

15. DISPUTE SETTLEMENT PROCEDURES IN U.S.-ANDEAN TRADE

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Two heresies underlay the argument of this chapter. The first is that trade disputes are a healthy economic sign. They indicate that the movement of goods, services, and capital between countries is accelerating beyond its customary speed, and hence is creating friction. The only countries that can be expected to avoid all trade disputes are those with small and stagnant levels of trade. Any trade agreement that is worth negotiating *should* lead to disputes. The second heresy is that the intractability of some disputes is a healthy political sign because democracies find it difficult to subordinate their policies to international rules. Democracy is now firmly entrenched in Latin America, as is the realization that open markets offer better hope for development than protectionism and state-directed incentives. Taken together, however, open markets and open political systems will predictably produce a growing docket of disputes between the United States and the Andean countries.

The purpose of this chapter is to examine how best to handle these inevitable disputes. I do so by reviewing the past performance and current status of three different models for adjudicating disputes and enforcing results: the trade laws of the United States, the multilateral rules of the General Agreement on Tariffs and Trade (GATT) and now the World Trade Organization (WTO), and the special rules devised in the free trade agreements (FTAs) that the United States has negotiated with Canada and Mexico. So far most U.S.-Andean disputes have been handled through the U.S. trade laws, a forum in which Andean countries are at an obvious disadvantage. The principal question examined here is whether future disputes should be pursued through the newly-reformed rules of the WTO, or if the FTAs offer a superior model for dispute settlement in the future Free Trade Area of the Americas (FTAA). One approach would be to develop a special dispute-settlement system for the Americas, either through the accession of countries to the North American Free Trade Agreement (NAFTA) or by establishing an FTAA dispute-settlement system that borrows from the NAFTA experience. I argue instead for a “WTO First” principle: wherever permitted by WTO rules, any future disputes between the United States and Andean countries should be adjudicated under the dispute-settlement rules of the WTO. There are however a few specific elements of the NAFTA model that might be applicable to the FTAA, at least until similar provisions can be negotiated into the WTO.

My argument is analogous to the economists’ pleas regarding the “second-best” nature of discriminatory trade agreements. Free trade agreements and customs unions are generally seen as second-best alternatives to multilateral trade liberalization, insofar as they both create and divert trade. They may nevertheless be welcome when the trade created exceeds the trade diverted, and when the agreements set useful precedents for new disciplines at the multilateral level. I suggest that “dispute diversion” may also pose a problem. Agreements should provide for the multilateral adjudication of disputes — and hence the multilateral creation of new law and precedent — whenever possible.

Before presenting this argument in detail, it is first necessary to establish a basis for comparing and assessing distinct dispute-settlement mechanisms. There are three distinct perspectives that analysts and policymakers take: politician, lawyer, and diplomat. From the perspective of the politician, the key issues are whether local industries win or lose in specific trade disputes, and more broadly whether they are treated fairly in the process. Taken to its extreme, such a parochial perspective can lead to impossible demands (e.g., a system must not impinge on one’s own sovereignty, but must somehow be powerful enough to impose results on other countries). While it is common to dismiss such apparently nonsensical conditions, it is important to remember that even the best dispute-settlement system will fail without the support of domestic politicians. The lawyer’s perspective is driven by a desire to establish a rule-based system that adjudicates disputes and produces clear, enforceable decisions. An ideal system should be based on clear and well-understood rules, producing principled decisions that are solidly grounded in both the letter and the spirit of these rules. It should also have the power to ensure that its

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judgments are honored. The diplomat's perspective stands between those of the politician and the lawyer. It stresses the need to mediate disputes in a fashion that avoids confrontations and loss of face by either side.

The analysis in this chapter is based on the recognition that each one of these perspectives must be addressed in order to devise a workable and effective dispute-settlement mechanism. It is my argument that disputes should be viewed within the broader problem of promoting closer economic relations between the United States and the Andean countries, rather than as a simple matter of law enforcement, power politics, or crisis management. The utility of any given arrangement should be judged according to how well it helps to promote this objective. The goal should be to provide a forum in which countries can find acceptable and amicable means for dealing with the frictions that will inevitably be created by the accelerated movement of goods, services, and capital. An ideal dispute-settlement mechanism would be one that balances the needs of politicians, lawyers, and diplomats by striving to serve each of the following four objectives:

1. **Objectivity.** The mechanism should be equally open to the complaints of all concerned parties. In particular, all of the Andean countries as well as the United States should fall under its jurisdiction, and all should have equal rights to present their grievances. A mechanism should avoid any appearance of being arbitrary or politicized. There are *prima facie* reasons to suspect the objectivity of decisions that are made by nationals or representatives of any states that are themselves party to a dispute.
2. **Scope.** The rules should cover a wide range of issues. It is inefficient to provide for multiple systems to resolve conflicts, which can readily lead to "forum shopping" on the part of litigants and pose a risk of multiple jeopardy to those who are the objects of a complaint. The expanding scope of the trading system makes this a particularly important trait.
3. **Strength.** A decision that cannot be enforced is of little use. The system should provide means for parties to ensure that the results are honored, recognizing however that no judgment involving sovereign states can be purely automatic and self-enforcing.
4. **Sensitivity.** A mechanism should demonstrate sensitivity towards the domestic politics of trade. An outcome in which the "loser" is humiliated can undermine support for liberalization, both in the United States (where authority is divided between the executive and legislative branches) and in Andean countries (where nationalism and concerns over sovereignty are perennially strong). A system should therefore allow first for the settlement of disputes through diplomatic rather than judicial means, and should provide face-saving options for a party that loses a case.

OPTIONS

Dispute-settlement mechanisms fall into two general categories. The first are those that form part of a country's domestic law, and hence tend to favor the country or party making the complaint. Chief among the domestic laws are the "reciprocity" statutes and the use of trade preferences as leverage. The second consist of those provisions that form part of a bilateral, regional, or multilateral trade agreement, which typically entail the referral of disputes to panels. Both types of mechanism are examined in the sections that follow, with particular emphasis on their significance for U.S.-Andean trade.

Enforcement of Domestic Law

More trade disputes between the United States and Andean countries have been adjudicated under U.S. law than under the terms of international agreements. This section deals with those laws that are generally termed "reciprocity" statutes, which resemble the trade-remedy laws in certain respects but are based as much on negotiations as on adjudication. Other U.S. laws reviewed below operate similar to the reciprocity statutes.

A distinction should be drawn here between private and public disputes. Many disputes between private nationals of different countries are adjudicated in national courts. In addition to cases arising over contractual matters, these disputes include allegations of dumping or subsidization. Such disputes are outside the scope of

my inquiry, unless and until one or both of the parties recruits the assistance of its government. Cases under the reciprocity laws are usually initiated by private interests, but then become subjects of state-to-state concern once the Office of the U.S. Trade Representative (USTR) has been convinced to adopt the matter as a U.S. negotiating objective.

Reciprocity Laws

The policy of reciprocity, or negotiating under the threat of retaliation, is a recurring theme in U.S. trade policy. In this approach a country seeks to enforce its economic rights by threatening or imposing sanctions unilaterally rather than by offering to negotiate mutually beneficial agreements. For example, the United States may threaten Colombia with the imposition of tariffs on coffee unless Colombia agrees to reduce or eliminate the tariffs that it imposes on computers. The objective might alternatively be to convince the trading partner to terminate an export subsidy or to require compliance with some other trade-related objective (e.g., protection of patents or resolution of an investment dispute). Reciprocity is power politics applied to trade. Some U.S. trading partners have responded to this policy with “tit-for-tat” reactions. While major economies such as China and the European Union have the market power to play this game, this is not ordinarily an option for smaller countries such as the Andean states. These countries account for relatively small shares of total U.S. exports and hence cannot effectively threaten counter-retaliation.

The reciprocity strategy is a central and recurring element in American policy. These proposals are especially popular among members of Congress, who can use them to demonstrate their opposition to foreign unfair trade practices, show support for domestic industries, and advance an alternative to outright protectionism. Negotiators and presidents tend to be much more skeptical of a policy that obliges them to engage in confrontations with their foreign counterparts, and risk a possible loss of face for either or both sides — especially when they must do so on terms and timetables dictated by Congress.

Andean countries first experienced the U.S. reciprocity laws a century ago. The McKinley Tariff Act of 1890 authorized the president to impose retaliatory duties on countries that discriminated against U.S. products. The law empowered him to penalize imported sugar, molasses, tea, coffee, or hides if the exporting country “impose[d] duties or other exactions on the agricultural or other products of the United States” that he deemed to be “reciprocally unjust or unreasonable.” Latin American countries were the chief targets of these provisions, and the United States ultimately took retaliatory action against Colombia, Haiti, and Venezuela. This experience embittered U.S. trade relations with these countries for years.

Reciprocity made a major comeback in the 1970s and 1980s, when Congress enacted numerous laws based on this principle. The most important of these are summarized in Table 15.1. Two reciprocity laws have been particularly important for U.S.-Andean trade relations: section 301 of the Trade Act of 1974, and the Special 301 intellectual property law.

Section 301. Section 301 is an “all-purpose” reciprocity law that can be employed to deal with a wide range of disputes with U.S. trading partners. The law empowers the USTR to investigate allegations that foreign laws, policies, or practices violate U.S. rights, and to negotiate for the elimination of these practices under the threat of retaliation.

Some analysts view section 301 as an alternative — and usually an unwelcome one — to the adjudication of disputes in the GATT or WTO. The relationship between this law and the GATT/WTO is in fact more complex, and has gone through three distinct phases. The first was 1974-1984, when the relationship between section 301 and the GATT was complementary. Its chief purpose was to provide authority for the president to pursue U.S. rights under the GATT dispute-settlement system, including the power to retaliate. Presidents Ford and Carter employed this law cautiously, as did President Reagan during his first term. Prior to 1984 most cases involved traditional issues of market access, and none of the forty-seven investigations during this period led directly to retaliation.

American policy entered a second phase in the mid-1980s, following the enactment of amendments that expanded the scope of the law (1984) and the adoption of a more aggressive policy by the Reagan administration (1985). Many cases involved issues that were not yet within the scope of GATT, and several led to threats of retaliation. The USTR dealt with investment under section 301 for the first time in 1985, and the

roster of intellectual property cases increased dramatically. The USTR also used the authority that Congress granted it to “self-initiate” cases (i.e., begin investigations on its own authority). Section 301 became a great source of friction in the world trading system. What American policymakers saw as self-defense was often cast in a far less favorable light by their foreign counterparts, not to mention those economists who sincerely but erroneously equated reciprocity (i.e., aggressive promotion of export expansion) with simple protectionism (i.e., restrictions on imports).

It is now hoped that the United States has entered yet a third phase in its policy, in which the complementary relationship between section 301 and the multilateral system is firmly reestablished. The Uruguay Round negotiations produced new disciplines in areas of importance to the United States, including a General Agreement on Trade in Services, an Agreement on Trade-Related Aspects of Intellectual Property Rights, and a less substantive but precedent-setting chapter on trade-related investment measures. The round also fashioned a much more effective dispute-settlement mechanism (as discussed later in this chapter). This compromise gave Washington recourse to international rules, but required that most disputes over the interpretation and application of these rules be adjudicated within the WTO rather than by national fiat. This does not mean that section 301 and related statutes have fallen into disuse; to the contrary, the USTR initiated nineteen cases in the first three years after conclusion of the Uruguay Round (i.e., 1994-1996). It does however mean that when a case involves WTO members and issues, the United States should operate within the newly expanded regime’s rules rather than on its own.

TABLE 15.1. PRINCIPAL U.S. RECIPROCITY LAWS
(in declining order of importance in U.S.-Andean relations)

Law	Purpose and Process	Andean Cases
USTR retaliatory authority (Section 301, Trade Act of 1974, as amended)	If USTR finds that a foreign act, policy, or practice violates U.S. rights, it can impose sanctions (e.g., 100 percent tariffs)	Three petitions filed, two investigations (one self-initiated); see Table 15.2.
Special 301 (section 1303, Omnibus Trade & Compet. Act of 1988)	USTR must name annually priority countries that do not protect intellectual property; can lead to retaliation	All Andean countries have been designated under the law; see Table 15.3
National Trade Estimate (Sec. 303, Trade & Tariff Act of 1984, as amended)	USTR produces an annual catalogue of foreign practices that pose significant barriers to U.S. exports or investment	The most recent reports include sections on Colombia, Ecuador, and Venezuela
Foreign Shipping Practices Act of 1988 (Title X, Omnibus Trade & Compet. Act of 1988)	The Federal Maritime Commission has the authority to retaliate in kind against foreign restrictions on U.S. shipping	Sanctions against Ecuador (1990); sanctions not applied to Peru (1989); case against Venezuela resolved (1991).
Longshoremen Services (Section 258[e] of the Immigration & Nationality Act of 1958, as amended)	Longshoreman activities (e.g., loading of ships) can be performed by alien crews of foreign vessels only when the country permits the same activity by U.S. crews	In 1996 Colombian, Peruvian, and Venezuelan crews partly restricted, Ecuadorian crews fully restricted
International Air Transportation Fair Trade Practices Act of 1974, as amended	The Secretary of Transportation has authority to retaliate in kind against foreign governments or air carriers that discriminate against U.S. carriers	Restrictions threatened against Colombia in 1996, but resolved through negotiations
Federal Aviation Act of 1958, as amended	Department of Transportation can retaliate in kind against foreign airlines whose governments restrict U.S. flights	Restrictions threatened against Ecuador and Peru in 1970s, negotiations resolved
Super 301 (section 1302, Omni. Trade & Compet. Act of 1988, as amended)	USTR must name annually any priority foreign practices and countries, and can initiate investigations leading to retaliation	Has not yet been used in cases involving Andean countries
Government Procurement (sec. 7003, Omni. Trade & Compet. Act of 1988)	USTR can retaliate against signatories that do not comply with the terms of the GATT Government Procurement Code	Has not yet been used in cases involving Andean countries
Wine Equity Act (Title IX, Trade and Tariff Act of 1984)	USTR must investigate barriers imposed by "major wine trading countries" and take appropriate measures to remove them	Has not yet been used in cases involving Andean countries
Telecommunications Trade Act of 1988	The president can retaliate against any "priority foreign countries" that do not enter into agreements to liberalize trade in telecommunications goods and services	Has not yet been used in cases involving Andean countries

What effect has section 301 had on U.S. trade relations with Andean countries? As can be seen in Table 15.2, four cases during 1980-1996 involved countries in the region. None of these cases led to retaliation, however, and only one of them — the Colombian banana case — involved a formal investigation by the USTR. (The multiparty dispute over trans-Atlantic banana trade is examined at greater length in the section below on the GATT/WTO dispute-settlement system.)

TABLE 15.2. U.S.-ANDEAN COUNTRY DISPUTES BETWEEN THE PURSUED UNDER SECTION 301 RETALIATORY LAW

Country	Years	Complaint	Result
Colombia	1985	Roses Inc. filed a petition alleging that Colombia (as well as seven other U.S. trading partners) with regard to trade in fresh cut roses were unjustifiable, unreasonable, and discriminatory and/or were inconsistent with or otherwise denied to the U.S. benefits under the GATT.	USTR decided not to initiate an investigation because several of the practices named in the petition had been terminated or were found not to exist; several already had been addressed in countervailing duty investigations; many of the allegations were insufficiently supported in the petition; and the petition did not adequately demonstrate the burden on U.S. commerce or the causal link between the alleged practice and effect.
Colombia	1995-1996	USTR self-initiated an investigation to determine whether Colombian policies and practices regarding banana exports to the EU are unreasonable and discriminatory and burden or restrict U.S. commerce. The chief focus was on whether an agreement between Colombia and the EU violated the rights of U.S. firms.	In 1996 the USTR determined that the practices of Colombia were unreasonable or discriminatory and burdened or restricted U.S. commerce. The USTR negotiated a memorandum of understanding with Colombia and terminated the investigation. USTR also announced its intention to address the remaining burden or restriction while monitoring Colombia's commitments made in the memorandum of understanding.
Ecuador and Venezuela	1986	Three shippers' groups in Florida filed a petition complaining that Ecuador and Venezuela (with Guatemala, Jamaica, and Paraguay) required preshipment inspections, often involving price verification for U.S. exports.	The petitioners withdrew their petition. The topic was later addressed in an agreement reached during the Uruguay Round.
Venezuela	1980	Diamond Sunsweet, Inc., filed a petition complaining of a Venezuelan decision to increase its <i>ad valorem</i> duty on dried prunes.	The petitioner withdrew its petition to allow USTR to negotiate. It later refiled the petition because a solution had not been reached, but then withdrew the refiled petition.

Source: Office of the U.S. Trade Representative.

The section 301 law has therefore been more of a potential than an actual threat for this region. The law has however been used more vigorously against other Latin American countries (especially Brazil), and it should not be assumed that the Andean countries would be immune from sanctions imposed under section 301.

Special 301. The Special 301 law is more specialized than section 301, and has been more frequently invoked in U.S.-Andean disputes. It deals specifically with allegations of intellectual property rights violations. This law dates from the height of the reciprocity craze in the 1980s, being one of several such provisions in the Omnibus Trade and Competitiveness Act of 1988 (see Table 15.1). Like the more widely known Super 301 law, this statute obliges the USTR to take a more active approach to reciprocity. Instead of waiting for the submission of petitions from private interests, the agency must conduct annual reviews of foreign countries' intellectual property laws and practices. These reviews can lead to the initiation of formal investigations, which can in turn produce the threat of retaliation.

The USTR developed a hierarchy of designations for countries under this law, including a "watch list" and a "priority watch list" for those that are potentially subject to action. As shown in Table 15.3, all of the Andean countries have been named at various times to the watch list, and the USTR placed Ecuador on the priority watch list in 1997. The agency initially declared that it would bring a WTO dispute-settlement case against Ecuador on the basis of these complaints, but this action was forestalled by further consultations between Quito and Washington. The two countries resolved their differences over some aspects of the dispute in mid-1997, in part through an Ecuadorian pledge to draft and seek passage of legislation that reflects the terms of the Uruguay Round TRIPs agreement. The USTR nevertheless kept Ecuador on the priority watch

list, and threatened to initiate sterner action “[s]hould Ecuador fail to achieve these long-overdue goals this year” (USTR, 1997c: 2).

The demands made by the United States are not restricted by the terms of international agreements. The Uruguay Round TRIPs agreement allows developing countries a transition period of up to ten years in their compliance with the agreement’s disciplines, but it is U.S. policy to press countries for more rapid implementation. The U.S. complaints against both Colombia and Ecuador were based in part upon these countries’ indications that they intended to take advantage of the TRIPs phase-in period. (Ecuador later backed away from this declaration, notifying the WTO on June 26, 1997 that it would not avail itself of the transition period.) In contrast to section 301, which has now been more closely synchronized with the WTO system, cases brought under Special 301 might entail demands that exceed WTO commitments. Current indications are however that the USTR will try to obtain formal judgments from WTO panels before taking any action against a country under this statute.

TABLE 15.3. STATUS OF ANDEAN COUNTRIES UNDER THE SPECIAL 301 INTELLECTUAL PROPERTY LAW (Status as of October, 1997)

Country	Placement on List	Allegations Made by USTR
Bolivia	Special Mention in May, 1996; placed on the Watch List in an October, 1996 “out of cycle” review.	Bolivia has not yet taken adequate steps to combat copyright piracy (particularly for software), implement the Andean Pact decision on copyright, or revise its copyright laws to conform to international standards. Bolivia does not provide full copyright protection for foreign sound recordings.
Colombia	On the Watch List every year since the law entered into effect in 1989.	Problems continue in piracy and border enforcement. Colombia has not fully implemented the Uruguay Round TRIPs agreement. Alleged deficiencies in Colombia’s patent and trademark regime include insufficiently restrictive compulsory licensing provisions, working requirements, inadequate protection of pharmaceutical patents, and lack of protection against parallel imports. Television broadcast laws discriminate against foreign content.
Ecuador	On the Watch List in 1992, 1993, and 1996; placed on the Priority Watch List in April 1997.	Ecuador has not yet ratified and implemented an intellectual property agreement reached with the United States in 1993, and (prior to June 26, 1997) sought to use the full transition period to implement the Uruguay Round TRIPs agreement. USTR is concerned that continued application of the recently- repealed Dealers’ Act to existing contracts may deny national treatment and protection to U.S. investment and trademarks.
Peru	On the Watch List every year since 1992.	Peru’s patent law does not protect certain types of inventions (e.g., computer programs or those involving elements of nature). A domestic working requirement can be satisfied by working in other Andean countries but not in other WTO countries.
Venezuela	On the Watch List every year since the law entered into effect in 1989.	Problems continue in piracy and border enforcement. Alleged deficiencies in Venezuela’s patent and trademark regime include insufficiently restrictive compulsory licensing provisions, working requirements, inadequate protection of pharmaceutical patents, and lack of protection against parallel imports.

Source: Office of the U.S. Trade Representative. Note that allegations are paraphrased here; for full details see USTR, 1997a. Categories of Designation under Special 301: *Priority Foreign Country:* A country under formal investigation and potentially subject to retaliation. *Priority Watch List:* Countries under close scrutiny, and could be named as priority foreign countries. *Watch List:* Countries under scrutiny, but do not face imminent action under the law. *Special Mention or Other Observations:* The lowest level of designation under the law.

Reciprocity in Trade Preferences

The United States employs three preferential trade programs for developing countries, two of which — the Generalized System of Preferences (GSP) and the Andean Trade Preferences Act (ATPA) — offer duty-free access to Andean countries.¹ While the original intention behind trade preferences was nonreciprocal (i.e., industrialized countries were to extend these privileges with no strings attached), these programs also offer a tool to American trade negotiators. Both the GSP and the ATPA establish “eligibility criteria” that countries must meet in order to receive these benefits. Since the mid-1980s the United States has used the GSP eligibility criteria as a means of encouraging countries to meet U.S. demands in trade disputes and other matters, and also employed the criteria as leverage when designating countries to the ATPA.

The Trade and Tariff Act of 1984 marked an important shift in direction for the GSP. Prior to that time, the program’s eligibility criteria were rarely used to remove or threaten the removal of countries from eligibility. The 1984 act expanded the number of criteria that GSP beneficiary countries were required to meet, and also enhanced the USTR’s authority to enforce these requirements. Beneficiary countries could lose some or all of their GSP privileges if they did not protect intellectual property, respect labor rights, resolve investment disputes, and meet other stipulations. The USTR could also offer enhanced GSP benefits to reward countries that cooperated with the United States. The agency used these provisions as a neo-reciprocal tool in a GSP “general review” during 1985-1987, and in subsequent annual reviews.

Table 15.4 summarizes the experience of Andean countries in the GSP general and annual reviews. Every country in the region except Ecuador has been the subject of at least one “country practices” complaint, and the issues most frequently cited in these petitions concerned alleged violations of intellectual property rights and workers’ rights. The USTR opted not to accept most of these petitions for review. Peru is the only country that has been subject to actual investigation. A USTR investigation concluded that Peru does in fact meet the GSP eligibility requirements concerning internationally-recognized workers’ rights, and (as explained below) a complaint regarding expropriation of an American insurance firm’s property was resolved in the negotiations over Peru’s designation for ATPA benefits. Like the section 301 law, therefore, the GSP has been more of a potential than an actual means of bringing pressure on Andean countries.

The ATPA proved to be more useful for the United States. This is a special preferential program extended only to four Andean countries (Venezuela is not eligible). The stated purpose of this program is to offer legitimate alternatives to the production and exportation of narcotics. The main benefit of the program is identical to the GSP — duty-free access to the U.S. market — but the ATPA applies to a much wider range of products than does the GSP. The program entered into law at the end of 1991. President Bush extended these benefits to Bolivia and Colombia in July, 1992, but expropriation disputes delayed the designations of Ecuador and Peru. Like the GSP reviews discussed above, these designation procedures gave U.S. negotiators an opportunity to exert leverage on the prospective beneficiary countries. President Clinton extended ATPA benefits to Ecuador in April, 1993, and to Peru in August, 1993, after the disputes with both of these countries were resolved.

¹ The third such program is the Caribbean Basin Initiative.

TABLE 15.4. DISPUTES BETWEEN THE UNITED STATES AND ANDEAN COUNTRIES UNDER GSP REVIEWS (Status as of October, 1997)

Country	Years	Complaint	Result
Bolivia	1995	International Intellectual Property Alliance alleged that Bolivia does not extend adequate protection to intellectual property rights.	USTR did not accept the petition for review.
Colombia	1990, 1993, 1995	Americas Watch, the United Mine Workers of America, and the International Labor Rights Education and Research Fund alleged that Colombia does not extend internationally-recognized workers' rights.	USTR did not accept petitions for review.
Peru	1989-1993	American International Group (a U.S. insurance firm) alleged that Peru expropriated property without adequate compensation.	Petition withdrawn in 1989 and decision deferred in 1990, but accepted for review in 1991 and 1992. Petition withdrawn in 1993; case resolved with Peru's designation to the ATPA
Peru	1992-1993	The American Federation of Labor-Congress of Industrial Organizations alleged that Peru does not extend internationally-recognized workers' rights.	Petition rejected in 1992, but accepted for investigation in 1993. Peru was found to meet the requirements of the law.
Peru	1995	International Intellectual Property Alliance alleged that Peru does not extend adequate protection to intellectual property rights.	USTR did not accept the petition for review.
Venezuela	1988	Occidental Petroleum alleged Venezuela expropriated property without adequate compensation.	Petition accepted for review but then withdrawn.
Venezuela	1993, 1995	International Intellectual Property Alliance (1993) and U.S. Nintendo Video (1995) alleged that Venezuela does not extend adequate protection to intellectual property rights.	International Intellectual Property Alliance withdrew petition; USTR did not accept Nintendo's petition for review.

Source: Office of the U.S. Trade Representative.

There is reason to doubt that these two programs will continue to be useful tools for U.S. negotiators. The ATPA benefits will expire on December 4, 2001, and the future of the GSP is also questionable. Since 1993 Congress has repeatedly allowed the GSP to lapse for periods of weeks or months, and it will expire again in mid-1998. It is not certain how long Congress will continue to approve new extensions, how long these will last, or whether additional conditions might be attached to the program. Moreover, the average U.S. tariff rate on dutiable products in 1996 was just 4.7 percent (USITC, 1997), indicating a narrow margin of preference. With the futures of the GSP and ATPA being uncertain, and the significance of tariffs declining, the leverage extended by these programs is decreasing.

There is however one reason why trade preferences could become even more useful for the United States. The GSP was legalized in the GATT through the negotiation in 1979 of an "enabling clause" that permits this exception to GATT Article I. An unanticipated consequence of this agreement was the removal of GSP from the scope of GATT rules, meaning that beneficiary countries who were also contracting parties to GATT had no recourse to multilateral rules in any disputes regarding the implementation of the program. While the new tilt towards reciprocity is inconsistent with the spirit of the original GSP proposal, there is nothing in the letter of the enabling clause that would allow beneficiary countries to challenge the manner in which the United States extended and manipulated these preferences. In the post-Uruguay Round environment, therefore, the GSP may be a more useful tool for U.S. negotiators than are the reciprocity laws. Consider for example the following hypothetical example. The United States continues to complain about certain aspects of Ecuador's intellectual property regime. Suppose the USTR retaliated under Special 301 by imposing penalty duties of 100 percent on certain products imported from Ecuador. If the USTR did so without first obtaining a ruling by a WTO dispute-settlement panel and the permission of the WTO Dispute-Settlement Body, Ecuador would have strong grounds to bring a complaint against the United States in the WTO. Suppose in the alternative that the USTR's retaliatory measures consisted of denying GSP and ATPA treatment to certain Ecuadorian products. In this instance, Ecuador would be on much weaker legal ground for bringing a complaint against the United States in the WTO.

Narcotics and Other Non-Commercial Disputes

The range of issues that are linked to trade grew in the 1980s, when the United States brought the topics of investment, intellectual property rights, and services to the negotiating table. In the 1990s the United States is seeking once again to expand the scope of trade policy, both by drawing linkages between legitimate and illegitimate trade (i.e., narcotics and proposed negotiations over bribery and corruption), and by bringing environmental and labor policies to the table. There is significant disagreement between the United States and its trading partners over whether these links, both actual and proposed, are part of the solution or part of the problem. The politics and economics of issue linkage are multifaceted; for the sake of simplicity, we will concentrate here on the narcotics issue. Trade relations between the United States and Andean countries are complicated by a U.S. law that provides for the “decertification” of countries that are found not to cooperate fully with the United States in the fight against drugs. As enacted in 1987 and amended several times since,² the law provides for a range of sanctions against countries that are so designated. It requires that most foreign assistance be denied to countries that are decertified, and that the U.S. representatives to multilateral financial institutions vote against the extension of loans to these countries. The president has additional options under the law, including the denial of trade benefits under the GSP or ATPA, the application of penalty duties, and banning the country’s airlines from the United States.

All countries in the region fall within the scope of this law. Bolivia, Colombia, and Peru are classified as major coca- and cocaine-producing countries, while Ecuador and Venezuela³ are classified as transit countries. Colombia is the only Andean country that has been subject to sanctions under the law. The United States decertified Colombia in 1996, and reiterated this decision in 1997. This put Colombia in the same unenviable category as Afghanistan, Burma, Iran, Nigeria, and Syria. The only sanctions applied to Colombia thus far concern U.S. assistance and loans from international institutions, but the president has the authority to impose harsher measures. It also possible that other countries in the region could be decertified. In 1995 Bolivia and Peru were, like Colombia, put in the category of states that were granted “national interests” waivers by the president even though they were found not to be cooperating fully. This was essentially a warning that decertification could be imminent. While both of these countries were found to be in full compliance in 1996, the possibility remains that disputes will flare up again in the years to come.

Dispute-Settlement Provisions in Trade Agreements

The domestic laws reviewed above put Andean countries at an obvious disadvantage, because the United States acts both as the plaintiff and the judge. It would be more equitable to rely upon a system that is open to the complaints of all states.

One recurring theme in international economic relations is the repeated failure of the United States and Latin American countries to establish an institutional framework for the resolution of disputes. On the Latin American side there are long-standing concerns over U.S. domination; on the U.S. side is a perennial fear, especially in Congress, that regional or multilateral organizations threaten sovereignty and (more specifically) the prerogatives of the legislative branch. Several efforts to establish such a mechanism have failed. At the International American Conference of 1889-1890, for example, Latin American countries rejected Secretary of State James Blaine’s proposal for a hemispheric arbitration system (Tyler, 1965). After pressuring both Britain and Venezuela into accepting American arbitration of a boundary dispute in 1893-1896, President Cleveland entered into an arbitration treaty with Britain in 1897. The Senate proceeded to amend the treaty extensively, and then rejected what was left (Bailey, 1980: 436-449). In 1907 the United States supported establishment of the Central American Court of Justice, but withdrew its sponsorship after the court declared in 1917 that a treaty between the United States and Nicaragua violated the rights of Costa Rica and El Salvador (Nussbaum, 1958: 222-223). Similarly, the Senate made reservations to the General Treaty of Inter-American Arbitration of 1929 that “almost nullified the practical value of the ratification” (*ibid.*: 274).

² The law itself has no distinct name. It consists primarily of amendments to the Foreign Assistance Act of 1961. The relevant authorities are in section 2492, Title 19 and section 2291j, Title 22 of the U.S. Code.

³ Venezuela gets the worst of both worlds under U.S. antinarcotics law. Like other Andean countries it faces potential sanctions under this law, but does not share the benefits extended under the Andean Trade Preferences Act.

These events underline two key problems in devising effective dispute-settlement mechanisms. One is that rules will be useful only if the United States agrees to be bound by them, and Congress has been historically reluctant to cede any authority to international tribunals or other bodies. As we shall see, this reluctance remains strong in the post-Uruguay Round period. The other is that efforts to devise a special system for the Americas have repeatedly failed. The global system established under the GATT and now the WTO has proven to be more successful.

The analysis that follows does not presuppose *how* the FTAA will be negotiated, but focuses instead on what precedents might be employed in devising its dispute-settlement rules. Irrespective of whether this bloc is formed through accessions to NAFTA, the negotiation of a single agreement, or some other mechanism, the alternatives examined below provide the clearest models on which dispute-settlement provisions might be based.

The GATT/WTO Dispute-Settlement System

The multilateral trading system has gradually evolved from one based upon mediation among a relatively small circle of industrialized, like-minded countries towards a more rule-based process that applies to almost all major trading countries. The most important step in this evolution was the establishment of a Dispute Settlement Understanding (DSU) in the Uruguay Round (1986-1994). The reformed system generally provides for a more adjudicative process, but nevertheless retains a preference for consultation and mediation over legal confrontation. The new WTO system offers advantages to both the Andean countries and the United States, especially by comparison to its GATT predecessor.

The Imperfect GATT System.

The GATT dispute-settlement system was based on the ambiguous language of GATT Article XXIII. This article provided that if a party believed that another country's policies nullified or impaired its trade benefits, it should first seek consultations with the other country. If the two nations could not resolve the matter within a reasonable amount of time, it could then be brought to the GATT for dispute settlement. Article XXIII did not actually define any specific procedures to be followed. During the early years of the GATT, a system emerged that revolved around panels of experts. In the 1950s this system worked quite well, but it then fell into disuse. Between 1963 and 1970 there were no GATT panels at all (Trebilcock and Howse, 1995). The system revived in the 1970s, but by the 1980s it was in serious need of reform. A series of bitter disputes between the United States and the European Union over agricultural trade, tax laws, and other matters threatened to undermine support for GATT itself (USITC, 1985).

The institutional structure of the GATT was not well equipped to reach or enforce definitive solutions. The GATT was not the embodiment of the rule of law at an international level. It was erroneous, in fact, to speak of the "member states" of the GATT, for the entity consisted of parties to a contract rather than members of a strong and *bona fide* organization. There was GATT law, but it was not enforced by a GATT sheriff or a GATT jail. Dispute-settlement provisions relied on the goodwill of the contracting parties. If a panel found that a country did not meet its obligations, it could only recommend that the country bring itself into conformity with the decision; failing that, the injured party could be authorized to retaliate. Retaliation *per se* was never the objective. In just one case prior to the Uruguay Round did the GATT contracting parties authorize one country to retaliate against another (i.e., a Dutch complaint against the United States in the 1950s). Problems multiplied when the scope of GATT expanded without a commensurate increase in the institution's authority. None of the special GATT codes in the Tokyo Round laid out identical rules for resolving disputes that might arise.

Perhaps the most serious shortcoming of the old GATT system, from the perspective of the Andean countries, was that they were not members until recently. Peru was the only country in the region to join GATT prior to the Tokyo Round (1974-1979), having acceded in 1951. Colombia joined in 1979, while Bolivia and Venezuela took this step in 1990. Ecuador and Panama are the only two Latin American countries that did not accede to GATT before it was replaced by the WTO in 1995. All of the Andean countries have been WTO Member Countries since either 1995 or (in the case of Ecuador) 1996. Of the many trade arrangements to which American states are parties, the WTO is thus far the only one that includes the United States and all Andean countries. This fact militates strongly in favor of a "WTO First" principle.

The United States used the old GATT system far more than did the Andean countries. An analysis by the GATT Secretariat showed that by the late 1980s the United States had been a party in 55 of the 103 cases considered under GATT Article XXIII; Andean countries had been parties in just one (GATT, 1987).⁴ The only direct dispute between the United States and an Andean country came at the very end of the GATT's existence. In 1994 Colombia was one of eight countries to support a Brazilian challenge to U.S. tobacco-import restrictions. This panel found that U.S. domestic-content rules for cigarettes violated GATT Article III, and the United States agreed to take steps to remedy the matter. There were also some matters resolved in GATT panels that indirectly affected Andean countries (e.g., a 1987 panel that led to revision of a discriminatory U.S. tax on imported petroleum and petroleum products).

GATT procedures were increasingly seen as cumbersome and time-consuming, and participants had numerous opportunities for dilatory maneuvers. Under the old system, the GATT Council had to reach a consensus decision to create a panel of experts from signatory countries. For a panel's ruling to have effect, the GATT Council had to reach a consensus decision (i.e., every country had veto power). Consensus was also required to authorize the imposition of sanctions against a country that was unwilling to implement a panel decision. A country that wished to block any step in the process thus had many options at its disposal. It could refuse to permit formation of a panel, reject panelists, or delay an investigation. Even after a decision had been adopted a contracting party could prevent full implementation. According to a compilation that Hudec (1988) made during the Uruguay Round negotiations, at least 17 of the 57 legal rulings issued by GATT panels between 1975 and 1989 involved in a significant way the power to block adoption of a panel ruling.

The old GATT system thus had some serious shortcomings. These difficulties were often noted by U.S. policymakers as justification for the emergence of a more confrontational negotiating posture in the late 1980s. If the United States is unable to obtain satisfaction of its complaints in the GATT forum, they suggested, then the country should pursue its concerns through unilateral means such as the reciprocity laws.

The Reformed WTO System.

The new procedures for dispute-settlement in the WTO are summarized in Table 15.5. The most significant reform is a restriction on a single country's ability to delay or block action. Parties to a dispute may no longer prevent the appointment of a panel, the adoption of a panel report, or the granting of permission to retaliate. The process is also swifter. Under the new procedures, it should ordinarily take twelve and a half months from the time that a country brings a complaint until the adoption of a panel report, or fifteen and a half months if there is an appeal.

These reforms strengthened the dispute-settlement system to the point where critics in the U.S. Congress reversed the basis of their complaints. The old GATT had been portrayed as too weak; some thought that the new system might be too strong. During the 1994 debate over approval of the Uruguay Round agreements, several legislators expressed concerns over the implications for U.S. sovereignty. The Clinton administration assured Congress that only the U.S. Government will have the power to decide whether and how to implement a panel's recommendations, and that the United States will retain the right to employ measures such as section 301.

⁴ The one dispute involving Andean countries was a complaint in 1982 filed against the European Community's sugar regime. Colombia and Peru were among the ten countries that jointly filed the complaint.

TABLE 15.5. STEPS IN DISPUTES BROUGHT BEFORE THE WORLD TRADE ORGANIZATION

1. **Consultations.** A dispute can be resolved well before the establishment of a panel if the parties can reach a settlement through consultations. This is a mandatory step.
2. **Mediation (Optional).** At the option of the parties, the WTO Director-General can (in an *ex officio* capacity) offer his good offices, conciliation, or mediation.
3. **Formation of a Panel.** If consultations do not produce a solution within 60 days, the complainant can ask the Dispute Settlement Body (DSB) to establish a panel. This will happen automatically unless there is a consensus against it.
4. **Setting the Terms of Reference.** The terms of reference are now standard, although the panel can operate under different terms if the concerned parties agree.
5. **Choosing Panelists.** The WTO Secretariat (or the Director-General in difficult cases) will suggest three panelists chosen from a roster of qualified individuals. The panelists serve in their individual capacities, and are not subject to instructions from their governments.
6. **Arguments.** The panel considers the written and oral arguments of the complainant, the responding party, and any third parties that have given notification of their interest in a dispute. Rebuttals are heard at a second substantive meeting.
7. **Expert Review Group (Optional).** The panel may appoint an expert review group in cases where a party presents arguments of a scientific or technical nature. This group will prepare an advisory report to the panel.
8. **Interim Report.** The panel submits the descriptive sections of its report to the parties, who have two weeks to comment. The panel then submits an interim report with findings and conclusions. If requested, the panel may review the report and hold additional meetings.
9. **Issuance of the Panel Report.** The panel issues a final report to the parties, and then (three weeks later) to all WTO Members. If the panel finds that the measure in question is WTO-inconsistent, it will recommend that the member bring the measure into conformity. A report should normally be issued six to eight months after the formation of a panel.
10. **Adoption of the Report.** The adoption of the recommendations of the panel may not be blocked by the parties to a dispute. Reports may be rejected only by a consensus against their recommendations in the Dispute Settlement Body. Reports are adopted within 60 days.
11. **Appeal (Optional).** A party objecting to a panel report can call for an independent review by a standing Appellate Body of seven persons.
12. **Compliance with Recommendations.** If the panel report indeed finds that the responding party's measure is WTO-inconsistent, that party must state within 30 days of adoption of the report (or the Appellate Body's report) its intention with respect to the recommendations. If it cannot comply immediately, the party can be given a reasonable period of time to comply.
13. **Options in Case of Noncompliance.** If a party neither complies with the recommendations nor offers acceptable compensation to the complaining party, the complainant may request authorization to suspend concessions (i.e., retaliate). Authorization will be granted automatically unless there is a consensus against it.

Congress nevertheless sought an additional concession. In a bargain with Senator Robert Dole, President Clinton agreed to a "three strikes and you're out" provision. This item would have allowed a vote in Congress on U.S. withdrawal from the WTO if a proposed WTO Dispute Settlement Review Commission found that at least three WTO panels had exceeded their authority, diminished U.S. rights, or acted arbitrarily or capriciously. The bargain secured enough Republican votes to ensure approval of the Uruguay Round agreements. The Senate took up this proposal the next year (U.S. Senate, 1995), but the commission was never established because opponents blocked passage of the implementing legislation for this opt-out mechanism.⁵

⁵ Ironically, the opponents of this proposal acted on the grounds of their *total* opposition to the WTO, rather than any objections to the Dole Amendment itself.

The gravitation towards a more legalistic system may redound to the benefit of Andean countries. Developing countries and other small economies tend to have greater faith in rule-based systems than do larger states. This is not so much a matter of scruples as of common sense: if decisions are made on the basis of power, the larger states will win every dispute. The advantages of the reformed system can best be understood by examining GATT and WTO cases involving bananas and gasoline.

The banana dispute underlines the problems that can arise under a system based more on mediation than adjudication, and hence one in which outcomes are greatly influenced by the power of the participants. This is an extraordinarily complex case in which there are at least five sides: the European Union (which discriminates in favor of its former colonies), the Caribbean countries that benefit from EU preferences, Latin American countries such as Ecuador that have strongly challenged the EU policy, other Latin American countries such as Colombia that challenged the EU but were willing to reach a negotiated solution, and the United States. The U.S. position has been to support Ecuador and other countries whose interests coincide with those American companies that have been shut out of the European banana market.

The Latin American countries initially pursued a complaint against the EU without the assistance of the United States. Operating under the old GATT rules, the panel ruled in these countries' favor in 1994. The EU then responded by proposing a negotiated solution. Colombia and Venezuela (as well as Costa Rica and Nicaragua) signed "framework agreements" with the EU on banana trade, in which the countries settled their GATT complaints in exchange for modifications in the EU banana regime. This settlement was certainly facilitated by the market power of Europe. It did not however eliminate the discriminatory aspects of the EU regime, and even worsened this problem by appearing to squeeze out U.S. firms. The United States then entered the dispute, first by initiating section 301 cases against the European Union, Colombia, and Costa Rica,⁶ and later by joining with Ecuador, Guatemala, Honduras, and Mexico in a WTO complaint against the EU policy. The WTO panel ruled in favor of the Latin American and U.S. complainants in May, 1997; a report by the Appellate Body largely upheld these findings. This case offers support for the contention that the interests of smaller countries are better protected through adjudication than through accommodation. The clarity of this conclusion is somewhat muddled, however, by the fact that the adjudication process did not work in the Latin American countries' favor until the United States joined in their complaint.

The case of reformulated and conventional gasoline is a less complex matter that more clearly illustrates the benefits of the reformed WTO rules. In this case a single panel considered the complaints of Venezuela and Brazil that U.S. rules imposed stricter environmental standards on imported gasoline than on gasoline refined in the United States. In early 1996 the panel found that the U.S. regulation did indeed deny national treatment by violating GATT Article III:4 (national treatment in regulatory matters), and did not qualify for an exception under GATT Article XX (general exceptions). The United States appealed in early 1996. The Appellate Body made a technical modification to the panel report, but otherwise confirmed the panel's findings. The DSB adopted both the panel and appellate reports.⁷ In late 1996 the United States concluded an agreement with Venezuela for a fifteen-month phase-out of the EPA regulations. In brief, Venezuela won. While it is possible that a similar result could have been obtained in the old GATT system, that would have depended critically upon the willingness of the United States not to block formation of the panel, oppose its terms of reference, object to the naming of specific panelists, or prevent adoption of the report.

While the WTO system is quite new, the United States and Andean countries have already been involved in several other cases. The U.S.-Andean cases are summarized in Table 15.6, which shows that only the gasoline dispute has thus far been definitively settled. Other cases involving Andean countries include a Peruvian complaint (together with Canada and Chile) against the European Union's rules on scallops, and a Mexican complaint against Venezuela's antidumping investigation of Mexican oil country tubular goods. Both of these cases were settled before the issuance of a panel report. The United States has been even more active, both as a defendant (named in 11 proceedings through late-1997) and as a complainant (27 proceedings).⁸

⁶ The United States did not initiate cases against Venezuela and Nicaragua because these countries did not implement the agreements that they had signed with the EU.

⁷ For a more detailed examination of this case and its significance, see Nogueira, 1996.

⁸ Note that for purposes of this tally, a "proceeding" can be either a formally-constituted panel or the initiation of consultations. These figures are from USTR, 1997b. When one counts the 11 cases in which the United States is a third-party participant, the country is involved in fully 49 of the 101 cases that have thus far been initiated.

U.S.-Canada FTA and NAFTA

As was summarized in the start of this section, the United States and Latin America have failed on several occasions to establish a regional arrangement for the resolution of disputes. One partial exception to this rule is NAFTA, which includes several different provisions dealing with disputes among Canada, Mexico, and the United States. These NAFTA provisions are based in part on the precedent set by the earlier U.S.-Canada FTA (CFTA). Should the NAFTA provisions in turn form a model for the FTAA, or for some other arrangement between the Andean countries and the United States?

TABLE 15.6. U.S., ANDEAN COUNTRY DISPUTES PURSUED THROUGH THE WTO (Status as of October, 1997)

Complainant(s)	Responding Party	Practice	Status
Venezuela and Brazil	United States	Environmental Protection Agency's regulations on reformulated gasoline alleged to deny national treatment to foreign gasoline.	Final panel report found in January, 1996 that the regulations are inconsistent with GATT Article III:4. An appellate report modified but reaffirmed this determination in May, 1996. The United States and Venezuela agreed to a 15-month phase-out of the regulations.
Ecuador, Guatemala, Honduras, Mexico, and United States	European Union	Banana import regime alleged to violate numerous provisions of GATT, its subsidiary codes, and the General Agreement on Trade in Services.	Final panel report found in May, 1997 that the EU policy violates WTO obligations on 16 counts. Upheld by the Appellate Body.
Colombia	United States	Colombia protested action the United States took in November, 1996 under the "escape clause" (GATT Article XIX and section 201 of the Trade Act of 1974) to restrict imports of broomcorn brooms.	Consultations held in May, 1997.
India <i>et al.</i> , with third-party rights reserved by Colombia, Ecuador, and Venezuela <i>et al.</i>	United States	Restrictions on imports of shrimp and shrimp products, imposed for environmental reasons, alleged to violate GATT articles I, XI, and XIII.	Consultations held in November, 1996. Panel established in February, 1997. The case is currently being heard.
European Union (Andean countries are not formal parties to the case, but have expressed interest in its outcome)	United States	The Helms-Burton Act (a law expanding the scope of U.S. economic sanctions on Cuba) alleged to violate GATT and GATS by <i>inter alia</i> applying U.S. law in an extraterritorial fashion.	Case suspended on the basis of an interim U.S.-EU agreement in April, 1997. The case could begin again if a definitive settlement is not reached.

Source: Office of the U.S. Trade Representative, World Trade Organization.

For reasons that are discussed at length below, most of the NAFTA provisions offer little advantage over what now exists in the WTO. Both the CFTA and NAFTA were negotiated at a time when it was uncertain whether the Uruguay Round would be successful, what new disciplines it might establish, and what types of dispute-settlement rules it might produce. Both of these agreements can therefore be seen as stop-gap measures, intended to fill a gap until the new multilateral rules were in place. While the NAFTA rules remain in effect, most of them fall short of what was ultimately achieved in the multilateral talks.

General Dispute-Settlement Provision (NAFTA Chapter 20)

The general dispute-settlement provisions of the CFTA (Chapter 18) and NAFTA (Chapter 20) are essentially similar to the GATT system *before* the reforms adopted in the Uruguay Round. The NAFTA system is

based on the same elements as the old GATT system: consultations, establishment of panels, and the losing side's options of implementing recommendations, compensating the injured party, or being the target of retaliatory measures. There are grounds to agree with those analysts (e.g., Gastle, 1995 and Marceau, 1997) who conclude that the NAFTA provisions offer no significant advantages over the reformed WTO system. For the following reasons, the WTO is better for both the parties to this regional agreement and for the trading system as a whole:

- The WTO's DSB and secretariat are stronger institutions than the NAFTA Commission (which still operates on the basis of consensus) and secretariat (which has few resources and virtually no independence);
- NAFTA has no appeals procedure comparable to the WTO's Appellate Body;
- The interests of countries that are not parties to NAFTA may not be taken into account by panels, and could be prejudiced by actions taken to redress any problems that are uncovered (especially if parties opt to compensate rather than eliminate the injurious practice);
- The much larger membership of the WTO can exert greater moral suasion on a country to implement a panel's recommendations; and
- In contrast to the integrated approach taken in the WTO, NAFTA establishes separate rules and procedures for distinct sectors (e.g., financial services), and hence is more susceptible to "forum shopping."

Other problems with NAFTA merit closer examination. One concerns a classic problem in the conflict of laws. It is necessary to devise rules to deal with any discrepancies that might arise between multilateral and regional trade agreements. The CFTA and NAFTA negotiators did so by adopting an ambiguous pair of rules. On the one hand, any conflict between the CFTA/NAFTA and GATT/WTO is to be resolved in favor of the regional agreement. On the other hand, GATT/WTO rules are incorporated into the CFTA/NAFTA. These two rules produced a conflict. While one CFTA/NAFTA rule provided that neither party would impose new tariffs on imports from the other, a bargain struck in the Uruguay Round provided that countries' nontariff restrictions on agricultural products would be converted into tariffs (with a view towards the progressive reduction of these tariffs). The United States claimed that the CFTA/NAFTA commitment should take precedence, so that the new Canadian tariffs should not be applied to U.S. dairy and poultry products, while Canada argued that the multilateral commitment should prevail. A NAFTA dispute-settlement panel ruled in Canada's favor in 1996. This dispute underlined the inherent difficulties of negotiating simultaneously at the regional and multilateral levels. Negotiators would do well to devise a more explicit hierarchy of norms that should prevail in the event of conflicts between the WTO and other agreements, as well as the forum in which such conflicts should be adjudicated.

Perhaps the most serious shortcoming of NAFTA Chapter 20 is the absence of truly disinterested third-party deliberation. At least four of the five members of a panel must be nationals of the countries that are parties to a dispute; the chairman can be from a third NAFTA country or even a non-NAFTA country.⁹ Even the most fair-minded jurist might not be wholly free of nationalist bias. This problem cannot be easily remedied even with the expansion of NAFTA to include additional countries. Suppose for example that the accession of Chile is accomplished soon, and suppose further that the Chapter 20 rules are amended to provide that most or all of the members of a panel must be from NAFTA countries that are not parties to the dispute. On its face this might be a reasonable reform, but realistically most disputes would involve the United States on one side and Canada or Mexico on the other. This would put great strain on the talented but small corps of trade experts in Chile. The WTO system is markedly superior, insofar as the organization can draw on the nationals of over 100 member countries when constituting panels.

Panel Reviews of Trade-Remedy Decisions

CFTA Chapter 19 was the most innovative aspect of that agreement's dispute-settlement provisions. This chapter, which was carried over into NAFTA Chapter 19, provides for the formation of binational panels to review decisions made under the trade-remedy laws (i.e., antidumping and countervailing duty laws) of the parties. Innovation does not always mean progress, however, and there are reasons to question whether this system should or will be employed in future FTAs.

⁹ This is at least an improvement over the CFTA Chapter 18 process, in which *all* members of the panels were nationals of the United States and Canada.

One of Canada's principal objectives in the CFTA negotiations was to find an alternative to the U.S. trade-remedy laws. Although the United States did not agree to the Canadian demand for an outright exemption from the trade-remedy laws,¹⁰ the CFTA incorporated a compromise. Any party to an antidumping or countervailing duty case could request that a binational panel be formed to review the determinations made by Canadian and U.S. administering agencies. The panels were to determine whether the agencies acted in accordance with their own country's law and precedent; decisions inconsistent with these laws could be remanded to the agency for reconsideration. While these provisions have received favorable reviews from some legal scholars¹¹ and political scientists,¹² they have also been a considerable source of controversy.

The principal problem is that many U.S. policymakers believe that the panels display a persistent bias in favor of Canada. Whether these perceptions are justified or not is almost a matter of secondary importance; the perception of bias has undermined congressional support for new trade agreements. Over half of all U.S. determinations brought before CFTA or NAFTA panels through mid-1997 have resulted in partial or total remands, but less than one-third of the challenged Canadian determinations have been remanded in whole or in part.¹³ One could read these figures to indicate either that Canadian agencies adhere more closely to the letter of their own laws, or that the panels have been biased against decisions that favor the United States. What these figures do not reveal is the intensity of opposition to the more controversial decisions that binational panels rendered under the CFTA. On three occasions the United States invoked provisions of the CFTA allowing for the establishment of an extraordinary challenge committee (ECC). From the U.S. perspective, the decisions reached by three binational panels — pork, live swine, and softwood lumber — were so questionable as to meet the standards for an ECC (i.e., the panel manifestly exceeded its powers, authority, or jurisdiction). From the Canadian perspective, the U.S. decisions to seek the formation of such panels were unjustified. An ECC is not an ordinary appellate court, and is supposed to be convened only in truly extraordinary cases. All three ECC rulings upheld the Canadian positions.

Two of the ECCs contributed to the perception in Washington that the panels are stacked against the United States. A CFTA binational panel reached a very controversial decision in late 1993, when it voted along national lines (three Canadians for and the two Americans against) to remand a Department of Commerce determination that low Canadian stumpage fees constitute a countervailable subsidy to the Canadian lumber industry. This was the first such national split of a CFTA panel. On remand, the department utilized the panel's instructions and determined that the Canadian programs did not constitute a subsidy. It was later discovered that two Canadian members of the CFTA binational panel were from law firms that represented clients in the Canadian lumber industry, as well as Canadian federal and provincial governments. The United States called for an ECC, based on "conflict of interest issues presented by the panelists' client relationships, and the failure to disclose them" (USTR, 1994). Like the Chapter 19 panel, the ECC split along national lines; this too was unprecedented. While the two Canadian members voted to dismiss the challenge, the sole U.S. panelist sharply protested the decision. Similarly, the quasi-judicial U.S. International Trade Commission protested in a case involving pork products that the panel reached conclusions that were "counter intuitive, counter factual, and illogical," but were nonetheless "legally binding" on the commission (USITC, 1991). This protest also led to a U.S. demand for an ECC, which likewise dismissed the complaint.

Concerns over these cases led several U.S. legislators to reconsider their support for trade agreements. One former chairman of the Senate Subcommittee on International Trade voted against the implementing legislation for the Uruguay Round agreements in 1994 as a protest against the aforementioned lumber decision.¹⁴ Other senators expressed their concerns by promoting the WTO "opt-out" proposal that was discussed earlier in this chapter. Nine influential senators took a further step in 1995, when they sent a letter to President Clinton calling Chapter 19 a "fundamentally flawed system" (Grassley, 1995) that should not be extended to any future FTA partners.

¹⁰ Canada has convinced at least one trading partner to eliminate these laws. The Canada-Chile FTA negotiated in 1996 provides for a six-year phase-out in the application of antidumping law between the two countries.

¹¹ Davey, 1996 argues that the arrangement has worked generally well, and that the attendant controversies are only to be expected.

¹² Goldstein, 1996 argues that these procedures have had the salutary effect of decreasing protectionist tendencies on the part of the U.S. administering authorities. Her analysis acknowledges that the panels established under the CFTA "ruled repeatedly in a pro-Canadian manner" (541), but casts this observation in a favorable light insofar as "[t]he panels moved U.S. policy in a liberal direction" (547).

¹³ Author's calculations, based on data supplied by the NAFTA Secretariat.

¹⁴ Prior to this vote in 1994, Senator Max Baucus was a steady supporter of trade liberalization.

Referral of Investment Disputes to Arbitral Panels

NAFTA Chapter 11 provides for the arbitration of investment disputes that might arise between a party and the nationals of another party. Instead of establishing a wholly new system for dealing with these state-private disputes, the agreement provides for binding arbitration under existing mechanisms: the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNCITRAL). The NAFTA rules represent an advance over the WTO investment provisions in two respects. First, the WTO Agreement on Trade-Related Investment Measures is one of the weakest products of the Uruguay Round, providing very limited disciplines. The scope of issues that might therefore be brought before a WTO dispute-settlement panel is correspondingly restricted. Second, the NAFTA rules enhance the enforceability of awards made under ICSID or UNCITRAL. If a party does not abide by an award (e.g., payment of monetary damages to an investor whose property was expropriated), the party whose national was injured can seek an arbitral panel under NAFTA Chapter 20.

This is an area in which NAFTA offers a model for U.S.-Andean dispute-settlement that is superior to the remedies available under the WTO. Moreover, it is one for which the Andean countries are already prepared. While Mexico is not an ICSID signatory, and hence any arbitration involving Mexico must rely upon the ICSID Additional Facility Rules, all of the Andean countries have signed the ICSID Convention.¹⁵ Colombia has yet to ratify this instrument, however, and in Ecuador there is disagreement regarding the applicability of ICSID. Although Ecuador ratified the ICSID Convention in 1986, the Government of Ecuador has recently taken the position that this facility is not available because the domestic ratification procedures were incomplete (a position that the United States opposes). In order for ICSID to have universal application in the Andean countries, it will be necessary for Colombia to complete its ratification and for Ecuador to resolve its domestic problem.

Labor and Environmental Provisions

NAFTA made innovations in two other areas that go well beyond what is now available in the WTO, but that may not be so easily extended to the Andean countries. Perhaps the most controversial aspect of current U.S. trade policy is the linkage with labor rights and environmental practices. Environmental issues have already been a source of friction between the United States and Andean countries, with the United States imposing restrictions on imports of tuna (in connection with efforts to conserve dolphins) and shrimp (in connection with efforts to conserve sea turtles).¹⁶ Andean countries have also been subject to complaints regarding their respect for workers' rights, with Colombia and Peru having been subject to "country practices" petitions submitted in GSP annual reviews (see Table 15.4).

NAFTA and its side agreements deal with these two newest issues in U.S. trade policy. The core provisions in NAFTA were negotiated by the Bush administration in 1991-1992, while the Clinton administration insisted in 1993 that they be supplemented by side agreements. To summarize, the North American Agreement on Environmental Co-Operation and the North American Agreement on Labor Co-Operation establish fairly elaborate procedures by which one NAFTA party can request consultations if it believes that another party persistently fails to enforce its own environmental or labor laws. If the consultations do not produce a solution, the complaining party can request formation of an arbitral panel. The panels have a range of options at their disposal, including the suspension of trade benefits and (in the case of environmental disputes) monetary penalties.

These two issues pose serious problem for the politics of trade, both at the international and domestic levels. Internationally there is a sharp split between developing countries (where both propositions are widely viewed as thinly disguised protectionism) and the industrialized countries, and even within the latter group there is considerable disagreement. While some industrialized countries generally agree with the U.S. position that these matters must be addressed in trade talks, some take the view that labor and environmental problems can best be resolved by allowing the free market to work. This same disagreement is repeated within the United

¹⁵ Bolivia ratified in 1995, Ecuador in 1986, Peru in 1993, and Venezuela in 1995. Colombia signed the convention in 1993, but has not yet deposited an instrument of ratification. The United States ratified the convention in 1966 (ICSID, 1997).

¹⁶ The shrimp restrictions are currently the subject of a WTO dispute-settlement case; see Table 15.5.

States. While the Clinton administration, labor unions, and Democrats in Congress have insisted upon strengthening the links between trade, labor rights, and the environment, most Republicans in Congress oppose this initiative. Republicans have been in the majority since 1994, and disagreements on these issues have prevented Congress from extending to the president the authority he needs to negotiate new trade agreements (VanGrasstek, 1997).

The merits of the NAFTA side agreements are therefore a question of secondary importance. Before deciding *how* to incorporate these issues into the trading system, Andean and U.S. policymakers must first decide *whether* to do so. That is a question that extends well beyond the scope of this chapter. If however it is decided to move forward on these issues, the NAFTA side agreements are the only models that are so far available (apart from the application of domestic laws such as the tuna-dolphin or shrimp-turtle restrictions).

ASSESSMENT AND CONCLUSION

We have now reviewed three different models for the resolution of disputes. Which of these approaches offers the best approach for dealing with future disagreements between the Andean countries and the United States?

We can start by dismissing U.S. laws such as section 301. It is self-evident that basic principles of objectivity are violated when one country acts simultaneously as the plaintiff and the judge in a case. However, we should not totally condemn the U.S. resort to unilateral measures in years past. The reliance upon these laws was encouraged by the fact that many Latin American countries were not yet contracting parties to the GATT, the GATT rules did not yet cover many issues of interest to the United States, and the GATT dispute-settlement procedures were imperfect. The argument can be made that, taking the long view, the aggressive U.S. policy of the 1980s served to strengthen the multilateral system. By threatening to act unilaterally, and indeed by taking some significant steps in this direction, the United States helped to expand the scope of issues in the jurisdiction of the GATT, and enhance the multilateral system. Such a favorable assessment will be valid, however, only if the United States now refrains from taking any further action in contravention of WTO norms.

The United States should also reconsider the wisdom of employing trade sanctions in non-commercial disputes. The narcotics “decertification” process has been a particularly severe irritant in U.S. relations with Andean countries, and there is little evidence to suggest that the ill will engendered by this law is compensated by substantial improvement in antinarcotics cooperation. Similarly, the punitive approach taken in environmental disputes may be both counter-productive and WTO-illegal.

Our inquiry then turns to the WTO and NAFTA models. Which of these approaches offers the best means for addressing U.S.-Andean disputes? At the start of this chapter I proposed four criteria by which different mechanisms might be judged.

The first criterion is **objectivity**. Here there is a very clear advantage in the WTO system, where the norm of third-party adjudication prevails. Under NAFTA both the general dispute-settlement panels (Chapter 20) and the binational panels reviewing trade-remedy determinations (Chapter 19) are composed primarily or exclusively of nationals of the interested parties. The experience with the CFTA Chapter 19 process suggests that it is all too easy for nationals of an interested party to give at least the appearance of partiality, and sometimes to render truly questionable decisions.

The second criterion is **scope**. Here there is a trade-off between the two models. On the one hand, there are some areas where the scope of NAFTA exceeds that of the WTO. These include some topics in which the NAFTA negotiators were more comprehensive than their multilateral counterparts (e.g., investment), and others where they broke altogether new ground (e.g., labor rights and the environment). On the other hand, the WTO rules have the virtue of being unified. All of the disciplines established in the Uruguay Round comprised part of a “single undertaking” for all WTO members, and any disputes that might arise under these agreements will be adjudicated in an integrated dispute-settlement mechanism.

The third criterion is **strength**. Here the WTO offers another advantage over the NAFTA model. While the NAFTA Commission still operates on the basis of consensus, the reformed WTO system prevents any single party from blocking action. In the balance between systems based on mediation and adjudication, the WTO approach tips judiciously towards a more rule-based and enforceable system.

The fourth criterion is **sensitivity** to the domestic politics of states. Here there appears to be no fundamental difference between the NAFTA and WTO systems. Both approaches are based on the sovereignty of states, and both give a losing party the opportunity to determine how it will respond to a panel's recommendations. It is ultimately up to that party to choose among the three options of reforming its laws, compensating the parties that it injures, or — when all else fails — being subject to retaliation.

On balance, these four criteria point to the adoption of a "WTO First" principle. Whenever possible, the Andean countries and the United States should rely upon the WTO as the principal site for the resolution of disputes. This means that when the issues in a dispute fall within the jurisdiction of the WTO, the parties should rely upon this institution's good offices, opportunities for consultation and mediation, and (if necessary) the formation of dispute-settlement panels. This principle recognizes that the WTO system is still young, and there are bound to be some difficulties in its implementation. The experience with the reformulated gasoline decision nevertheless demonstrates the value of the new WTO system for Andean countries. Moreover, in 1999 the WTO will conduct a full review of its dispute-settlement rules. Any problems encountered in the operation of this mechanism can be examined at that time.

"WTO First" does not however mean "WTO Only." There may arise some disputes between the Andean countries and the United States that can best be handled through other means. For example, disputes between private investors and states fall under the rubric of ICSID, and (pending ratification by Colombia and resolution of a dispute in Ecuador) the Andean countries can adhere to the norms of this convention. The United States and its Andean partners might consider using the NAFTA's ICSID-enhancement provisions as a model for the improvement of this instrument, and hence for the improvement of the Andean countries' investment climate. There may be some other aspects of NAFTA that could be replicated in the region, at least until similar provisions can be negotiated in the WTO. Similarly, the FTAA's own dispute-settlement provisions will have to be employed in any areas where the regional agreement breaks truly new ground or establishes unique obligations among its members. Finally, it is important to stress the value of consultations as a means of preventing or ameliorating disputes. It is to be expected that the growing movement of goods, services, and capital among these partners will inevitably produce new disputes. Countries should not be surprised when that happens, and should not hesitate to consult when it does.

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