2011

Managing the rule of law in the Americas: an empirical portrait of the effects of 15 years of WTO, MERCOSUL, and NAFTA dispute resolution on civil society in Latin America

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Stephen Joseph Powell and Ludmila Mendonça Lopes Ribeiro[1]

I.--Abstract

The objective of this article is to analyze the effect of World Trade Organization (WTO), Common Market of the South (MERCOSUL), and North American Free Trade Agreement (NAFTA) disputes involving Latin American (LA) countries on perfection of the rule of law by LA governments. Specifically, we examine the extent to which dispute settlement facilitates the strengthening by LA governments of human rights for their civil societies. Professor Powell previously has noted that trade and human rights are inextricably linked because trade rules weaken the ability of governments to promote sustainable development, to alleviate the widening gap between rich and poor, to ensure core labor rights among their workforce, to deter trafficking in women and farm workers, to address devastating levels of disease, to preserve indigenous and other cultural identities, and even to sustain democratic governance.[2]

Our study permitted creation of an extensive series of data arrays on dozens of aspects of dispute panel decisions, ranging from the countries most actively appearing before panels, the measures most often challenged, the effectiveness of dispute settlement systems to reach their treaty timelines, and the

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[2] *See* Stephen J. Powell, *Regional Economic Arrangements and the Rule of Law in the Americas: The Human Rights Face of Free Trade Agreements*, 17 FLA. J. INT'L L. 59, 61 (2005) (hereafter *The Human Rights Face of Free Trade Agreements*). Powell and Berta E. Hernández-Truyol have argued, however, that a state of conflict between trade and human rights is not foreordained and that the synchronicity of their common foundations and goals can be splendidly integrated "to promote the social well-being of the individual alongside the economic well-being of the world." JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 297 (New York: NYU Press 2009), http://www.nyupress.org/books/Just_Trade-products_id-7917.html.

trend toward increased litigation before regional trade panels rather than the WTO. We documented the substantially increased chance of appeal if the USA was a party, measured the extent to which dispute resolution has brought non-conforming laws into compliance, and revealed prevailing undercurrents in MERCOSUL from the pattern of dispute settlement among the Members.

The article finds that a groundswell of legislation increasing the transparency and accountability of government rule making lends support to our hypothesis that trade dispute settlement contributes to management and perfection of the rule of law in support of democratic governance for civil societies in Latin America. Although governments must enforce these laws with vigor for civil society to realize their promise of increased freedom of expression and due process, we are heartened by the results of this project and impassioned to mine further the legislative data in particular as additional laws are enacted and enforcement infrastructure created and improved.

II – Previous studies on trade and human rights

The International Trade Law Program at the University of Florida has explored in some depth the general impact of trade rules on human rights. Our premise is straightforward. Trade and human rights are inextricably linked because trade rules weaken the ability of governments to promote sustainable development, to alleviate the widening gap between rich and poor, to ensure core labor rights among their workforce, to deter trafficking in women and farm workers, to address devastating levels of disease, to preserve indigenous and other cultural identities, and even to sustain democratic governance.[3] Warning that purposeful coordination of these two critical public policies is "ignored only at the peril both of trade and human rights agendas," we argued that "trade negotiators must ever be mindful that global trade rules do not operate in a vacuum, but instead cohabit a world of preexisting human rights laws— articulated most often by demands of the labor and environment sectors, but underpinned by even more basic human rights of individuals such as the right to education and freedom from oppression – that simply should not, in any sensible system of laws, be contravened by narrow economic precepts."[4]

[3] *See* Stephen J. Powell, *The Human Rights Face of Free Trade Agreements*, *supra* note 2*, at* 61. *See also* Berta E. Hernández Truyol, *The Rule of Law and Human Rights*, 16 FLA. J. INT'L L. 167, 191-92 (2004).

[4]Stephen J. Powell, *id.* at 61.

We examined first the global rules, marking the surprisingly numerous direct linkages between trade and human rights in World Trade Organization agreements.[5] While concluding that international trade rules have done little with their commanding strength to avoid conflict—much less promote conscious integration—with human rights law, we identified an arsenal of WTO provisions that stand ready for use as instruments of this necessary task. The general exceptions of the GATT's Public Health and Welfare Clause contain numerous examples of potential shelter from the foundational non-discrimination premises of global trade rules. From the protection of public morals to measures aimed directly at ensuring public health to guarantees of a healthy environment, GATT Article XX, as interpreted broadly by the WTO's new world trade court, has set a hopeful path toward elevating human rights policies above economic ones. The world trade court's ready embrace of other public international law to aid interpretation of WTO provisions adds further optimism by bringing into play other customary and treaty sources of human rights law.[6]

From the global trade rules and these more visible and controversial linkages between international trade law and international human rights law, we turned to regional economic arrangements and the Americas to uncover the more indirect or hidden linkages between trade and human rights. Our focus was on the contribution of regional free trade agreements (FTAs)–primarily the rich trove of such pacts found among the nations of the Western Hemisphere–to the rule of law. The rule of law, the definition of which in our usage includes the substantive ingredients of justice and fairness, is basic to enjoyment of human rights.[7] We hypothesized that FTAs, by their necessary ground rules and quite without meaning to do so, have pronounced effects on attainment of rules-based governance.

We found strong anecdotal evidence that FTAs indeed contribute to enjoyment by civil society in general, and not solely by those involved in international trade, of rules-based governance. Regional trade agreements require governments to conduct their activities in a more transparent and expeditious manner, relying exclusively on administrative records created with input from all affected members of

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

[6] Stephen J. Powell, *id*. at 230.

[7] Application of the rule of law is included, along with open and transparent civil institutions, in the list of the trappings of democracy, which was affirmed as a human right by the United Nations in 1999, C.H.Rule res. 1999/57/ U.N. Doc. E/CN.4/1999/57 (1999). *See* David Weissbrodt, Joan Fitzpatrick, & Frank Newman, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 540 (Anderson Pub. 3d Ed. 2001).

civil society. These agreements mandate that government measures be subject to substantive review by an independent and accessible judiciary. They require transparency, accountability, and due process by governments. Dispute settlement systems in FTAs similarly promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process.[8]

That further work remained was clear from our finding that "the rule of law" remains an inaccessible objective unless defined within the context of specific cultural premises and combined with the substantive norms that frame the concept for use in a particular society. Moreover, FTAs cannot directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law for their citizens. Outside sources such as international treaties can only lend a "helping hand" to governments in their transformation of these FTAs into legislation, regulations, policy guidance, and administrative measures that will contribute to previously established national objectives to promote rules-based governance.[9]

We next tested our theses within the context of a particular culture and a single trade agreement. The paper examining Peru and its Trade Promotion Agreement with the United States suggested several "small steps" that the Peruvian and US governments could take within the context of their FTA to improve worker rights, protection of the environment, and preservation of indigenous cultures.[10]

III—Conceptual framework for the present study: the idea of rule of law

The idea of the rule of law includes the substantive ingredients of justice and fairness. It also includes open and transparent institutions.[11] Viewed from that perspective, the rule of law bears a strong relationship to the ideas of transparency, accountability, and due process by governments that implement these trade agreements.

[8] Stephen J. Powell, *supra* note 2, at 97.

[9] Stephen J. Powell, *supra* note 2, at 70.

[10] Stephen J. Powell & Paola A. Chavarro, *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*, 20 Fla. J. Int'l L. 93, 139 (2008).

[11] Joseph Raz, *The Rule of Law and Its Virtue*, ch. 11 in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 218 (Oxford Univ. Press 1979).

Moreover, the rule of law is basic to enjoyment of human rights in general.[12] Therefore, the authors hypothesized that international trade agreements, by their necessary ground rules and quite without meaning to do so, assist state parties in promoting timeliness, inclusive record keeping, and impartiality in the administrative decisional process. The purpose of this study is to interrogate whether international trade dispute settlement assists in converting the visions of law as an operative system and justice as a moral construct into an integrated reality.

Professor Powell previously has noted that all international trade agreements contain provisions that incidentally aid member governments committed to strengthening the rule of law for their citizens.[13] In particular, dispute settlement system attributes of timeliness, impartiality, and record keeping not only determine the procedures to be followed by dispute resolution entities, but also serve as powerful supplements to measures governments already have in place to advance the rule of law. In the present study, we test this thesis by measuring the degree to which agreements actually are achieving these effects.

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

IV. The WTO as a mechanism of dispute resolution

A. First Things

To understand how the rule of law is applied in the context of the WTO dispute resolution system, it is important first to comprehend the foundations of this trade agreement. The WTO is the culmination of a series of multilateral negotiations that took place during a half century of explosive trade growth,

[12] Stephen J. Powell & Paola A. Chavarro, *supra* note 10, at 95.

[13] Stephen J. Powell, *supra* note 2, at 97.

accompanied inevitably by increasingly strident trade conflicts.[14] In a historical perspective, we can trace its ancestry to 1947, when the international trading system began as the General Agreement on Tariffs and Trade (GATT), which set down the fundamental nondiscrimination rules that continue to this day to govern global trade.[15]

On 1 January, 1995, the World Trade Organization (WTO) came into force to administer the two dozen agreements that comprise the WTO/GATT system, one that requires the present 150+ Members to adhere to each agreement without exception.[16] This unitary structure, which replaced GATT's *a la carte* approach, made the WTO's Dispute Settlement Understanding (DSU) an even more powerful umpire of trade conflict, given the broad reach of dispute settlement and its near-binding nature.[17] The DSU provided for the creation of the Dispute Settlement Body to oversee the system, *ad hoc* panels of trade experts to make initial decisions on challenges to government trade measures, and the inelegantly branded "Appellate Body," which serves as the World Trade Court.[18]

Any dispute that originates from a complaint by a Member country that another Member has created a trade policy or taken an action that violates a WTO agreement may be brought before a dispute settlement panel created under rules of the DSU. Once a member country presents a request for consultations (complainant) in order to determine if another country is violating a WTO rule protected by a WTO agreement (respondent), the dispute settlement system of the WTO becomes operative.[19]

The Dispute Settlement Body is composed of representatives of all WTO Member countries. It is essentially a "General Council" of ambassadors of the Members countries. The Dispute Settlement Body

[14] John H. Jackson, William J. Davey, and Alan O. Sykes, Jr., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT 235(Thomson/West 2008).

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

[16] *Supra* note 15, at 240.

[17] Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (GATT Secretariat 1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)(hereinafter DSU).

[18] BERTA E. HERNÁNDEZ-TRUYOL AND STEPHEN J. POWELL, *supra* note 2, at 39-40.

[19] DSU, *supra* note 17, at art. 4.3.

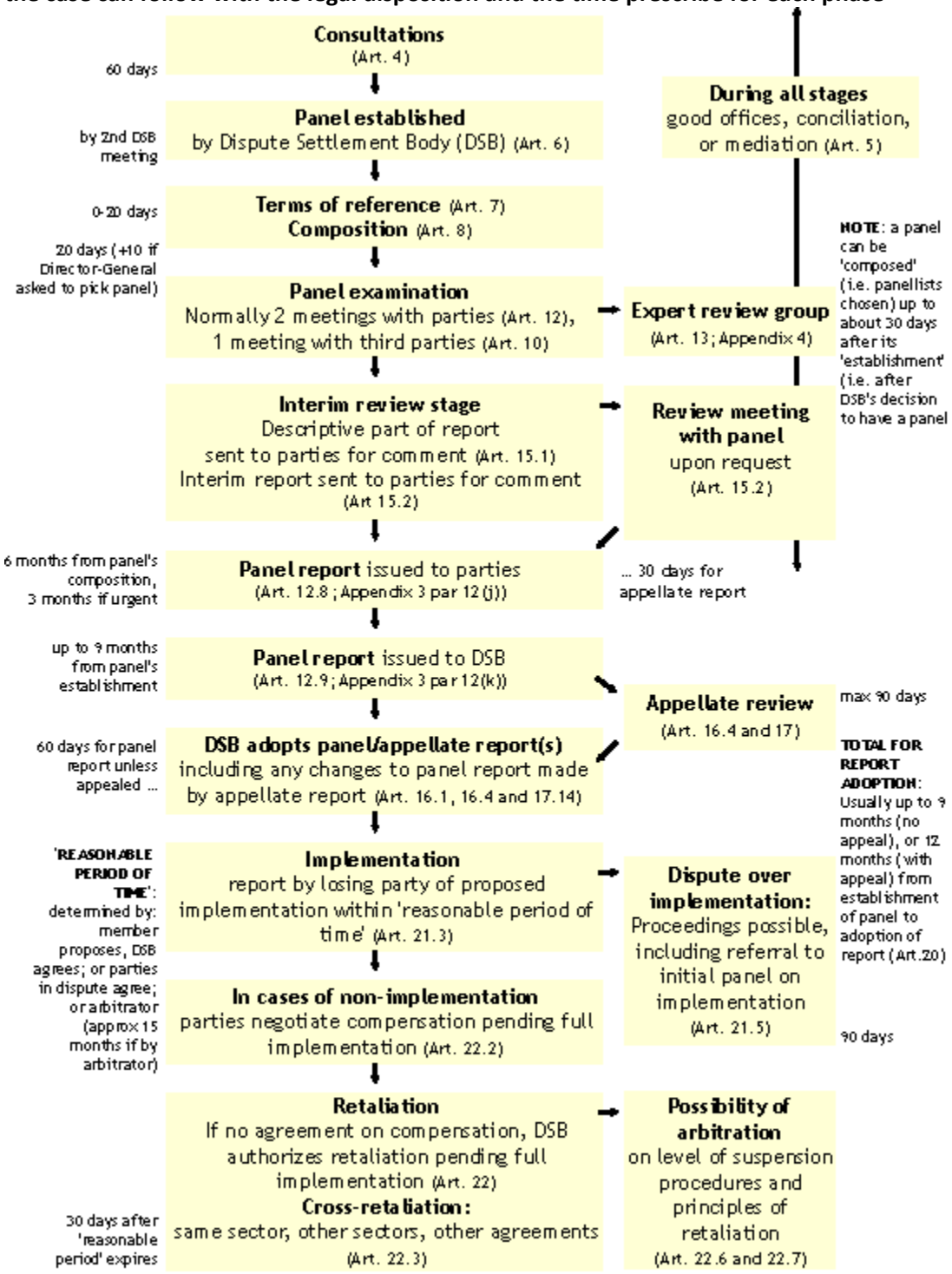
– DSB has the sole authority to establish “panels” of experts to consider the case, and to accept or reject the panels’ findings or the results of an appeal. It monitors the implementation of the rulings and recommendations, and has the power to authorize retaliation when a country does not comply with a ruling.

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

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

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

Figure IV-01 - Dispute Settlement Body articles for dispute resolution procedure - All the routes that the case can follow with the legal disposition and the time prescribe for each phase



Source: WTO web site[20]

[20] http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp2_e.htm.

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

B. The data collection and the results

In pursuit of our objective, we gathered data about such disputes from 1995 to 2007. Using this information and relevant provisions of the WTO Dispute Settlement Understanding (DSU),[21] we analyzed various aspects of these disputes. Among other things, we looked at the efficiency of the WTO's Dispute Settlement Body (DSB) in meeting treaty-set deadlines, the types of measures challenged, and the nature of the final resolution of the dispute.

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

These cases are usually settled by panel decision, although a high number of cases were resolved through a "solution mutually acceptable to the parties"[22] prior to establishment of a panel. This result is positive for the disputing parties because an agreement can be found in a short length of time. The length of time for issuance of a panel decision is not only longer, but the data show that panels routinely take even longer than the DSU anticipates.

Few experts have devoted their attention to empirical analyses describing these disputes, and there are almost no empirical studies that have attempted to measure how much time the DSB takes to process a

[21] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

[22] Article 3.7 of the DSU, *supra* note 2, notes that this outcome "is clearly to be preferred."

case at the panel and Appellate Body levels in comparison to the timeline prescribed by the Dispute Settlement Understanding (DSU) that generally contains the procedural rules for WTO disputes.[23] Therefore, in order better to understand the details and timelines of these cases, the Levin College of Law at the University of Florida has gathered information and has drawn several conclusions based on this research.

[23] Other WTO Agreements sometimes prescribe special rules for disputes involving these Agreements, *e.g.*, WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) art. 17.6, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 1144, Annex 1A, but none overrides the time frame for processing disputes anticipated by the DSU.

Table IV-01 – Complainants and respondents in WTO disputes between 2 or more LA Members or between 1 or more LA Members and USA

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

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

Thus, analyzing Table IV-01 we can assert that from the total of cases involving at least one Latin American country submitted to the DSB (74)[24], 30 cases were between two Latin American countries (complainant and respondent) and 44 cases were between the USA and a Latin American country. It is interesting to observe also that the USA is a party in more of these cases than any single Latin American country. For a breakdown of these cases organized by year, see Table IV-02.

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

Table IV-02 – Number of WTO cases involving LA Members or one LA Member and the USA organized by year dispute initiated

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

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

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

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

We may hypothesize that one reason for this inward turn toward greater reliance on MERCOSUL dispute settlement is that its Members have been less willing over time to share their “internal” conflicts with

the broader trade community.[25] For reasons discussed below, the NAFTA does not aspire to any role other than economic integration of the Parties. There is no hesitation whatever for the NAFTA Parties to "air their dirty laundry" in the global forum. Another reason is that the dispute settlement system under MERCOSUL has been slower to develop than in the NAFTA, which entered into force with a fully operation system in 1994.[26] MERCOSUL was established in 1991 with no dispute resolution system, which was added by the Protocol of Olivos in 1998. The 2006 Protocol of Ouro Preto added a private right of action for complaints to be brought by members of civil society, although establishment of a dispute settlement panel continues to require state-party approval. [27]Thus, it could be said that only in the past few years has MERCOSUL dispute settlement stood as an acceptable alternative to the sophisticated system created in the WTO.

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

Table IV-03 – Number of cases that involved USA as complainant as opposed to USA as respondent

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

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

[25] While final decisions of MERCOSUL dispute settlement panels ultimately are posted on the treaty's web site, earlier stages of a dispute, including the majority of cases that are settled prior to establishment of a panel, are far less transparent than WTO dispute settlement, even though that system is broadly criticized for the "confidentiality" of its proceedings.

[26] The Parties did not have the luxury of a slower transition because chapter 19 of the treaty divested national courts of jurisdiction over the large number of trade remedy cases under the anti-dumping and countervailing duty laws of the Parties. North American Free Trade Agreement, Dec. 17, 1992, art. 1904, § 1, 32 I.L.M. 605 (1993).

[27] Eduardo Grebler, *Dispute Settlement: Regional Approaches: MERCOSUR* 29, UN Conf. on Trade & Dev. 2003, *available at* http://www.unctad.org/en/docs/edmmisc232add28_en.pdf.

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

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

Table IV-04 – Nature of resolution of WTO dispute cases involving Latin American Countries

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

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

The second important task is to identify the nature of the case's resolution by the type of case submitted. These data are compiled in Table IV-05. We have grouped challenges into three categories: (1) imposition of border or internal taxes on an imported product, including a so-called "price band" system; (2) safeguard or escape clauses measures imposed under the WTO Agreement on Safeguards;[28] and (3) anti-dumping or countervailing duty measures (AD/CVD) imposed under the Subsidies or Anti-dumping Agreements.[29].

[28] Agreement on Safeguards, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 315 (GATT Secretariat 1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994)

[29] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY

Table IV-05 –Nature of resolution of WTO dispute organized by type of measure challenged in cases involving LA countries

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

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

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

Table IV-06 – Type of measure challenged organized by disputing countries

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

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

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

ROUND OF MULTILATERAL TRADE NEGOTIATIONS 168 (GATT Secretariat 1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 264 (GATT Secretariat 1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

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

C. Length of time to complete panel review

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

Table IV- 07 – DSU time line for each phase from request for consultations until the panel report is adopted by the DSB for cases not appealed.

Phase	Days prescribed by DSU
From request for consultations to request for panel establishment[30]	60[31]
From request for establishment of panel to DSB establishment of panel	48[32]

[30] Setting of terms of reference is automatic unless the parties agree otherwise within 20 days from establishment, but art. 7.1 does not intend this 20-day period to be an additional time period.

[31] DSU art. 4.7.

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

From DSB establishment of panel to composition of panel	30[33]
From panel composition to issuance of panel's final report	270[34]
From issuance of panel report to DSB adoption of panel report (if no appeal)	60
Total	468

Therefore, from the request for consultations until the panel report is by the DSB, the DSU prescribes a maximum of 468 days. In order to investigate if the time deadlines established by the DSU are being met, we calculated the mean of the time between the day that consultations were requested and the day that the panel decision was adopted by the DSB[35] (Graph 01).

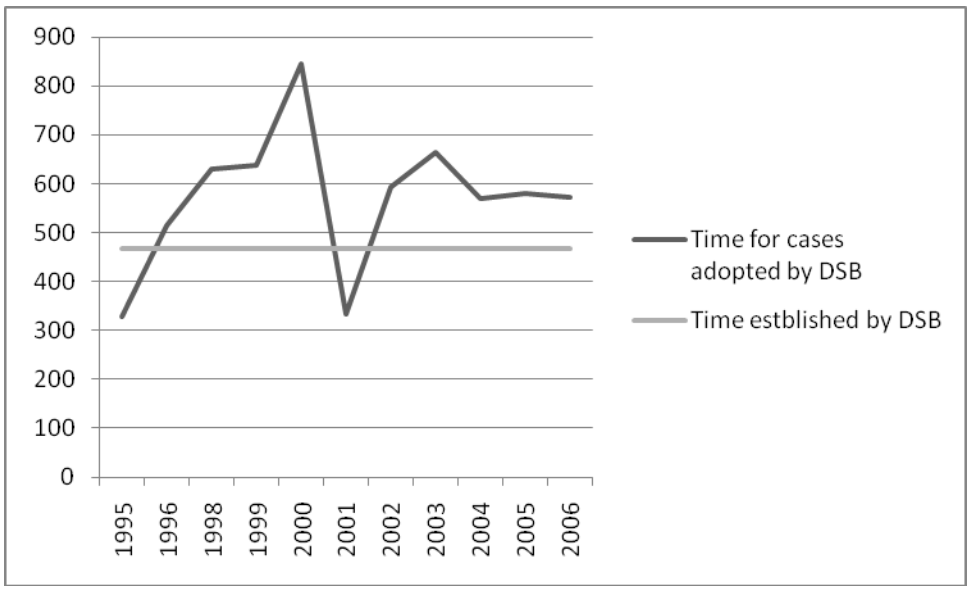
Graph IV-01 – Mean time between date consultations requested and date of DSB adoption of panel report by year cases were initiated.[36]

[33] DSU art. 8.7.

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

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

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

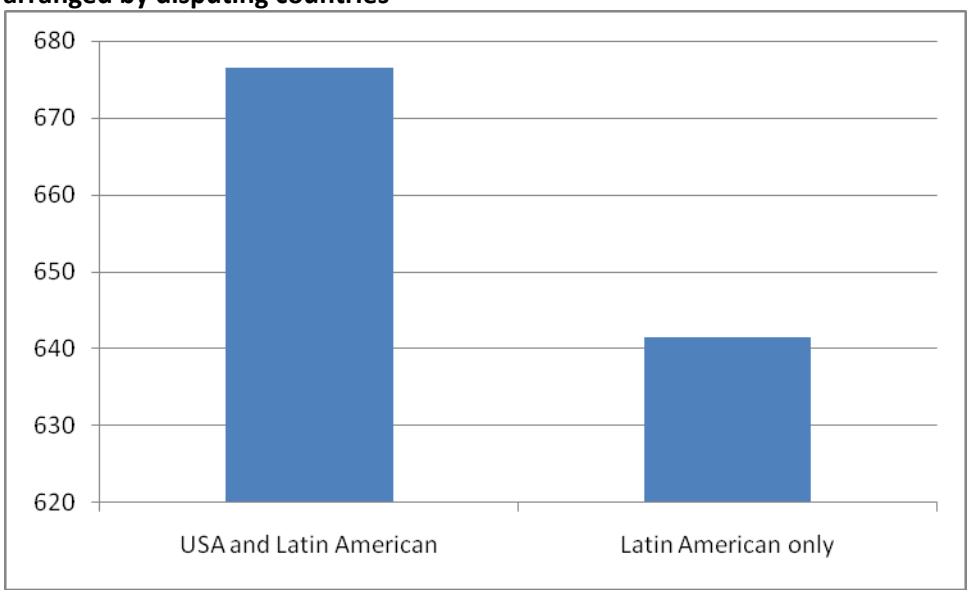


Source: WTO data base, organized by College of Law – University of Florida

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

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

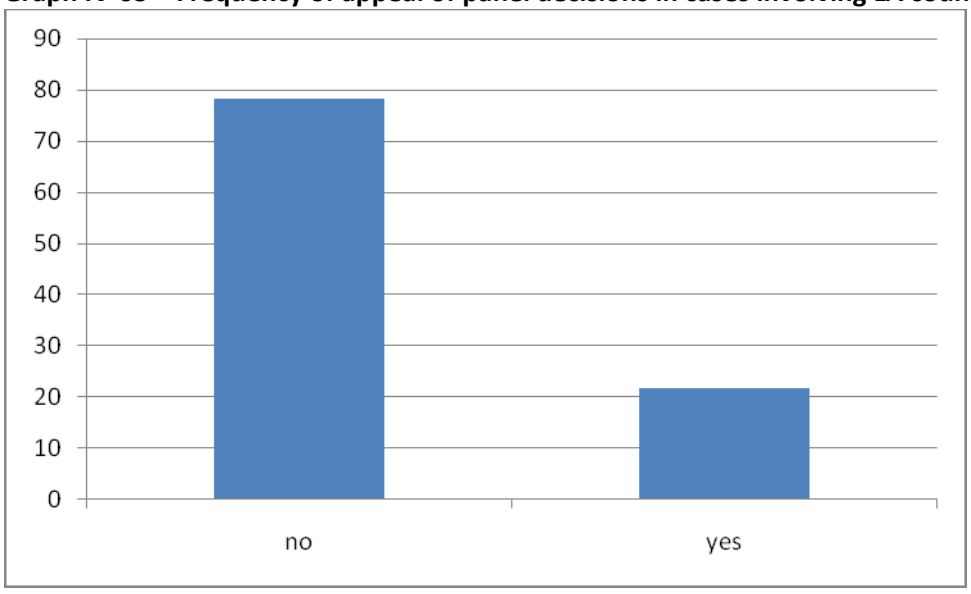
Graph IV-02 - Mean length of time between request for consultations and adoption of panel report, arranged by disputing countries



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

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

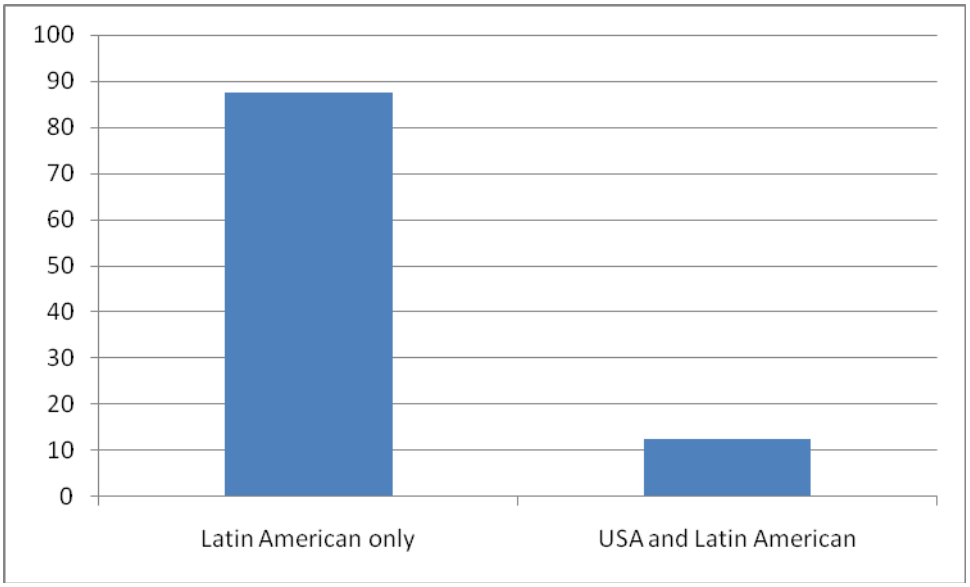
Graph IV-03 – Frequency of appeal of panel decisions in cases involving LA countries



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

Using Graph IV-03, we can see that about 68 per cent of panel decisions were appealed. Next, we look at whether the countries involved in the dispute have an impact on whether an appeal was filed (Graph IV-04).

Graph IV-04 - Appeal of panel decision organized by countries involved

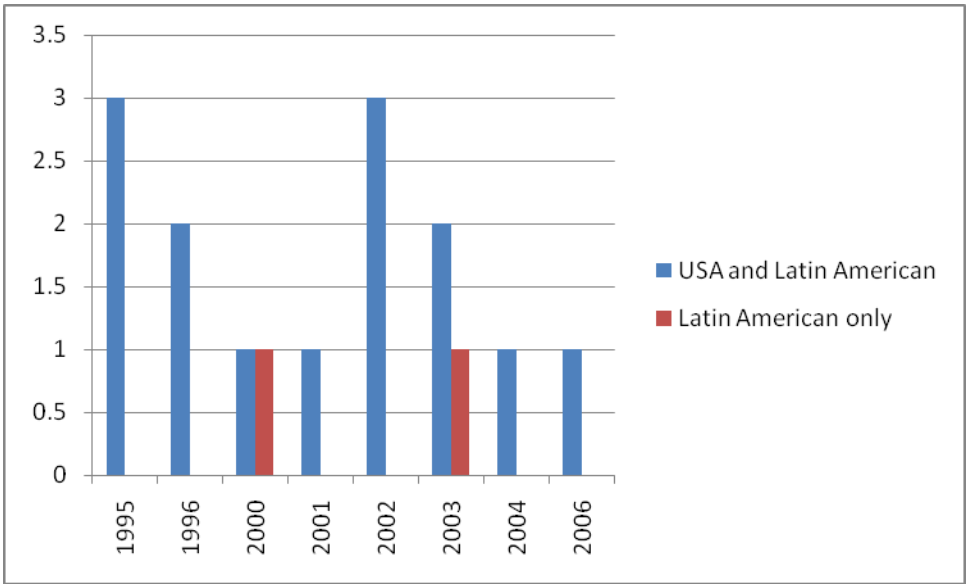


Source: WTO data base, organized by College of Law – University of Florida

Thus, Graph IV-04 demonstrates that from a total of 16 cases, 14 of the panel decisions appealed involved the USA as a party. If the case involved only Latin American countries, it was seven times less likely to be appealed than if the USA was one of the parties (12,5% vs. 87,5%) In cases involving the USA and a LA country, the USA was the appellant 87,5% of the time (14 of 16 cases). In other words, the USA was 1,14 times more likely to appeal than the LA country. That the USA is more likely to find itself on the losing end of the panel report would help explain the outsized rate of appeal by the USA.

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

Graph IV-05 – Number of appeals by year and by countries involved in the dispute



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

As noted earlier, only 2 of the 16 cases appealed—one in 2000, one in 2003—involved Latin American countries only.[37].

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

Table IV-08 – DSU time line for each phase from request for appellate review until the DSB adopts the AB report

Phase	**Days prescribed by DSU**
From issuance of final panel report to request for appellate review	60[38]
From request for appellate review to issuance of appellate report	90[39]

[37]For this purpose, we counted cases in which the AB has ruled and the DSB has adopted the report, even if the case is not "ended" because implementation issues still are being disputed by post-dispute arbitration under DSU arts. 21 and 22.

[38] DSU art. 16.4.

[39] DSU art. 17.5.

From issuance of appellate report to adoption by DSB	30[40]
Total	180

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

Table IV- 08 reports that WTO dispute resolution procedure prescribes 180 days for the appeal phase.[41] In order to analyze if the DSB has met this deadline, for the cases where the Appellate Body's report already has been adopted, we calculate the mean length of time between issuance of the report and adoption of the appellate report by the DSB. Table IV- 09 summarizes the results.

Table IV- 09 –Length of time between request for appellate review and DSB adoption of the appellate report by countries enrolled in the dispute

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

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

Table IV- 9 shows us that all of the completed cases in this database met the time deadline established by the DSU for the appeal process. If the point in analysis is the length of time of the average WTO dispute resolution, using the data gathered, it is possible to reach two conclusions. First, looking at all our data, overall the DSB is not efficient in meeting the established deadline for the time between the request for consultations and release of the panel's or Appellate Body's adopted final report —the mean amount of time was 672 days, while the DSU mandates no more than 468 days for the process. On the other hand, the DSB appears to be efficient in meeting the timeline for the period between issuance of an appealed panel report and approval of the Appellate Body report—all cases have taken less than the DSU timeline of 180 days.

[40] DSU art. 17.14.

[41] DSU art 16.4 and 17

V. NAFTA Chapter 19 - Anti-dumping and Countervailing Duties

A. First Things

In NAFTA Chapter 19, article 1904 establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases (hereinafter AD/CVD), with review by independent binational panels.[42] NAFTA requires member states to comply with panel conclusions and prohibits individual state judicial reviews once a state requests a NAFTA chapter 19 panel review.[43] These binational panels consist of "private trade law experts chosen by the two countries involved in the dispute, instead of the traditional review by national courts."[44] Upon a request for a binational panel each party must appoint two panelists within thirty days and within fifty-five days of the request for a panel, the parties must agree on the fifth panelist.[45] Involved parties select the panelists "on the basis of their objectivity, reliability, sound judgment, and general familiarity with international trade law."[46]

A party state may challenge a final AD/CVD determination under normal judicial review procedures within the NAFTA state if neither government requests a panel within thirty days after receiving notice of the determination.[47] However, if a member state request a binational panel determination, NAFTA will compose the panel upon the NAFTA Secretariat's filing of a Request for Panel Review on behalf of the state seeking the review.[48] In Mexico, the Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales makes the dumping, subsidy, injury determinations, and requests the binational panel determination with the NAFTA Secretariat.[49] For the USA the Department of Commerce International

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[42] North American Free Trade Agreement Art 1904(1), Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (Jan. 1, 1994) [hereinafter NAFTA].

[43] NAFTA Art 1904(1).

[44] Stephen Powell and Mark Barnett, *The Role of the United States Trade Laws In Resolving the Florida-Mexico Trade Conflict*, 11 Fla. J. Int'l L. 319, (Spring 1997).

[45] NAFTA Annex 1901.2(2) and (3).

[46] *Id*.

[47] *Id*.

[48] http://www.nafta-sec-alena.org/en/view.aspx?x=225 (Last visited Nov. 30, 2010).

[49] *Id*.

Trade Administration makes the dumping and subsidy determinations, "while the United States International Trade Commission conducts injury inquiries."[50] Parties may appeal the dumping, subsidy and injury determinations of the investigating authorities in Mexico to the Tribunal Fiscal de la Federación and in the United States to the Court of International Trade.[51]

Individual USA and Mexican nationals may continue to take complaints to their respective national court systems or, instead, may initiate Chapter 19 procedures upon request by an entity that could sue in its national courts.[52] Thus, "private companies with standing to challenge an antidumping and countervailing duty determination in the national courts may entirely bypass judicial review by selecting Chapter 19's binational panel system.[53]

The binational panels determine whether the investigating authority properly applied its AD/CVD laws.[54] NAFTA creates no substantive law relating to AD/CVD, but rather relies on the importing nations' AD/CVD duty laws when making legal determinations.[55] Therefore, panels base decisions solely on the record created during the administrative process, on the standard of review, and the general legal principles applicable to the country's courts.[56] The standard of review varies based on the respondent's legally enacted standard of review. The USA follows the standard set in § 516A(b)(l)(A) of the *Tariff Act*

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[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] Patrick Macrory, NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution 15 (C.D. Howe Institute No. 168 Sept. 2002)

[54] *Id.*

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

[56] NAFTA Art. 1904(2)

of 1930 and in the case of the Mexico the standard set in Article 238 of the *Federal Fiscal Code* (Código Fiscal de la Federación).[57]

The tribunal's decisions must obtain a majority vote based on the votes of all members of the panel.[58] The panel then issues a binding "written decision with reasons, together with any dissenting or concurring opinions of panelists."[59] "Although not bound to follow panel decisions as precedent, national courts are encouraged by national implementing legislation to view panel decisions as persuasive authority."[60] Parties may not appeal binational decisions to their respective national courts nor create legislation overturning the decisions.[61]

However, an "extraordinary challenge procedure" exists whereby a state party to the dispute may seek review upon a finding of gross misconduct, bias, or serious conflict of interest of a panel member.[62] Additionally, a party may obtain such review through allegations that the final determination departs from the rules of procedure or that the panel exceeded its power, authority or jurisdiction and that such actions affected the final determination.[63] In such instances, NAFTA composes a panel of three members, usually former judges, to review and make a determination of the allegations.[64]

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[57] NAFTA Annex 1911(5)(b) and(c).

[58] NAFTA Annex 1901.2(5).

[59] *Id.* and NAFTA 1904.9.

[60] Edward D. Re, International Judicial Tribunals and the Courts of the Americas: A Comment with Emphasis on Human Rights Law, 40 St. Louis U. L.J. 1091 (1996).

[61] NAFTA Arts. 1904.11 and 1903.1(b).

[62] NAFTA Art. 1904(13).

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

[64] *Id*.

As of January 1, 2010, twenty-eight recorded cases exist under NAFTA chapter 19 between the USA and Mexico.[65]

Table V-01 – Complainants and Respondents under Chapter 19

Complainant v Respondent	**Frequency**	**Percent**
Mexico v USA	17	60.7
USA v Mexico	7	25
Canada v Mexico	2	7.1
Mexico v Canada	2	7.1
Total	**28**	**100**

Table V-02 – Cases between USA and Mexico Issued Under Chapter 19 and Analyzed In This Paper

Case	**Frequency**	**Percent**
OCTG (AD)	2	8.33
Bovine (AD)	1	4.17
Cement (4th AR)	1	4.17
Cement (5th AR)	1	4.17
Cement (6th AR)	1	4.17
Cement (7th AR)	1	4.17
Cement (9th AR)	1	4.17

[65] NAFTA website

Cement (AD)	1	4.17
Cookware (9th AR)	1	4.17
Cookware (AD)	1	4.17
Corn Syrup (AD)	1	4.17
Cut-to-Length Plate (AD)	1	4.17
Flat Coated Steel (AD)	1	4.17
Flowers (AD)	1	4.17
Gray Portland Cement (AD)	1	4.17
Leather Wearing (CVD)	1	4.17
OCTG (4th AR)	1	4.17
OCTG (5 yr)	1	4.17
Polystyrene (AD)	1	4.17
Sodium Hydroxide (CVD)	1	4.17
Stainless Steel Sheet and Strip (5yr)	1	4.17
Steel Pipe (AD)	1	4.17
Urea (AD)	1	4.17
Total	**24**	**100**

C. Timeline of Binational Panel Determinations

NAFTA chapter 19 cases begin with an initial petition by the complainant requesting a binational panel to resolve the dispute.[66] Following the date of publication of the final determination in the official journal of the importing party, the claimant must request a panel in writing within thirty days.[67] Therefore, claims arising under Chapter 19 may come forth only after a primary decision in the matter. In the case of final determinations not published in the official journal of the importing Party, the importing Party must immediately notify the other involved Party of such final determination where it involves goods from the other involved Party.[68] The other involved Party may request a panel within 30 days of receipt of such notice.[69] The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision.[70] Where the panel remands a final determination, the panel is tasked to establish as brief a time as reasonable for compliance with the remand.[71] NAFTA designed the rules to result in final decisions within 315 days of the date on which a Party requests a panel.[72] *See* Table V-03.

Table V-03 – Ideal Timeline for a NAFTA Chapter 19 Panel Review under the Rules of Procedure[73]

Rule 34	Request for Panel Review filed	Day 0
Rule 39	Complaints to be filed	Within 30 days after Request for Panel Review
Rule 40	Notices of Appearance to be filed	Within 45 days after Request for Panel Review

[66] NAFTA Art. 1904(1).

[67] NAFTA Art. 1904(4).

[68] *Id*.

[69] *Id*.

[70] NAFTA Art. 1904(8).

[71] *Id*.

[72] NAFTA Art. 1904(14).

[73] http://www.nafta-sec-alena.org/en/view.aspx?x=226 (last visited Nov. 30, 2010).

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

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

Table V-04 – Average time to complete principal phases of Chapter 19

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

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

Table V-05 – Decision of Binational panels Issued under Chapter 19 by Length of Time to Reach Final Decision[74]

[74] NAFTA ch. 19 creates the following rule for affirming, remanded, and denying a final determination; "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review

Description of the Panel Decision	Mean Time between Panel Request and Case Termination	Number of Cases
Panel remanded the case to the Investigating Authority	2028	2
Panel ordered partial remand and affirmed some of the issues	1676	1
Panel unanimously remanded the Agency's Determination	1578	3
Panel unanimously affirmed in part and remanded in part the Agency's determination.	1543	5
Panel upheld the Final Determination in part and remanded in part	1320	1
Panel decided that it lacked competence to review the final determination	1260	1
Panel unanimously affirmed the agency’s determination	1253	2
Data about the panel were not available	1137	2
Panel unanimously affirmed the Commission's Review Determination	1120	1
Panel, with one partial dissent, remanded the Agency's determination	1010	1

shall be before the same panel, which shall normally issue a final decision within 90 days of the date on which such remand action is submitted to it.” NAFTA Art. 1904.8.

Panel unanimously remanded the determination to the agency twice	1000	1
Panel affirmed the final determination	643	1
Panel unanimously affirmed, with one partial dissent, the Agency's determination	575	1
Panel unanimously, with one concurring opinion of two panelists, affirmed in part and remanded in part, the agency's determination	527	1
Panel remanded the Final Determination to the Administrative Authority	363	1
Total	**1282**	**24**

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

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

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

On the other end of the panel's decision, while the treaty provides substantial time for the panel to deliberate and issue its decision, and for the administrative agency to comply with any remand instructions, in fact, the remand procedure has demanded far more time than anticipated, in the case both of the USA and the Mexican authorities. Apparently, no one anticipated that two and sometimes three remands will be necessary to force compliance with the panel's holdings, even though such a situation is not uncommon in at least USA courts. More troubling has been the open defiance by agencies in both countries in the most hotly contested disputes.

VI. The Case of MERCOSUL

1. First Things

Argentina, Brazil, Paraguay, and Uruguay through the 1991 Treaty of Asunción devised a Regional Trade Agreement, MERCOSUL,[75] in an attempt to liberalize trade in South America through the tariff-free circulation of goods and services.[76] Bolivia, Chile, Colombia, Ecuador, and Peru hold associate membership allowing the States to join individual free trade agreements within MERCOSUL.[77] Venezuela is apparently on the path of integration into the agreement with a recent agreement in Paraguay.[78]

The Treaty of Asunción calls for the coordination of each Member State to pass appropriate legislation in the pertinent areas of MERCOSUL to harmonize each State's trade policies. The Member States assume the Protocol of Brasilia ,[79] establishing arbitration procedures, and the Protocol of Ouro Preto,[80] implementing the governing body of MERCOSUL. Although the Treaty of Asunción provides some basic dispute resolution guidelines, the Protocol of Brasilia implements a more comprehensive dispute

[75] *See* http://www.MERCOSURuleorg.uy/ for a general historical background of the agreement and http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp for an English translation of the Treaty of Asunción.

[76] The Treaty of Asunción, http://www.MERCOSURuleorg.uy/t_generic.jsp?contentid=655&site=1&channel=secretaria&seccion=2 (Last visited Aug. 14, 2010 (hereinafter Treaty of Asunción).

[77] *MERCOSUR, Common Market of the South* – Profile, BBC News, June 16, 2010.

[78] *Paraguay finally says 'aye' to Venezuela's Mercosur full membership*, MercoPress Dec. 13, 2010, *http://en.mercopress.com/2010/12/13/paraguay-finally-says-aye-to-venezuela-s-mercosur-full-membership*.

[79] English translation of the Protocol of Brasilia found at http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

[80] English translation of the Protocol of Ouro Proto found at http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp.

resolution system through the Common Market Group[81] (hereinafter CMG). The CMG holds the authority to resolve disputes, however, if the CMG fails to resolve the dispute the Protocol calls for the creation of an Ad Hoc Court, to hear and rule on the States dispute.[82] In recognition of the need to "guarantee the correct interpretation, application and enforcement of the fundamental instruments of the process of integration and the regulations of MERCOSUL, in a consistent and systematic way" the Protocol of Olivos constructs a Permanent Review Court with the authority to review holdings of the CMG and Ad Hoc Courts.[83]

B. MERCOSUL Structure, Jurisdiction, and Forum Selection

MERCOSUL consists of several governing bodies: the Common Market Council (hereinafter CMC),[84] the CMG, the MERCOSUL Trade Commission,[85] the Permanent Review Court,[86] the Joint Parliamentary

[81] As the executive branch of MERCOSUL, the CMG consists of four members and four alternates from each country representing the public bodies of the Ministry of Foreign Affairs, he Ministry of Economy, or the Central Bank. CMG duties consist of "monitoring compliance with the treaty, taking steps to enforce the holdings of the Council of the common market, proposing measures to further liberalize trade, coordinate macroeconomic policies and negotiate agreements with third-parties, and to draw up programs of work to ensure progress towards the formation of the common market." Treaty of Asunción, *available at* http://www.sice.oas.org/trade/mrcsr/TreatyAsun_e.ASP#CHAPTER_I. (Last visited 8/14/2010).

[82] The Protocol of Brasilia Ch. 2 Art. 2-3, *available at* http://www.sice.oas.org/trade/mrcsr/brasilia/pbrasilia_e.asp#CHAPTER_II__ (last visited Aug. 14, 2010).

[83] Protocol of Olivos Ch. I Art. 1.

[84] As the highest governing body, the CCM is responsible for the "political leadership of the integration process and for making the holdings necessary to ensure the achievement of the objectives defined by the Treaty of Asuncion." Treaty of Asunción, http://www.sice.oas.org/trade/mrcsr/TreatyAsun_e.ASP#CHAPTER_I. (Last visited 8/14/2010). Additionally the CCM's duties consist of formulating policies that promote the building of a common market, assuming the legal personality of MERCOSUL, negotiating and signing agreements on behalf of MERCOSUL with third countries and international organizations, ruling on proposals submitted by the CMG, and clarifying the substance and scope of its holdings. As with the CMG, the CCM's holdings bind State parties.

[85] The MERCOSUL Trade Commission assists the CMG in policing the realization of MERCOSUL trade policy. *See* Protocol of Ouro Preto Ch. I Sec. III Art. 16-21.

[86] The Olivos Protocol for the Settlement of Disputes in MERCOSUR, http://untreaty.un.org/unts/144078_158780/5/7/13152.pdf (Last visited 8/14/2010). (Hereinafter Olivos Protocol).

Commission,[87] the Economic Social Consultative Forum,[88] and the MERCOSUL Secretariat.[89] Only the first four MERCOSUL organs hold the decision making power.[90] MERCOSUL maintains two separate jurisdictions; labor dispute jurisdiction[91] and jurisdiction over causes of action between Member States.[92] Since no court holdings exist in the labor dispute jurisdiction, this paper will focus on MERCOSUL's jurisdiction over Member States.

The Protocol of Ouro Preto establishes jurisdiction over causes of action between Member States, a Member State and a private party, and those involving private parties domiciled in a Member State.[93] Member States retain the right to mutually choose the forum in which to bring the dispute.[94] Once the Member States begin a cause of action in one forum, the parties may not submit the same cause of action in another forum.[95] No requirement exists in MERCOSUL demanding States resolve disputes within the dispute resolution system of MERCOSUL, thus this potentially weakens MERCOSUL's authority over Member States.[96]

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[87] The MERCOSUL Parliament replaced the Joint Parliamentary Commision, *See* http://200.40.51.218/SAM/GestDoc/PubWeb.nsf/Normativa?ReadForm&lang=ESP&id=DB44183BFF1899F90325760800546686&lang=. Available only in Spanish or Portugese.

[88] Composed of representatives of the social and economic sectors of the Member States, the Economic Social Consultative Forum guarantees the participation of the civil society in the integration process of MERCOSUL initiatives. Protocol of Ouro Preto Ch. I Sec. V Art. 28-30.

[89] The Secretariat's principal functions include safeguarding documents and information on the activities of MERCOSUL, rendering operational support and services for the other agencies, and publishing the Official Bulletin of MERCOSUL. Nádia Araújo, *Dispute Resolution in MERCOSUL: The Protocol of Las Leñas and the Case Law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AMER. L. REV. 25-26 (2001).

[90] Protocol of Ouro Preto, Ch. I, Sec. I, Art. 2.

[91] Decision 42/97 Art. 56 of the Common Market Group. *See* http://www.MERCOSURuleint/msweb/portal%20intermediario/es/index.htm

[92] Protocol of Ouro Preto, Ch. VI, Sec. VI, Art. 43.

[93] Nádia Araújo, *supra* note 56.

[94] Protocol of Olivos, Ch. I, Art. 1(2).

[95] *Id.*

[96] Mario Viola de Azevedo Cunha, *The Judicial System of MERCOSUR: Is There Administrative Justice?*, THE INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, Nov. 2007. http://www.iilj.org/GAL/documents/cunha.pdf. "The Protocol of Olivos contains explicit provisions regarding the need for selecting the forum before which the conflicts will be settled. The Protocol of Brasilia Protocol did not account for this aspect, which, for example, has permitted that in light of the application of antidumping measures

C. Dispute Resolution by the Common Market Group

Annex III of the Treaty of Asunción requires direct negotiations between disputing parties before submitting the dispute to the CMG.[97] This Annex grants the CMG 60 days to decide the matter, after which, the CMG's holding binds all State parties.[98] However, if the CMG fails to reach a resolution, the CMG turns the matter over to the CCM to adopt relevant recommendations of the CMG.[99] Thus, the Treaty of Asunción limits conflict resolution to inter-party negotiations and submittal of the issue before the CMG for a resolution.

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

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by Argentina regarding the importation of Brazilian poultry, Brazil first raise the complaint with Argentina within the scope of the Protocol of Brasilia and then, not having had its expectations satisfied, it raised the issue to the World Trade Organization's (WTO) Dispute Settlement Body. With respect to this, the Protocol of Olivos establishes that if a controversy can be submitted either to the controversy resolution system of MERCOSUL or to that of the WTO, the plaintiff state must select one of these mechanisms, permanently waiving access to the other forum." Celina Pena and Ricardo Rozemberg, *MERCOSUR: A Different Approach to Institutional Development*, FOCAL (The Canadian Foundation for the Americas), March 2005. http://www.focal.ca/pdf/MERCOSUR_Pena-Rozemberg_different%20approach%20institutional%20development_March%202005_FPP-05-06_e.pdf

[97] Treaty of Asunción Annex III, http://www.sice.oas.org/trade/mrcsr/mrcsr10.asp. (Last visited 8/14/2010). (Hereinafter Annex III).

[98] Protocol of Ouro Preto, http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp, (Last visited 8/14/2010).

[99] Annex III, fn. 8.

Table VI-01 - Disputes settled under the CMG arbitration system by countries involved in dispute

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

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

Table VI- 02 – Summary of disputes under the CMG arbitration system			
Type of Dispute	**Countries Involved**	**Description of Dispute**	**Laws at Issue**
Anti-Dumping	Brazil v. Argentina	The CMG determines that no specific MERCOSUL norms regulate antidumping within MERCOSUL intra-zone commerce. Thus, the CMG decides in favor of Argentina on the basis that the internal Argentine measures as apply at the domestic level do not constitute a violation of the rule imposing the free circulation of goods within MERCOSUL. Consequently, the CMG holds that the challenged resolution complies with MERCOSUL law.	Resolution 574 of 2000 from the Ministry of Economy establishing the Argentine antidumping export measures for poultry meat coming from Brazil.
Lack of Incorp. of MERCOSUL Rules	Argentina v. Brazil	The CMG confirms Brazil´s obligation to incorporate the CMG's Resolutions into its internal legal system. The CMG grants Brazil 120 days to comply with the holding.	Group Resolutions Nos. 48/96, 87/96, 14/96, 156/96, and 71/98
Safeguards	Argentina v. Brazil	Argentina questions four Brazilian internal measures in reference to pork meat export and Brazilian subsidies for Brazilian pork producers.	Law No. 8.171 of January 17 of 1991 and Inter-ministry Letters No. 657 of 1991 and No. 182 of August 22 of 1994 from the Brazilian government regarding the application of the Corn Public Stocks System; Law 9.198 of June 1 of 1991 which enacted the Exports Financing Program (PROEX)
Safeguards	Brazil v. Argentina	The CMG defines the term "controversy" according to international law principles (using ICJ Reports). The CMG holds that the Resolution 861 of 1999 incompatible with Annex IV of the Treaty of Asunción and with general MERCOSUL rules. CMG orders its revocation. The award establishes a period of 15 days for the parties to	Resolution 861 of 1999 from the Ministry of Economy and Public Works and Services, which establishes annual quotas on cotton textiles from Brazil

		comply with the holding.	
Safeguards	Argentina v. Uruguay	The CMG orders Uruguay to eliminate the tax benefits of Law 13.695 and complementary decrees regarding industrialized wool products exports to MERCOSUL Member States. The CMG orders Uruguay to revoke the measure within fifteen days from the date of the award.	Law 13.695 of October 24, 1968 "Stimulus System for Wool Industrialization" and complementary decrees of Uruguay
Tariff Restrictions	Argentina v. Brazil	Argentina claims that non-automatic import licenses or import licenses subject to conditions that Brazil imposes amounts to non-tariff restrictions affecting the reciprocal commerce of the Treaty of Asuncion.	Letters No. 37 of December 17, 1997 and No. 7 of February 20 of 1998 from the Department of Foreign Trade Operations (Departamento de Operaciones de Comercio Exterior (DECEX) of the Secretariat of Foreign Commerce (Secretaría de Comercio Exterior (SECEX), which according to Argentina provides for the application of restrictive measures on the reciprocal trade between Argentina and Brazil.
Tariff Restrictions	Uruguay v. Argentina	The CMG determines that the Argentine Resolution (without distinguishing which resolution in particular) violates MERCOSUL rules and impedes the free access of Uruguayan bicycles to the Argentinean market. The CMG orders its revocation and grants a period of 15 days to comply.	Resolutions 335 of 1999, 857 of 2000, 1044 of 2001, 1004 of 2001 and 1008 of 2001 from the Federal Administration of Public Revenue
Tariff Restrictions	Uruguay v. Brazil	The CMG declares on January 9, 2002, that the Brazilian legislation affecting preexisting commercial intra-zone exchange violates MERCOSUL law. The CMG gives Brazil sixty days to comply.	Resolution No. 8 of September 25 of 2000 from the Secretariat of Foreign Commerce of the Ministry of Development, Industry and Foreign Trade (SECEX
Tariff Restrictions	Paraguay v. Uruguay	Uruguay´s domestic laws regarding the application of the "Internal Specific Tariff" and the method of calculating the tariff constitute trade discrimination and violate MERCOSUL rules. The CMG orders Uruguay to stop the discrimination against imported	Uruguay´s domestic laws regarding the application of the "Internal Specific Tariff" and the method of calculating said tariff.

		cigarettes from Paraguay.	

D. Dispute Resolution by the Ad Hoc Court

Adopted concurrently with the Treaty of Asunción, the Protocol of Brasilia[100] grants further dispute settlement by allowing the formation of an Ad Hoc Court if parties first meet the Annex III requirements of (1) negotiating a settlement[101] and (2) submittal of the dispute to the CMG and the CMG's failure to reach a conclusion on whole or part of the matter.[102] Parties to the dispute may submit the cause of action to the Administrative Secretariat of MERCOSUL who will then immediately notify the other States party to the dispute and the CMG of the cause of action.[103] Each MERCOSUL State must maintain a list of ten nominated arbitrators to constitute an Ad Hoc Court.[104] The Court will consist of three arbitrators and one alternate.[105] Upon submission of an issue to an Ad Hoc Court, each disputing State must elect one arbitrator from the State's list of ten arbitrators.[106] Together the disputing States must then agree on a third arbitrator to preside over the dispute.[107] The responsibilities of the Ad Hoc Court include (1) resolving controversies between the States or individuals of the States, (2) dictating temporary injunctions or orders , (3) clarifying the issues of the dispute, (4) resolving differences over the implementation of the judgment, and (5) pronouncing the compensatory measures States must take and any other award to the harmed party or parties.[108]

Table VI-03 – Dispute resolution and Ad Hoc Court provisions, procedures, and timeline according to the Protocol of Brasilia and the Protocol of Olivos.

Provision	Procedure	Timeline
Protocol of Brasilia Chapter IV, Art. 7	If State parties fail to resolve the dispute through negotiations or the aid of the	

[100] The Protocol of Olivos amended and added additional provisions regarding the Ad Hoc Courts.

[101] Protocol of Brasilia Ch. 2 Art. 2-3.

[102] Protocol of Brasilia Ch. 3 Art. 4-6

[103] Protocol of Brasilia Ch. 4 Art. 7.

[104] Protocol of Brasilia Ch. 4 Art. 10.

[105] Protocol of Brasilia Ch. 4 Art. 9(1).

[106] Protocol of Brasilia Ch. 4 Art. 9(2).

[107] *Id.*

[108] http://www.MERCOSURuleint/t_generic.jsp?contentid=374&site=1&channel=secretaria&seccion=6 (Last visited 8/18/2010)

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

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

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

The Protocol of Brasilia includes the requirements of Annex III of direct negotiations for a maximum period of fifteen days and arbitration by the CMG, but also provides a provision establishing an Ad Hoc Court to rule on a dispute at the request of State parties.[109] The data available show that Ad Hoc Courts resolved ten Member State disputes since 1991. As with the CMG cases, Argentina was party to a majority of the disputes (Table VI-04, 7/10, 70 percent). In addition, a majority of the disputes again concern tariff restrictions (Table VI-05, 5/10, 50 percent).

Table VI- 04 – Countries party to the dispute settlement under the Protocol of Brasilia

Countries Party to the Dispute	Number of cases

[109] *See* Protocol of Brasilia.

Argentina v. Brazil	3
Brazil v. Argentina	2
Uruguay v. Argentina	1
Uruguay v. Brazil	2
Paraguay v. Uruguay	1
Argentina v. Uruguay	1
Total	**10**

Table VI- 05 - Type of disputes at issue under the Protocol of Brasilia

Type of case	**Frequency**
Tariff Restrictions	5
Safeguards	3
Anti-dumping	1
Lack of Incorporation of MERCOSUL rules	1
Total	**10**

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

Table VI- 06 – Length of time between constitution of the Ad Hoc Court and end of dispute by measure challenged

Type of Dispute	**Mean Time**	**Number of Disputes**
Anti-dumping	75	1
Lack of Incorporation of MERCOSUL rules	113	1

Safeguards	240	3
Tariff Restrictions	101	5
Total	**141**	**10**

E. Dispute Review by the Permanent Review Court

The 2002 Protocol of Olivos embraces additional dispute resolution procedures then that of Annex III, the Protocol of Brasilia, and the Protocol of Ouro Preto. The Protocol sets up a review of CMG and Ad Hoc Court holdings through the formation of the Permanent Review Court that consists of three arbitrators; one from each disputing MERCOSUL State and a third arbitrator decided upon jointly.[110] Any party utilizing the Ad Hoc Court or CMG arbitration may submit a motion to review a holding within 15 days of the judgment.[111] The Permanent Review Court must limit its holding to the issues addressed by the CMG and Ad Hoc Court's original holding.[112] The holding of the Permanent Review Court binds all State parties, preventing parties from any further appeal of the holding.[113]

Table VI- 07 –Permanent Court of Review of provisions, procedures and timeline

Provision	**Procedure**	**Timeline**
Protocol of Olivos **Ch. 7 Art. 17** MOTION FOR REVIEW		Parties must file motion for review within **15 days** of Ad Hoc Court holding.
Protocol of Olivos **Ch. 7 Art. 18**	Permanent Review court to consist of 5 arbitrators. One from each of the four original MERCOSUR States and a fifth decided upon jointly. Each State shall nominate 2	The arbitrator and alternate may serve for a 2 year term and such position is renewable up to 2 more terms. The fifth arbitrator is to serve a non-

[110] Olivos Protocol Ch. 7 Art. 18.

[111] Olivos Protocol Ch. 7 Art. 17.

[112] Olivos Protocol Ch. 7 Art. 17 and 22. In addition to providing review, the Permanent Review Court may give advisory opinions and review disputes causing irreparable harm in exceptional cases as dictated by the CCM. Olivos Protocol Ch. 7 Art. 24. Fn 7.

[113] Olivos Protocol Ch. 7 Art. 23.

COMPOSITION OF PERMANENT REVIEW COURT	arbitrators to compose the list from which the fifth arbitrator is chosen.	renewable 3 year term.
Protocol of Olivos **Ch. 7 Art. 20** OPERATION OF THE COURT	When the dispute includes only two State parties then the Court shall consist of three arbitrators; one chose from each disputing party State and a third decided upon jointly. When the dispute involves more than two State parties then the Court will consist of five arbitrators.	
Protocol of Olivos **Ch. 7 Art. 21** REPLY TO THE MOTION TO REVIEW	The other party to the dispute may reply to the motion for review.	The Permanent Review Court shall decide on the motion within **30 days**. The Court may decide to extend the 30 day term by **15 days**.
Protocol of Olivos **Ch. 7 Art. 22** SCOPE OF THE HOLDING	The Permanent Review Court may confirm, modify or revoke the holdings of the Ad Hoc Arbitration Court. The holding of the Permanent Review Court shall be final and shall prevail over the holding of the Ad Hoc Arbitration Court.	
Chapter VII, Art. 23 DIRECT ACCESS TO THE PERMANENT REVIEW COURT	After direct negotiations and/or CMG resolution, the parties may expressly agree to submit the dispute directly and with no other recourse to the Permanent Review Court, which would have then the same competence as the ad Hoc arbitral Court. The award of the Permanent Review Court is	

	mandatory and final.	
Protocol of Olivos Chapter VIII, Art. 28 REQUEST FOR CLARIFICATION	Any of the involved parties may request the Clarification of the Permanent Review Court awards.	Clarification may be requested **within the 15 days following the award notice**. The Court must issue its holding within **15 days following the clarification request** and may grant an additional period for compliance with the award.
Protocol of Olivos Chapter VIII, Art. 29 COMPLIANCE OF PERMANENT REVIEW COURT AWARDS		Awards must be complied with within the period established by the corresponding Court. In lieu of this period, the award must be complied with **within 30 days after its notification.**
Protocol of Olivos Chapter VIII Art. 30 DISCREPANCY AS TO THE ENFORCEMENT OF THE AWARD	If the State benefited from the award considers that the measures adopted by the other party are not in compliance with it, it must notify the respective Ad Hoc Arbitral Court or Permanent Review Court.	Notification must be **within 30 days after the adoption on measures**. The respective Court must decide the matter **within 30 days from the notification**.
Protocol of Olivos Chapter IX Art. 31 COMPENSATORY MEASURES	If an involved State does not totally comply with the award within one year, the other State may implement temporary compensatory measures tending to attain compliance with the award.	The award must be complied with **within one year from the day following the period established by the corresponding Court, or in lieu of this period, the following day after 30 days from the award notification.** The State implementing the temporary compensatory measures must notify the other State **at least 15 days before their implementation**.
Protocol of Olivos Chapter IX Art. 32	The State against whom temporary compensatory measures are implemented may challenge them if it considers that it satisfactorily	Challenge must be made **within 15 days** after the other State notified the temporary compensatory measures implementation.

CHALLENGING OF COMPENSATORY MEASURES	complied with the award	The corresponding Permanent Review Court must decide the matter within 30 days after its constitution.

Because the Protocol of Olivos also addresses the Protocol of Brasilia procedures of Ad Hoc Court arbitration and so few cases exist, we decided to construct qualitative rather than quantitative tables. Hence, Table VI- 08 summarizes the awards of a dispute between Uruguay and Argentina concerning the prohibition of used tires and a dispute between Uruguay and Argentina concerning Argentina's omission in adopting appropriate measures to promote free trade.

Table VI- 08 –Dispute, Procedures, and Timing

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

			the designation of the third arbitrator. On July 6, 2006, the Permanent Review Court issued Award N°. 2/2006 holding the request for review inadmissible.	

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

Table VI- 09-Cases settled before the Permanent Review Court

Type of case	Previous Procedures	Year that the case started	Year that the dispute ended
AWARD N° 1/2005 Ad Hoc Court to decide the review procedure requested by Uruguay against the Ad Hoc Arbitral Court´s Award dated October 25, 2005 regarding the **Argentine Prohibition of the Importation of Remolded Tires**	On October 25, 2005 the Ad Hoc Arbitral Court decides the case against Uruguay.	November 9, 2005 Uruguay requests the review proceeding	December 20, 2005 The Permanent Review Court revokes the October 25, 2005 award from the Ad Hoc Arbitral Court
AWARD Nº 2/2006 Court to decide the review procedure at the request of Argentina in regards to the Ad Hoc Court´s decision of June 21, 2006 in the case of **Argentina´s Failure to Adopt Measures Promoting Free**	On June 21, 2006 the Secretariat forms the Ad Hoc Court to decide the case of between Argentina and Uruguay. Argentina challenges the designation of the third arbitrator requesting a review proceeding.	June 29, 2006 Argentina requests the review proceeding before the Permanent Review Court challenging the designation of the third arbitrator.	July 6, 2006 the Permanent Review Court holds that the request for review is inadmissible.

Trade between Argentina and Uruguay			
AWARD N° 1/2007 Court to decide whether the compensatory measures in the case of the **Argentine Prohibition of the Importation of Remolded Tires** requires excessive measures.	On December 20, 2005 the Permanent Review Court repeals the Ad Hoc Court award of October 25, 2005 and orders Argentina to comply with its award. On January 13, 2006 the Court rejects a Request for Clarification. On April 17, 2007 Uruguay imposes compensatory measures against Argentina pointing Argentina's failure to comply with the award.	May 3, 2007 Argentina asks the Permanent Review Court to determine the proportionality of the compensatory measures with Uruguay.	June 8, 2007 Permanent Review Court upholds the compensatory measures.
AWARD N°1/2008 Discrepancy regarding compliance with Award **N°1/05 initiated by Uruguay (Art. 30 Protocol of Olivos)"**	On January 13, 2006 the Ad Hoc Court rejects a Request for Clarification On April 17, 2007 Uruguay imposes compensatory measures against Argentina pointing to Argentina's failure to comply with the award. On June 8, 2007 the Court upholds the compensatory measures. (Award N° 1/2007) Argentina enacts Law Nº 26.329 modifying the MERCOSUL conflicting law, Law Nº 25.626. Uruguay considers that this new law fails comply	February 23, 2005 Uruguay notifies the MERCOSUL Secretariat its intention to initiate the Arbitral procedure. April 25, 2008 President of the Permanent Review Court assembles the Court.	April 25, 2008 The Permanent Review Court decides that the new Law 26.329 fails to comply with the Award Nº 1/2005 and orders its revocation or modification. Additionally, the Court authorizes Uruguay to maintain the compensatory measures until Argentina complies with the award.

	with Award Nº 1/2005 and initiates this proceeding under Chapter VIII, Art. 30 of the Protocol of Olivos		

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

Even though we require further information to determine whether MERCOSUL Member States turn to MERCOSUL dispute resolution systems rather than to WTO dispute resolution systems, and the trends in one direction or another, other conclusions arise from the collected data. The cases in Table VI-09 illustrate that some State laws, regulations, administrative procedures, and company standards can and do contradict MERCOSUL requirements. MERCOSUL requires Member States to publish all acts affecting trade and an annual report of the adoption of new regulations, but the publications create a financial burden that few States follow. [114] Additionally, while MERCOSUL dispute bodies adhere to precedent in their legal analysis,[115] the lack of resolved cases and lack of information regarding Member State regulations inhibit the transparency of MERCOSUL and, rather than promote free trade, hinder free trade.[116]

Without consistent MERCOSUL decisions, MERCOSUL leaves Member States in the dark as to the manner in which MERCOSUL courts may rule and may restrain Member States from selecting MERCOSUL as a forum to resolve disputes. In addition, MERCOSUL's failure properly to record the dates of Member State actions prevents a proper analysis of the fulfillment of MERCOSUL time requirements. This includes missing data concerning when the President of the ad hoc court obtains

[114] Protocol of Montevideo Part II Art. VIII, (Dec 1997), http://www.cvm.gov.br/ingl/inter/MERCOSUL/montv-e.asp (Last visited 09/18/1981).

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

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

a case and the dates and duration of arbitration. Without this information, analysts cannot determine whether MERCOSUL adheres to the rule of law by fulfilling treaty time requirements. MERCOSUL Members maintain the power to implement temporary compensatory measures against other Member States, however, the MERCOSUL body maintains no such power.[117] Enforcement of MERCOSUL decisions thus lies directly with the Member States.[118] Without this individual capacity, MERCOSUL's inability to properly enforce decisions prevents MERCOSUL from requiring the implementation of holdings and ultimately the rule of law. With a lack of transparency, poor records, and week enforcement power MERCOSUL lacks the ability to uphold the rule of law in South America.

VII. Conclusions and Recommendations

The intention of this paper was to construct an empirical data array that might portray a broader and deeper picture of trade dispute settlement cases involving Latin American countries, with particular regard to their relevance to the complex task of managing the rule of law. We have addressed a variety of cases under the 3 dispute settlement systems described below.

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

[117] Protocol of Olivos Chapter IX Art. 32

[118] Protocol of Ouro Preto, Art. 37-40.

With respect to WTO dispute settlement, our first finding was that for cases involving a Latin American country (74, see Table VI- 01), most (44, or 60 percent) also involve the USA as respondent or complainant (Table VI- 02). More often than not (54 of 74, or 73 percent), the USA is respondent (Table VI- 03). In addition, the USA has been involved in more cases involving another LA Member than any single LA country (Table VI- 01). The peak year for such cases was 2000 (13 cases) and the numbers have been decreasing since that time, to 2 cases in 2007 (Table VI- 02).

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

In respect to the type of measure challenged, we can assert that most of the contested government actions are taxes and regular tariffs (30 of 74, or 41 percent, see Table VI- 05). Safeguard measures were a close second at 24, about 32 percent), with the count for AD/CVD cases being 27 percent (20 of 74). It is also important to note that a case involving taxes and regular tariffs is the type of case which is less likely to be settled prior to a panel decision than the trade remedy challenges. A notable number of "trade remedy" cases (safeguard and AD/CVD) end with a mutually agreed solution prior to panel decision (15 of 74, or 20 percent, see Table VI- 06).

Using the data we gathered from the WTO, it was possible for us to measure the time between the request for consultations and adoption by the DSB of the final decision of the panel or Appellate Body. Using this information, we could conclude that the timelines prescribed by the DSU often are not met. The mean time for these cases is 672 days (Graph IV-01), although the DSU prescribes 468 days for this phase. On the other hand, when the focus is on appealed cases only, we observed that all cases met the time deadlines prescribed by the DSU (Table VI- 09).[119]

[119]In light of the AB's procedures, we could expect that the AB would more easily meet its deadlines. This is because the Appellate Body's permanent structure has permitted establishment by its Secretariat of a rigorous procedure in which its legal division assigns an attorney to a challenge from the time a Member files a request for establishment of a panel. This attorney tracks the case through its stages of written and oral submissions, the panel's preliminary report to the parties, and the panel's final report. In other words, by the time a party appeals, the AB already has outlined an approach to the panel's report that will then be reviewed and decided by the three AB members appointed to the appeal. Interview with former chief legal advisor to the Appellate Body, Debra Steger, Feb. 12, 2001 (authors' notes).

Initial panels, on the other hand, are *ad hoc* entities with a varied composition that may not even include a lawyer (the USA insists that at least one lawyer be chosen for any panel in which it is a primary party). While many officials in the WTO Mission or in the capitals of the Members are reappointed to multiple panels over time, this familiarity with the process has not apparently improved panel efficiency.

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

It has been the experience of the authors that trade negotiators are compelled to agree to unrealistically short deadlines for panel decisions. In order to convince industry leaders whose companies will be most affected by panel decisions that dispute settlement under a trade agreement is an improvement on litigation or arbitration methods otherwise available to resolve commercial disputes, the decision process must be squeezed to an absolute minimum. The price, however, as shown by our research, is that in the real world, *ad hoc* panels cannot function under these inordinately short deadlines. We find some panels brazenly announcing that their decision will be delayed for 3 months, 6 months, or even longer.[120]

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

Should we be surprised, then, when losing respondents treat the DSU requirements for implementation of panel and AB decisions as mere guidelines instead of international obligations?[121] Should we be surprised when we see the most developed WTO Members simply ignoring a challenge altogether, that is, not even conceding the jurisdiction of the WTO dispute settlement system over a

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

[121] Ten years after the EU Member States refused to approve importation from the USA and Canada of meat treated with growth hormones, a position found contrary to WTO rules in *EC—Hormones*, WT/DS26, 48/AB/R, Report of the Appellate Body (Jan. 16, 1998). US - 1916 Act, EU - Biotech Products, the USA and Canada still are imposing financial retaliation against EU imports.

measure inarguably within WTO purview?[122] Should we be surprised when losing Members delay implementation of panel findings of violation for years?[123]

Based on our findings, we could predict that access by LA countries to WTO dispute settlement procedures against alleged violations by the USA will continue to decrease. Armed with an expert staff of trade lawyers in several agencies,[124]the USA is both a formidable opponent and a reluctant loser. Even in cases in which the LA country scores an enormously important victory, such as the change in Members' understanding of the WTO Agreement on Agriculture represented by the *US-Cotton Subsidies* decision,[125] USA compliance has been so slow and begrudging that even a large country such as the complainant here, Brazil, must question whether the massive outlays of attorney's and other expert fees have been justified.[126] Perhaps this is unjustifiably flippant, but the

[122] In response to the EU's challenge to USA legislation that imposed a secondary boycott on companies related to Cuban companies that benefited from nationalization of the property of USA citizens, *see* EU Request for Consultations, *United States—The Cuban Liberty and Demoncratic Solidarity Act*, WT/DS38 (May 13, 1996), the USA announced that it "would not show up" for proceedings because its expanded embargo affected its essential national security, which it claimed were exempt from WTO purview under Article XXI of the GATT. Alan S. Alexandroff and Rajeev Sharma, *The National Security Provision: GATT Article XXI*, ch. 35 in THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1577 (Springer US, Patrick F.J. Macrory, Arthur E. Appleton, & Michael G. Plummer, eds. 2005).

[123] In response to the Appellate Body's finding that distributing anti-dumping duties collected at the border to USA companies harmed by the dumping violated the WTO Anti-Dumping Agreement, *US–Offset Act (Byrd Amendment)*, WT/DS217/234/AB/R, Report of the Appellate Body (Jan. 16, 2003), the USA Congress repealed the legislation in 2006, but transitional provisions have resulted in payouts continuing to this day. *See* Peter Morton, *Byrd Amendment Finally Bites the Dust*, National Post (Oct. 1, 2007), *available at* http://network.nationalpost.com/np/blogs/fpposted/archive/2007/10/01/byrd-amendment-finally-bites-the-dust.aspx. The tax breaks given by the USA to exports dates to the 1980s as a means to equalize tax rebates given by the EU to its exports. Several challenges by the EU to serially-amended USA legislation culminated in a $4 billion win by the EU in the 2002 case of *United States—Tax Treatment of "Foreign Sales Corporations*," WT/DS108/AB/RW (Jan. 14, 2002); *see* Tim Josling, *WTO Dispute Settlement and the EU-US Mini Trade Wars: A Commentary of Fritz Breuss*, Journal of Industry, Competition and Trade, Bank Papers 337, 342–343 (2004).

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

[125] *United States—Subsidies on Upland Cotton*, Report of the Panel, WT/DS267/R (Sept. 8, 2004).

[126] After 3 years of informal negotiations and WTO maneuvering with the USA to obtain compliance with the decisions of the panel and the Appellate Body that had been adopted by the DSB in March 2005, Brazil finally triggered establishment of an arbitration panel to approve Brazil's proposed financial retaliation against other

Cotton case showed, on one hand, that David can indeed slay Goliath and, on the other, that Goliath seems to have as many lives as a cat.

As to NAFTA Chapter 19 disputes, the most striking data are contained in Table V-04. Not only has no case involving Mexico and the USA met the treaty deadline of 315 days (far from it, the mean being 1,282 days), but nearly as much time is absorbed in remand proceedings after the panel's final decision is issued (279 days on average) as the treaty anticipates for the entire dispute settlement process. Strictly from a rule of law perspective, taking an average of two and one-half years longer than required by a binding international treaty, whatever the reason, shows an astounding with basic due process entitlements. While complying with deadlines, as compared with the panel's reaching well reasoned decisions, may seem of a lesser priority, we would posit that much else that has gone awry in the NAFTA Chapter 19 process is explicable from this revealing start.

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

VIII. Legislative changes affecting civil society

Legislation in LA countries in the midst of this swirl of dispute panel jurisprudence has been far more supportive of the rule of law than the record of ignored treaty deadlines would predict. We identified recent laws in 9 LA countries that require transparency and accountability in government rulemaking.[127]

Country	Law and year enacted
Argentina	Decree 1172 of December 4, 2003, Access to Public Information; Law of Fiscal Responsibility, Law 24156 of Financial Administration and Systems of Public National

USA exports to Brazil, a challenge in which Brazil in large part prevailed, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, Report of the Panel (Dec. 18, 2007), *aff'd in part*, WT/DS267/AB/RW (2 Jun 2008). The battle of the arbitrators continues.

	Sector Control; and Decree of Regulation of Public Offering Transparency No. 677 of 2001[128]
Brazil	Fiscal Responsibility Law (LRF), of May 2000[129]
Chile	Law of Transparency No. 20.285, enacted on August 11, 2008[130]
Honduras	Decree No. 170-2006 of Transparency and Access to Public Information, published on December 30, 2006[131]
Mexico	Federal Law of Transparency and Access to Governmental Public Information, published on June 11 , 2002[132]
Nicaragua	Law No. 662 of Transparency for Nicaraguan Governmental Entities and Companies, enacted on June 24, 2008[133]
Panama	Law No. 6 of January 22 of 2002, providing for transparency in regulations in public management[134]
Peru	Law Nº 27806 of Transparency and Access to Public Information, enacted on August 2, 2002[135]
Uruguay	Law No. 18.381 of Access to Public Information, published on November 7, 2008[136]

[128] http://www.argentina.gov.ar/argentina/portal/paginas.dhtml?pagina=308.

[129] http://www.indicedetransparencia.org.br/?p=857.

[130] http://www.bcn.cl/ley-transparencia.

[131] http://www.honducompras.gob.hn/Info/LeyTransparencia.aspx

[132] http://www.funcionpublica.gob.mx/leyes/leyinfo/ley_lftaipg2002.htm.

[133] http://legislacion.asamblea.gob.ni/Normaweb.nsf/($All)/C34AD5893B7AFF9E06257508005C5EB6?OpenDocument

[134] http://www.setransparencia.gob.pa/documentos/Ley_6_Transparencia.pdf.

[135] http://www.transparencia.org.pe/documentos/ley_27086._ley_de_transp.acceso_informacion_publica.pdf

[136] http://200.40.229.134/IndexDB/Leyes/ConsultaLeyes.asp

These laws, dating from 2002 to 2008 (most in the latter two years), and thus coincident with the reported decisions, make explicit what Professor Powell argued was an incidental impact of regional trade agreements and their dispute settlement systems. [137] The early Mexican law has the broadest reach[138] and Brazil's opens only banking transactions, but each works toward managing the rule of law by requiring transparency, accountability, and due process by governments, these laws make obligatory what before were the unwritten and indirect effects of implementation of the agreements themselves. They promote timeliness, inclusive record keeping, and impartiality in the administrative decisional process of rulemaking, improvements that, taken with transparency and accountability, are key elements of democratic governance and, in turn, the rule of law. As the Inter-American Court of Human Rights put it,

> Freedom of Expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural associations and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[139]

We find these results even more compelling in verifying our hypothesis in light of the fact that the studied challenges, after all, are about technical trading measures, not matters of constitutional court importance, such as an effort by an authoritarian ruler to extend the term of the presidency. For example, concerning Argentina's success in overturning Brazil's ban on importation of used tires,[140] Brazil simply repealed the measure banning retreaded tires. While this step alone will not likely affect many people or companies not engaged in producing or distributing retreaded tires, except perhaps in the cost of such tires in the marketplace, Brazil's further legislation in support of open governance will indeed have broader impact on its civil society.

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[137] *See* text at n. 8, *supra*.

[138] Eric Heyer, *Latin American State Secrecy and Mexico's Transparency Law*, 38 Geo. Wash. Int'l L. Rev. 437, 438-39 (2006).

[139] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-Am. C.H.R. A5, para. 70 (1985).

[140] *Brazil – Measures Affecting Imports Of Retreaded Tyres,* AB-2007-4, WT/DS332/AB/R (Dec. 3, 2007).

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