

## DISPUTE SETTLEMENT

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The past 15 or so years have seen the emergence and elaboration of ever more complex preferential trade agreements (PTAs), forming multiple and rapidly proliferating networks. Almost all of these PTAs include a dispute settlement clause of some sort. Indeed, dispute settlement provisions have become a *sine qua non* for PTA negotiators, even though the number of actual government-government disputes within PTAs is only a fraction of the hundreds of existing agreements.

Governments enter into PTAs expecting to secure economic benefits. In particular, estimates of the welfare benefits of PTAs normally assume that the parties will faithfully implement their market access commitments. If private investors doubt that the partners to a PTA will actually keep their commitments, they will not engage in the type of risk-taking investment that the PTA could otherwise generate. If a PTA is to be fully implemented and to yield the expected benefits, the agreement should, at a minimum, be equipped with institutions that facilitate information exchange among the parties, help the parties monitor implementation, and provide an incentive structure that meaningfully supports compliance.

A dispute settlement arrangement is part of this necessary structure because there will inevitably be disagreements in a PTA concerning the scope and nature of the commitments that the parties have made. The PTA must provide an orderly way for its members to settle disputes and move on, or else the disputes will poison bilateral relations, reduce the PTA's benefit, and perhaps even lead to the demise of the agreement.

Dispute settlement mechanisms are also needed to ensure that the promises in a PTA are kept. Economic studies on PTAs teach that where the parties' tariffs are low ex ante, a PTA between them will only produce gains if it involves deep integration provisions. Those provisions need to be backed up by enforcement. Every economic projection of the gains from a PTA is based on the assumption

of 100 percent compliance with the PTA's obligations. Ensuring compliance through enforcement is essential if the gains are to materialize. PTAs therefore typically include some mechanism incorporating elements of both compliance enforcement and dispute settlement.

By participating in a PTA with strong dispute settlement provisions, a government signals its level of commitment to private and public interests at home and abroad. Each PTA competes with other PTAs for investment, jobs, and economic growth, in a field that becomes more crowded every year. Even if no disputes are anticipated, enforcement provisions in a PTA reinforce the precommitment of the governments, make their promises more credible, and signal that the PTA is a solid platform for investment that will create jobs and economic growth.

Solid dispute settlement is even more important in North-South (or South-South) PTAs with asymmetrical power relations. Recently concluded PTAs in Latin America, Europe, and Asia demonstrate to a striking extent that as PTA obligations deepen, become more complex, and provide more value, PTA partners seek more certainty than purely diplomatic dispute settlement can provide.

In theory, the parties to a PTA are the masters of their own treaty and could design an original dispute settlement mechanism from the ground up, or have no dispute settlement mechanism at all. In practice, almost all PTAs rely on one of the three general types of dispute settlement mechanisms: diplomatic settlement by negotiation; judgments by standing tribunals; or the World Trade Organization (WTO) model, in which an ad hoc panel is convened to hear the dispute. Many recent PTAs have adopted the third system, based on the WTO's Dispute Settlement Understanding (DSU). The WTO model has provided a useful focal point for bargaining; its familiarity means that negotiators and stakeholders understand how it works and what trade-offs can be made.

This chapter, the last in the volume, discusses the options available for dispute settlement and enforcement

provisions in PTAs. Following a brief literature review, we outline the three models of dispute settlement in PTAs, discuss their scope and exclusions, and compare them from the standpoint of development, infrastructure cost, and open regionalism. We then examine how PTAs define the scope of disputes that they will deal with, their handling of overlap and forum choice between the PTA and WTO dispute settlement systems, and various procedural and institutional issues. Subsequent sections describe alternative dispute resolution procedures and examine compliance procedures and enforcement issues and decisions. The final sections explore the reasons for the limited use of PTA dispute settlement procedures to date and present the conclusions and recommendations that emerge from the study.

## Literature on PTA Dispute Settlement

The surge in the number of PTAs is a rather recent phenomenon. As yet, few cross-regional comparative surveys of PTA dispute settlement have been published, and those that do exist focus on the dispute settlement mechanisms in particular PTA agreements, regions, or networks rather than on the application of the mechanisms. The reason is that the number of cases of government-to-government PTA disputes that can be examined is still small.

### General Surveys

The most significant recent general survey, by Donaldson and Lester (2009), concentrates on a sample of 20 recently concluded PTAs, primarily in the Asia-Pacific area, and almost all with dispute settlement systems based on the WTO model. The authors provide a detailed comparison of the various stages of handling disputes in these PTAs and in the DSU and include a useful discussion of the institutions that administer dispute settlement. An older study (Smith 2000) evaluates legalism in PTA disputes by analyzing a coded dataset of 60 pre-1996 PTAs. Smith finds that legalism improves compliance by increasing the costs of opportunism and the probability of detection. He argues that negotiators, in drafting PTAs, weigh the benefits of improved treaty compliance against the costs of limited policy discretion for their own countries. PTA parties with high relative economic power accordingly favor less legalistic dispute settlement, and so standing tribunals such as the European Court of Justice (ECJ) exist only in those PTAs in which asymmetry of power is low. Deeper integration also favors legalism because it generates more economic gains and because the trade barriers involved are more complex.

Kwak and Marceau (2006) present an updated cross-regional summary of PTA dispute settlement provisions and conclude that there is a real possibility of overlaps or conflicts of jurisdiction between the WTO and PTA dispute settlement mechanisms. They outline in tabular form the dispute settlement provisions of the main PTAs in all regions, with attention to issues that affect such overlaps or conflicts. Morgan (2008) confirms the trend toward greater legalism in PTA dispute settlement but argues that the absence of effective enforcement mechanisms forces the parties to find negotiated solutions. He points out that even within the North American Free Trade Agreement (NAFTA), Canada opted for a negotiated settlement to its long-running softwood lumber dispute with the United States, after a series of rulings in NAFTA and the WTO.

### European Union (EU) PTAs

Garcia Bercero (2006), a negotiator for the European Commission, surveys the development of the Commission's thinking on dispute settlement in trade agreements, starting with the traditional diplomatic approach seen in the EU's association agreements and other agreements before 2000, and discusses why the Commission's preferences have shifted toward ad hoc arbitration procedures in the free trade agreements (FTAs) with Mexico and Chile. In studies of earlier EU PTAs, Ramirez Robles (2006) finds that the political model of dispute settlement has been the dominant model for EU association agreements, and Broude (2007) surveys the disputes brought under these earlier PTAs. Broude argues that the dispute settlement provisions of most EU PTAs contribute to EU regional hegemony by encouraging and perpetuating nonjudicialized bilateral dispute settlement, where the EU has advantages. He points out that EU PTA partners do not even use the WTO system for settlement of their own disputes and do not have the real option of recourse to judicial dispute settlement procedures in their relations with the EU.

### U.S. PTAs

EU association agreements have opted for political settlement of bilateral disputes. Thus, the first PTAs to incorporate formal panel procedures of the type used in the WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), were the Canada–U.S. FTA (CUSFTA) and NAFTA. U.S. PTAs still largely follow the CUSFTA/NAFTA model, although post-2001 PTAs have departed from it in some respects, as discussed below. Annex A gives an account of the dispute settlement choices made in negotiating these agreements—choices that influenced the design of the WTO

Dispute Settlement Understanding (DSU). Hart, Dymond, and Robertson (1994); Kreinin (2000); and Cameron and Tomlin (2002) provide detailed accounts of the negotiations. Among the abundant literature on these agreements, Loungnarath and Stehly (2000) analyze CUSFTA and NAFTA disputes and argue that political pressure has impaired outcomes for Canada, as the weaker partner. Davey (1996) presents a detailed retrospective on every CUSFTA dispute. He concludes that binational review of trade remedy decisions under CUSFTA Chapter 19 has been generally reasonable but could be improved, and he makes suggestions for minor changes to that end. He also finds that the general trade dispute procedures of Chapter 18 were not an improvement on GATT procedure; in practice, the parties largely preferred GATT for their bilateral disputes, and he predicts that the NAFTA governments will continue to prefer WTO procedures wherever possible. Gantz (2006) surveys experience under the three NAFTA dispute settlement mechanisms (state-to-state trade disputes, antidumping and countervailing duty binational reviews, and investor-state arbitration), reviews U.S. attitudes toward NAFTA dispute settlement, and discusses the decline in U.S. government support for NAFTA since 1994. He rates Chapter 19 review of antidumping and countervailing duty decisions as a success—although it enjoys little support in the U.S. government, which has not included such a provision in any post-NAFTA PTA.<sup>1</sup>

### *East Asian PTAs*

As Baldwin (2008) points out, East Asia's regional integration into "Factory Asia" took place initially not through PTAs but through unilateral cuts in most favored nation (MFN) tariffs. Baldwin notes the potential insecurity of such liberalization, which is not backed by any enforceable legal obligations. He characterizes the Association of Southeast Asian Nations (ASEAN)–China FTA initiative in 2000 as the trigger for similar moves by Japan, the Republic of Korea, and others, resulting in the current "noodle bowl" of East Asian PTAs. Wang (2009) describes the Dispute Settlement Mechanism Agreement of the ASEAN–China FTA as a "landmark agreement," since it is China's first PTA to provide for settlement of bilateral or regional disputes through formal procedures, even to the extent of authorizing trade retaliation. Snyder (2009) analyzes China's PTAs and finds that almost all have used WTO dispute settlement as a template, with the exception of China's Closer Economic Partnership Agreements (CEPAs) with Hong Kong SAR, China, and Macao SAR, China. Disputes under the CEPA agreements are settled diplomatically, by consultation and agreement between the parties.

Choi (2004) analyzes the dispute settlement provisions of a selection of East Asian PTAs and makes a number of specific suggestions for PTA dispute settlement procedures. Choi suggests that opening panel hearings in such disputes would be undesirable because it would increase pressure on panelists by domestic interest groups. Luo (2005) discusses the "Asian way" of dispute settlement under ASEAN and points out that, following the establishment of the ASEAN Dispute Settlement Mechanism (DSM) in 1996, there were many actual disputes among ASEAN members concerning implementation of the ASEAN Free Trade Area, but none were brought to the DSM. Luo suggests the use of an independent enforcement body, or access for private parties, to counteract governments' reluctance to engage in open conflict. Nakagawa (2007) analyzes the use of dispute settlement by East Asian governments in the WTO and in PTAs. He argues that most trade disputes between Asian PTA parties will be brought to the WTO and that settlement of disputes through negotiated deals will continue to be the trend in East Asia because of underlying economic factors and the limits on what dispute settlement mechanisms can accomplish. Kawai and Wignaraja (2009) present the results of a survey of firms in East Asia. They find that most of the firms surveyed do not use PTA preferences because of lack of information, costs related to rules of origin, and low margins of preference. Obviously, if firms are not using PTAs, there will be fewer PTA-related disputes.

### *Latin American PTAs*

A wealth of data is available on dispute settlement in PTAs in Latin America and the Caribbean.<sup>2</sup> Sáez (2007) finds that countries in the region have been very active in dispute settlement, that they use the WTO even when PTA dispute settlement mechanisms exist, and that in Latin American PTAs, disputes on tariff application, drawback, and excise tax discrimination have tended to peak during an agreement's initial period, when tariffs are being phased out.

There is a substantial scholarly literature in Spanish examining the Andean Community institutions, the dispute settlement mechanism of the Southern Cone Common Market (Mercosur, Mercado Común del Sur), the Latin American Integration Association/Asociación Latinoamericana de Integración (LAIA/ALADI), and other regional institutions in the light of Latin American domestic and international legal doctrine. English-language sources consulted for this chapter include the valuable recent empirical studies on the Andean Community by Helfer and Alter (2009) and Alter and Helfer (2011), as well as a collection edited by Lacarte and

Granados (2004), which covers dispute settlement under LAIA/ALADI (Rojas Penso 2004), Mercosur (Opertti 2004; Whitelaw 2004), the Andean Community (Vigil Toledo 2004), and various Central American trade agreements (Echandi 2004).

### *African PTAs*

World Bank and International Monetary Fund (IMF) studies on African regionalism (Foroutan 1992; Yang and Gupta 2005), as well as discussions in World Bank (2000), Schiff and Winters (2003), Gathii (2010), and Thorp (2010), note the dense web of PTAs in Africa. These studies generally find that, although most African PTAs have a high level of ambition for integration, they have not been effective in eliminating intraregional trade and investment barriers and have struggled with (or succumbed to) economic conflict resulting from an asymmetric distribution of gains from liberalization. Implementation of PTAs has been beset with obstacles, including linguistic differences, intra-PTA differences between common law and civil law systems, and a pervasive shortage of resources for PTA institutions, including those involved in dispute settlement. As noted by Essien (2006), general information on the status of PTA courts in Africa is difficult to find. Gathii (2010) presents a broader portrait of African PTAs, arguing that they must be understood as flexible regimes that incorporate variable geometry, asymmetric obligations, mechanisms for redistributing benefits, and commitments that are perhaps not meant to be enforced. If enforcement is not intended, a scarcity of formal trade agreement disputes should be no surprise.

### **Dispute Settlement and Enforcement: The Basic Options**

In theory, the negotiators of a PTA start with a blank slate and can choose any form or type of dispute settlement they wish. In practice, dispute settlement mechanisms in PTAs fall into three broad groups: political or diplomatic dispute settlement; systems based on a standing tribunal; and referral to an ad hoc arbitral panel, as in the WTO. In a negotiating situation, the choice of system depends, first, on whether the governments wish to have a third-party dispute settlement procedure, rather than rely solely on negotiation to settle disputes. If they opt for a third-party decision maker, they can go down the path of establishing a standing tribunal, or they can follow the currently dominant approach of using a WTO-type ad hoc panel procedure. The pros and cons of each approach are discussed next.

### *Political or Diplomatic Dispute Settlement*

Political or diplomatic dispute settlement consists of settling disputes by negotiation and agreement. It gives the parties to a PTA maximum flexibility. The agreement may have no dispute settlement provisions at all; it may provide only for consultations; it may provide for consultations and refer disputes to a political body for resolution; or it may provide for referral to a third-party adjudicator but allow a party or parties to block the referral.

The choice of a political dispute settlement model often reflects asymmetric power relations between the PTA parties. For instance, China's Closer Economic Partnership Agreements with Hong Kong SAR, China, and with Macao SAR, China, state that the parties "shall resolve any problems arising from the interpretation or implementation of the 'CEPA' through consultation in the spirit of friendship and cooperation." In pre-2000 European Union PTAs and in the 1969 Southern African Customs Union (SACU), disputes were settled exclusively through political processes. The use of political dispute settlement may also reflect a low level of ambition for implementation of intra-PTA liberalization, as in the case of partial-scope agreements in LAIA/ALADI, in ASEAN trade liberalization in the 1990s, and in the Economic Cooperation Organization Trade Agreement entered into by Central Asian countries.

The choice of political dispute settlement method may also reflect a level of deep integration that gives both sides in a PTA real leverage, even without third-party adjudication, as in the Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and in the relations between Australia and New Zealand under the recently signed ASEAN–Australia–New Zealand agreement.

The diplomatic model of dispute settlement was the dominant model in all the EU's pre-2000 association agreements and PTAs. These include the Europe Agreements with Eastern European accession candidate countries; the Euro-Mediterranean Agreements with the Arab Republic of Egypt, Israel, Jordan, Morocco, and Tunisia; and the Stabilization and Association Agreements with Balkan countries (Ramirez Robles 2006). A party to one of these agreements may refer to the agreement's Association Council any dispute concerning the application or interpretation of the agreement, and the Association Council may, by consensus, adopt a binding decision to resolve the dispute. Broude (2009) describes this concept as "a case of *faux* institutionalization—the Association Council is a ministerial-level body, designed to meet but once a year." He notes that, in practice, disputes are officially delegated to an Association Committee that reports to the Council and are handled by diplomatic negotiation. In theory, these

agreements permit any party to have recourse to arbitration if negotiations fail to settle a dispute, but the appointment of arbitrators can be blocked, and there are no deadlines or procedures. The agreements provide no organized procedures for ensuring compliance with arbitral awards except for a “nonexecution clause” that permits a party to take “appropriate measures,” even without going through a dispute settlement procedure, if it considers that the other party has failed to fulfill an obligation under the agreement.

Garcia Bercero (2006) states that this diplomatic approach has been an effective means of settling “low profile trade irritants” but that some disputes linger unresolved for years, if one party is stubborn and the other is unwilling to blow up the relationship by taking retaliatory action. He reports that the arbitration procedure has seldom been used, that the nonexecution clause has been invoked very sparingly, and that most of these invocations have involved EU disputes with the Russian Federation.

The standard dispute settlement procedure in LAIA/ALADI is set forth in Resolution 114 of the association’s Committee of Representatives. The resolution, adopted in 1990, provides for consultations between the parties, after which a member country may request the Committee of Representatives to propose a nonbinding solution. The association’s secretary-general has characterized this system as “virtually useless” and ineffective in resolving disputes (Rojas Penso 2004). As a result, parties to the partial-scope agreements within LAIA/ALADI have adopted specific dispute settlement procedures. Some agreements simply rely on direct negotiations, and some recent ones provide for third-party panels.

The 1992 ASEAN Framework Agreement and the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area both provided for settlement of disputes by agreement between the parties, with referral of nonsettled disputes to a ministerial-level body. (This scheme has since been replaced by a panel mechanism, as discussed below.)

To a notable extent, PTAs that started with diplomatic or political dispute settlement have moved toward rule-oriented third-party dispute settlement modeled on the DSU. Examples include ASEAN, which replaced earlier arrangements with the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism; SACU, which implemented a DSU-type scheme in the 2002 SACU Agreement; and Mercosur, an agreement formally within the LAIA/ALADI framework, which provides an elaborate third-party dispute settlement system, including appellate review. The FTAs and economic partnership agreements (EPAs) negotiated by the EU since 2007 have shifted to panel-based third-party dispute settlement.

### *Standing Tribunals*

The standing tribunals of the European Union represent the oldest system of this kind. Its example has been highly influential worldwide, but especially in countries with historical ties to Europe.

*The EU system.* The European Court of Justice (ECJ) is the original PTA standing tribunal. Established in 1952 as the Court of Justice of the European Coal and Steel Community, it later became the Court of Justice of the European Communities and is now known formally as the Court of Justice of the European Union. It now consists of the 27-judge Court of Justice itself; a 27-judge court of first instance, the General Court; and the Civil Service Tribunal, for EU civil service employment disputes. In 2009 the ECJ received 562 new cases, completed 588 cases, and had 742 cases pending at the end of the year. The 562 new cases comprised 302 requests from EU member state courts for preliminary rulings on issues of EU law, 143 direct actions, 105 appeals, and a few other cases (ECJ 2010a).

Direct actions include enforcement actions brought by the European Commission against a member state for failure to fulfill an obligation under Article 258 of the Treaty on the Functioning of the European Union and (very rarely) cases brought by one member state against another regarding nonfulfillment of EU Treaty obligations (Article 259). In enforcement actions, the Commission sends a letter of formal notice to a member state—the most recent official figures show that about 68 percent of complaints are settled before this point (European Commission 2009). After giving the member state an opportunity to reply, the Commission delivers a “reasoned opinion”; about 84 percent of infringement procedures based on a complaint are settled before this stage. If the member state does not comply with the reasoned opinion by a deadline set by the Commission, the Commission may bring a case before the ECJ; around 94 percent of these infringement procedures are settled before an ECJ ruling. Thus, only 6 percent of all procedures are resolved by the court. Judgments under Article 259 or its predecessor provisions have been extremely rare (fewer than five since 1951). In practice, if an EU government or stakeholder has a problem with another member state’s compliance with EU Treaty rules, it lobbies the Commission to negotiate with the noncomplying government and possibly bring an action under Article 258. The Commission then takes on the resource and reputational costs of negotiation and litigation and is also free to pursue its own institutional agenda.

The ECJ and the European Commission enforcement infrastructure represent the maximum in treaty enforcement,

as measured by activity and resources. At the end of 2008, the Commission was handling 1,557 complaints and infringement files. Complaints accounted for two-thirds of all cases other than those regarding late implementation of EU directives. In 2008 the Commission opened 2,223 infringement procedures, sent 512 reasoned opinions, and referred 209 cases to the ECJ (European Commission 2009).

The ECJ also provides guidance to the courts in all member states, through preliminary rulings on EU law requested by national courts. These preliminary references ensure uniform application of EU law, and the principles they establish affect the entire EU legal order. They have given the ECJ a platform for establishing fundamental principles of EU law, such as its direct effect in national law, and legal doctrines safeguarding freedom of movement of goods and services. Private actors can bring domestic court cases in order to obtain an ECJ preliminary ruling.

The ECJ and the judicial structure under it represent a very large commitment of resources. Its 27 judges, one for each member state, are assisted by a registrar; 8 Advocates-General who provide impartial advisory opinions on the cases before the Court; and a large staff, including many translators, housed in a new building in Luxembourg. The ECJ also acts as an appellate court for cases brought before the 27-judge General Court or the Civil Service Tribunal. The 2011 draft budget for the Court of Justice of the European Union, comprising all these courts, is projected at 345,293,000 euros (about US\$450 million), not including the Commission's enforcement expenses. Of the total, 75 percent goes for personnel and 25 percent for buildings and other costs (EU 2010).

*Other standing tribunals.* The obligations of the European Free Trade Area (EFTA) and the European Economic Area (EEA) are enforced by the EFTA Surveillance Authority and the EFTA Court. The most recent figures, for 2008, show an actual cost for both of 3,606,035 euros (EFTA Court 2009).

A number of South-South PTAs have patterned their dispute settlement institutions on the ECJ and the European Commission: they include the Andean Community, the Economic Community of West African States (ECOWAS), the West African Economic and Monetary Union/Union Économique et Monétaire Ouest-Africaine (WAEMU/UEMOA), the Economic and Monetary Community of Central Africa (CEMAC, Communauté Économique et Monétaire de l'Afrique Centrale), the East African Community (EAC), and the Common Market for Eastern and Southern Africa (COMESA). The reasons for following the EU model are partly historical and (in the case of African PTAs) partly attributable to the influence of the EU as the regional hegemon. At the time many of these

PTAs were negotiated, the GATT dispute settlement mechanism was in disuse or did not otherwise provide a positive model for enforcement of obligations. The project of building the European Community and then the European Union provided a stronger model for PTA ambitions.

The most judicialized South-South PTA dispute settlement institutions, the Andean Tribunal of Justice (ATJ) and the Andean Community General Secretariat, were established in 1979 as part of the Andean Pact. Treaty amendments in 1996 created a new Andean Community, strengthened the ATJ, gave the General Secretariat a stronger role, and reduced diplomatic elements in the procedures. The General Secretariat may now initiate a non-compliance investigation on its own and must initiate an investigation in response to a complaint by a government or private party. There have been up to 30 such cases per year.<sup>3</sup> The General Secretariat sends a notice to the government concerned, which must respond. The General Secretariat then issues a reasoned opinion, which is published and with which the government concerned is obligated to comply. If the government does not comply, then the General Secretariat, a complaining member state, or a private party whose rights have been affected may bring a non-compliance case (*acción de incumplimiento*) against the noncomplying country to the ATJ, which sits in Quito. There have been up to 20 such cases per year.<sup>4</sup> If the ATJ makes a finding of noncompliance and the losing government fails to comply by the deadline set by the ATJ, the ATJ may initiate a summary procedure (*procedimiento-sumario*) in response to a request by the General Secretariat, a member state, or an affected private party and may authorize sanctions against the noncomplying government by other member states (Vigil Toledo 2004; CAN 2008a). Alter and Helfer (2011) observe that, compared to the ECJ, the ATJ has been deferential to Andean states and unwilling to push for compliance with Andean law and that the ATJ has “refused to serve as the engine of Andean legal integration”—which they characterize as a politically prudent path in the face of Andean states’ “tepid” commitments to Andean integration.

The ATJ also can issue rulings in response to references from national courts; such rulings account for 90 percent of ATJ case law. Ninety-six percent of preliminary references through 2007 involved intellectual property disputes, for three reasons: first, private litigants have rarely used Andean rules to challenge other policies; second, intellectual property agencies in the Andean countries actively encouraged such references and incorporated them into their domestic decision making; third, national courts rarely send novel questions to the ATJ; fourth, there is no infrastructure of scholars and practitioners proselytizing

for Andean law; and, fifth, these conditions have continued the same no matter what the level of political support for the Andean Community project (Helfer and Alter 2009; Alter and Helfer 2011). The fiscal 2008 budget for the Andean Tribunal was US\$1,170,667.<sup>5</sup>

As part of an overall initiative to strengthen Central American regional integration, governments in the region established the Central American Court of Justice (CACJ), or Corte de Justicia Centroamericana, in 1994. The CACJ has almost never been used for trade disputes. In the late 1990s, the countries established a Central American Trade Dispute Resolution Mechanism, modeled on the WTO, which, since 2003, has applied to all countries in the region (Echandi 2004).

The Caribbean Court of Justice was created in 2001 with a dual role: to serve as a final court of appeal in civil and criminal cases for its member states, and to interpret the Treaty of Chaguaramas, which established the Caribbean Community (CARICOM). The extent of regional support for this court is unclear, and it lacks the institutional support of a secretariat to monitor compliance (INTAL 2005). In 2007 the CCJ's administrative expenses amounted to US\$32.2 million (CCJ 2008).

A number of African PTAs have also established courts on the ECJ model; these include ECOWAS, WAEMU/UEMOA, CEMAC, the EAC, and COMESA. As the following examples illustrate, a regional tribunal created to enforce trade law may also become involved in other issues, and vice versa:

- The ECOWAS Community Court of Justice was created in 1991, but its members were only appointed in 2000. The court sits in Abuja and has a modest budget for handling both enforcement of ECOWAS norms and human rights issues. Originally, only states could bring disputes, but since 2005, individuals have been able to bring cases, including complaints based on human rights instruments. The court has been active recently, but mostly on cases with a human rights dimension (Banjo 2007; Hessbruegge 2011; *Daily Independent* 2011).
- The UEMOA court has a permanent building at its seat in Ouagadougou, and a modest budget.<sup>6</sup> CEMAC's Court of Justice sits in Ndjamena. Each court issues fewer than 10 decisions per year.
- The Court of Justice of the East African Community, which meets in Arusha, Tanzania, was dormant from 1999 until receiving its first case in December 2005. It hears both disputes between member states and preliminary references by courts in member states. Its fiscal 2010/11 budget was US\$2,841,777, out of a total EAC

budget of US\$60 million, half of which is financed by aid donors (see EAC 2010).

- The COMESA Court of Justice was established in 1994 and appointed in 1998, but since moving to Khartoum in 2006, it has reportedly faced problems with inadequate funds and staff, lack of a physical location, and the need to adapt to *shari'a* law. It has been unable to meet even twice a year. Its 2001 budget was US\$595,538 (COMESA 2000, 2009; *East African* 2006; AICT data).<sup>7</sup>
- The SADC Tribunal of 10 part-time members was formally established in 1992 and was inaugurated in 2005. It meets, as required, in Windhoek. It has a registrar and 16 employees. The SADC budget is largely funded by donor countries. The tribunal's cases have included appeals by SADC employees and three cases in which the court condemned Zimbabwe's land reform program as racially discriminatory and illegal under the SADC Treaty. Faced with noncompliance, the complainants have used South African courts to seize property of the Zimbabwe government, and the tribunal has asked the SADC heads of state to consider a request by one of the complainants that the SADC expel Zimbabwe (Nyaungwa 2010; Reuters 2010).

#### *Dispute Settlement by Referral to Ad Hoc Panel (WTO Model)*

The third, currently dominant, model for PTA dispute settlement is based on the WTO's dispute settlement system (originally developed in the GATT). A panel is convened for one dispute (thus, it is "ad hoc"), with terms of reference limited to that dispute. The panel hears the written and oral arguments of disputing parties, issues a written ruling applying the trade agreement's law to the dispute, and then disbands. The WTO's dispute settlement procedures have shaped expectations of governments and stakeholders regarding credible dispute settlement and enforcement within trade agreements. As a result, PTA negotiators have converged on the WTO-like model. Dispute settlement procedures of this type are very widespread and appear in virtually all new PTAs, such as the following list, which includes some PTAs that have been signed but not yet ratified:

- Australia: FTAs with Chile, Singapore, and Thailand
- ASEAN Enhanced Dispute Settlement Mechanism, which covers disputes under at least 46 ASEAN agreements on tariff preferences, tariff nomenclature, investment, services, mutual recognition of standards or certification, customs, and the like; ASEAN FTAs with China and Korea; the ASEAN–Australia–New Zealand FTA

- Canada: FTAs with Chile, Colombia, Costa Rica, Israel, Jordan, Panama, and Peru
- Chile: FTAs with Central America, China, Colombia, EFTA, Japan, Korea, Mexico, Panama, and Peru
- China: FTAs with Costa Rica, New Zealand, Pakistan, Peru, and Singapore
- EFTA: FTAs with Canada, Colombia, Croatia, Egypt, Israel, Jordan, Korea, Lebanon, the former Yugoslav Republic of Macedonia, Morocco, and the Palestinian Authority
- EU: FTAs with Chile, Korea, and Mexico and the recent EPA with the Caribbean Forum of African, Caribbean, and Pacific (ACP) States (CARIFORUM)
- India: FTAs with Chile and Mercosur
- Japan: EPAs with Brunei Darussalam, Chile, Indonesia, Malaysia, Mexico, the Philippines, Singapore, Switzerland, Thailand, and Vietnam
- Mercosur: Protocol of Olivos, with Argentina, Brazil, Paraguay, and Uruguay
- Mexico: FTAs with Bolivia, Colombia, EFTA, Israel, Nicaragua, the Northern Triangle countries (El Salvador, Guatemala, and Honduras) and Uruguay
- New Zealand: FTAs with Thailand and Singapore
- Singapore: FTAs with the Gulf Cooperation Council (GCC), India, Jordan, Korea, Panama, and Peru; Trans-Pacific Strategic Economic Partnership (Trans-Pacific SEP).
- United States: NAFTA; U.S. FTAs with Australia, Bahrain, Dominican Republic–Central America Free Trade Agreement (CAFTA–DR), Chile, Colombia, Israel, Jordan, Korea, Morocco, Oman, Panama, Peru, and Singapore

The cost of an ad hoc panel system depends on how many panels exist. If there are none, the cost of dispute settlement approaches zero, as the disputes that do not reach the panel stage will be supervised by existing PTA institutions. The out-of-pocket system costs of panels—panelist compensation and expenses; hearing venue; and clerical, translation, and interpretation services—depend on the parties' procedural choices and the number of disputes. The WTO's annual budget for dispute settlement panels (excluding the organization's first three years) has ranged from a high of 1,195,300 Swiss francs (Sw F) in 1999 to a low of Sw F 655,592 in 2006. For 2011, it was estimated at Sw F 987,000 for panels and Sw F 50,000 for arbitrations (WTO 2009, 52). The WTO's costs for panel proceedings are low in relation to the number of disputes handled because WTO members whose delegates serve as panelists contribute their services without compensation. The estimated 2011 budget for the WTO Appellate Body is

Sw F 5,691,000, of which personnel costs account for 69 percent, or Sw F 3,909,500 (WTO 2009, 52).

These system costs exclude the costs of participation for the parties. Some governments maintain an internal legal staff or otherwise represent themselves in trade disputes. Others hire counsel or expect stakeholders to pay for counsel engaged by the government. The standard ceiling fees for legal assistance (without further subsidy) set by the Advisory Centre for WTO Law provide a lower-bound estimate for legal costs in the WTO: Sw F 47,628 for consultations and Sw F 143,856 for panel proceedings, or Sw F 191,484 together (ACWL 2007).

### *Choosing among the Options*

In considering dispute settlement, the first choice is whether to rely exclusively on diplomatic or political dispute settlement or to provide for third-party dispute settlement of some sort. The key difference between the two is that in the former, a complaining party that has tried and failed to negotiate a mutually satisfactory solution does not have the option of obtaining a determination by a neutral third party. In a tribunal or ad hoc panel system, if there is no agreement, the complaining party can refer the dispute to a neutral decision maker who rules on the dispute. Settlement by negotiation is possible in any system; indeed, the classic WTO model requires that the complaining party give the responding party an opportunity to settle the problem through bilateral consultations, and the preliminary stages in a tribunal system may also result in compliance or a compromise settlement.

Negotiators may choose to rely solely on diplomatic or political dispute settlement if the PTA is unambitious or represents only a low sunk investment in integration. They may also feel that government-government dispute settlement is not necessary if the PTA partners have a transparent commercial and legal environment with stable trade relations and a high degree of economic integration, as in ANZCERTA. And there may be no place for third-party dispute settlement in a PTA with strongly asymmetric relations, such as the CEPAs that China has negotiated with Hong Kong SAR, China, and with Macao SAR, China. Political or diplomatic means of dispute settlement are unlikely, however, to provide a sufficient incentive structure to keep markets open in times of economic stress.

Most recent PTAs have opted for third-party dispute settlement because of significant factors that distinguish the new and enhanced PTAs negotiated since 1994 from their predecessors of the GATT era, as described by Schiff and Winters (2003).



First, many of these agreements have embraced *deep integration*, going well beyond border measures to cover subjects such as investment, services, and domestic regulation. Where a partner has relatively low border barriers, expansion of the scope of the PTA to behind-the-border measures may be necessary if the PTA is to offer substantial economic benefits—as Francois and Manchin (2009) find for a possible PTA between the EU and the Commonwealth of Independent States (CIS). The increased level of ambition involved in a deep integration agreement requires the parties to make a greater resource investment in implementing the agreement. Accordingly, negotiators typically choose legalized, formal dispute settlement, following some widely understood model—currently, that of the WTO. In North–South PTAs with asymmetrical power relations, binding third-party dispute settlement becomes even more important (World Bank 2000, 69–70). Recently concluded PTAs in Latin America, Europe, and Asia demonstrate to a striking degree that as PTA obligations deepen, become more complex, and provide more value, PTA partners seek more certainty than can be had through purely diplomatic dispute settlement.

Second, the dominant paradigm has shifted to integration into the globalized economy through *open regionalism*. “Open regionalism” implies that PTA parties actively seek inclusion in global supply networks under transparent, rule-of-law conditions by using the PTA to secure market access rights, and by turning away from import-substituting industrialization or administrative protectionism. Open regionalism can also lead to coexistence of PTA networks, docking (legal connection) of PTA networks, and even multilateralization of PTA networks. Dispute settlement can reinforce open regionalism in the first sense by ensuring full PTA implementation and reinforcing the PTA’s lock-in effect. Systems based on a regional court can be an important focus of region building, as seen in the case of the European Court of Justice. However, if the goal is to connect PTAs into larger networks, ad hoc panel systems are easier to merge than court-based systems of dispute settlement.

### **Structuring a PTA Dispute Settlement System: More Decisions**

Some threshold decisions are required in order to set the system’s parameters. The agreement will need to define the range of possible complaints, or “causes of action,” as well as their potential subject scope. Since practically all PTAs overlap with the WTO (and may overlap with other PTAs), PTA negotiators must also decide what will happen in the event that a party brings claims under the WTO concerning a measure disputed in the PTA.

### **Defining the Grounds for Complaint**

*Breach of obligations.* Many PTAs simply state that dispute settlement will be available in cases of violation of the PTA obligations or of failure to implement the PTA; some also allow for the use of the mechanism to settle disputes regarding interpretation of the PTA. For instance, in CUSFTA and later U.S. FTAs, the dispute settlement provisions apply with respect to avoidance or settlement of disputes regarding the interpretation or application of the agreement, or regarding measures considered to be inconsistent with the obligations of the agreement. Some PTAs (e.g., the Japan–Chile and ASEAN–Australia–New Zealand agreements) draw instead on the formulation in GATT Article XXIII:1(a), which permits invocation of the dispute settlement mechanism when a “benefit accruing . . . directly or indirectly under this Agreement is being nullified or impaired . . . or the attainment of any objective of this Agreement is being impeded as the result of the failure of another [party] to carry out its obligations under this Agreement.”

*Nonviolation nullification or impairment of concessions or obligations.* Some PTAs give their parties not just a remedy against violation or noncompliance by another party, but also a remedy against measures of other parties that are PTA-consistent but still take away the benefit of bargained-for PTA market access. These “nonviolation nullification or impairment” remedies are modeled on GATT Article XXIII:1(b).<sup>8</sup> GATT and WTO panels have interpreted Article XXIII:1(b) as providing for recourse when (a) benefits that could reasonably have been expected at the time of a negotiated market access concession (b) are nullified or impaired by (c) a later (GATT-consistent) government measure that upsets the conditions of competition between domestic and imported products. Under the GATT and now the DSU, remedies in such “nonviolation” cases are limited to compensatory tariff reduction on other products; the WTO cannot require a member to alter measures that are WTO-consistent. Almost all GATT nonviolation disputes concerned subsidies that were GATT-consistent but distorted trade.

PTAs with panel-based dispute settlement show continued interest in nonviolation remedies as a means of protecting the market access and other benefits that these agreements provide. However, the PTAs that provide such remedies tend to explicitly identify which benefits are thus protected, typically by citing specific PTA chapters. For instance, all U.S. FTAs explicitly permit disputes regarding nonviolation impairment of benefits accruing under specific identified chapters, usually those concerning market access and national treatment for trade in goods

(including rules of origin), cross-border services trade, procurement, intellectual property rights (IPRs), and, sometimes, technical barriers to trade (TBTs). Some PTAs provide nonviolation remedies only for certain chapters—for example, only for goods, or for goods and services, or for goods, services, and various other categories that may include TBTs, sanitary and phytosanitary (SPS) measures, aviation, procurement, and IPRs.<sup>9</sup> A few PTAs make provision for disputes regarding nullification or impairment of PTA benefits generally (e.g., Japan–Switzerland and Canada–Israel). Other PTAs only provide for settlement of disputes regarding noncompliance with obligations under the agreement (the Australia–Singapore, Chile–China, Chile–EU, Japan–Indonesia, and Japan–Mexico PTAs, and many others) or explicitly exclude any possibility of nonviolation complaints (the ASEAN–Australia–New Zealand agreement).

### *The Target of a Complaint*

*Measures by a government.* It goes without saying that PTA dispute settlement deals with *government* measures—that is, existing laws, regulations, or other official actions or failures to act that engage state responsibility, as opposed to actions of private parties. Although there is at least one case of a dispute (in Mercosur) concerning trade-obstructing actions by private parties (see annex B), the actionable measure was a PTA party's failure to ensure free circulation of goods as required by the PTA.

*Proposed measures.* Some PTAs permit disputes concerning proposed measures, such as pending legislation. The first modern example of such a provision appears in CUSFTA Chapter 18. Both CUSFTA and NAFTA provide for consultations and for requests for a panel decision regarding whether pending legislation in a partner is consistent with the PTA. Since 2001, U.S. PTAs have permitted consultations, but not arbitral panel proceedings, on pending legislation.

As Donaldson and Lester (2009) note, dispute settlement about proposed measures raises significant policy issues. It can be a waste of resources for panels to consider measures that may never be enacted, but early consultations can help limit or prevent trade damage by persuading governments not to enact measures that would violate their PTA obligations.

*Subject matter exclusions.* PTA dispute settlement procedures generally apply only with respect to the rights and obligations provided in that PTA. Some subject areas are often excluded from dispute settlement even when they are included in a PTA.

If a PTA contains “soft-law” obligations that urge but do not mandate economic or other cooperation, those

obligations are often excluded from formal dispute settlement. Such an exclusion makes sure that no dispute settlement panel will ever read “should” as “shall.”<sup>10</sup> As a corollary, when obligations regarding a subject area are limited to soft law, that area is likely to be excluded from formal dispute settlement.<sup>11</sup>

PTAs may also exclude areas from dispute settlement in order to ensure policy space for domestic regulation or to avoid PTA challenges to determinations by domestic regulators in particular cases. For instance, some PTAs exclude from dispute settlement any complaint regarding denial of rights to temporary entry and stay by business visitors unless the complaint concerns a pattern of practice and the nationals involved have exhausted local administrative remedies.<sup>12</sup> The objective is clearly to prevent the agreement's being used for immigration litigation. Some PTAs exclude TBT or SPS issues, or both, for similar reasons. The Japan–Switzerland FTA limits possible complaints regarding the effect of taxation on the PTA while subordinating the PTA to tax treaty obligations, following the example of Article XXII:2 of the WTO General Agreement on Trade in Services (GATS). In PTAs with competition chapters, the relevant chapter is often excluded from dispute settlement because competition authorities see panel review of their decisions as unwelcome and inappropriate.

PTAs may exclude areas from PTA dispute settlement when the PTA's obligations merely reaffirm WTO obligations. For instance, if a PTA simply confirms TBT or SPS obligations that are derived from the WTO Agreement, it may exclude TBT or SPS issues from PTA dispute settlement.

Finally, PTAs may exclude panel interpretation of subjects that are reserved to specific bodies in one of the parties. For instance, all New Zealand PTAs that have formal dispute settlement mechanisms provide that the interpretation of the 1840 Treaty of Waitangi between the British Crown and Maori tribes shall not be subject to dispute settlement under the PTA. Under New Zealand law, matters concerning this treaty are reserved to a special tribunal.

### *Overlap between the PTA and Another Forum*

Overlap in obligations between two legal regimes occurs when the same parties take part in two separate regimes and both regimes regulate the matter in dispute at the same time. Almost all PTAs overlap with the WTO Agreement, as PTAs and the WTO both require national treatment and ban quantitative restrictions in trade. Indeed, many PTAs simply incorporate GATT Articles III and XI by reference. Some PTA members are also members of another overlapping PTA, as happens with CAFTA–DR and the Central American Common Market (CACM), SACU and the

Southern African Development Community (SADC), and ANZCERTA and the ASEAN–Australia–New Zealand FTA (Pauwelyn 2004).

When both legal regimes have independent dispute settlement regimes, overlap affords opportunities for a complaining party to choose the most advantageous forum or to relitigate a case in one forum (usually, the WTO) after an unsatisfactory outcome in another (the PTA). For example, Brazil brought a Mercosur challenge to an Argentine antidumping measure on poultry; the Mercosur arbitral tribunal found that the measure was not regulated by Mercosur law and was therefore not inconsistent with Argentina's Mercosur obligations. Brazil then went to the WTO, and the WTO panel found that the antidumping measure violated the WTO Agreement on Antidumping (Piérola and Horlick 2007). In another case, Brazil prevailed in a Mercosur challenge to an Argentine textiles safeguard, but Argentina did not remove its quotas, and Brazil obtained a settlement only after bringing the dispute to the WTO (Kwak and Marceau 2006). Similarly, Argentina brought a complaint against Chile's price band tariffs to the WTO after Chile failed to comply with a nonbinding PTA panel decision (Tussie and Delich 2005).

For any government, and particularly for developing countries, relitigation poses a resource burden, particularly if a developing country must mount multiple defenses of the same measure in different forums. Overlap also presents the possibility of conflicting rulings, as in the Argentina poultry case (Pauwelyn 2006). A WTO panel does not have jurisdiction to rule on whether a measure violates a PTA, and vice versa. Domestic law doctrines that curb duplicate litigation, such as *lis alibi pendens* and *res judicata*, are not a solution because the obligations are not the same.<sup>13</sup> Even if GATT Article III is incorporated by reference into a PTA, in the PTA context it is part of PTA law and is subject to exceptions and dispute settlement procedures that may not be the same as in the WTO (Kwak and Marceau 2006).

### Resolving Overlap

There are three options for dealing with forum shopping in dispute settlement: give precedence to the PTA proceeding; give precedence to the WTO or other proceeding; or allow the parties to choose but prohibit relitigation.

*Preference for PTA rules.* A PTA may require that all disputes between PTA parties involving PTA provisions be settled exclusively within the PTA. The EU Treaty has such a requirement, and in the MOX Plant Case, the ECJ interpreted the relevant EU Treaty article as barring Ireland from bringing a dispute against the United Kingdom under

the UN Convention on the Law of the Sea or any other treaty concluded by the European Community (MOX Plant Case 2006).

PTA negotiators have also required parties to give precedence to PTA rules that provide more policy space than WTO rules (or otherwise are “WTO-minus”) by specifying the forum for particular disputes. For instance, NAFTA's Article 104 provides that in the event that obligations under certain listed environmental agreements are inconsistent with NAFTA obligations, the environmental agreements prevail, and under Article 2005(3), if a defending party claims that Article 104 would apply, the complaining party can only bring the dispute under NAFTA. Article 2005(4) similarly gives the responding party the right to have an SPS or TBT dispute heard only under NAFTA, which was considered to afford more policy space. The Chile–Mexico and Canada–Chile FTAs have similar clauses.

NAFTA also gives a third NAFTA party the right to force a preference for PTA dispute settlement. Under NAFTA Article 2005(2), before a NAFTA party initiates WTO dispute settlement against another party on grounds that are “substantively equivalent” to those available under NAFTA, it must notify the third NAFTA party. If the third party wishes to litigate regarding the matter under NAFTA, it must inform the complaining party and consult; if the parties fail to agree on the forum, the dispute is normally to be settled in NAFTA.

*Preference for the WTO.* The other extreme is represented by the EU–Chile PTA, which provides that if a dispute concerns a breach of a PTA obligation that is equivalent in substance to a WTO obligation, it must be brought in the WTO. Once a forum is selected, it is to be used to the exclusion of any other, and all arguments regarding forum choice must be resolved within the first 30 days (Garcia Bercero 2006).

*Binding election of forum.* Most recent PTAs use some variant of the approach adopted first in CUSFTA. That model allows disputes arising under both the PTA and the WTO to be settled in either forum at the discretion of the complaining party but provides that, after the “initiation” of dispute settlement, the procedure employed must be used to the exclusion of any other. (The “initiation” point can be defined as the parties wish; CUSFTA pegs it at the point of referral to a panel, so that the complaining party can make its choice after consultations.) The complaining party thus has the option to choose the strongest substantive and procedural rules, while duplicative proceedings are excluded. Provisions of this type appear, for instance, in CUSFTA and all later U.S. FTAs; in Mexican PTAs; and in the China–New Zealand, Japan–Indonesia, Japan–Switzerland, Australia–Thailand, and SACU–EFTA PTAs. Under Mercosur's Protocol of

Olivos, which was signed in 2002 in the wake of the poultry case discussed above, if a dispute may be brought in more than one forum, the complaining party may select the forum, or the parties may agree on a forum, but once the dispute is initiated, none of the disputing parties may go to another forum. Variations on this formula permit a dispute to be brought again in another forum if the parties have so agreed (as in the China–ASEAN and ASEAN–Australia–New Zealand PTAs), or if substantially separate and distinct rights and obligations under different international agreements are in dispute (e.g., under the ASEAN–Japan and Australia–Chile PTAs).

Given a choice between bringing a dispute under the WTO or under a PTA, most complainants now choose the WTO, which is one reason there are so few PTA disputes. Before the establishment of the WTO, two Canada–U.S. disputes that could have been brought under GATT Articles XI and III were brought under CUSFTA instead, because at the time, CUSFTA offered the quickest and most binding dispute settlement mechanism.<sup>14</sup> The choice would be different today.

Complainants prefer the WTO for several reasons: the large body of cases (with appellate review), which offers greater clarity and certainty about WTO obligations, and greater predictability about the likely outcome of a dispute; the fact that the WTO panel process cannot be blocked; the stabilizing effect of WTO institutions; and the availability of postjudgment compliance obligations and remedies. WTO proceedings may also provide a unique opportunity to mobilize third-party support and exert political pressure on the respondent party (Piérola and Horlick 2007). Furthermore, WTO panels are composed of neutrals, whereas PTA panels often include representatives of the parties. Gantz (2006) suggests that this is a factor in the U.S. preference for the WTO forum over NAFTA.

## Options for Procedures

In constructing a dispute settlement mechanism, negotiators need to consider what procedures to make available, what financial and infrastructural support will be necessary, and what complaints the panels or tribunals may handle.

### Consultations

Whether a diplomatic or political dispute settlement scheme or an ad hoc panel procedure is employed, a formal dispute officially starts with a request for bilateral consultations. The consultation clause may require that the request be in writing and that it state the legal grounds for the

complaint. It typically also requires the respondent party to consult promptly, and it may obligate the respondent to bring relevant officials to consultations and to provide sufficient information to facilitate settlement of the dispute.

The consultation clause must define the scope of issues on which the parties are obligated to consult upon request. Some agreements define this broadly: the consultation clause in the ASEAN Enhanced DSM includes “any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement.” The consultation clause will also determine whether a consultation request can include both existing and proposed measures and whether it can include both breaches of the rules and nonviolation nullification or impairment of trade benefits. As already noted, the consultation or pre-panel phase of a dispute may also extend to mediation, conciliation or good offices, or other forms of alternative dispute resolution.

A consultation clause is important because it gives any PTA party a right to get another party to have a focused talk about market access barriers in relation to the PTA’s rights and obligations. The consultations provide a cost-effective opportunity for the parties to settle their dispute with maximum control over the outcome, by negotiation and agreement. The consultation request is the first visible formal document, but it usually only comes after extensive contact between stakeholders and the complaining government, or between the governments concerned.

Consultations are also important because they provide a key opportunity to clarify the facts. Governments normally do not know the details of a PTA partner’s trade or regulatory regime; they do not know foreign law; and they do not know what aspects of government regulation will have the most impact on trade flows or the interests of stakeholders. Before the consultations, the government may not have collected the facts that it needs to determine its PTA rights and prove a violation of PTA law. The government may also not have a sense of the range of options for PTA-consistent implementation. Consultations provide an opportunity for a government to gather information to help evaluate a case before committing to it and to orient its litigation strategy and settlement negotiations to maximize commercial benefit. For the respondent government, consultations may offer an opportunity to reduce litigation costs by persuading the other side that certain claims are not worth litigating.

Both functions of consultations—settlement and fact-gathering—can also be fulfilled through discussions in the framework of a specialized PTA committee. Some PTAs provide that committee consultations can take the place of dispute settlement consultations procedurally, as discussed below.

*Cases of urgency or perishable products.* Some PTAs (e.g., the Chile–U.S., Canada–Peru, and ASEAN–Japan agreements and the Trans-Pacific SEP) provide accelerated consultation timetables for cases of urgency, including those involving perishable products, following the example of Article 4.8 of the DSU. Most agreements do not define “perishable,” but some do define it as including perishable agricultural or fish products. The 2009 Canada–Colombia and Canada–Peru PTAs provide accelerated consultations for “cases of urgency, including those concerning perishable goods or otherwise involving goods or services that rapidly lose their trade value, such as seasonal goods or services.” This clause recognizes that if the harvest period for a crop is limited and the crop is perishable, delay can make dispute settlement worthless except as a deterrent to repetition.

*Requirement to have consulted.* The GATT, the WTO, and all PTAs reviewed for this chapter require that before a party can use the agreement’s common resources for third-party arbitration of a dispute, it must give the responding party an opportunity to settle the dispute through consultations. In the WTO, written consultation requests serve as evidence that such an opportunity was provided. PTAs generally require a written consultation request, and plurilateral PTAs require that the request be circulated to all PTA parties so that they will have an opportunity to participate in consultations as third parties. The consultation procedures may also afford a minimum consultation period by stipulating that the next step can be taken only after a certain number of days have elapsed after the consultation request.

### ***The Formal Phase of a Dispute***

During or after the consultations, the complaining party may decide that a beneficial settlement by negotiation is not possible. At that point, it begins to draw on the collective resources of the PTA and to seek a formal determination—by submitting a request to a political body (in PTAs with political dispute settlement, such as the EU association agreements), or by submitting legal documents as required by the rules in a tribunal system, or by submitting a formal request for establishment of an ad hoc panel. Dispute settlement rules that use ad hoc panels generally require that the request be in writing and that it identify the measure or measures at issue and the legal and factual basis for the complaint.

PTAs based on ad hoc panel arbitration use two approaches toward invocation of the panel process. In the first, delivery of a panel request to the other party or to the PTA’s central institutional body (or both) directly triggers

the obligation to start the panel appointment process; the Korea–Singapore, China–Singapore, and Australia–Chile PTAs are in this category. Under the other approach, after consultations are exhausted, the complaining party refers the dispute to a political body for conciliation, and after a specified period of time, or if conciliation otherwise fails, the complaining party delivers a written request for a panel to the other party, triggering the panel selection process. This is the approach taken in NAFTA, in later U.S. PTAs, and in some later Mexican and Canadian agreements, under which the political body is a commission or joint committee, nominally at the ministerial level. Where there is potential for settlement, the conciliation phase provides another chance to negotiate, but in practice, the required meeting of the political body can consist of a brief conference call.

### ***Infrastructure and Support for Dispute Settlement***

*Institutions.* PTA negotiators will need to decide how the PTA’s institutions will be used to support formal PTA dispute settlement. Dispute settlement requires management of document exchanges and hearings; coordination of any roster; secretarial, translation, and interpretation services; provision or rental of a place to hold hearings; research and drafting assistance to panelists; payment of panelist fees and expenses; information services; and capacity building. Negotiators may decide to have an existing secretariat take on these functions. For instance, the ASEAN Secretariat provides support to the ASEAN Enhanced Dispute Settlement Mechanism; the Mercosur Administrative Secretariat supports Mercosur dispute settlement; and each national section of the NAFTA Secretariat provides support for dispute settlement under NAFTA Chapters 19 and 20. This approach can foster consistency of approach and build common knowledge. PTAs can also have each panelist arrange his or her own support services on a reimbursable basis in the event of a dispute; this approach is more economical in the short run but can lead to uneven or legally inconsistent results from case to case.

*Expenses.* Where dispute settlement is conducted through a political body, each side supports its own diplomatic efforts. Where dispute settlement is conducted by a standing tribunal, the tribunal and its associated secretariat will have a standing budget process that involves substantial contributions by the parties. The expenses and payment for an ad hoc panel process typically depend on whether the process is supported by a secretariat. The parties can set a standard scale for panelists’ fees and expenses, eliminating fee competition between them and making costs more predictable.

A PTA that provides for an ad hoc panel process without drawing on existing institutional support typically calls on the disputing parties to split the expenses. For instance, where a panel is selected by each party choosing an arbitrator, with a third or presiding arbitrator chosen by agreement, each party usually pays its own expenses and the fees and expenses for its arbitrator, and the parties divide equally the tribunal expenses (including the costs of the venue and the interpretation and secretarial services for the hearing) and the fees and expenses of the presiding arbitrator. A few agreements—for example, the Colombia–EFTA and Canada–EFTA PTAs, and the Mercosur Protocol of Olivos—permit the arbitrators to apportion costs or expenses among the parties as part of their award. In 2006, when the Mercosur Permanent Review Tribunal rejected as inadmissible an interlocutory appeal by Argentina against the designation of a panel chairman in a case, it assessed all costs and expenses against Argentina (Mercosur 2006).

An existing secretariat, where there is one, may provide dispute settlement support from its budget. This support affords extra benefits to those who make more frequent use of dispute settlement (but also provides public goods for other PTA parties). PTAs can also budget and pay for dispute settlement separately or case by case. The ASEAN Enhanced DSM provides for ASEAN member states to initially contribute equally to a separate revolving ASEAN DSM Fund, to pay for the expenses of ASEAN panels, the ASEAN Appellate Body, and related administrative costs of the secretariat. The parties to a dispute otherwise bear their own legal and other expenses and can be assessed for system expenses to replenish the DSM Fund.

*Languages.* Negotiators may also wish to consider the working language for dispute settlement submissions, hearings, and decisions. They may need to preserve the option to conduct disputes in their own language or languages, or they may wish to choose a single common language in order to economize on costs, as translation of submissions and interpretation at hearings can substantially increase the expense and time for dispute settlement. On the one hand, NAFTA provides meticulously for the use of up to three languages in dispute settlement, as do the Canada–Peru PTA and other Canadian PTAs with Latin American countries. On the other hand, some PTAs opt for disputes to be conducted in English (Japan–Switzerland, Korea–Singapore, Chile–China, Chile–Korea, ASEAN–Australia–New Zealand). The EU–CARIFORUM EPA states that the parties are to negotiate a common working language but that if they cannot agree, the defending party chooses the language, and each disputing party pays its own costs of translating submissions into that language.

Whatever the language actually used in the dispute, it may be politically necessary for texts of the decision to be made available in all the official languages of the disputing parties, to ensure public acceptance.

### *Panel Procedures*

Predictability and consistency yield major benefits for any litigation process, and PTA dispute settlement is no exception. In a PTA that settles disputes through a standing tribunal, the tribunal has standard rules of procedure that establish expectations regarding requirements for submission of pleadings, evidence and arguments, deadlines, conduct of hearings, and other issues relevant for an orderly and predictable proceeding. In those PTAs that settle disputes diplomatically, procedure is less important, but if a PTA relies on ad hoc panels to settle disputes, the negotiators may wish to lay down agreed rules of procedure to ensure that the panels make consistent procedural decisions.

Many PTAs require the establishment of model rules of procedure.<sup>15</sup> Typically, the PTA text requires the establishment of model rules and specifies key issues that these rules must cover, leaving details to be negotiated later.

Model rules may deal with issues such as how to commence a proceeding; the number and spacing of submissions to the panel; responsibility for administering dispute settlement proceedings; who may attend hearings; deadlines and places for filing documents; languages, translation, and interpretation; protection of business confidential information; how the panel makes decisions (consensus or vote); whether there can be separate arbitrators' opinions; and whether such separate views must be anonymous. The rules can also provide for transparency.

*Panel requests for information; handling of business confidential information.* Some PTA disputes may concern product bans, SPS measures, or other measures, and in such cases the parties may base their arguments on assertions of scientific or environmental fact. Examples are the disputes on SPS measures and on Argentina's ban on retreaded tires that were adjudicated by Mercosur tribunals and the SPS measure on milk imports that went before a CUSFTA panel.

A panel faced with evaluating such issues and arguments may wish to seek help. The DSU permits a panel, without limitation, to seek information from any relevant source, and so do some PTA provisions or model rules of procedure. Some PTAs, such as the Trans-Pacific SEP, require that any information obtained must be submitted to the disputing parties for comment. Under some agreements (e.g., the ASEAN–Australia–New-Zealand PTA), the

panel has to ask the disputants before seeking outside information; the parties have a veto over such a request; and any information obtained has to be submitted to the parties for comment. Some PTAs, such as the China–New Zealand agreement, further require that if a panel takes information or technical advice into account in its report, it must also take into account any comments on that information by the parties.

Claims regarding a breach of PTA rules may involve reliance on proprietary or business confidential factual data. Even information on government programs can be business confidential in nature; for example, information about Canadian government subsidies to the dairy industry was excluded from a WTO panel report (WTO 1999). Some WTO disputes (e.g., the dispute about the EU’s banana import regime and the aircraft subsidies disputes) have involved information extremely sensitive to the companies providing it. If PTAs are to be able to handle such disputes, negotiators may wish to consider requiring panelists and panels to respect the confidentiality of the data.

*Formalized expert groups.* NAFTA, in Article 2015, authorizes panels to request a written report from a scientific review board on factual issues concerning environmental, health, safety, or other scientific matters raised by a disputing party; the Canada–Chile and Chile–Mexico PTAs contain similar provisions. These provisions have never been used. Parallel provisions in the WTO (DSU Article 13.2 and Appendix 4) also have never been used; WTO panels in cases involving health or safety issues have consulted individual experts, who did not draw up any group report.

### *Duration of Panel Process*

The governments that have negotiated PTAs have shown a strong preference for speed in the panel process. For panel-based dispute settlement procedures that call for initial and final panel reports, PTAs’ notional deadlines for a panel to produce its initial report vary widely: 30 days in SACU–Mercosur; 60 days in Mercosur and the ASEAN Enhanced DSM; 90 days in NAFTA and the Canada–Peru PTA; 120 days in the Chile–U.S. PTA; and 180 days in the U.S.–Korea and Chile–Australia agreements. These PTAs typically allow two weeks for comments from the parties and then ask the panel to finalize its report within 30 to 45 days after the initial report.

Stakeholders favor short deadlines. The consultations and other preliminary phases of a dispute, including panel selection, can take considerable time, and business stakeholders are almost never compensated for damage caused them by the breach of trade obligations. In practice, these deadlines may be more aspirational than real. So far,

NAFTA panel proceedings have taken well in excess of the prescribed time. Defending parties are often motivated to delay, and even complaining parties may prefer to take time to prepare. If the panelists cannot coordinate their timetables to schedule a hearing, or do not meet deadlines, there is little that the parties can do.

### *Appeal, Correction, and Remand*

Where a trade agreement relies on ad hoc panels to settle disputes, the PTA parties may seek greater assurance that the decisions of successive panels will be consistent and legally sound. Such assurance may be essential to secure domestic acceptance of panel rulings. Tribunal systems such as the ECJ respond to the same concerns with appellate review, or provisions for revision or interpretation of past judgments. An appellate body involves incremental cost to the parties, but it generates public goods in the form of enhanced certainty and uniformity in the application of international trade law.

The WTO and some PTAs now use two methods to prevent and correct panel error. The first method is to give the parties to a dispute an opportunity to comment on a panel’s report in draft form before the report is finalized; this innovation in CUSFTA was incorporated into the WTO DSU and has been adopted in many PTA ad hoc panel processes. The second method is appeal. The DSU includes an Appellate Body, which the EU required as a quid pro quo for accepting binding dispute settlement in the WTO. The EU has instituted a two-level process, with the General Court as a court of first instance for certain types of disputes, with appeal to the ECJ. Mercosur’s 2003 Protocol of Olivos created the Tribunal Permanente de Revisión (TPR), an appellate tribunal (box 22.1). The Olivos Protocol reacted to a number of difficult disputes and responded in part to smaller states’ concerns about compliance with Mercosur law (Whitelaw 2004). The TPR reflects a high level of institution-building ambition and helps enforce and build not only treaty law but also the decisional law being created by Mercosur institutions (Operti 2004).

The ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004 calls for the ASEAN Economic Ministers to establish a seven-person Appellate Body patterned on the WTO Appellate Body. As of early 2011, this had not yet taken place.

### *Labor, Environment, Financial Services, and Other Special Sectors*

As noted in earlier chapters of this volume, many PTAs provide special dispute settlement procedures for particular

**Box 22.1.** The Protocol of Olivos

The Mercosur Protocol of Olivos established a new five-person Permanent Appeals Tribunal (Tribunal Permanente de Revisión, TPR). It consists of one arbitrator (with an alternate) appointed for a renewable two-year term by each of the four Mercosur members, plus a fifth arbitrator appointed for one three-year term by agreement between the members. The TPR's permanent headquarters is in Asunción.

Disputes between Mercosur members are normally first heard by an ad hoc arbitral tribunal, which provides its award within 60 days (extendable to a total of 90 days). Within 15 days after the award, any party to the dispute may bring a motion for review to the TPR. The TPR may consider only the legal issues dealt with in the dispute and the legal interpretations in the award, not issues of fact. It renders its decision within 30 days. If the dispute involves two members, it is heard by three judges, and if more, by five judges. (Whitelaw 2004). The TPR has heard two appeals. In one, it reversed the panel decision, and in the other, it ruled the request inadmissible.

Under the Protocol of Olivos, parties to a dispute may also, by agreement, submit their dispute directly and in a single instance to the TPR; in that case, the TPR acts like a panel and issues a nonappealable award in 60 days, which may be extended by 30 days. The TPR also may rule on appeals by disputants regarding failure to comply with tribunal awards, or regarding the extent of suspension of concessions after a failure to comply, and it may provide opinions to the Mercosur Common Market Group on request.

subject matter. Special procedures may refer particular disputes to a political process for settlement, but even in the context of binding third-party dispute settlement, the parties may wish to bring to bear special expertise, to provide special opportunities to participate, to provide particular forms of redress, or to limit the possible scope of sanctions by a prevailing party. The key examples are labor, environment, and financial services.

*Labor and environment.* Chapters 19 and 20 of this volume describe the substantive obligations, including dispute settlement, in those PTAs that deal with environment and labor issues. Such obligations exist in all U.S. PTAs concluded since NAFTA, in some Canadian PTAs, in New Zealand's PTA with Thailand, in the Trans-Pacific SEP, in the EU-CARIFORUM EPA, and in the chapter on trade and sustainable development of the EU-Korea agreement.

As Bartels (2009) observes, the treatment of these issues in North American PTAs has changed over time. These dispute settlement provisions can be grouped into four categories.

1. The side agreements to NAFTA—the North American Agreement on Labor Cooperation (NAALC) and the North American Agreement on Environmental Cooperation (NAAEC)—represent one model. They establish institutional frameworks for cooperation, require that domestic legislation adhere to high standards, and obligate each party to enforce and strive to improve its own legislation. Panel proceedings require a two-thirds vote of the three NAFTA parties. They are to be preceded by consultations and a report by a committee of experts, and they are only available in cases of persistent, trade-related patterns of failure to effectively enforce worker

safety, child labor, or minimum wage standards that are covered by mutually recognized labor laws (a failure that violates the NAALC), or to effectively enforce domestic environmental law relating to production of traded goods or services (a breach of the NAAEC). The panelists must be from a specialized labor or environment roster. If the panel agrees that such an enforcement failure exists, and if no remedial action is taken, the panel may ultimately set a monetary assessment, to be paid by the losing party into a fund to promote (depending on the sector) labor law enforcement or improvement of the environment or of environmental enforcement in the party complained against. The Canada-Chile PTA contains similar provisions (Bartels 2009). The side agreements also provide for citizen submissions claiming that a party is not enforcing its own laws. The NAFTA governments received 37 submissions on labor issues in 1994–2010, of which 24 concerned conditions in Mexico, 13 pertained to the United States, and 2 were against Canada (U.S. DOL 2010). The NAFTA Commission on Environmental Cooperation received 77 citizen submissions from 1995 through early 2011; of these, 39 focused on Mexico, 9 on the United States, 27 on Canada, and 1 on a cross-border Canada-U.S. issue (CEC 2011). The Canada-Costa Rica FTA also provides for citizen submissions, as well as government-government dispute settlement without fines or trade measures (Bartels 2009).

2. Under the Jordan-U.S. agreement, parties must not fail, through a sustained or recurring course of action or inaction, to effectively enforce domestic environmental or labor laws in a manner affecting trade between the parties. These labor and environmental obligations are



- enforceable through the same procedures as the rest of the agreement, but a side letter provides that they will not be enforced so as to block trade (Bartels 2009).
3. Seven other U.S. PTAs negotiated in 2000–07, with Australia, Bahrain, CAFTA–DR, Chile, Morocco, Oman, and Singapore, adopt the same standard as in the Jordan agreement. They also provide that parties may not weaken, reduce, or waive environmental or labor protections to encourage trade or investment. These obligations are enforceable through the same dispute settlement procedures as the rest of the agreement, but no trade retaliation is possible—only fines capped at US\$15 million (adjusted for inflation). Fines are collected through suspension of concessions, if necessary, and are spent on labor or environmental initiatives in the territory of the party complained against. These agreements also create cooperative institutions and provide for receipt of input from the public.
  4. In May 2007 the Bush administration agreed with the leadership of Congress (then controlled by Democrats) on elements that future free trade agreements must have in order to be considered by Congress. These elements include increased substantive standards for labor rights provisions and an enforcement standard like that in the Jordan agreement. The provisions are subject to the same dispute settlement mechanisms and penalties as in other provisions, but dispute settlement must be preceded by consultations in a specialized labor or environment council. The Peru–U.S. FTA and pending FTAs with Colombia, Korea, and Panama all follow this pattern (Bolle 2009).

On July 30, 2010, the United States initiated the first formal PTA labor complaint, under the labor chapter of CAFTA–DR. In a letter signed by U.S. Trade Representative Ron Kirk and Secretary of Labor Hilda Solis, the United States formally requested consultations with the Guatemalan government regarding (a) failure by the Guatemalan Ministry of Labor to investigate alleged labor law violations or to take enforcement action when the ministry had identified a violation, and (b) failure by the Guatemalan courts to enforce Labor Court orders in cases involving labor law violations. The complaint expressed concerns about the Guatemalan government's alleged failure to protect those attempting to exercise labor rights against violence and threats. It followed a submission by U.S. and Guatemalan unions and informal consultations that had been going on since January 2009 (Kirk and Solis 2010; USTR 2010).

New Zealand has negotiated labor and environment side agreements to the Thailand–New Zealand FTA and the

Trans-Pacific SEP. In both, the labor obligations are only enforced through consultations. Dispute settlement provisions in the environment agreements provide for referring a dispute to the interested parties for a report. Those affected are obligated to implement the report's recommendations (Bartels 2009).

Historically, most EU PTAs have treated labor and environment as “matters for cooperation” (Bartels 2009). However, the EU's Global Europe policy, announced in late 2006, calls for environment and labor to be part of the trade agreement negotiations. For instance, the chapter on trade and sustainable development in the EU–Korea FTA calls for high levels of protection in both areas and obligates both parties not to fail to effectively enforce environmental and labor laws “through a sustained or recurring course of action or inaction” and not to waive or derogate from its environmental or labor laws, regulations, or standards in a manner affecting trade or investment between the parties. Enforcement, however, consists exclusively of bilateral consultations and an advisory report by a group of experts.

In the EU–CARIFORUM EPA, the labor and environment obligations in Chapters 4 and 5 of Title IV are enforceable through the agreement's regular dispute settlement procedures, but only after separate procedures in the labor or environment chapters are pursued for at least nine months. These procedures call for bilateral consultations, possibly including advice from relevant international environmental bodies or the International Labour Organization (ILO), and may also include a report by a three-member committee of experts. In any ensuing dispute, at least two of the three arbitrators must have specific expertise on the subject matter and must be drawn from a special roster. The panel report must recommend how to ensure compliance with the EPA's trade or environment obligations, and measures taken in case of noncompliance may not include suspension of EPA trade concessions. Separately, the agreement's investment chapter (Article 72) obligates the parties to ensure that investors act in accordance with core labor standards and do not behave in a manner that circumvents international environmental or labor obligations in agreements to which the EU and the CARIFORUM states are parties. This obligation is subject to the agreement's regular dispute settlement procedures.

*Financial services.* As Stephanou (2009) observes, PTA parties have been particularly cautious about covering financial services because of regulatory sensitivities and strategic considerations. Countries that follow the GATS approach for services in their PTAs have used it for financial services as well, with special adaptations or a separate chapter expanding on the GATS Annex on Financial

Services. Others follow the NAFTA model, in which investment to provide services is treated like any other type of investment and has access to investor-state dispute settlement. Stephanou (2009) points out that an increasing number of countries prefer a dedicated chapter on financial services because it facilitates customizing the application of services disciplines in this area and allows financial sector policy makers to control negotiation and implementation of the obligations.

Governments have demonstrated in their PTAs that they want special procedures for settling financial services disputes. As in the WTO, PTA provisions often require that panels for such disputes have specific regulatory or other financial sector expertise, and they prohibit trade retaliation against financial services in any dispute in any other sector. In NAFTA-model PTAs that have a separate financial services chapter, that chapter limits the scope of investor-state dispute settlement to claims regarding expropriation or transfer of payments. National treatment claims, for instance, are only subject to state-state dispute settlement, giving a host state additional flexibility to discriminate in favor of domestic financial services providers if its PTA partners agree (Sauvé and Molinuevo 2008). NAFTA-model financial services chapters also refer claims regarding prudential or monetary or exchange-rate measures for a consensus decision by a financial services committee composed of financial services regulators; if the committee agrees, its decision binds the tribunal.

*Other sectors.* PTA negotiators can provide specialized dispute settlement for any subject they wish, or they can require that arbitrators for disputes on technical subjects have specialized expertise. For instance, the EU–Chile FTA contains a chapter on trade in wine that includes provisions on regulation of labeling and oenological practices. The chapter requires the parties to establish a roster of arbitrators with oenological expertise for disputes regarding obligations under the agreement.

### **Participation in PTA Dispute Settlement and Enforcement**

This section reviews participation in PTA dispute settlement, including qualification and selection of decision makers, third-party participation, use of experts, and participation by civil society in the dispute settlement process.

#### ***Qualifications and Selection of Decision Makers***

Selection of decision makers is a key issue for international dispute settlement; if governments are to give a third-party decision maker (a standing tribunal or an ad hoc panel)

power to make binding decisions that matter, the tribunal must be composed of people who are perceived as trustworthy, impartial, and confidence-inspiring. Negotiators solve this problem by specifying criteria for decision makers such as neutrality, geographic distribution, and professional expertise. They may also try to expedite panel formation by agreeing in advance on a roster of persons who meet the criteria.

*Standing tribunals.* In a standing tribunal, judges are selected on the basis of certain criteria and some form of geographic distribution. The governments bound will need to agree on the judges' terms of service, their payment, and the funding of the necessary infrastructure. The original model, the International Court of Justice (ICJ), consists of 15 judges elected to nine-year terms by the United Nations (UN) General Assembly and the UN Security Council. The Statute of the International Court of Justice requires that its judges be persons of high moral character who possess the qualifications required in their countries for appointment to the highest judicial office or who are lawyers of recognized competence in international law. Each judge participates in all cases. The Statute also requires that in the ICJ as a whole "the representation of the main forms of civilization and of the principal legal systems of the world should be assured." If a state party to an ICJ case does not have a judge of its nationality on the Court, it may appoint an ad hoc judge for that case only.

The European Court of Justice has one judge for each of the 27 member states and normally hears cases in panels of 3, 5, or 13. The judges must have the qualifications or competence needed for appointment to the highest judicial positions in their home countries. Both the ICJ and the ECJ are backed by an elaborate and expensive infrastructure of buildings, legal and support staff, libraries, and translators. The four judges of the Andean Tribunal (one per member state) also serve full time. Other standing tribunals, for ECOWAS, COMESA, and the EAC, are composed of member-state judges who serve part-time (Banjo 2007).

The WTO Appellate Body consists of seven part-time members, appointed by consensus for a renewable term of four years, who must be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally" (DSU Article 17.3). They are geographically balanced through informal agreement. Members have included public international lawyers, trade lawyers, and diplomats with no formal legal training. A division of three members, determined randomly, considers each case. The Appellate Body has a small staff and shares in the infrastructure provided by the WTO.

*Ad hoc panels.* The DSU requires that WTO dispute settlement panels be composed of impartial, “well-qualified governmental and/or non-governmental individuals” and lists types of acceptable experience (WTO litigation; service as a delegate, or in the WTO Secretariat, or as a senior trade policy official; teaching or publishing on trade law or policy). Many PTA dispute settlement mechanisms modeled on the DSU specify similar characteristics of impartiality and expertise. Some, such as the China–New Zealand PTA, also require that the panelists comply with the WTO DSU’s rules of conduct for panelists. NAFTA and other U.S. FTAs require compliance with a code of conduct to be established by the parties.

Another issue is citizenship or nationality. In the WTO, citizens of parties or third parties to a dispute cannot serve on the panel, unless the parties agree otherwise. The most common model in PTAs is for each party in a bilateral dispute to select an arbitrator, who can be (and usually is) a national of that party. The parties to the dispute then select a neutral chair by agreement, with a fallback to selection by lot or by an appointing authority, as discussed below.

#### ***Ad Hoc Panels and the Blockage Problem***

Ad hoc panels, as bodies created to settle a particular dispute, present particular moral hazard problems that the text of a PTA can and should anticipate and prevent. The central problem arises when a defending party refuses to cooperate with the process by declining to name its arbitrators or to cooperate with the panel selection process.

The WTO’s DSU procedures have successfully overcome this problem. The WTO Secretariat takes the initiative to nominate panelists to the parties. If a panel has not been completed by agreement within 20 days from the decision by the Dispute Settlement Body (DSB) to establish the panel, then, if either party so requests, the WTO Director-General can and will select the missing panelists, in consultation with the WTO’s political leadership.

Some PTAs deal with the failure-to-appoint situation by designating an appointing authority, such as the WTO Director-General, the Secretary-General of the Permanent Court of Arbitration in the Hague, or a regional secretariat.<sup>16</sup> Other PTAs provide for the missing arbitrator or neutral to be selected by lot; this is the method chosen by the Japan–Mexico, Japan–Chile, and Japan–Thailand PTAs and by NAFTA and other U.S. FTAs. If negotiators choose selection by lot, the selection should be conducted by a body that is not controlled by the defending party.

In practice, governments may wish a PTA panel, and its decision, to have the legitimacy that flows from consent. They may therefore be reluctant to actually use these

fallback mechanisms. But the existence of a fallback mechanism does provide an incentive to reach agreement.

Panel selection can take considerable time. The panel selection process has been a significant obstacle for NAFTA disputes, according to Gantz (2006), who observes that the NAFTA dispute on cross-border trucking services was delayed for 15 months by panel formation and that in the NAFTA sugar dispute, the U.S. authorities declined for more than four years to appoint panelists.

#### ***Rosters***

A roster can speed panel selection by providing a preapproved list of persons who are qualified and willing to serve. Since 1907, arbitral institutions, which now include the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration, and many others, have maintained rosters of arbitrators to facilitate dispute resolution (Schreuer 2001). In the WTO, DSU Article 8.4 provides for the maintenance of a roster of governmental and nongovernmental individuals qualified to serve on panels (WTO 1996b, 724). For special obligations in agreements (on labor, environment, financial services, or other designated topics), PTAs may require specialized rosters to ensure that the decision makers in a dispute have the necessary expertise.

A roster of panelists can be open or closed. The WTO has an open roster; disputing parties may choose any panelists they wish. The WTO’s DSB accepts practically all names nominated by members. At the other extreme is a closed roster, like that provided for in the EU–Chile FTA. As required by that agreement, the EU–Chile Association Committee has established a list of 15 persons. Of these, five are Chilean, five are from the EU, and five, of neither nationality, are identified as possible chairpersons (European Commission 2007). The FTA provides that within three days of any panel request, the chair of the Association Committee must select by lot two arbitrators, one each from the EU and Chilean sublists, as well as a chair from the list of individuals identified as potential chairs. Panel selection takes days instead of months. (The initial list was not finalized until two years after the FTA entered into force, however.) Similarly, panelists for ad hoc tribunals for Mercosur disputes are selected from sections of a Mercosur roster; if a disputant fails to appoint its arbitrator, or if there is no agreement on the presiding arbitrator, the arbitrator in question is appointed by Mercosur’s Administrative Secretariat from the roster.

The PTA rules can also favor panel selection from the roster—for instance, by barring any veto of panelists selected from the list—without excluding nonroster candidates. If

a roster is used, it is advisable that it remain valid until it is replaced. NAFTA provides for each party to select panelists from the roster who are not its citizens (“cross-selection”) but this innovation has not been picked up in any other PTA, including later U.S. FTAs.

Some other PTAs, such as the ASEAN Enhanced DSM, provide for indicative lists modeled on that of the WTO. Many do not use a roster for panel selection at all, however, permitting governments to select the candidates that they prefer when the dispute arises.

### *Panelist Ethics*

PTA provisions on the qualifications of panelists often include qualitative requirements designed to ensure impartiality. In December 1996 the WTO’s DSB adopted a code of conduct for panelists (WTO 1996b) that is also applied by the WTO Appellate Body. This code requires that panelists be independent and impartial, avoid direct and indirect conflicts of interest, and respect the confidentiality of WTO proceedings. The disclosures required by this code have become a routine aspect of panel disputes in the WTO.

Influenced by the WTO example and by the requirement for a code of conduct in NAFTA, a number of PTAs call for panelists to adhere to a code of conduct to be agreed by the parties. These PTAs include the Singapore–GCC, Mexico–Northern Triangle, Chile–Colombia, Chile–Australia, Canada–Peru, and Chile–EU agreements; NAFTA; and all later U.S. PTAs. In addition, following the example of Article 18.1 of the DSU, PTA model rules of procedure or codes of conduct may prohibit *ex parte* contact with panelists, as do the ASEAN Enhanced DSM and the Singapore–GCC PTA.

### *Plurilateral PTAs and Multiparty Disputes, Joinder and Consolidation, and Other Third-Party Participation*

When a dispute arises in a plurilateral PTA, another party to the PTA may wish to join the complaint or merely to observe and submit views. The reasons for wanting to do so may include commercial competition in the markets concerned, a desire to prevent discriminatory settlements, an interest in the interpretation of common PTA rules such as rules on market access or rules of origin, and concern for endeavors such as regional public goods. Third-party participation can also be a useful way for developing countries to build capacity in dispute settlement. Similar motives have built a rich practice of joinder and consolidation of disputes, multiparty cases (as in the EU banana import regime dispute), and third-party participation, under the

GATT (WTO 1996a) and the WTO. Rules for multiparty disputes also exist in, for example, NAFTA, CAFTA–DR, the Trans-Pacific SEP, and PTAs involving EFTA.

NAFTA permits a third party to join as a complaining party as of right, if it delivers a timely notice to the disputing parties and the NAFTA Secretariat. The third party can then participate in the consultations, but if it fails to join the dispute, it is “normally” precluded from initiating or continuing a NAFTA or WTO dispute on the same matter, in the absence of a significant change in circumstances. The NAFTA Commission must consolidate two or more pending NAFTA disputes regarding the same measure and may consolidate other cases that are appropriately considered jointly. Similar provisions exist in the CAFTA–DR and Chile–Central America PTAs. The Trans-Pacific SEP Agreement requires consolidation of disputes on the same measure, and the Colombia–EFTA, China–ASEAN, and ASEAN–Australia–New Zealand PTAs express preference for consolidation or use of common arbitrators. Where there are multiple complaining parties, the panel selection procedure may be adjusted accordingly, as is done in NAFTA and the CAFTA–DR, Chile–Central America, and Mercosur agreements.

Most plurilateral PTAs permit another PTA member to participate in dispute settlement consultations as of right; some make such participation conditional on consent by the disputing parties. Many also permit another PTA member to attend panel hearings, to make written and oral submissions to the panel, and to receive some or all written submissions of the disputing parties (as in WTO panel proceedings).<sup>17</sup> Broader participation is not cost-free, of course. It involves costs for the third party or extra complainant and for the defending party, and it decreases the likelihood of early settlement (Busch and Reinhardt 2003).

### *Transparency and Civil Society Participation*

One of the parties to a PTA negotiation may seek to have the PTA dispute settlement provisions incorporate elements of procedural transparency. WTO practice has been evolving since 1995 in the direction of increased transparency in dispute settlement, but views are still divided within the WTO as to whether to mandate such transparency. PTA practice varies widely, but it too has evolved substantially in recent years. Some U.S. PTAs now mandate considerably more dispute settlement transparency than the WTO.

The WTO’s dispute settlement rules largely codify the informal, diplomatic, nontransparent practice under the GATT, which treated dispute settlement as a private negotiating process between the parties. The DSU provided that

disputing parties could make their submissions and non-confidential summaries public but made no other changes. Since 1998, the United States has advocated that all panel submissions be available to the public; that panel hearings be open to public observation, except where there is a need to protect confidential business information; and that panels accept *amicus curiae* submissions from the public or from nongovernmental organizations (NGOs). These proposals have gained at least partial support from the EU, Canada, and others, to help strengthen public support for trade liberalization. The United States has made all of its dispute settlement submissions since 1995 public; other members have made some of their submissions public; *amicus* briefs have been submitted and even considered; and in a number of WTO disputes, at the request of the parties, the panel or Appellate Body hearing has been open for public observation via closed-circuit television.

Not all governments agree. As described by Mercurio and LaForgia (2005), some WTO delegations have argued that openness would undermine the character of the WTO as a forum for confidential discussion between governments, that it would burden members' ability to participate effectively in disputes, and that allowing observers at hearings would lead to trials by media. Although almost all WTO members strongly criticized the Appellate Body for accepting *amicus* submissions in the asbestos dispute in 2000, later panels and the Appellate Body have continued to accept such submissions. Many developing countries continue to oppose *amicus* submissions as a resource burden.

*Direct participation by stakeholders and civil society.* No government opposes all participation by civil society in dispute settlement. On the contrary, governments usually welcome stakeholder input and guidance on facts, commercial data, and negotiating priorities. WTO studies (Tussie and Delich 2005; Xuto 2005) illustrate the critical role played by developing-country stakeholders in disputes. Governments also have put in place organized structures for receiving stakeholder complaints.<sup>18</sup> Moreover, PTA provisions on labor and environment have provided for receipt of public submissions on these issues; the first PTA labor dispute ever, initiated by the United States against Guatemala in July 2010, followed an April 2008 public submission by the AFL-CIO labor group in the United States and by Guatemalan unions, under the labor chapter of the CAFTA–DR PTA (USTR 2010).

Practically all governments involved in trade disputes now expect stakeholders to hire or pay for legal counsel to assist the government. A few PTAs (Canada–Israel, EU–Chile, Canada–Chile, Chile–Central America) explicitly guarantee the right of parties to be assisted by counsel and impose conditions regarding the counsel's conduct.

*Complaints by stakeholders against governments.* Articles 39–44 of the Mercosur Protocol of Olivos permit individuals or juridical persons to bring complaints against any Mercosur party for applying legal or administrative measures that have a restrictive, discriminatory, or unfairly competitive effect, in violation of the Treaty of Asunción or the associated agreements and legal instruments. Such complaints must be filed with the national section of the Common Market Group of the country in which the claimant resides or has its headquarters. If the national section supports the complaint, it must negotiate directly for 15 days to resolve the matter with the defending country's national section. If the complaint is not resolved, it must be brought to the Common Market Group. Unless the Common Market Group rejects the complaint summarily by consensus, it must convene a group of three neutral experts, who are to report in 30 days. If the panel unanimously agrees with the complaint, any Mercosur party can demand that corrective measures be adopted, or that the dispute measure be annulled, and can then proceed to Mercosur state-state dispute settlement if the defending state does not comply within 15 days. If the panel's report is not unanimous, the claim terminates. Any Mercosur party can bring the same complaint.

*Amicus curiae submissions.* Civil society groups have argued that panels should consider not just the arguments presented by governments but also facts and arguments presented by others, even those who may be at odds with the governments participating in dispute settlement. If dispute settlement provisions are neutral regarding *amicus* submissions, presumably a panel could consider them.

Some PTAs go further and explicitly favor consideration of *amicus* submissions. U.S. FTAs after NAFTA have required that panels consider requests from nongovernmental entities in the parties' territories to provide written views that may assist the panel in evaluating the submissions and arguments of the parties. A number of other recent PTAs explicitly authorize the panel to accept and consider *amicus* submissions under certain conditions. For instance, the Trans-Pacific SEP and the EU–Chile, EU–Korea, Chile–Panama, Canada–Colombia, and Canada–Peru PTAs all permit *amicus* submissions, but only if timely (submitted within 10 days of panel composition), concise (not over 15 typed pages, including annexes), and directly relevant to the factual and legal issues before the panel. The submission must also describe the submitter, its activities, its source of funding, and the nature of its interest in the proceeding. The Canada–Peru PTA adds more requirements: in deciding whether to permit an NGO to make a submission, a panel must consider, among other matters, whether there is a public interest in the

proceeding, whether the NGO has a substantial interest in the proceeding, and whether the written submission would add a perspective, particular knowledge, or insight that is different from that of the parties. (A footnote clarifies that an interest in jurisprudence, in the interpretation of the PTA, or in the subject matter of the dispute is not enough to establish an NGO's substantial interest.) An NGO submission may not introduce new issues to the dispute, must stay within the dispute's terms of reference, and must avoid disrupting the proceeding. It must preserve the equality of the disputing parties, who must have an opportunity to respond.

*Transparency in the dispute settlement process.* All U.S. PTAs after NAFTA have required that any dispute settlement submission (including written submissions, texts of oral statements, and other documents) must be made public within 10 days. Other PTAs authorize, but do not require, their parties to make their own submissions public; these include the Canada–Colombia, Canada–Peru, ASEAN–Australia–New Zealand, and Japan–ASEAN agreements.

All U.S. PTAs after NAFTA have required that hearings in disputes are to be open to the public; the recent Canada–Colombia, Canada–Peru, and EU–Korea PTAs also require open hearings. The 2009 Japan–Switzerland PTA provides for open hearings unless either disputing party objects. In some other PTAs (the Trans-Pacific SEP and the EU–Chile agreement), hearings are closed unless the disputing parties agree otherwise.

### **Alternative Enforcement and Dispute Settlement Methods**

Formal disputes take place only in exceptional cases; the universe of large and small trade disputes in a PTA is much larger. Statistics on dispute settlement, which record formal disputes, systematically understate the total number of disputes and the proportion of disputes that is settled.

Most PTAs set up an institution or institutions to maintain the PTA, to address practical problems of PTA implementation and market access, and to provide a framework for further negotiations. These institutions may include joint committees or councils at the ministerial or senior official level to oversee the operation of the PTA. As Donaldson and Lester (2009) note, most such committees meet annually (and more often, as required), and a few meet biennially. They may be ad hoc or standing committees at the working level, or even joint public-private working groups. Maintaining these institutions requires a commitment of resources and personnel but can be economical and effective in resolving problems.

PTA institutions can provide a cost-effective channel for gathering information. Governments, and particularly those of resource-poor developing countries, normally do not know the details of a PTA partner's trade or regulatory regime and may not have access to foreign legislation. Institutional contacts provide a way to obtain those facts. Cooperation within PTA institutions, and the regular contact that it implies, offer a means of building mutual confidence at the personal level, resolving routine trade irritants and minor issues, and negotiating further trade liberalization. Asia-Pacific Economic Cooperation (APEC), for instance, has provided useful settings for dialogue and regulatory harmonization on customs and trade facilitation, chemical regulation, SPS measures, and automotive standards.

### ***Specialized Institutions***

PTA institutions can be particularly helpful for regional integration in complex issue areas or regulated industries. PTAs may establish specialized committees composed of regulators from each country. Contacts between regulators build trust in each other's judgments, facilitating market access for regulated products or services. Some agreements provide an incentive to consult about issues in these technical committees by providing that such discussions will satisfy the usual requirement for consultations before recourse to a dispute settlement panel. The CAFTA–DR agreement, for instance, establishes committees on agricultural trade (Article 3.19), market access for goods, rules of origin, and customs issues (Article 3.30), SPS measures (Article 6.3), TBTs (Article 7.8), and financial services (Article 12.16). Each committee is able to consider routine market access issues. Consultations that have taken place in the TBT Committee may substitute for the first step in the dispute settlement process. The Chile–EU FTA establishes special committees on rules of origin (Article 81); standards, technical regulations, and conformity assessment (Article 88); and financial services (Article 128), as well as special consultation processes on SPS requirements, trade in wine, and trade in spirits; these can substitute for the consultation stage of dispute settlement proceedings (Articles 89, 129, Annex 5).

### ***Collective Enforcement Procedures***

The adversary process used in panel-based dispute settlement procedures, and triggered only if one PTA party brings a formal complaint against another, is not the only possible structure for enforcement of PTA obligations. In the EU, for instance, the predominant method of enforcement is through action by the supranational European

Commission, which actively monitors member states' actions and can bring enforcement actions before the EU's courts even in the absence of any stakeholder or member state complaint. The secretary-general of the Andean Community has similar enforcement powers, as do the secretaries-general of COMESA and the EAC. Enforcement of this type is typically coupled with a standing tribunal empowered to adjudicate cases and impose sanctions. Where PTA members have pooled their sovereignty, as in the EU, such enforcement is strong, but where the members are less ambitious, it is not (Alter and Helfer 2011).

As another example, ASEAN formally agreed in 2004 to establish an ASEAN Compliance Body (ACB), modeled on the WTO Textiles Monitoring Body. The optional compliance procedures (Yoshimatsu 2006) provide for group peer review of measures on a 90-day timeline. The ACB's findings, drawn up by countries not party to the dispute, would not be binding but could serve as inputs for formal dispute settlement. However, the ACB does not appear to be operational at present.

True multilateral sanctioning mechanisms (such as the UN Security Council) are quite rare, but collective persuasion mechanisms exist, including the specialized institutions described in the preceding subsection. The Montreal Protocol on the Protection of the Ozone Layer has such a mechanism in its Implementation Committee of 10 treaty parties, which regularly examines the treaty parties' compliance reports, can receive other parties' submissions, and can investigate and provide reports and recommendations to the Meeting of the Parties. But accounts indicate that it is ineffective at stopping even intentional and continuing violations (Yang 2007).

### ***Alternative Dispute Resolution: Good Offices, Mediation, and Conciliation***

Good offices, mediation, and conciliation all are traditional, widely recognized means of dispute settlement in public international law, as well as means of alternative dispute resolution (ADR) used in commercial situations. In each case, the parties cooperate voluntarily with a neutral, uninvolved third party. The third party, which, in a public international law context, could be an individual, an international organization, or a state, offers to assist the parties in settling their differences by negotiation and agreement, without arbitrating the merits of the legal claims concerned. The three types of ADR overlap but are distinguished by the extent and nature of the neutral party's involvement.

Article 5 of the WTO DSU provides for the possibility of good offices, mediation, or conciliation, if agreed to by the

"parties to a dispute." The implication is that a dispute exists, but Article 5 has never been used *during* a dispute. The only known WTO mediation, in 2002 on European Community tariff preferences for canned tuna, was used in place of dispute settlement proceedings.

*Good offices* may include using shuttle diplomacy, restoring contact between the parties, inviting them to meetings, or offering suggestions for settlement. In public international law, good offices can also include supervision of plebiscites or armistices. The UN Secretary-General, the Swiss government, and the Holy See have provided good offices in international conflicts. When an organization is called on to provide good offices, a senior official is often appointed to take charge of the issue. The Director-General of the GATT, through a designated representative, provided good offices in a number of instances, notably in the GATT dispute between Latin American countries and the EU regarding banana trade (WTO 1996a, 765–67). Gathii (2010) reports a recent dispute in COMESA over the Kenya Sugar Board's nontransparent auctioning of import licenses for sugar, which affected import trade from COMESA members. In September 2009 COMESA sent to Kenya a Sugar Sector Safeguard Assessment Mission, which recommended elimination of auctioning as a nontariff barrier but apparently did not characterize the auctioning as a treaty violation. The intervention successfully persuaded Kenya to eliminate the auctioning.

In *mediation*, the neutral party actively proposes options for settlement. The success of mediation depends very much on the mediator and on the willingness of the parties to make concessions (Merrills 1991, 29, 39–41). There are few widely reported cases of such mediation within a PTA. An example involving the EU is the 2002 WTO tuna mediation. Its success is attributable to a number of factors: the complainants' ability to use leverage (a threat to block an EU waiver and indirectly prevent the launch of the Doha Round) as a means of obtaining the EU's political commitment to the process; skilled mediation by a veteran, neutral dealmaker who suggested a practical solution; EU goodwill in promptly implementing a solution that increased the complainants' market access; and the fact that the problem was framed not in terms of legal rights but as a question of impairment of interests (Porges 2003).

In *conciliation*, the parties set up a permanent or ad hoc commission, or refer a dispute to a conciliator that is to impartially examine the dispute and suggest an acceptable settlement. Historically, conciliation has worked best when the main issues in a dispute are legal but the parties wish to settle (Merrills 1991, 77). For instance, conciliation was used to wind up the defunct original East African Community in

the 1980s. In response to a request by Kenya, Tanzania, and Uganda, a Swiss diplomat, Victor Umbricht, acted as conciliator to locate and value the EAC's assets and liabilities, propose a formula for dividing them among the member states, and assist in an agreement winding up the organization (Merrills 1991, 65–72).

A number of WTO-model dispute settlement systems in PTAs provide for these alternative dispute resolution mechanisms—because of a preference for consensual settlements, because negotiators view ADR as potentially fruitful and as free or low cost, or as a reaction against the time the WTO takes to determine rights and obtain compliance.<sup>19</sup> For instance, Annex 14-A of the EU–Korea FTA sets out a mediation procedure for nontariff measures affecting industrial products. The parties can appoint a single mediator who is a subject matter expert and who would use an informal, confidential process to help the parties clarify the problem and its trade effects and reach a mutually agreed solution. The process is agnostic regarding rule violations. The mediation process, and the positions taken in the process, are confidential and would not be admissible in dispute settlement. The EU–CARIFORUM EPA similarly provides for nonbinding, confidential mediation by agreement between the parties to a dispute and for keeping a roster of mediators.

As the COMESA example discussed above illustrates, ADR can serve as a useful channel through which the other members of a PTA can focus efforts in a practical, time-effective way on removing a PTA member's illegal trade barriers; the benefits of providing for ADR in a PTA are speculative but are very likely to exceed any cost. Formal ADR mechanisms may also offer a pathway for less formal diplomatic settlement. Further empirical research would be useful to determine the extent to which the parties to existing PTAs use ADR in practice, the disputes they use it for, the solutions produced by ADR, and factors leading to the success or failure of ADR. The use of ADR may well be underreported in the existing literature because it may not be characterized as dispute settlement and because the internal records of ADR proceedings are usually not publicly available.

### **Implementation, Compliance, and Sanctions in PTA Dispute Settlement**

When an ad hoc panel, arbitral tribunal, or other third party produces its decision, the process of rights determination may be complete, but trade agreement enforcement is far from done. The WTO DSU procedures recognize this by outlining an organized compliance process.

WTO compliance procedures begin by requiring the party found in breach of the agreement to set a deadline for

compliance, through negotiations or an arbitration process, with a 15-month benchmark for the compliance deadline. During the period before the deadline, the complying party must report on its actions, and after the deadline elapses, if compliance has not occurred, the Dispute Settlement Body will authorize the complainant to suspend concessions or other obligations under the WTO, in an amount equivalent to the nullification or impairment (trade damage) caused by the breach of the rules. If there is a dispute regarding compliance, it must be settled under the DSU by recourse (whenever possible) to the original panel; a dispute regarding the amount of the suspension of concessions must be arbitrated (whenever possible) by the original panel.

PTAs' approaches toward compliance vary. PTAs based on diplomatic or political settlement of disputes rely on settlement by agreement, not sanctions, and a failure to comply with an agreement settling a case simply means the start of another negotiation. In PTAs with standing tribunals, the tribunal remains available to enforce its judgments on a continuing basis, and a strong tribunal may have the power to impose sanctions on a noncomplying government. When the European Commission considers that an EU member state has not complied with a judgment by the ECJ, under Article 260 of the Treaty on the Functioning of the EU, the Commission may issue a reasoned opinion and then bring the case before the ECJ, specifying an appropriate fine; the Court may impose a fine on the member state as a lump sum or on a continuing basis during the period of noncompliance. In the Andean Community, Article 27 of the 1996 treaty establishing the Andean Tribunal requires a member state to comply within 90 days with any tribunal judgment of noncompliance with its Andean Community obligations, and authorizes the tribunal to determine suspension of benefits against a noncomplying state by the claimant state or any other member; the tribunal may decree other measures if such a suspension would be ineffective or would make the situation worse. Under Article 30 of the same treaty, private persons may use the tribunal's verdict as sufficient basis for claiming compensation in domestic courts for damage caused to them by the noncompliance. Because member states have often responded with changes that did not bring them into compliance, the tribunal often mandates that a member state comply and refrain from employing any measure that is contrary to the tribunal's judgment (SIEL 2010).

A PTA ad hoc panel is convened for the limited purpose of deciding a dispute, or making recommendations and rulings to the parties. For this reason, it generally is not given the power to enforce its own decisions; either the PTA itself or the parties to the PTA authorize enforcement-related



actions such as suspension of concessions. U.S. FTAs currently take the following approach, exemplified by the Peru–U.S. FTA. After the panel report, the parties are to agree on the resolution of the dispute. If they cannot agree on elimination of the noncompliance, they must negotiate on compensation. If they cannot agree on compensation, or if the complaining party considers that the defending party has failed to carry out a settlement agreement, the complaining party may notify the defending party that it will suspend concessions, and at what level, and may suspend concessions 30 days later. The defending party can then ask the panel to reconvene to rule on whether it has actually complied or whether the suspension is manifestly excessive. The same approach to compliance and suspension appears in a number of other PTAs—for instance, the Canada–Colombia, Canada–Peru, Canada–Israel, and Thailand–Australia agreements.

Since 2001, U.S. FTAs have provided that concessions may not be suspended if the defending party provides timely notice that it will pay an annual monetary assessment to the complaining party. The assessment amount is set by agreement between the parties, with a fallback to 50 percent of the trade damage determined by the panel or by the complaining party. When the circumstances warrant, the PTA's supervisory body can direct that the assessment be paid into a fund to be spent on initiatives to facilitate trade between the parties. This provision responds to criticism that trade retaliation damages the economies of both parties and harms innocent exporters in the other party, without achieving compliance.

Some countries are unable to accept the U.S. approach to compliance and suspension of concessions because that approach affords very little flexibility regarding the period for compliance and relies in the first instance on the complaining party's unilateral determination regarding compliance. These countries have adopted a different approach patterned on the DSU and on proposals tabled for DSU reform. The ASEAN–Australia–New Zealand agreement, for instance, provides for a DSU-like process for determining the postpanel compliance period by negotiation or by arbitration by the panel. Any disagreement about compliance must be resolved by the original panel, reconvened for this purpose, which hands down a quick ruling. If the defending party states that it will not comply, or if the panel has found a failure to comply, the defending party must negotiate on compensation, and if there is no agreement, the complaining party has the right to suspend concessions equivalent to the nullification or impairment. The defending party can ask the panel to reconvene again if it believes it has complied or that the level of the suspension is excessive (in some agreements, “manifestly excessive”). This pattern

is followed in, for example, the Chile–Japan, EU–Korea, India–Korea, Japan–Indonesia, Japan–Switzerland, and China–New Zealand agreements. In another variation, the original panel determines the level of the suspension when it rules on compliance (e.g., the ASEAN–India Framework Agreement on Dispute Settlement and the Australia–Singapore and China–Singapore PTAs).

Some recent PTAs also provide explicitly for arbitration by the original panel if the defending party believes it has complied with the panel decision after concessions were suspended; examples are the China–New Zealand, EU–Korea, Korea–U.S., and Peru–U.S. agreements. The WTO DSU does not make explicit provision for this situation.

### PTA Disputes: The Experience

We now examine disputes brought using PTA dispute settlement procedures and the written decisions that have resulted from them. A survey of PTA dispute settlement experience presents a mixed picture, complicated by a shortage of organized information and by a definitional question: at what point does a bilateral trade irritant ripen into the status of being a dispute? It is difficult to know the full extent of dispute settlement activity under any PTA, particularly those featuring settlement of disputes by negotiation or by ad hoc panels. Comparison with the WTO is useful and demonstrates that to some extent, disputes are being brought not in PTAs, but in the WTO.

For PTAs with *diplomatic or political dispute settlement*, the true level of dispute activity is unknown and perhaps unknowable. Disputes do exist: for instance, the long-running, legally focused dispute in the EC–Israel Association Agreement regarding the status of products made in the West Bank, East Jerusalem, the Golan Heights, and the Gaza Strip (see Harpaz 2004; Broude 2007). Because these agreements treat dispute settlement as a diplomatic issue, they do not systematically require that panel decisions (if any) or dispute outcomes be public. As Broude (2007) observes, the EU has no official list of disputes under its association agreements, and (at least at the time of that article) there is no group within the European Commission whose job is PTA dispute settlement.

The true level of formal disputes in these agreements may also be low. In the EU's association agreements, either party can block a panel proceeding. Moreover, the lack of detail in the agreements means that the disputing parties must agree on procedures before they can convene a panel, further increasing the burden on a would-be disputant. A dispute may simmer for years as a diplomatic issue without going through any formal process. Garcia Bercero (2006) mentions a long-standing dispute between Turkey and the

EU over nonadoption of the EU *acquis* on pharmaceuticals, and a dispute between the EU and Ukraine was blocked because of disagreement on how to split the costs of the arbitration. In a PTA with no third-party dispute settlement procedures at all—for instance, the Closer Economic Partnership Agreement between China and Hong Kong SAR, China—no dispute can even be considered unless both parties recognize it exists.

There are also selection effects at work; as Broude (2007) observes, the EU's partners in its association agreements have not even litigated much in the WTO. Thus, PTAs with diplomatic or political dispute settlement arrangements may attract governments that do not place a high value on enforcement. And in the EU context, some issues that might have been litigated in bilateral dispute settlement, such as the application to PTA members of rules of origin or border trade measures, have instead been litigated in the EU courts (see, e.g., ECJ 2010b).

*Tribunal-based PTA dispute settlement* has an extremely broad range. The ECJ and its related supranational court system, benefiting from abundant resources at the EU level and linking to the domestic court systems in EU member states, have handled thousands of cases since 1952. By contrast, some African PTA tribunals, struggling with lack of infrastructure or resources, have little or no reported activity. The Andean Tribunal falls somewhere in the middle; 85 tribunal cases against members for noncompliance were initiated during the period 1987–2006, although much of the Andean Tribunal's work focuses on relatively narrow intellectual property issues (Helfer and Alter 2009). The República Bolivariana de Venezuela's 2006 withdrawal from the Andean Community eliminated a significant number of pending disputes about Venezuelan trade measures.<sup>20</sup>

*Panel-based dispute settlement* has also been quite variable, but there have been relatively few panel decisions or arbitral awards. There have been 25 known decisions in PTA formal proceedings, relating to 16 disputes, as listed in annex B. By comparison, in the WTO (1995 through March 3, 2011) there have been 423 WTO complaints; 136 panel reports; 78 Appellate Body reports; 28 panel reports and 18 Appellate Body reports in compliance proceedings; and 45 arbitration awards of various types.<sup>21</sup> As in the WTO, the disputes formally raised under PTAs may substantially exceed the number of panel reports. Information available on dispute settlement under Chapter 20 of NAFTA indicates that whereas there have been only 3 reports of Chapter 20 panels from 1994 through March 1, 2011, at least 11 disputes in this period were settled or were abandoned after formal consultations.

Why are PTA dispute levels so low? The first, and primary, reason is that so many PTAs are very new, and bene-

fits are still being phased in. It is natural for a PTA to postpone implementation for difficult sectors to the latest point possible (as for sugar and Mexican corn in NAFTA, for instance). If implementation is postponed, so are disputes about failure to implement. The implication is that an upsurge can be expected in the future. Second, PTA institutions, and the repeated contacts they involve, provide opportunities to avoid or proactively resolve disputes, diminishing the amount of trade conflict. Third, where a market access dispute can be brought either in the WTO or in a PTA, the WTO may be a more attractive forum for complainants for several reasons: the WTO's familiar institutions and unblockable dispute settlement; the desire to be able to mobilize greater pressure against illegal denial of market access by suspending MFN tariffs and other WTO obligations (particularly where the PTA's margin of preference is low); the larger pool of neutral panelists in the WTO; the broader issue scope of the WTO compared with some PTAs; the possibility of forming alliances; access to technical assistance such as the Advisory Centre for WTO Law; and the price tag. (The system cost of WTO dispute settlement is included in a member's annual assessment, but in most PTAs the parties pay the panelists or pay for the cost of the tribunal.)

The list of disputes in annex B, however, shows that some real issues can only be dealt with through PTA dispute settlement. Among them is denial of rights that are only created by the PTA agreement, such as preferential market access, or application of preferential rules of origin. Because Mercosur creates a right of free circulation, Uruguay brought and won a dispute in Mercosur against Argentina's toleration of blockades on international bridges. Moreover, where the MFN tariff rate is high (35 percent for all the Mercosur countries), the PTA, and the enforcement of PTA rights, may be essential for obtaining real market access, as is shown by the high number of Mercosur panel proceedings listed in annex B. The Mercosur partners have fully litigated 12 disputes in the Mercosur forum, but they have only litigated three disputes against each other in the WTO, and two of those concerned antidumping measures not covered by Mercosur.

## Conclusions

Since the beginning of the world economic crisis in 2008, protectionist measures have increased. PTA negotiation has increased as well, both as an economic life raft and in reaction to the lack of progress in multilateral trade liberalization. Reports on Mercosur, for instance, indicate an increase in pure border protection measures such as nonautomatic import licensing by Argentina, sectoral

private voluntary restraints on exports to Argentina precipitated by import licensing, and up-valuation of imports using reference prices, which have affected almost 11 percent of Argentina's imports from Brazil and 22 percent of its imports from China (INTAL 2010). And Mercosur is not the only jurisdiction involved: elsewhere there are also tariff increases, valuation issues, new preshipment inspection requirements, buy-local or buy-national requirements, export restrictions on strategic materials, and other restrictions on trade in goods and services (Evenett 2010). All these measures have been put in place with no great apparent upsurge in PTA dispute settlement.

Periods of sustained unemployment are a difficult time to push back against protection, but a rollback will be needed when recovery occurs—and in order for recovery to occur. Both WTO and PTA dispute settlements and institutions will have a part to play, and it will be a considerable challenge. Only time will tell whether these institutions will do their job in helping move governments away from crisis protectionism.

Some practical conclusions of use to negotiators emerge from the discussion in this chapter.

- Every PTA has to have a way of settling disputes, and a PTA that promotes growth needs enforcement provisions. Economic projections of the gains from a PTA are based on the assumption of 100 percent compliance with the PTA's obligations. Ensuring compliance through enforcement is essential if the projected gains are to materialize. Even if no disputes are anticipated, enforcement provisions in a PTA reinforce the precommitment of the governments, make their promises more credible, and signal that the PTA is a solid platform for investment that will create jobs and economic growth.
- PTAs create public goods, in the form of economic growth, transparency, and stability in the trading regime and an environment for trading goods and services based on the rule of law. They also promote open regionalism by strengthening institutions to make trade liberalization more transparent, less exclusionary to traders outside the PTA, and more accessible to firms investing in the PTA area.
- The best time to reach agreement on fair rules to settle disputes is during the PTA negotiation, and in advance of any known dispute.
- Even if the parties start with low ambitions, experience demonstrates that stronger, more ambitious rules can evolve later.
- Most PTA dispute settlement procedures are now based on those in the WTO, but negotiators remain free to add

to, subtract from, or vary those procedures. There is no reason not to borrow from other PTAs' creative and constructive ideas for addressing dispute settlement.

### **Annex A. Dispute Settlement in CUSFTA and NAFTA**

Since the early 1990s, almost all dispute settlement procedures in preferential trade agreements have been based on referral of disputes for decision by ad hoc panels. This "NAFTA model" started with the Canada–U.S. Free Trade Agreement (CUSFTA) in 1988 and underwent minor revisions in NAFTA. The choices made in 1988 and 1993 remain influential today, and so it is useful to examine some key decisions and the rationales described by negotiators.

The CUSFTA negotiations took place against a background of increasing trade conflict, particularly over U.S. trade remedies. According to Canada's dispute settlement negotiator, Canada's overarching goal for the negotiation was to obtain secure access to the U.S. market, which meant obtaining agreement to binding dispute settlement (von Finckenstein 2000). Canada sought a permanent tribunal that could bind both parties and issue remedial orders. The United States preferred ad hoc panels; it wanted to avoid creating a new bureaucracy or a tribunal that might see itself as an independent player in bilateral relations and might be perceived as telling the U.S. government what to do, and it wished to preserve a right to retaliate for noncompliance (Hart, Dymond, and Robertson 1994, 302). The FTA eventually included two dispute settlement procedures: binational review (Chapter 19) for antidumping and countervailing duty decisions, and government-government procedures for other disputes (Chapter 18). Chapter 18 was designed to address both sides' objections about GATT dispute settlement procedures: the GATT process was too lengthy and could be delayed; it involved panelists from other countries who might not have the required expertise; and it provided no certainty regarding adoption or implementation of panel reports (von Finckenstein 2000).

Chapter 18 provided a specific timetable, a standing roster of panelist candidates, and procedures designed to prevent most ways of blocking dispute settlement. It established a ministerial-level commission to oversee the functioning of the agreement and to administer disputes. In a provision sought by Canada, disputes could address not just actual measures but also proposed measures such as pending legislation. The dispute process included consultations, referral to the commission, and then referral to a panel for arbitration. Arbitration would be binding only if

the parties agreed (or if the disputes concerned safeguards). In CUSFTA disputes, as it turned out, the parties never chose nonbinding arbitration (von Finckenstein 2000).

As for panel composition, CUSFTA called for five-person panels composed of two citizens from each side, chosen wherever possible from a standing roster. If a party failed to appoint its panelists, they would be selected from the roster by lot. The fifth panelist would be selected jointly and, in the absence of agreement, would be chosen by the four already selected panelists, or by lot. In practice, the two sides initially decided by lot (by coin flip) which party would choose the panel chair, and they then discussed candidates (Winham 1993). The panel then provided an initial report and a final report responding to any objections by the parties.

If, after receipt of a final panel report, the commission was not able to reach agreement on a settlement within 30 days, and a party considered that its fundamental rights or benefits under CUSFTA would be impaired by implementation or maintenance of the measure at issue, that party would be free to suspend CUSFTA benefits of equivalent effect. At the time, the GATT did not automatically authorize suspension of concessions.

Because CUSFTA incorporated by reference the GATT provisions on national treatment and quantitative trade restrictions, the negotiators also included a choice of forum provision. Article 1801(2) provided that disputes arising under both CUSFTA and the GATT could be settled in either forum, at the discretion of the complaining party, but that once an election of forum had been made by initiation of dispute settlement, the procedure initiated would be used to the exclusion of any other. This provision gave the complaining party the option to choose the strongest substantive and procedural rules, while duplicative proceedings were ruled out.

NAFTA's Chapter 20 continues the framework of CUSFTA Chapter 18, with a few changes.

- Because NAFTA is trilateral, Chapter 20 gives intervention rights to a NAFTA party not involved in a dispute, including rights to attend hearings and to receive and make submissions; the procedures also allow for two-complainant cases.
- Chapter 20 makes provision for a consensus roster of 30 individuals experienced in law, international trade, and dispute settlement. Each party selects two panelists who are citizens of the other disputing country. The selection cannot be blocked if a panelist is on the agreed roster.
- Because panels under Chapter 18 had visibly split on national lines, views in Chapter 20 panel reports are anonymous.

- The provision on choice of forum remains, and before a NAFTA party initiates a WTO dispute against another party on grounds substantially equivalent to those available to it under NAFTA, it must consult with the third party. If the three cannot agree, the dispute must normally be settled under NAFTA.

A few changes responded to environmental concerns. NAFTA's Article 103 gives precedence to obligations under five environmental treaties. In a WTO dispute between NAFTA parties, if the responding party claims that its measures are subject to Article 103, the complaining party can only bring a NAFTA dispute. Similarly, if a dispute between NAFTA parties concerns sanitary and phytosanitary (SPS) measures or environmental standards, the responding party can insist that the dispute be pursued only under NAFTA. A panel or a party can request a scientific review board on factual issues concerning environmental, health, safety, or other scientific matters. All of these changes responded to criticism that GATT panels and GATT rules were hostile to environmental regulation.

## **Annex B. PTA Dispute Settlement: Ad Hoc Panel Decisions**

In comparison with experience in the GATT and the WTO, ad hoc panel proceedings under preferential trade agreements (PTAs) have yielded relatively few completed decisions. The known panel decisions are listed and briefly described here. The sources for this annex are Davey (1996); Reich (1996); Grebler (2003); Tussie and Delich (2005); Gantz (2006); Barral (2007); SIEL (2010); Mercosur arbitral awards on the Organization of American States (OAS) website at [http://www.sice.oas.org/Dispute/mercosur/ind\\_s.asp](http://www.sice.oas.org/Dispute/mercosur/ind_s.asp); and newspaper reports.

### ***Canada-U.S. FTA (1988–93), Chapter 18***

1. *Canada's landing requirement for Pacific Coast salmon and herring*, final report, October 16, 1989. At issue was a Canadian landing requirement that replaced GATT-inconsistent export restrictions on certain fish.
2. *Lobsters from Canada*, final report, May 21, 1990. The case involved a U.S. ban on interstate transport or sale of whole live lobsters smaller than a minimum size.
3. *Article 304 and the definition of direct cost of processing or direct cost of assembling*, final report, June 8, 1992. The complaint concerned a U.S. rule that did not allow certain nonmortgage interest payments to count toward meeting CUSFTA rules of origin.

4. *The interpretation of and Canada's compliance with Article 701.3 with respect to durum wheat sales*, final report, February 8, 1993. The United States claimed that sales of durum wheat by the Canadian Wheat Board for export to the United States violated a CUSFTA ban on a government entity's selling products for export at a loss (that is, at a price below the acquisition price of the goods, plus storage, handling, and other costs incurred with respect to those goods).
5. *Puerto Rico regulations on the import, distribution and sale of ultra-high-temperature (UHT) processed milk from Quebec*, final report, June 3, 1993. The case concerned milk standards in Puerto Rico.

#### **Israel–U.S. FTA**

*Machine tools from Israel*, settled informally after the panel report. The dispute concerned the U.S. decision to count imports of machine tools assembled by Sharnoa Ltd., in Israel, from parts from Taiwan, China, against the U.S. import quota for machine tools from Taiwan, China.

#### **NAFTA (Since 1994)**

1. *Tariffs applied by Canada to certain U.S.-origin agricultural products*, final report, December 2, 1996. The dispute was brought by the United States against Canada's maintenance of tariff-rate quotas on certain dairy and poultry products after full tariff elimination. Examining the relationship between the CUSFTA chapter on agricultural trade, the Uruguay Round tariffication of agricultural import quotas, and NAFTA, the panel found no breach by Canada.
2. *U.S. safeguard action taken on broom-corn brooms from Mexico*, final report, January 30, 1998. The dispute brought by Mexico concerned the application of global safeguard action on broom-corn brooms to imports of such brooms from Mexico. The panel found the measure in breach.
3. *Cross-border trucking services*, final report, February 6, 2001. In a dispute brought by Mexico, the panel found a U.S. breach of the NAFTA commitment to permit operation of Mexican trucking firms in four U.S. border states. After U.S. congressional action terminating the pilot program for Mexican trucking, Mexico, on March 19, 2009, announced suspension of NAFTA concessions (i.e., an increase in tariffs to most favored nation, or MFN, levels) on imports of 90 products from the United States.

Other matters settled or abandoned after consultations but before panel proceedings concerned uranium exports

(United States v. Canada, 1994); import restrictions on sugar (Canada v. United States, 1995); restrictions on small-package delivery (United States v. Mexico, 1995); restrictions on tomato imports (Mexico v. United States, 1996); the Helms-Burton Act (Mexico and Canada v. United States, 1996); Mexican rebalancing for U.S. safeguards on broom-corn brooms (United States v. Mexico, 1996); restrictions on sugar imports (Mexico v. United States, 1998); farm products blockade (Canada v. United States, 1998), bus service (Mexico v. United States, 1998); sport fishing laws (United States v. Canada, 1999); and restrictions on potatoes (Canada v. United States, 2001).

#### **Mercosur (Since 1998)**

1. *Application by Brazil of restrictive measures to trade with Argentina*, award, April 28, 1999. The panel found that Brazilian import-licensing requirements on imports from Argentina breached the Mercosur treaty and recommended compliance by December 31, 1999.
2. *Subsidies on production and export by Brazil of pork to Argentina*, award, September 27, 1999. The panel rejected claims by Argentina regarding a system for corn stocking and Brazil's advances on exchange contracts. It found that use of the PROEX export-financing program by Brazil was only acceptable for capital goods.
3. *Application by Argentina of safeguard measures on textiles from Brazil*, award, March 10, 2000. The panel found that Argentina's application of safeguards to textiles was incompatible with the Mercosur legal regime and ordered revocation of the safeguard measure within 15 days. Brazil brought a complaint about the same textile safeguard to the WTO Textiles Monitoring Body and requested a WTO panel (WT/DS190), which was established on March 20, 2000. The parties notified a settlement to the WTO in June 2000.
4. *Application of antidumping measures on imports of whole chickens from Brazil*, award, May 21, 2001. The panel found that Mercosur law did not regulate the application of antidumping measures and rejected the claim by Brazil. Brazil then took the same dispute to the WTO (WT/DS241) and prevailed there.
5. *Market access restrictions in Argentina on bicycles imported from Uruguay*, award, September 23, 2001. Argentina treated Uruguayan bicycles made by one company as non-Mercosur in origin and therefore subject to the common external tariff. The panel ruled that this measure violated Argentina's Mercosur obligations and ordered its revocation and the restoration of market access.

6. *Brazilian import ban on remolded tires from Uruguay*, award, January 9, 2001. The panel found that Brazil's ban on imports of remolded tires was incompatible with the Mercosur standstill on new trade restrictions. Brazil later defended related measures in the WTO, raising environmental defenses not mentioned in the Mercosur proceedings.
7. *Barriers to entrance of Argentine phytosanitary products into the Brazilian market*, award, April 9, 2002. The panel found that Brazil had failed to implement in its domestic law five Mercosur Common Market Group resolutions designed to create a streamlined phytosanitary system for evaluating and registering food. It found that Brazil was obligated to implement these measures within a reasonable period of time and that six years was not reasonable; the panel ordered enactment within 120 days.
8. *Application of Uruguay's specific internal taxes on the sale of cigarettes*, award, May 21, 2002. The panel found that Uruguay's method of calculating taxes on imported cigarettes discriminated against Paraguayan cigarettes, denying national treatment. It ordered Uruguay to cease discrimination within six months.
9. *Uruguayan subsidies for processing of wool*, award, April 3, 2003. The panel found that Uruguayan export subsidies for processed wool products exported to Mercosur were inconsistent with Mercosur law and had to be eliminated within 15 days.
10. *Discriminatory and restrictive measures by Brazil on trade in tobacco and tobacco products*, award, August 5, 2005. Uruguay brought a complaint concerning a Brazilian decree raising tariffs on tobacco and tobacco products to 150 percent. Brazil repealed the decree during the proceedings.
11. *Argentine ban on imports of remolded tires*, award, October 25, 2005. In the first case under the Protocol of Olivos, the panel found that the Argentine ban was consistent with Mercosur law.
12. *Appeal by Uruguay of award on Argentine ban on imports of remolded tires*, award, December 20, 2005. The appellate tribunal reversed the award, finding that the Argentine measure was incompatible with Mercosur laws.
13. *Request for ruling regarding excess in compensatory measures in the dispute between Uruguay and Argentina on the prohibition of imports of remolded tires from Uruguay*, award, June 8, 2007. The appellate tribunal found that the Uruguayan compensatory measure was proportional and lawful.
14. *Review of tribunal decision regarding Argentine compliance with the tribunal award on remolded tires*, award, April 26, 2008. The tribunal found that Argentina had not brought itself into compliance and that until it did, Uruguay had the right to maintain compensatory measures.
15. *Failure by the Argentine state to adopt appropriate measures to prevent and/or cease impediments to free circulation caused by blockages in Argentine territory of access roads to the international bridges General San Martín and General Artigas, which connect Argentina and Uruguay*, award, September 6, 2006. Uruguay challenged Argentina's failure to act against environmental groups that blocked international bridges between Uruguay and Argentina from December 2005 to May 2006 to protest the construction of pulp mills in Uruguay. Uruguay argued that the blockage injured imports, tourism, and transport, in violation of Mercosur guarantees of free circulation of goods, services, and factors of production via the elimination of quantitative restrictions and measures of equivalent effect. The panel largely agreed. The underlying dispute concerned Argentina's objections to the construction of pulp mills in Uruguay, which Argentina separately appealed to the International Court of Justice.
16. *Interlocutory appeal by Argentina objecting to selection of the panel chairman in the free circulation dispute*, award, July 6, 2006. The tribunal rejected Argentina's appeal as inadmissible under Mercosur rules and assessed all costs and expenses of the proceeding against Argentina.

#### Other

*Chilean price bands (application of price-band tariffs on imports of vegetable oils)*. (a) Bolivia brought a dispute against Chile in 2000 under Chapter XIII of the Bolivia–Chile (LAIA/ALADI) Economic Complementation Agreement 22, which provides that a dispute settlement panel decision is fully binding on the parties. Chile then reimbursed the safeguard duties collected. (b) Argentina brought a complaint in 2000 under the Administrative Commission of the Mercosur–Chile (LAIA/ALADI) Economic Complementation Agreement 35, which provides that a panel decision is nonbinding. After Argentina prevailed but Chile failed to comply, in October 2000 Argentina brought a dispute in the WTO (WT/DS207, *Chile–Price Band System and Safeguard Measures Relating to Certain Agricultural Products*), and prevailed in 2002. Argentina later prevailed in WTO compliance proceedings in 2007 but has not suspended concessions.

## Notes

The views expressed herein do not represent those of any present or past client or employer.

1. CUSFTA and NAFTA panel decisions are available from many sources, including the NAFTA Secretariat website, <http://www.nafta-sec-alena.org/>. Panel decisions of CUSFTA, NAFTA, and Mercosur, as well as the texts of PTAs involving Western Hemisphere countries, are available at the website of the Organization of American States (OAS) Foreign Trade Information System, <http://www.sice.oas.org/>.

2. During the period 1996–2000, the OAS Trade Unit prepared an inventory of dispute settlement in the Western Hemisphere (FTAA 2000), as an input for the Free Trade Area of the Americas (FTAA) Negotiating Group on Dispute Settlement. The FTAA negotiations have been stalled since 2003, but the inventory remains a useful snapshot of these provisions as they stood in 2000. Considerable information on dispute settlement and institutions in Latin America and the Caribbean is available at the websites of Mercosur, the Andean Community (CAN), the Central American Court of Justice, the Caribbean Court of Justice, and regional institutions, including the OAS, the Inter-American Development Bank (IADB), the secretariat of the Latin American Integration Association/Asociación Latinoamericana de Integración (LAIA/ALADI), and the United Nations Economic Commission for Latin America and the Caribbean/Comisión Económica para América Latina (ECLAC/CEPAL). The last-named organization maintains a database on trade agreement dispute settlement, “Base de Datos Integrada de Controversias Comerciales de América Latina y el Caribe/Integrated Database of Trade Disputes for Latin America and the Caribbean,” <http://badicc.eclac.cl/>.

3. CAN, “Procesos del Tribunal de Justicia: Acciones de Incumplimiento” (updated list of all Andean Tribunal noncompliance proceedings), <http://www.comunidadandina.org/canprocedimientosinternet/ListaExpedientes11.aspx?CodProc=7&TipoProc=%27S%27>.

4. *Ibid.*

5. Andean Community Decision 680 of 2007 (authorizing ATJ budget for fiscal year 2008), <http://www.comunidadandina.org/normaativa/dec/D680.htm>.

6. Investir en Zone Franc (IZF) website, <http://www.izf.net/pages/institutions-afrique---zone-uemoa-et-cemac/2199>. The site contains information on trade and investment in the Central and West African franc zones, including the legislation and jurisprudence of WAEMU/UEMOA and CEMAC. Information on legal systems in francophone Africa is also found at <http://www.archive.org>.

7. African International Courts and Tribunals (AICT), <http://www.aict-ctia.org/>.

8. The term “nonviolation nullification or impairment” comes from the pioneering work by Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (Hudec 1975).

9. Nonviolation remedies apply as follows in the PTAs studied: Chile–Japan, only for the chapters on trade in goods; India–Korea, Korea–Singapore, Panama–Singapore, Canada–Costa Rica, Canada–Chile, Canada–Colombia, and Chile–Peru, goods and services; Panama–Taiwan, China, goods, services, and TBTs; El Salvador–Honduras–Taiwan, China, goods, services, SPS measures, and TBTs; Chile–Central America, goods, services, TBTs, and aviation; Chile–Colombia and the Trans–Pacific SEP, goods, services, TBTs, and procurement; Nicaragua–Taiwan, China, goods, services, TBTs, SPS measures, and IPRs; and Chile–Australia, goods, services, TBTs, procurement, and IPRs.

10. Examples include the general cooperation chapters in the following PTAs: China–New Zealand, Japan–Mexico, Japan–Malaysia, Japan–Philippines, Japan–ASEAN, ASEAN–Australia–New Zealand, Australia–Thailand, and Korea–Singapore.

11. Examples include intellectual property cooperation provisions in the Japan–Philippines and Japan–Thailand PTAs and the competition policy cooperation obligations of the Australia–Chile, Australia–Thailand, ASEAN–Australia–New Zealand, Australia–U.S., Peru–U.S., and SACU–EFTA PTAs.

12. This is the case for the Japan–Mexico, Japan–Chile, Australia–Chile, ASEAN–Australia–New Zealand, Chile–U.S., and Singapore–U.S. agreements.

13. *Res judicata* is the legal doctrine that once a case has been determined, neither party can bring the same claims regarding the same subject matter against the other in another court. *Lis alibi pendens* is the legal doctrine that proceedings regarding the same facts cannot be commenced in a second court if the *lis* (i.e., action) is already *pendens* (pending) in another court.

14. The two disputes brought under CUSFTA rather than the GATT were those on Canada’s landing requirement for Pacific Coast salmon and herring (final report October 16, 1989) and on lobsters from Canada (final report May 21, 1990).

15. PTAs that require model rules of procedure include NAFTA and all later U.S. PTAs; the Mercosur Protocol of Olivos; the Singapore–GCC, Chile–EU, Chile–Australia, Chile–Colombia, Chile–Central America, ASEAN–China, and Korea–Singapore PTAs; the ASEAN Enhanced DSM; and the Trans–Pacific SEP.

16. Appointing authorities named in PTAs include the WTO Director-General (e.g., the China–New Zealand, ASEAN–Japan, Japan–Malaysia, Japan–Vietnam, and New Zealand–Singapore PTAs and the Trans–Pacific SEP), the Secretary-General of the Permanent Court of Arbitration in the Hague (e.g., the Japan–Switzerland and Canada–EFTA PTAs), or a regional secretariat (the Mercosur Administrative Secretariat for disputes under the Mercosur Protocol of Olivos, and the ASEAN Secretary-General for the ASEAN Enhanced DSM).

17. Participation by another PTA member is permitted by NAFTA, the ASEAN Enhanced DSM, the Trans–Pacific SEP, and the ASEAN–Australia–New Zealand, Canada–EFTA, Colombia–EFTA, Japan–ASEAN, China–ASEAN, Chile–Central America, and CAFTA–DR agreements.

18. Examples of provisions for stakeholder input are the EU Trade Barriers Regulation, U.S. Section 301, and China’s analogous legislation.

19. Examples of PTAs with provisions for alternative dispute resolution include China–New Zealand (Article 187), Thailand–Australia (Article 1803), Singapore–Australia (Article 16.3), the Trans–Pacific SEP (Article 15.5), NAFTA (Article 2007) and later U.S. FTAs, and the ASEAN Enhanced DSM, which authorizes good offices, mediation, or conciliation by the ASEAN secretary-general (Article 4).

20. CAN, “Procesos del Tribunal de Justicia: Acciones de Incumplimiento.”

21. “Facts and Figures on WTO Dispute Settlement,” <http://www.worldtradelaw.net>.

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