In Search for an Optimal Legal/Institutional Framework for the Americas : Dispute Settlement Mechanisms of NAFTA and MERCOSUR

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Institutional options in dispute settlement designs

Spectrum of legalism

	More diplomatic ←		→ More legalistic
1) Third-party review	None	Access controlled by political body	Automatic right to review
2)Third-party ruling	Recommendations	Binding if approved by political body	Binding
3)Judges	*Ad hoc* arbitrators	*Ad hoc* panelists drawn from roster	Standing tribunal of judges
4)Standing	Countries only	Countries and treaty organs	Countries, treaty organs and private parties
5)Remedies	None	Retaliatory sanctions	Direct effect in domestic law

（Source : McCall Smith 2000: 143)

Enhanced legalization of regional integration in the Americas during the last decade

1 Expansion of standing to include non-state actors (MERCOSUR)

2 Frequent use of DS mechanisms triggered by non-state actors (NAFTA Chapter 11)

3 Strengthened third party dispute settlement mechanisms (MERCOSUR)

DS mechanisms of the NAFTA

1 Chapter 20 procedure

2 Chapter 19 procedure

3 Chapter 11 procedure

4 DS procedure under Environmental Side Agreement

5 DS procedure under Labor Side Agreement

Chapter 20 procedure

① Consultation (Arts.2003,2006)
↓ (30 days)
② Free Trade Commission (Arts.2007.4-6)
(good offices, conciliation, mediation)
↓ (30 days)
③ Arbitral panel (Art.2008)
（Final report including recommendation, Art.2018)
↓ (non-compliance within 30 days)
④ Retaliation (Art.2019)

Chapter 19 procedure

An independent panel of five panelists reviews a final AD/CVD determination of a competent investigating authority of a Party to decide whether such determination was in accordance with the AD/CVD law of the importing Party.

- no prior consultation, no FTC mediation
- applicable law – AD/CVD law of the importing Party
- alternative to judicial review within the importing Party
- private actors (exporters/producers) have *de facto* standing (Art.1904.5)

Chapter 11 procedure

To settle investor-to-state disputes through arbitration under ICSID or UNCITRAL

- Private investors of a NAFTA Member have standing.
- Applicable law – Chapter 11 rights and obligations (national treatment, MFN treatment, fair and equitable treatment, compensation for expropriation, etc.)
- Arbitral awards binding and enforceable under domestic courts

This repudiated the Calvo doctrine – epoch making policy change for Mexico.

DS under Environmental/Labor Side Agreements

- Against “a persistent pattern of failure .. to effectively enforce its environmental (labor) law”

① consultation
↓ (60 days)
② mediation by the Council (cabinet-level)
↓ (60 days)
③ Arbitral panel
↓ (240 days)
final report
↓ (no deadline)
④ action plan
↓ (no deadline)
⑤ monetary sanction

Case record of the NAFTA DS procedures : Mixed

1 Frequently used:

Chapter 19 procedure (87 panel decisions)

Chapter 11 procedure (44 cases, finished and pending combined)

2 Rarely used:

Chapter 20 procedure (3 panel reports)

3 Never used:

DS under Environmental/Labor Side Agreements

What were the reasons?

Chapter 19 procedure - Exporters/producers preferred this to domestic judicial review

Chapter 20 procedure – Supplementary to WTO DS procedure

Chapter 11 procedure – Global trend of investor-state arbitration. Not only Mexico (15), but Canada (13) and U.S. were subject to investor claims.

Interpretative Note of the FTC (31 July 2001)

DS procedure under the Side Agreements – Not a workable DS, but a political response to the environmental NGOs and labor unions.

Dispute settlement mechanism of MERCOSUR

Treaty of Asunción (1991), Annex III : Dispute settlement (transitory mechanism)

① Direct negotiation

↓

② Common Market Group（GMC)

↓ (60 days)

recommendations

↓

③ Common Market Council（CMC)

↓

recommendations

Dispute settlement under the Brasilia Protocol (1994)

(1) State-to-state dispute settlement
① Direct negotiation
↓
② Mediation/recommendation by the GMC
↓
③ Ad hoc arbitral tribunal (Articles 8-24)

(2) Claims by private actors (Articles 25-32)
① Claims to National Section of the GMC
↓
② Report of a group of experts
↓
③ Corrective measures → (1)③ in case of failure

Dispute settlement under the Olivos Protocol (2002)

(1) State-to-state dispute settlement

- Basic three-layer structure (direct negotiation-mediation by the GMC-*ad hoc* Arbitral Tribunal) plus Permanent Review Tribunal
- Forum choice (Article 1.2)

(2) Claims by private actors (Articles 39-44)

Inherited the Brasilia Protocol

Investor-state arbitration under the Colonia Protocol (1994)

Arbitration under the ICSID or UNCITRAL Arbitration rules.

Still inactive:

① Brazil reluctant to recognize foreign arbitral awards

② Failure to establish common regime on foreign investment

Case record of the MERCOSUR DS mechanisms

- A strong bias toward diplomatic settlement (consultation, diplomatic negotiation and “presidential diplomacy”)
- Short list of awards of ad hoc tribunals and the Permanent Review Tribunal (13 in total)
  - not because of preference to WTO DS but because of preference to diplomatic settlement

① Flexibility and gradualism (even setback) in regional integration

② Paucity of substantive rules

- Inactive use of private actors’ claims procedure
  - legalism gave way to sovereignty

And the FTAA?

- FTAA negotiation stalled in November 2005.Little chance of its reconvening in the near future.
- Proliferation of FTA negotiations in the Americas

  (*e.g.*, U.S.-Chile FTA (2003); Mexico-Uruguary FTA (2003))

Dispute settlement mechanisms under the FTAA

– A forecast

① Binational AD/CVD review panel not feasible
② Investor-state arbitration procedure will be included
③ State-to-state dispute settlement procedure

Arbitration and forum choice feasible, but difficult to foresee the actual implementation

(End of presentation)