and the Labor Side Agreement—include a variety of dispute resolution processes. Within NAFTA, the two most significant dispute resolution structures are those of Chapter 20, which applies to controversies concerning the interpretation, application or breach of the Agreement, and Chapter 19, which deals with anti-dumping and countervailing duty disputes.[130]

In general terms, Chapter 20 constructs a three-stage dispute resolution process that escalates from consultations, to a meeting of the Free Trade Commission, to nonbinding arbitration, as necessary.[131] Assuming a dispute works its way through consultations and the Free Trade Commission to an arbitral finding against a NAFTA country, the disputing countries are to reach a "mutually satisfactory resolution."[132] If this does not occur within thirty days of the arbitral panel's final report, the complaining party may suspend NAFTA benefits to the offending party until such time as an agreed resolution is reached.[133]

Pursuant to Chapter 19, a private Canadian, Mexican, or American business subject to a final antidumping determination of one of the three governments may request that the determination be reviewed by a binational arbitral panel.[134] Chapter 19 panels are charged with assessing "whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party."[135] A panel ruling that a final determination is not in compliance with the importing Party's law is binding on the Party.[136] "No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts."[137]

126. *Id.* at art. 32.
127. *Id.* at art. 32.
128. Ouro Preto Protocol, *supra* note 24, Annex, arts. 102.
129. See text accompanying notes 113-116, *supra.*
130. Aside from the dispute resolution processes set forth in Chapters 19 and 20, NAFTA provides for other forms of dispute settlement such as in the case of investment disputes between a NAFTA investor and one of the countries, *see* NAFTA, *supra* note 7, Ch. 11, and between a financial services provider and one of the countries, *see* NAFTA, Ch. 14.
131. NAFTA, *supra* note 7, arts. 2006-2008.
132. *Id.* at art. 2019.
133. *Id.* at art. 2019(1).
134. *Id.* at arts. 1904(2) & 1911.
135. *Id.* at art. 1904(2).
136. *Id.* at art. 1904(9).
137. *Id.* at art. 1904(11). Chapter 19 includes an extensive set of procedures for ensuring that the member states comply with panel rulings. *Id.* at art. 1905.

The Environmental Side Agreement provides for the resolution of two general types of controversies: those not involving allegations that a NAFTA government has failed to enforce its environmental laws ("non-enforcement matters") and those wherein a government's failure to enforce its environmental laws is directly at issue ("enforcement matters").[138] The category of enforcement matters further is divided into cases of mere failure to enforce environmental laws and a "persistent pattern" of failure to enforce environmental laws.[139] As to all cases other than "persistent pattern" cases, the only measures available to the Environmental Secretariat are to conduct an investigation, subject to limitation by the Council, and to prepare a report, potentially for distribution to the public.[140] Disputes involving allegations of a "persistent pattern" of failure to enforce environmental laws are subject to a more intricate settlement process, involving consultations, a special session of the Council, and ultimately an arbitral panel.[141] Assuming it does not occur voluntarily, compliance with adverse determinations by an arbitral panel is to be obtained by imposing a "monetary enforcement assessment" on the offending country or suspending NAFTA benefits to it.[142]

The Labor Side Agreement creates a four-step dispute settlement process that progresses sequentially from initial consultations between NAOs, to ministerial consultations, to expert evaluations, and to further consultations that may lead to nonbinding arbitration, as necessary.[143] A broadly defined category of "labor law" matters may be subjected to the first two steps, NAO and ministerial consultations.[144] A smaller category of labor-related controversies may proceed to expert evaluation.[145] And only three types of labor controversies, those involving occupational safety and health, child labor, or minimum wage concerns, may advance to the fourth stage of dispute settlement.[146] As is the case with respect to environmental cases, assuming compliance with a labor panel's ruling does not occur voluntarily, compliance is to be obtained by imposing a "monetary enforcement assessment" on the offending country, and if that fails to earn compliance, by suspending NAFTA benefits to it.[147]

NAFTA's initial and current dispute resolution structures are broader in scope, more complex, and far more detailed than MERCOSUR's initial dispute settlement structures. NAFTA's primary dispute resolution devices apply to controversies surrounding the interpretation and application of NAFTA, antidumping conflicts, and environmental and labor disputes. In contrast, for the first eighteen months of MERCOSUR's existence, only disputes involving the application of the Treaty of Asuncion were susceptible to resolution with MERCOSUR. The expansion of MERCOSUR's dispute settlement capacity in April 1993, pursuant to the Brasilia Protocol, broadened the scope of disputes resolvable within

138. NAAEC, *supra* note 70, arts. 13-15 & 22-36.
139. *Id.* at arts. 14-15 & 22-36.
140. *Id.* at art. 15.
141. *Id.* at arts. 22-34.
142. *Id.* at arts. 34(5) & 36(1).
143. NAALC *supra* note 71, at Pts. 4 & 5.
144. *Id.* at arts. 21(1) & 22(1).
145. *Id.* at art. 23.
146. *Id.* at art. 27(1).
147. *Id.* at arts. 39(4) & 41.

MERCOSUR. Presently, disputes concerning the "interpretation, application, or breach" of all of the MERCOSUR accords as well as the decisions of the MERCOSUR institutions are within the subject matter authority of the group's dispute settlement processes. Nevertheless, antidumping duty, environmental, and labor conflicts between the member states are not expressly susceptible to resolution within MERCOSUR. In short, one sees Chapter 20-like processes within MERCOSUR but no direct analogs to the dispute resolution mechanisms of NAFTA Chapter 19 or the side agreements.

As in the case of Chapter 20, MERCOSUR controversies generally may progress along a three-tiered path, from direct negotiations to ministerial intervention to arbitration; however, MERCOSUR arbitration formally is binding on the disputants, whereas Chapter 20 arbitration is not. Like Chapter 20 panels, those within MERCOSUR are ad hoc and drawn from pre-formed rosters; however, MERCOSUR panels consist of only three arbitrators, not five as in the case of NAFTA. In the same way, the ultimate means of compelling compliance with panel determinations under both NAFTA and MERCOSUR lies in the suspension of trade concessions.

A final point of similarity is that MERCOSUR and NAFTA both provide for the resolution of "public" and "private/public" disputes. NAFTA Chapter 19 cases as well as many of those under the side agreements involve private individuals or entities as formal participants. Private MERCOSUR citizens or entities too may initiate dispute settlement proceedings to the extent they are affected by the group's underlying accords or decisions of its institutions. As with Chapter 19 disputes under NAFTA, private/public disputes potentially are subject to binding arbitration within MERCOSUR.

IV. Early Dispute Resolution Experience Under MERCOSUR.

MERCOSUR and its initial dispute resolution processes entered into force in November 1991. Since then, numerous trade-related disputes have arisen among the parties. Surprisingly, few of these controversies appear to have been submitted to MERCOSUR's formal dispute resolution systems for settlement. The reasons underlying the parties' reluctance to utilize the MERCOSUR structures and ways in which the early dispute resolution experience in MERCOSUR differs from the early experience under NAFTA are examined below.

A. Trade-Related Disputes Arising Between November 1991 and September 1996.

From November 1991 to September 1996, a variety of trade-related disputes arose between the MERCOSUR parties. Generally, these fell into four distinct categories: disputes concerning barriers to internal trade, conflicts relating to MERCOSUR's common external tariff, antidumping and countervailing duty disputes, and disputes concerning intellectual property protection.

At least four major controversies concerning barriers to internal trade arose. First, in November 1992, Argentina imposed a "statistical tax" of three to ten percent ad valorem on all imports, including those from the other three MERCOSUR countries.[148]

148. *See Progress Toward Economic Integration Continues to Elude MERCOSUR Members*, 10 Int'l Trade Rep. (BNA) 663 (Apr. 21, 1993) [hereinafter *Progress*].

"Paraguayan officials threatened to withdraw their country from the MERCOSUR negotiations if Argentina did not lift its tax."[149] Second, in December 1993 Argentina banned the importation of Brazilian beef and pork, ostensibly to protect against disease; in response, Brazil threatened to suspend imports of fruit from Argentina for "health reasons."[150] Next, in June 1995 Brazil announced that it intended to impose quotas on automobile imports, including those from Argentina, so as to drastically cut such imports.[151] Finally, in May 1996, Brazil announced plans to resurrect "financial guarantee" requirements on 500 different types of textile and clothing imports from Uruguay that previously had been eliminated under the MERCOSUR agreements.[152] Aside from these relatively significant controversies, many smaller internal trade matters also plagued MERCOSUR.[153]

Apparently, many antidumping disputes arose between the parties during MERCOSUR's first five years of existence. For example, in July 1993 Argentina, unilaterally and without the prior consultation required under certain "complementary economy agreements," imposed antidumping duties and quotas on a wide variety of imports from Brazil, including automobile parts and steel.[154] Moreover, from January 1995 to May 1996 alone, at least fourteen antidumping cases involving Brazilian goods were filed with the Argentine Trade Secretariat.[155]

The effort to form a common external tariff has been the source of numerous disputes within MERCOSUR. In 1993, Argentina, Paraguay, and Uruguay experienced some disagreement with Brazil in setting a common tariff for "sensitive" items such as automobiles, telecommunications equipment, and petrochemicals.[156] In November 1994, controversy

149. Manzetti, *supra* note 10, at 136 n.5.

150. *See MERCOSUR Lowers Internal Import Duties; Brazil, Argentina Trade Charges, Bans*, 11 Int'l Trade Rep. (BNA) 58 (Jan. 12, 1994).

151. *See* Angus Foster, *Car Curbs Row Ends Mercosur Honeymoon*, FIN. TIMES, June 21, 1995, at 5; *Americas Drift*, *supra* note 8, at 35.

152. *See Uruguay: Economy Expected to Remain Stagnant in 1996 Following Poor Performance in 1995*, NotiSur-Latin American Political Affairs, May 24, 1996, *available in* WESTLAW, Latnews Database, 1996 WL 8089400 [hereinafter *Uruguay Economy*].

153. Even as late as May 1995 (five months after the formal birth of the customs union), many nontariff barriers remained between all four of the MERCOSUR parties. *See Recent Developments*, *supra* note 34, at 27 (explaining that Brazil and Uruguay each continued to require prior governmental approval of the importation of a number of products, including flour, wheat, petrochemicals, sugar, alcohol, and honey; Argentina continued to prohibit the importation of wine in bulk; and Paraguay persisted in banning the importation of a "wide range" of items). At a meeting of the MERCOSUR Presidents in August 1995, Uruguay complained of Brazil's erection of new non-tariff barriers that would hinder the exportation of Uruguayan grains and textiles to Brazil. *See Summit of Mercosur Presidents Discusses Group's Initial Problems*, 12 Int'l Trade Rep. (BNA) 1351 (Aug. 9, 1995).

154. *See MERCOSUR Free Trade Area Jeopardized by Rifts between Argentina and Brazil*, 10 Int'l Trade Rep. (BNA) 1304 (Aug. 4, 1993) [hereinafter *MERCOSUR Jeopardized*].

155. *See Argentine Government Facilitates Dumping Cases, Tax Recovery*, 13 Int'l Trade Rep. (BNA) 981 (June 12, 1996).

156. *See Progress*, *supra* note 148, at 663; *Common Market Under MERCOSUR Delayed as Countries Fail to Reach Agreement*, 10 Int'l Trade Rep. (BNA) 989 (June 16, 1993).

arose over the completion of lists of items to be exempted from MERCOSUR's common external tariff.[157] Still, the most serious threat to MERCOSUR's common external tariff occurred in March 1995, when Brazil unilaterally raised the tariffs on 109 exempted goods to seventy percent, far, far in excess of the tacit understanding between the parties that tariffs on exempted goods would not exceed thirty-five percent.[158] Subsequently, Brazil reduced the tariffs on 90 of the 109 exempted items.[159]

As trade between the MERCOSUR partners grew in the mid-1990s, tensions rose concerning the lack of intellectual property protection within the group, particularly with respect to the rights of Brazilian companies seeking to expand sales in Argentina, Paraguay, and Uruguay.[160] Nevertheless, as late as 1995 none of the countries possessed any significant legislation for expanding the protection of intellectual property rights.[161]

Presumably, some private businesses within MERCOSUR possessed legitimate trade disputes arising out of the actions of one or more of the member states. Be that as it may, as of September 1996, there was no indication in the public media that any private individual or business had presented a claim to any National Section of the CMG or Trade Commission under Articles 25 and 26 of the Brasilia Protocol. The MERCOSUR Secretariat and commentators within MERCOSUR confirmed that no such cases existed as of September 1996.[162]

B. THE LACK OF USE OF THE FORMAL MERCOSUR PROCESSES.

The MERCOSUR parties successfully resolved many of the trade-related disputes that arose among them from November 1991 to September 1996. The November 1992 Argentine "statistical tax" controversy was resolved after Argentina first agreed to reduce the tax on imports from Paraguay and later completely abolished the tax as to all MERCOSUR parties.[163] The December 1993 Brazilian beef and pork feud ended after Argentina agreed in August 1994 to eliminate its ban on these imports.[164] Similarly, the parties

157. Pursuant to an August 1994 agreement, Argentina and Brazil were to be permitted to exempt up to 300 products from the common external tariff, while Paraguay was to be allowed to exempt 399 items. *See Presidents of MERCOSUR Nations Ratify Common External Tariffs*, 11 Int'l Trade Rep. (BNA) 1268 (Aug. 17, 1994). By November 1994, the parties encountered some difficulty in developing complete exemption lists and had to postpone the deadline for doing so. *See Complications, Delays Beset MERCOSUR Pact Implementation*, 11 Int'l Trade Rep. (BNA) 1669-70 (Nov. 2, 1994).

158. *See* Bill Hinchberger, *Mercosur's Pain and Presence*, INT'L BUS., June 1995, at 46, 48; *Recent Developments, supra* note 34, at 27. This action by Brazil technically did not violate the Treaty of Asuncion because the thirty-five percent ceiling on exempted items was based on a mutual understanding and not a formal treaty limitation. *Id.*

159. *Id.* at 27.

160. *See Trademark Piracy Tops MERCOSUR Nations' Agenda*, 12 Int'l Trade Rep. (BNA) 305 (Feb. 15, 1995).

161. *See id.*; *Mercosur Nations Examine Trademark Piracy*, J. PROPRIETARY RIGHTS, Apr. 1995, at 37.

162. Telephone Interview with Manuel Olarreaga, Coordinator, MERCOSUR Secretariat (Oct. 8, 1996); Telephone Interview with Professor Adriana Dreyzin de Klor, Faculty of Law and Social Sciences, Universidad Nacional de Córdoba (Oct. 3, 1996).

163. *See Progress, supra* note 148, at 663; *Recent Developments, supra* note 34, at 29 n.4.

164. *See After NAFTA, AFTA?*, ECONOMIST, Aug. 13, 1994 at 15, 16.

resolved their disputes over the common external tariff. This is true with regard to the "sensitive" items dispute,[165] the conflict over exemptions from the common external tariff,[166] and the March 1995 effort by Brazil to unilaterally raise external tariffs to seventy percent.[167] Officials from Argentina and Brazil also negotiated a solution to the July 1993 antidumping dispute.[168] Finally, the leaders of the four MERCOSUR countries were able to formulate a solution to many of their intellectual property concerns.[169]

Curiously, although many major disputes between the MERCOSUR parties were settled, it is not necessarily the case that these resolutions were products of the group's formal dispute settlement structures. To a great degree it is unclear whether the disputing parties formally invoked the MERCOSUR's dispute settlement mechanisms to reach solutions or whether they simply operated outside that structure. MERCOSUR's initial dispute resolution system, in effect from November 1991 to April 1993, did not require a party invoking that system to provide formal notice of such invocation.[170] Thus, during the trading bloc's initial eighteen months, disputes arose and were resolved, but not necessarily within the MERCOSUR structure.[171]

The Brasilia Protocol, which took effect in April 1993, specifically requires that, when a controversy concerning interpretation, application, or breach of the Treaty of Asuncion arises and the parties initiate direct negotiations to resolve it, the involved parties are to inform the CMG, through the Secretariat, of the issues under negotiation and the outcome.[172] As of the time notice became required, it appears that only two disputes, those concerning Brazil's automobile import quotas and its "financial guarantee" requirements on Uruguayan textiles and clothing, were formally placed into the MERCOSUR dispute settlement system.[173] The automobile quotas dispute ended following negotiations in

165. *See Presidents of MERCOSUR Nations Ratify Common External Tariffs*, 11 Int'l Trade Rep. (BNA) at 1268 (Aug. 17, 1994).
166. *See Brazil, Argentina Agree on Details; MERCOSUR Customs to Take Effect Jan. 1*, 11 Int'l Trade Rep. (BNA) 1952-53 (Dec. 21, 1994).
167. *See Recent Developments, supra* note 34, at 27-28.
168. *See MERCOSUR Jeopardized, supra* note 154, at 1304.
169. In August 1995, Argentina, Brazil, Paraguay, and Uruguay signed the Protocol on Harmonization of Rules on Intellectual Property in Mercosur in Relation to Trademarks, Geographical Indications and Denominations of Origin, under which illegally registered trademarks would be voided. *See Governments Sign Agreement to Harmonize Trademark Laws in South American Countries*, J. PROPRIETARY RIGHTS, Feb. 1996, at 31, 31-32. Moreover, in October 1996 the MERCOSUR parties agreed to pursue coordination of their respective intellectual property policies. *See MERCOSUR Nations Ready to Move to Intellectual Property, Fiscal Issues*, 13 Int'l Trade Rep. (BNA) 1587 (Oct. 16, 1996).
170. *See* Treaty of Asuncion, *supra* note 16, Annex III(1).
171. *See* Michael Reid, *MERCOSUR Survey: The Road to a Single Market*, ECONOMIST, Oct. 12, 1996, at 24 (explaining that MERCOSUR's dispute settlement mechanisms remained untested).
172. *See* Brasilia Protocol, *supra* note 88, art. 3(1).
173. *See Uruguay Economy, supra* note 152; Pastori, *supra* note 35, at 3 (stating that the Brasilia Protocol "was never used during the transition period," which ended on December 31, 1994).
174. *See Brazil Abandons Car Quotas for Fellow MERCOSUR Members*, 12 Int'l Trade Rep. (BNA) 1224-25 (July 19, 1995). It appears that this dispute may have been settled within the context of MERCOSUR because an official from Argentina stated: "It is very encouraging that we settled the issue a whole week before the [30-day] deadline, because it confirms the stability of the MERCOSUR agreements." *Id.*

which Brazil decided not to limit automobiles imported from its MERCOSUR partners.[174] The May 1996 "financial guarantee" controversy between Brazil and Uruguay apparently was being handled within the MERCOSUR dispute resolution system and appeared to be ongoing as of September 1996.[175] One conflict, that arising out of the March 1995 attempt by Brazil to unilaterally raise external tariffs to seventy percent, clearly was resolved outside of MERCOSUR's dispute settlement structure.[176]

A second problem, even considering the present provision for notice to the MERCOSUR Secretariat, is that the Secretariat does not make the relevant information, such as the nature of a controversy, the date negotiations were requested, the identities of the complaining party and party complained against, or the date and substance of any resolution, available to the public. Assuming compilations or lists of such information exist, they are limited to internal use only.[177]

South American commentators confirm that, as of September 1996, MERCOSUR's formal dispute resolution structures rarely had been invoked.[178] This is despite the fact that in the five years from 1991 to 1996, trade between the MERCOSUR nations "ballooned from $4 billion a year to $14.4 billion,"[179] providing ample opportunities for conflict. What explains the parties' non-use of the dispute resolution systems they carefully negotiated and officially assented to in the Treaty of Asuncion, Brasilia Protocol, and Ouro Preto Protocol? The next section examines several possible answers.

C. The Role of Culture and Presidencialismo in MERCOSUR Dispute Resolution

Two emerging explanations for the non-use of MERCOSUR's dispute settlement systems relate to Latin American culture and the near total political dominance of the four MERCOSUR presidents. Professor Sola explains that the absence of any claims by private persons or firms under Articles 25 and 26 of the Brasilia Protocol is attributable to "legal culture," not to any perceived lack of merit in the structure itself.[180] "They [private par-

175. *See Uruguay Economy, supra* note 152.

176. One author suggests two reasons why the dispute never was subject to the group's dispute settlement system. First, there was little Argentina, Paraguay, and Uruguay could do in view of Brazil's economic dominance. *See Recent Developments, supra* note 134, at 27-28 ("Brazil's ability to raise its tariffs up to 70 percent on over 100 products with little overt complaints from its MERCOSUR partners serves to underscore who the real powerhouse is within the four country grouping."). Second, Brazil's MERCOSUR partners stood to profit from the high Brazilian tariffs on imports from third-parties. *Id.* at 28.

177. Telephone Interview with Manuel Olarreaga, Coordinator, MERCOSUR Secretariat (Oct. 8, 1996). The Ouro Preto Protocol stipulates that rulings of the MERCOSUR arbitral tribunals are to be published in the trading group's official journal, *see* Ouro Preto Protocol, *supra* note 23, art. 39; however, since no controversies have reached the arbitration stage under MERCOSUR, there have been no arbitration rulings to report. Even had some rulings existed, they may not have been publicized since, at late as February 1996, no official MERCOSUR Bulletin existed. *See* Juan V. Sola, La Jerarquía de las Leyes y Reglamentos Nacionales con las Normas del Mercosur 5 (1996) (unpublished manuscript on file with author).

178. Telephone Interview with Professor Adriana Dreyzin de Klor, Faculty of Law and Social Sciences, Universidad Nacional de Córdoba (Oct. 3, 1996); Sola, *supra* note 177, at 11.

179. Michael S. Serrill, *Keep It in the Neighborhood Forget NAFTA—South America is Busy Building its Own Powerful Trading Bloc, Called Mercosur*, Time Int'l, Aug. 26, 1996, at 26.

180. *See* Sola, *supra* note 177, at 11.

ties] prefer in many cases to lobby their own national authorities to negotiate an appropriate solution with the authorities of the other government. In other legal cultures resort to the national courts and binding arbitration is preferred. As Mercosur's legal community becomes consolidated in the future, it is probable that this [adversarial approach] will be the path selected."[181] Thus, the non-use of MERCOSUR's formal dispute settlement systems in part may be attributable to a cultural predisposition toward informal, non-public, non-adversarial methods of conflict resolution.[182]

The second explanation focuses on the broad authority and practice of the four MERCOSUR presidents to get directly involved in trade disputes that arise within the bloc. "Even Mercosur's smallest disputes have tended to go up for settlement by national presidents."[183] Although neither the Treaty of Asuncion nor Ouro Preto Protocol formally designates the presidents as members of any MERCOSUR institution, the executives in fact are the central actors in MERCOSUR. According to Professor Manzetti: "MERCOSUR has been marked by a top-down development strategy heavily dependent upon presidential initiatives, the initiative still remains firmly in the hands of the presidents and of their respective ministries of foreign affairs."[184]

To assure that the MERCOSUR presidents would be personally involved in resolving major controversies without extensive delay, the Treaty of Asuncion stipulated that the presidents would convene at least once a year.[185] The presidents "strictly fulfilled" this obligation during the period 1991 to 1994.[186] After 1994, the Ouro Preto Protocol doubled the formal involvement of the presidents by explicitly requiring them to meet "at least once every six months."[187] As of September 1996, the MERCOSUR presidents had done so.[188]

To a great degree the active and direct involvement of the presidents of Argentina, Brazil, Paraguay, and Uruguay makes sense and is explainable as part of a larger political

181. *Id.* ("Prefieren en muchos casos insistir en el lobby a las autoridades nacionales para que éstas a su vez negocien la solución del diferendo con los demás Estados parte. En otras culturas jurídicas se preferiría el acceso a los tribunales nacionales y al arbitraje obligatorio. Es probable que en el futuro con la consolidación de la comunidad de derecho del Mercosur éste sea el camino utilizado.").
182. An additional reason for the absence of claims by private parties under Articles 25 and 26 may be that such parties perceive there to be risks in complaining to officials administering MERCOSUR that would not be present if, instead, private parties could complain to judicial tribunals. *See* Roberto Bloch, *Aportes para la Resolución de Conflictos en el Mercosur*, EL DERECHO, May 31, 1995, at 23, 25 ("... los Estados dominan a los órganos actuales del Mercosur y son los que en definitiva efectuarán el control de admisibilidad de los reclamos presentados por los particulares, aceptándolos o rechazándolos; además, sometería a un extremadamente azaroso resultado la tutela debida a los intereses de los particulares, tal como funciona el sistema.").
183. Michael Reid, *A Survey of Mercosur: A Lopsided Union*, ECONOMIST, Oct. 12, 1996, *available in* 1996 WL 11247181 [hereinafter *Lopsided Union*].
184. Manzetti, *supra* note 10, at 117-18. *See also Lopsided Union*, *supra* note 183, at 9 (explaining that, in practice, decision-making in MERCOSUR typically has rested with the presidents).
185. Treaty of Asuncion, *supra* note 24, art. 11.
186. *See* Pastori, *supra* note 35, at 1-2.
187. Ouro Preto Protocol, *supra* note 23, art. 6.
188. Telephone Interview with Professor Adriana Dreyzin de Klor, Universidad Nacional de Córdoba, Córdoba, Argentina (Oct. 3, 1996).

pattern of presidencialismo. Argentine political scientist Guillermo O'Donnell argues that the young democracies one finds in Argentina and Brazil constitute "delegative democracies," as distinct from "representative democracies."[189] Representative democracies, such as those of "highly developed capitalist countries," are characterized by the presence of strong formal institutions—e.g., a congress, judiciary, political parties, fair elections, and a strong executive which are, in fact, "important decisional points in the flow of influence, power, and policy."[190] In such systems, the president's accountability runs both vertically, to voters, and horizontally, "across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish" attempts by the president to discharge his responsibilities in improper ways.[191]

In stark contrast, "[d]elegative democracies rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office. The president is taken to be the embodiment of the nation and the main custodian and definer of its interests."[192] Moreover, "[i]n this view, other institutions—courts and legislatures, for instance—are nuisances that come attached to the domestic and international advantages of being a democratically elected president."[193] In short, presidents in delegative systems are subject to vertical accountability, to voters, but largely are free from the burdens of horizontal accountability.[194] By implication, therefore, it is in the political self-interest of the president in a delegative democracy to oppose the rise of formal organizations that may challenge or deplete his own authority.[195]

Pragmatism, as well as cultural preference and political expectations, may explain the phenomenon of presidencialismo within MERCOSUR. In MERCOSUR the direct and authoritative involvement of each country's leader simultaneously exists by virtue of and perpetuates the lack of strong supranational institutions. "By giving leaders of the member countries direct responsibility for MERCOSUR's development during its initial stages, rather than delegating authority to a supranational bureaucracy, it was hoped that decisions could be made, and effective action taken, more quickly."[196] Thus, presidencialismo South American-style helps to explain why the MERCOSUR parties have been able to suc-

189. *See* Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 55-56 (1994). Interestingly, Professor O'Donnell categorizes Uruguay as a representative democracy, not a delegative one. *See id.* at 56. According to O'Donnell, Uruguay presents a case of "redemocratization," wherein the executive, upon the return to democracy, had no choice but to work with a "strongly institutionalized legislature" that, in turn, constrained the executive's authority. *See id.* at 63-64.

190. *Id.* at 57.

191. *See id.* at 61.

192. *Id.* at 59-60. "After the election, voters/delegators are expected to become a passive but cheering audience of what the president does." *Id.* at 60.

193. *Id.* at 60.

194. *See id.* at 61.

195. *See id.* at 61-62. As O'Donnell describes it, delegative democracies manifest an "anti-institutional bias." *See id.* at 66.

196. Manzetti, *supra* note 10, at 119.

cessfully address trade-related disputes that have arisen, not by resorting to the formal dispute resolution structures of MERCOSUR, but "through new internal arrangements or the offer of side payments."[197]

D. COMPARISON TO THE EARLY DISPUTE RESOLUTION EXPERIENCE UNDER NAFTA.

There are many differences between the early dispute settlement experience under MERCOSUR and NAFTA. Some of these are interesting but, ultimately, of only intermediate significance. For example, whereas the South Americans have shown little concern for tracking controversies that formally entered MERCOSUR's dispute resolution structures and for disseminating information to the public about such controversies, the North Americans meticulously have tracked all formal NAFTA disputes and, upon request, will provide non-confidential material to any interested person. Under NAFTA it is possible, on any given day, to learn exactly what cases have entered the Chapter 20, Chapter 19, environmental, and labor systems; what the nature and current status of each case is; and the approximate date on which rulings or reports in such cases will be issued. This clearly is not true in the context of MERCOSUR and, in part, may be due to the expectation that, after elections, voters in countries such as Argentina and Brazil are to become passive spectators of the political process.

Three other differences in MERCOSUR and NAFTA dispute resolution practices are of more profound significance. First, NAFTA does not rely on face-to-face presidential intervention for the resolution of trade-related conflicts. Since the Agreement took effect in January 1994, President Clinton, President Zedillo, and Prime Minister Chrétien formally met only once, in December 1994 at the Summit of the Americas; however, that meeting involved thirty-one other heads of state and focused on FTAA formation, not NAFTA dispute resolution.[198] High-level ministerial officials from North America have met more often to mediate trade disputes in their capacities as members of the Free Trade Commission, CEC, and CLC; yet, even these sessions represented only a small portion of the total time and effort devoted to dispute resolution under NAFTA as of September 1996.[199]

Instead of resolving disputes at the highest political levels, the NAFTA countries have committed dispute resolution to lower-level bureaucrats in the respective governments as well as to the formal NAFTA institutions that, since January 1994, have "materialize[d] in buildings, seals, rituals, and persons in roles that authorize them to 'speak for' the organi-

197. *Id.* at 130. One example of the use of a "side payment" to resolve a dispute occurred in connection with Argentina's concern over its large trade deficit with Brazil. To defuse this crisis, Brazil "agreed to increase its purchases of Argentine crude oil, wheat, and flour in 1993; as a result, Argentina's trade deficit with its large neighbor decreased by 34% during the first half of 1993 as compared with the same period in the previous year." *Id.* at 124.

198. *NAFTA "Amigos" Invite Chile to Begin Accession Talks*, 11 Int'l Trade Rep. (BNA) 1914 (Dec. 14, 1994).

199. As of September 1996, only four Chapter 20 disputes had advanced to a formal meeting of the Free Trade Commission. *See* Lopez, *supra* note 22, at 170-71. The CEC had been involved in only one environmental dispute. *See id.* at 190-91. And the CLC had consulted on only two labor cases. *See id.* at 196-98. This is out of a total of forty-three disputes that were initiated under Chapter 20, Chapter 19, and the two side agreements as of that date.

200. O'Donnell, *supra* note 189, at 57.

zation."[200] This substantial difference between the two trading blocs clarifies that NAFTA's dispute settlement institutions are becoming increasingly "important decisional points in the flow of influence, power, and policy" but that the MERCOSUR's institutions are not.[201]

A second critical difference in the early dispute resolution experience is the frequency with which North Americans have resorted to the formal NAFTA structures. As of September 1996, forty-three separate cases formally had entered Chapter 20, Chapter 19, and the environmental and labor side agreements for resolution.[202] The first formal NAFTA disputes were brought under the Labor Side Agreement on February 14, 1994, roughly six weeks after NAFTA took effect.[203] The first Chapter 20 and Chapter 19 cases quickly followed in March 1994.[204] Each of the NAFTA countries resorted to NAFTA's formal dispute settlement systems with some frequency.[205]

Third, as compared to the South American experience, the early North American experience reveals the excessive length of time it takes to reach a conclusion in many North American trade disputes. It is not unusual for major trade controversies in NAFTA to remain pending for two years or more, without resolution.[206] Moreover, many NAFTA disputes were filed and then permitted to languish at the initial consultation stage for extensive periods of time, without ever being dismissed or otherwise concluded.[207] This difference in speed with which North and South trade disputes are resolved is consistent with Professor O'Donnell's theory of delegative democracy. He writes:

> Because policies are carried out by a series of relatively autonomous powers, decision making in representative democracies tends to be slow and incremental and sometimes prone to gridlock. But, by this same token, those policies are usually vaccinated against gross mistakes, and they have a reasonably good chance of being implemented; moreover, responsibility for mistakes tends to be widely shared. ... [Delegative democracy] gives the president the apparent advantage of having practically no horizontal accountability. [Delegative democracy] has the additional apparent advantage of allowing swift policy making, but at the expense of a higher likelihood of gross mistakes, of hazardous implementation, and of concentrating responsibility for the outcomes on the president.[208]

201. *Id.*
202. *See generally* Lopez, *supra* note 22.
203. *See id* at 195.
204. *See id* at 168 & 175-76.
205. As of September 1996, Canada or Canadian entities and individuals filed twelve cases. *See generally* Lopez, *supra* note 22. Mexico and Mexican entities brought ten of the NAFTA cases filed as of September 1996. *See id.* The United States and U.S. entities filed sixteen cases. *See id.* The remaining cases were initiated by two governments or citizens of two countries acting jointly and, therefore, are not credited as being brought by any one country. *Id.*
206. Two examples of the deliberate pace with which NAFTA disputes can proceed are the Chapter 20 agricultural products conflict between Canada and the United States, which lasted for over 660 days, and the so-called "Flat Coated Steel" antidumping duty case brought by American steel companies against the Mexican government, which took nearly 770 days to be resolved. *See id.* at 172 & 183.
207. *See Id.* at 168-170.
208. O'Donnell, *supra* note 189, at 62.

It is particularly intriguing that such fundamental differences in dispute resolution experience under NAFTA and MERCOSUR exist because the dispute resolution systems delineated in the Brasilia Protocol and the NAFTA accords both were heavily influenced by the dispute resolution mechanisms of the Canada-United States Free Trade Agreement.[209]

Not all comparisons between NAFTA and MERCOSUR dispute resolution reveal differences. There exists at least one major similarity. In both systems, governmental participants recognize that although the resolution of specific trade disputes is essential, the overall relationship between the trading partners and fundamental political interests are at stake. In NAFTA, the willingness of the parties to forestall dispute resolution for the sake of political necessity repeatedly has manifested itself.[210] If a complaining country's escalation of a controversy to higher levels of dispute settlement might threaten the political fortunes of an official of the country complained against, the complaining country often has refrained from such escalation, hoping, of course, to gain some political good will in the process.[211]

The same principle applies in MERCOSUR; however, the political stakes in that context are higher. The struggle in Argentina, Brazil, Paraguay, and Uruguay is to preserve and advance the democratic gains of recent years. Economic and political integration through MERCOSUR is seen as a means of accomplishing those goals as well as "a guarantee against coups d'ètat."[212] In its short life, MERCOSUR already "proved its worth as an international escrow fund for democracy and political stability. Paraguay was the test case. In April [1996], the local military began to resist the authority of Paraguay's first democratically elected president, Juan Carlos Wasmosy. Paraguay's MERCOSUR partners warned the general that the old ways were over and a coup would damage Paraguay's investment prospects. The coup stopped."[213] Thus, as is true in NAFTA, the resolution of trade disputes in MERCOSUR will give way as political necessity may dictate.

V. Implications for the Formation of a Free Trade Area of the Americas.

The early dispute resolution experience under MERCOSUR and comparisons that can be drawn from the early dispute settlement experience under NAFTA show that it is essential to approach formation of an FTAA based upon principles of gradualism and reasonable flexibility. Gradualism implies an evolution from informal methods of dispute settlement to more formal, institution-based mechanisms. Reasonable flexibility means two

209. *See* Pastori, *supra* note 35, at 2; GARY C. HUFBAUER & JEFFREY J. SCHOTT, WESTERN HEMISPHERE ECONOMIC INTEGRATION 7 (1994).

210. *See* Lopez, *supra* note 22, at 206-07.

211. *See id.*

212. Manzetti, *supra* note 10, at 110. *See also* Felix Peña, *Strategies for Macroeconomic Coordination: Reflections on the Case of MERCOSUR*, in THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS 183, 195 (Peter H. Smith ed., 1993) ("The consolidation of democracy represents a major goal of MERCOSUR.").

213. Ruth Wedgwood, *Double-Jointed Diplomacy*, CHRISTIAN SCI. MONITOR, Aug. 1, 1996, at 20. *See also* Peter Hakim, *Good News from Paraguay*, CHRISTIAN SCI. MONITOR, May 30, 1996, at 19 (attributing the military's failed attempt to return Paraguay to authoritarianism, in substantial part, to the threat that Paraguay would be ejected from MERCOSUR).

things: (1) that the FTAA parties ought to establish time limits for making the transition from less to more formal processes but that they should not be surprised or discouraged if those deadlines go unmet, within reason, and (2) that deviations from the formal dispute settlement structures, in favor of informal bilateral approaches, may not be uncommon, especially early into the integration process.

In FTAA negotiations, the MERCOSUR parties and other South Americans can be expected to favor a form of dispute resolution that, at least initially, emphasizes high-level consultation. This is consistent with their culture, political expectations, and political needs, as evidenced by early dispute resolution under MERCOSUR. Of course, this approach may be consistent with the political interests of North Americans. To the extent gradualism in hemispheric economic integration advances the consolidation of the fledgling South American democracies, it serves the long-term interests of the United States, Canada, and Mexico. Furthermore, there is danger in pushing too far, too soon. If North American governments insist that the MERCOSUR parties and other Latin American states agree to dispute resolution mechanisms that, judged by the experience from 1991 to 1996, are too formal or adversarial in nature, those mechanisms may be doomed to failure. It then will be left to protectionist forces in all of the member states, but particularly in the United States, to call for withdrawal from the FTAA because of its perceived shortcomings.[214]

Gradualism does not mean capitulation by those seeking more formal dispute settlement structures such as those contained in NAFTA. Ideally, a dispute resolution system could be constructed for the FTAA that varies the speed of the evolution from high-level consultations toward formal, institutional review according to the nature of the dispute. For example, conflicts in fields that do not challenge broad governmental interests, such as individual antidumping duty cases, ought to be placed on a relatively fast-track to binding, binational panel review with the caveat of course that such panels would be limited to assessing a country's compliance with its own antidumping laws. In NAFTA, Chapter 19 binational panel review has proven to be a remarkably efficient and effective method of addressing antidumping duty disputes.[215] Mexico and Mexican businesses, which share presidencialismo and cultural aversion to adversarialism with Argentina and Brazil,[216] have adapted quickly to the Chapter 19 process, even in the face of adverse rulings by Chapter 19 panels.[217]

In other fields where broader or more fundamental government interests are at risk, such as in Chapter 20-type "interpretation, application or breach" disputes or in environmental or labor controversies, the pace of evolution should be far more deliberate, perhaps taking many years to reach the earliest stages of supranational institutionalization, if that is

214. According to one commentator, "[p]rotectionist sentiment . . . is flourishing among the American people." Marc Levinson, *Kantor's Cant: The Hole in Our Trade Policy*, FOREIGN AFF. 2, Mar./Apr. 1996 at 2.

215. *See* Lopez, *supra* note 22, at 201.

216. *See* RODERIC A. CAMP, POLITICS IN MEXICO 13 (1993).

217. *See* Lopez, *supra* note 22, at 180 & 202.

218. NAFTA, *supra* note 7, ch. 20

a goal.[218] "This is the rub: effective institutions and congenial practices cannot be built in a day. As consolidated democracies show, the emergence, strengthening, and legitimation of these practices and institutions take time, during which a complex process of positive learning occurs."[219]

The distinction between formal and informal methods of dispute resolution has been characterized as the difference between "legalism" and "pragmatism." As one commentator explains:

> Legalism refers to a model of dispute settlement designed above all, to produce compliance with treaty norms. A truly legalistic or 'rule-oriented' system involves a formal adjudicatory decision-making process and a strict enforcement mechanism. Pragmatism, on the other hand, refers to a more flexible model, designed primarily to facilitate negotiations between treaty partners. In a pragmatic system, decisions are made by consensus of the parties, and enforcement measures are intended to encourage further negotiations rather than to coerce compliance.[220]

It is argued that pragmatism can create unfairness in the sense that it allows the more powerful members of a trading bloc to "coerce" relatively weaker members in a way that an effective, legalistic dispute resolution system does not.[221] Unfortunately, the parties to an FTAA may not have the luxury of a choice. If the early dispute settlement experience under MERCOSUR is any indication of future dispute resolution practices under an FTAA, a legalistic or adversarial regime simply is not possible at the outset.

A final critical implication of the early dispute resolution experience under MERCOSUR for the formation of an FTAA concerns political expectations in North America. The NAFTA experience confirms that the fruits of free trade and economic integration are borne slowly and it is counterproductive to promise North American constituencies more than free trade can deliver. In the early years of an FTAA, one should expect to see only minimally effective implementation of dispute resolution results in South America.[222] Therefore, it is essential for North American political leaders to portray realistically the advantages of an FTAA. Even though such integration is vital from an economic perspective, expectations of tangible, early economic success should be downplayed. Instead, political leaders should stress the vital role of hemispheric integration in supporting the

219. O'Donnell, *supra* note 189, at 68. *See also* Gary Hufbauer, *International Trade Organizations and Economies in Transition: A Glimpse of the Twenty-First Century*, 26 L. & POL. INT'L BUS., Summer 1995, at 1013, 1016 (stating that "open markets work as a tide that raises all boats, but over a generation, not within two or three years").

220. David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 408 (1993) (footnotes omitted).

221. *See id.* at 426-27.

222. In large part this is will be true because "the hasty, unilateral executive decisions of [delegative democracies] tend not to be implemented whereas slower organizational decisions of representative democracies are likely to be implemented." O'Donnell, *supra* note 189, at 66-67. *See also* Daniel S. Sullivan, *Effective International Dispute Settlement Mechanisms and the Necessary Condition of Liberal Democracy*, 81 GEO. L.J. 2369 (1993) (arguing that "liberal democracy" is a necessary condition for effective international dispute settlement).

transition of Latin American countries from authoritarianism to representative democracy. It cannot be emphasized too often that "[p]olitical considerations play crucial roles in regional integration schemes. The most successful integration experiences have political purposes that are central to the overall mission."[223]

VI. Conclusion

As the 20th century draws to a close, a Free Trade Area of the Americas stretching from Alaska to Argentina appears inevitable.[224] At this stage, the critical issue for the American democracies to decide is which of the various paths to hemispheric integration is the best path. Brazil favors a gradual approach that merges a northern bloc with a Brazil-centered southern bloc. In contrast, the United States may believe that NAFTA expansion or replication best serves its interests and otherwise is the most appropriate route to an FTAA.[225] The dispute resolution experience under MERCOSUR from 1991 to 1996 suggests that any effort to transplant NAFTA wholesale to all of the Western Hemisphere, without due regard for significant differences in culture and politics, could be a mistake that ultimately endangers the long-term success of the FTAA.

North Americans took great care in constructing the sophisticated dispute resolution mechanisms contained in NAFTA and the Labor and Environmental Side Agreements. Similarly, Argentina, Brazil, Paraguay, and Uruguay carefully devised intricate dispute resolution systems and expended substantial political energy in ratifying the Brasilia Protocol. Yet, the differences in the parties' use of these dispute settlement processes could not be starker. Mexico, Canada, and the United States have not hesitated to resort to dispute resolution under NAFTA. In contrast, the four South American trading partners have managed to successfully settle their internal trade controversies largely without resort to MERCOSUR's dispute resolution devices, relying instead on face-to-face presidential meetings. If MERCOSUR is any indication, the FTAA, both on paper and in practice, is unlikely to be much like NAFTA.

Although the expansion of NAFTA wholesale into Latin America may be neither prudent nor possible by the year 2005, the United States nevertheless could insist upon a hemispheric agreement that NAFTA-like dispute resolution structures will come into force in the FTAA overtime. A phased-in dispute resolution system that initially relies nearly exclusively on high-level consultations and then, after some years, makes available the use of multinational institutions and formal, adversarial proceedings for the resolution of trade disputes might prove to be an attractive alternative. This Article's call for United States negotiators to look beyond the NAFTA experience "is not a call to retreat from our historical leadership role in developing the global framework for trade, but to think hard about what really constitutes the best way to be effective in pursuing our interests."[226]

223. Peter H. Smith, *The Politics of Integration: Concepts and Themes, in* THE CHALLENGE OF INTEGRATION: EUROPE AND THE AMERICAS 2 (Peter H. Smith ed., 1993).

224. *See* Abbott, *supra* note 64, at 187 (observing that "the prospects for Western Hemispheric integration in the mid-1990s are better than at any other time in modern history").

225. The United States may feel an entitlement to begin negotiations with NAFTA as the centerpiece because but for NAFTA an FTAA probably would not now be possible. *See* Jason R. Wolff, *Putting the Cart Before the Horse: Assessing Opportunities for Regional Integration in Latin America and the Caribbean*, THE FLETCHER FORUM, Winter/Spring 1996, at 103, 116 ("The subsequent completion of NAFTA has lent greater credibility to integration efforts in Latin American and the Caribbean.").

226. Jeffrey E. Garten, *American Trade Law in a Changing World Economy*, 29 INT. LAW. 15, 16 (1995).