

THE UNITED STATES AND THE EXPANSION OF WESTERN HEMISPHERE FREE TRADE: PARTICIPANT OR OBSERVER?

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I. INTRODUCTION

This Article provides a brief summary of the North American Free Trade Agreement (NAFTA), followed by a selective narrative of some highlights of the operation of the Agreement after three years. It then discusses the problems and prospects relating to the expansion of the NAFTA to other nations, such as Chile, and the proposal for a "Free Trade Agreement of the Americas," both as a NAFTA-centric entity and otherwise.

As of April 1997, it appears to this writer that the pressures in favor of free trade and against protectionism are sufficiently strong in the Western Hemisphere to assure expansion of free trade. This seems likely to occur initially through multiple bilateral or regional multilateral agreements, with a good chance of a near-hemisphere-wide agreement by the end of the first decade of the third millennium. However, it appears that the U.S. government, because of a lack of political and economic will, is likely to be largely an observer rather than an architect of this process, at least in the early stages, with the MERCOSUR group (Argentina, Brazil, Paraguay, and Uruguay) as well as Canada, Mexico, and Chile ultimately having the upper hand in determining the form and structure of hemispheric free trade arrangements.

II. OVERVIEW OF THE NAFTA

A. General

The NAFTA entered into force among the U.S., Mexico, and Canada on January 1, 1994.¹ It thereby established a free trade area with more than 365 million persons² and a gross national product of \$6.5 trillion.³ Its complex and

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA]; see North American Free Trade Agreement Implementation Act of 1993, 19 U.S.C. §§ 3301-3473 (Law Co-op. Supp. 1996) [hereinafter NAFTA Implementation].

2. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS (1991). Two hundred fifty-five million in the United States, twenty-seven million in Canada, and eighty-eight million in Mexico. *Id.*

detailed provisions, comprising several thousand pages of text and tariff schedules, have impacted the operations of virtually all firms that do business in or export goods or services to North America.

This comprehensive Agreement, which governs trade in goods and services as well as in investments and intellectual property, is notable for its broad coverage. It provides for removal of all intra-regional tariffs within fifteen years and removal of essentially all non-tariff barriers. It also incorporates comprehensive rules, *inter alia*, for treatment of foreign investment; government procurement; trade in services, including financial and transportation services; customs procedures; technical standards; sanitary and phytosanitary standards; protection of intellectual property; trade in agriculture, energy, and basic petrochemicals; temporary immigration entry for business purposes; appeals of administrative decisions; appeals in anti-dumping and countervailing duty trade actions; and comprehensive settlement of disputes among the governments concerning the application or interpretation of NAFTA provisions.⁴

The Canada-U.S. Free Trade Agreement (CUSFTA) dealt with many of the same areas.⁵ In most respects, the NAFTA supersedes the CUSFTA, and prevails in cases of inconsistency except where it specifically indicates otherwise.⁶ The principal area in which the CUSFTA continues to govern pertains to the tariffs applicable to bilateral trade between the U.S. and Canada. These will be eliminated by January 1, 1998.⁷ However, the NAFTA goes much further. It specifies rules for the treatment of foreign investment and provides international arbitration for resolution of disputes between foreign investors and host states; it mandates minimum levels of intellectual property protection;⁸ and it requires each country, principally Mexico, to incorporate certain procedural due process standards into its domestic law as a condition of enjoying the benefits of NAFTA trade-dispute resolution.⁹ Perhaps most notably, the NAFTA incorporates parallel agreement mechanisms, unprecedented in free trade agreements (FTAs), to

3. INTERNATIONAL MONETARY FUND (1991). For the U.S.-\$567 trillion dollars, for Canada \$570 billion, and U.S. \$284 billion for Mexico. *Id.*

4. NAFTA, *supra* note 1, *passim*.

5. Canada-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., ch. 19, 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter CUSFTA].

6. NAFTA Implementation, *supra* note 1, § 107 (amending 19 U.S.C. § 2112) (providing that the CUSFTA would be "suspended" for such period as the NAFTA remains in force); *see also* NAFTA, *supra* note 1, art. 103(2), 32 I.L.M. at 297 (providing that in the event of a conflict between the NAFTA and other trade agreements, the NAFTA prevails).

7. CUSFTA, *supra* note 5, art. 401(2), 27 I.L.M. at 306.

8. NAFTA, *supra* note 1, ch. 17, 32 I.L.M. at 670.

9. *Id.* Annex 1904(15), 32 I.L.M. at 684. Like the CUSFTA, the NAFTA does not alter the substantive anti-dumping or countervailing duty laws of the parties, which are governed largely by multilateral rules under GATT 1994 and the World Trade Organization agreements.

require and monitor local enforcement of labor and environmental laws and regulations.¹⁰

B. Rules of Origin

The NAFTA is perhaps best understood if it is recognized as a "preferential" rather than a free trade agreement. Many in the U.S. had long expressed concern that Asian companies had been using Mexico as an "export platform" from which Asian parts and components would undergo final assembly and then be exported to the U.S. duty-free. Mexico, for its part, desired to assure that the NAFTA would serve as a tool for medium- and long-term economic development and industrialization. These concerns dictated that every effort be made to assure that the benefits of free trade would accrue to companies located in Mexico, the U.S., or Canada.¹¹ The NAFTA accomplishes this by detailed rules of origin that are designed to assure that, where import-sensitive products are concerned, extensive manufacturing processes and certain materials or components, a fixed minimum percentage of the total value, or both, be of North American origin.¹² For example, automobiles will ultimately require 62.5% "regional value content"

10. See North American Agreement on Environmental Cooperation of September 14, 1993, 32 I.L.M. 1482 (1993) [hereinafter Environmental Agreement]; North American Agreement on Labor Cooperation of September 14, 1993, 32 I.L.M. 1502 (1993) [hereinafter Labor Agreement].

11. See David A. Gantz, *Rules of Origin Under NAFTA*, in MAKING FREE TRADE WORK IN THE AMERICAS 52, 53 (B. Kozolchik ed., 1993).

12. NAFTA, *supra* note 1, art. 401, 32 I.L.M. at 349. However, the majority of products are not subject to these special rules. The general rules for "originating goods" are as follows:

(a) the good is wholly obtained or produced in the territory of one of the NAFTA parties;

(b) each of the non-originating materials used in the production of the good undertakes the required tariff change as a result of production taking place entirely in the territory of one or more of the NAFTA parties, or otherwise meets the rules of origin in Annex 401;

(c) the good is produced entirely in the territory of one or more of the parties exclusively from originating materials; or

(d) except for certain textiles, the good is produced entirely in the NAFTA region, but one or more non-originating materials do not undergo the required tariff change, because (i) the good was classified as an assembled good or (ii) the final product and the components are both classified under the same heading or subheading, provided that the regional value content is at least 60% (transaction-value method) or 50% (net-cost method). *Id.* The "transaction-value," top-down, method analyzes the "regional value content" based on the portion of the total transaction (usually customs or export) value comprised of materials originating within the NAFTA region. The "net-cost," bottom-up, method follows a production cost approach. *Id.* art. 402, 32 I.L.M. at 349.

(calculated as a percentage of the "net cost") to qualify as having North American origin and be eligible for free trade.¹³ Textile and clothing products follow the "yarn forward" rule, meaning that all materials used to make the product, from the "yarn forward," must be of North American origin if the product is to enjoy duty-free treatment.¹⁴

Obviously, when a particular good is wholly obtained or produced in the territory of one or several of the NAFTA parties, from materials originating in the region, there can be no doubt of NAFTA origin.¹⁵ In most other instances, even where a finished product is not wholly the product of the region, the NAFTA uses the international Harmonized System (HS) tariff-change rule of origin.¹⁶ Generally, this means that if the materials and components are classified under one tariff category, and the finished goods under another category, the finished product is deemed to originate in the nation where the change in tariff category took place. For example, a bathtub classified under heading 6910, HTSUS,¹⁷ is considered to be of North American origin if all of the imported materials entered the region under a different HTSUS chapter—for example, kaolin under heading 2507.¹⁸

The NAFTA, unlike the Canada-U.S. Free Trade Agreement, has a *de minimis* rule: if parts or components worth less than seven percent of the transaction value fail to undergo the tariff change, the product will still qualify for NAFTA origin.¹⁹ Where a product does not meet the HS tariff-shift standard, it may still qualify for NAFTA origin if the regional value content of the good is at least sixty percent of the transaction value or at least fifty percent of the net cost of the good.²⁰

C. Dispute Settlement Mechanisms

The NAFTA and its two "parallel" agreements on labor and the environment²¹ incorporate a broad and sometimes confusing variety of mechanisms for resolving disputes regarding the interpretation and application of certain NAFTA provisions in specific situations. The principal dispute

13. *Id.* art. 403(5)(a), 32 I.L.M. at 351. Initially, 50% rising to 56% in 1998 and 62.5% in 2002.

14. *Id.* Annex 401, 32 I.L.M. at 349.

15. *Id.* art. 401(a), (c), 32 I.L.M. at 349.

16. *Id.* art. 401(b), Annex 401, 32 I.L.M. at 349, 397.

17. U.S. INTERNATIONAL TRADE COMMISSION, HARMONIZED TARIFF SCHEDULES OF THE UNITED STATES (1995).

18. NAFTA, *supra* note 1, annex 401, 32 I.L.M. at 401-53.

19. *Id.* art. 405(1)(b), 32 I.L.M. at 352.

20. *Id.* art. 401(d), 32 I.L.M. at 349.

21. Environmental Agreement, *supra* note 10, 32 I.L.M. 1482; Labor Agreement, *supra* note 10, 32 I.L.M. 1502.

resolution provisions relate to investment;²² financial services;²³ appeals of anti-dumping and countervailing duty administrative decisions;²⁴ interpretation and application of the agreement generally;²⁵ failure to enforce environmental laws;²⁶ and failure to enforce labor laws.²⁷ While there is no NAFTA provision that furnishes an alternative dispute resolution mechanism for private disputes, each NAFTA party is committed to steps which will facilitate such procedures in the future.²⁸

D. Limitations

The NAFTA, of course, has its limitations. Except with regard to trade in computers and computer peripherals,²⁹ it does not establish a common external tariff. The U.S., Canada, and Mexico remain free, restrained only by their obligations under the World Trade Organization, to set "most favored nation" tariff rates on imports from outside North America. Nor can the NAFTA be a solution to all of the problems relating directly or indirectly to trade and commerce within North America. It does not deal at all with illegal immigration or the illicit drug trade, or with the negative impact of drug-related corruption on Mexico's investment climate or on Mexico's political relationship with the U.S. Neither does it establish any common monetary or economic policies, although the Free Trade Commission established under Chapter 20 provides a basis for consultations "regarding any actual or proposed measure or any other matter that it considers might affect the operation of this agreement,"³⁰ a basis clearly broad enough to encompass monetary actions.³¹ Coordination of such policies, when it occurs, is derived not from the NAFTA, but from the economic realities of long common borders and a complex web of economic, political, and historical relationships.

Although the NAFTA's financial services provisions should eventually encourage greater competition in the Mexican banking, insurance, and brokerage

22. NAFTA, *supra* note 1, ch. 11, 32 I.L.M. at 639.

23. *Id.* ch. 14, 32 I.L.M. at 657.

24. *Id.* ch. 19, 32 I.L.M. at 682.

25. *Id.* ch. 20, 32 I.L.M. at 693.

26. Environmental Agreement, *supra* note 10, 32 I.L.M. 1482.

27. Labor Agreement, *supra* note 10, 32 I.L.M. 1502.

28. NAFTA, *supra* note 1, art. 2022, 32 I.L.M. at 698; *see November 1996 Report of the NAFTA Advisory Committee on Private Commercial Disputes to the NAFTA Free Trade Commission* <<http://www.iep.doc.gov/nafta/report96>.

29. NAFTA, *supra* note 1, Annex 308(A), 32 I.L.M. at 314.

30. *Id.* art. 2006, 32 I.L.M. at 694.

31. *Id.* art. 2104, 32 I.L.M. at 700-01. Article 2104 of the NAFTA establishes a limited exception for balance of payments measures which requires a government invoking such rights to obtain IMF approval and limits parties' restrictions on cross-border trade in financial services. *Id.*

industries,³² the NAFTA does not itself deal with the structural changes in Mexican law that would facilitate consumer and small business access to credit. Harmonization of commercial and other laws affecting the free movement of goods, services, and capital depends to a great degree on the activities of private entities, such as the National Law Center for Inter-American Free Trade in Tucson, Arizona, its sister entity, the Instituto de Investigaciones Jurídicas in Mexico City, and other public and private institutions. Also indispensable is the willingness of national, state, and local governments to move toward fuller economic integration.

Moreover, it is evident that the NAFTA itself will not ensure that necessary structural reforms or adjustments will take place in any of the three countries. While the NAFTA arguably will not have a significant impact on U.S. employment, it does not address the longer-term problem of the shift of labor-intensive production to lower-wage-cost countries, including but not limited to Mexico, with U.S. corporate downsizing. Nor, in Mexico, does it ensure that the obvious restructuring necessary in such disparate areas as the court system, secured financing, subsistence farming, petroleum exploration and marketing, transportation, insurance, and competition in the telecommunications sector, among others, will take place. Without such internal changes, it is obvious that the full potential benefits of the NAFTA for both Mexico and the U.S. will never be realized.

III. NAFTA AFTER THREE YEARS

NAFTA implementation to a great extent has simply occurred as expected, in itself a significant accomplishment. The specific issues discussed below should be considered to be an illustrative, subjective list of some highlights, rather than a comprehensive analysis. They reflect the fact that for the U.S., one of the major benefits was to "lock-in" free market reforms in Mexico, guarding U.S. investors and exporters against back-sliding and protectionism, as happened with the 1982 Mexican peso devaluation, but was not even considered in the 1994 crisis.³³ More generally, it should be remembered that the NAFTA itself will not be fully implemented for fifteen years. The full impact of the Agreement on the U.S., Mexico, and Canada can be accurately assessed only in the long term.

32. *Id.* Annex VII (Mexico), at VII(B)-M-13, 14, 17, 32 I.L.M. at 775. For example, under the NAFTA, U.S. banks are limited to aggregate ownership of 8% of the Mexican banking industry, increasing to 15% by 1999, and disappearing entirely in the year 2000. *Id.*; J. COM., Oct. 19, 1994, at A2. In October 1994, the Mexican Ministry of Finance approved applications for 18 U.S. banks, 16 brokerage houses, 12 insurance companies, 5 financial groups, and a Citibank leasing company to establish Mexican subsidiaries. *Id.*

33. See Julia Scheeres, *NAFTA Works Better than Expected*, EL FINANCIERO (Int'l Edition), Feb. 10-16, 1997, at 3 (quoting U.S. Ambassador to Mexico James Jones).

A. Tariff Elimination

The focal point of the NAFTA, tariff reduction and elimination, has proceeded as scheduled under the Agreement, based on the various phase-out schedules incorporated in Chapter 3.³⁴ While some sixty percent of the Mexican goods exported to the U.S. became duty free as of January 1, 1994, many other such exports, and most exports from the U.S. and Canada to Mexico, remain dutiable today, although at reduced levels. Because the process is largely automatic, it has seldom been interrupted. For example, the Mexican peso crisis did not affect applicable tariffs on intra-NAFTA trade (although Mexico raised duties on certain products from third countries); U.S. exports decreased because Mexican individuals and companies saw their buying power severely curtailed. On the other hand, efforts to accelerate the NAFTA's tariff reductions have had only very limited success.³⁵

B. Trade Volume

Canada remains the largest trading partner of the U.S., with two-way trade exceeding \$289 billion in 1996; Mexico is third, with two way trade of \$130.2 billion.³⁶ Total U.S.-Mexico trade (exports and imports) continues to grow, from \$81.6 billion in 1993 to \$100.3 billion in 1994, \$108.0 billion in 1995, and an estimated nearly \$130 billion in 1996. However, a \$2 billion U.S. trade surplus with Mexico in 1993 and a \$1.2 billion surplus in 1994 became a \$15.9 billion deficit in 1995, and the deficit for 1996 reached nearly \$16 billion.³⁷ The deficit with Canada was almost \$22 billion.³⁸

U.S. trade with Mexico is likely to remain at a significant imbalance throughout the rest of the twentieth century,³⁹ even though Mexico's negative 9% growth in 1995 became a 5.1% positive growth rate in 1996, and, according to the Organization for Economic Cooperation and Development, Mexico is

34. NAFTA, *supra* note 1, art. 302(2), Annex 302(2), 32 I.L.M. at 309-10.

35. J. COM., Mar. 24, 1997, at 5A. The NAFTA parties, after several years of negotiations, announced in March that duties on 38 items would be eliminated July 1, 1997, rather than in 2005. These goods represent less than 1% of total U.S.-Mexican trade in 1996. *Id.*

36. U.S. CENSUS BUREAU THE OFFICIAL STATISTICS, FOREIGN TRADE DIVISION, TOP TEN COUNTRIES WITH WHICH THE US. TRADES (Dec. 1996).

37. U.S. CENSUS BUREAU, FOREIGN TRADE DIVISION, EXPORTS, IMPORTS AND BALANCE OF GOODS BY SELECTED COUNTRIES AND GEOGRAPHIC AREAS—1996 (Nov. 1996).

38. *Id.*

39. Amy Borrus et. al., *Singing the NAFTA Blues*, BUS. WEEK, Dec. 9, 1996, at 55 (quoting Lawrence Chimerine, Chief Economist, Economic Strategy Institute). "It will be years before we reverse these large deficits with Mexico . . . the best we can hope for is that the deficit comes down gradually." *Id.*

expected to rise to 6% in 1997.⁴⁰ The decline of the peso from approximately 3.3 to the dollar in November 1994 to approximately 7.8 to the dollar currently is primarily responsible for the shift in trade. Mexican goods, particularly those using domestic inputs, including labor, are substantially cheaper in dollar terms, and hard currency imports correspondingly more expensive, even for the limited number of companies and individuals that have funds, or credit, to purchase them.

C. Financial Services

Mexico's opening of the financial services sector is proceeding more rapidly than required under the NAFTA due to Mexico's critical need of additional capital. Under the NAFTA, as of January 1, 1994, U.S. banks were permitted to own 8% of the Mexican banking industry in the aggregate, with the percentage to increase to 15% after seven years, at which point the limit is to disappear.⁴¹ The U.S. securities industry was permitted an initial 10% interest, rising in increments to 20% over the seven-year period,⁴² with all restrictions eliminated thereafter.⁴³ Existing U.S. and Canadian insurance joint venturers in Mexico will be able to acquire 100% ownership by 1996; new entrants may obtain a majority interest by 1998.⁴⁴ Mexico's financial crisis, beginning in December 1994, has encouraged the Mexican government to increase the extent to which foreign financial institutions can acquire equity ownership in Mexican banks to 49%, and to accelerate the opening of the Mexican financial sector to foreign investment more generally.⁴⁵

D. Truck and Bus Transport

The U.S. had until very recently refused to implement the NAFTA requirements that as of December 18, 1995, Mexican trucks be provided direct access to the four U.S. border states, and U.S. trucks to the ten Mexican border states.⁴⁶ Although safety concerns have been cited as the basis for this refusal, labor union pressures on the Clinton Administration in an election year were

40. *OECD Cautiously Optimistic in Outlook for Mexican Economy*, Int'l Bus. & Fin. Daily (BNA), at D-2 (Jan. 10, 1997).

41. NAFTA, *supra* note 1, Annex VII-B-5, 9 (Mexico), 32 I.L.M. at 774.

42. *Id.*

43. *Id.* Annex VII-B-9, 32 I.L.M. at 774. During the ensuing four-year period, Mexico has the right to freeze the aggregate foreign capital percentage at 25% for commercial banks or 30% for securities firms for a maximum of three years. *Id.*

44. *Id.* Annex VII-C-4 (Mexico), 32 I.L.M. at 775-76.

45. "Amendments to the Law to Regulate Financial Groups and the Law of the Securities Market," D.O., Feb 15, 1995, *reprinted in* INTER-AMER. TRADE & INVESTMENT, Feb. 24, 1995, at 255.

46. NAFTA, *supra* note 1, Annex I-M-69,70, I-U-20, 32 I.L.M. at 737, 746-47.

suspected.⁴⁷ While Mexico immediately sought consultations under the NAFTA dispute settlement mechanism,⁴⁸ it did not press the issue during the U.S. election campaign. Domestic opposition remains in the U.S.,⁴⁹ but the Clinton Administration apparently decided in January 1997 to comply with the U.S.' NAFTA obligations in this respect, and the issue may be resolved by mid-1997.⁵⁰ The U.S. also has delayed access for the scheduled passenger bus services required under Chapter 12 of the NAFTA as of December 21, 1996.⁵¹

E. Unfair Trade Actions

The NAFTA does not alter the parties' anti-dumping laws (except procedurally with regard to Mexico),⁵² although Mexico and Canada continue to press the U.S. to eliminate anti-dumping actions among the three parties.⁵³ Given the enormous value of trade among the NAFTA nations, there has been a continuing volume of anti-dumping cases among the parties. A number of these have reached the Chapter 19 dispute settlement mechanism.⁵⁴ Among the more

47. *Mexico Asks United States for Consultation on Trucking Delay*, Int'l Trade Daily (BNA), at D-3 (Dec. 21, 1995). The Teamsters Union had unsuccessfully sought from the U.S. federal courts an injunction against U.S. implementation of regulations that would have permitted the approval of applications from Mexican trucking firms seeking access to the U.S. border states. *Id.*

48. *Id.*

49. *NAII (National Association of Independent Insurers) Urges Clinton to Retain Moratorium on Mexican Trucks*, Int'l Trade Daily (BNA), at D-2 (Jan. 23, 1997).

50. *NAFTA Transport Accord Imminent, Ambassador Says*, Int'l Trade Daily (BNA), at D-8 (Mar. 5, 1997). Mexican trucks entering the U.S. are no less safe than those of U.S. motor carriers, according to experts speaking at a meeting of the Border Trade Alliance. *Id.* at D-7.

51. *U.S. Delays Allowing Mexican Bus Companies to Operate under NAFTA*, Int'l Trade Daily (BNA), at D-2 (Jan. 3, 1997); *International Trade Outlook: Agriculture, Mexican Buses, Among Many NAFTA Issues*, Int'l Trade Daily (BNA), at D-10 (Jan. 27, 1997) [hereinafter *Agriculture, Mexican Buses*]. The U.S. Department of Transportation is expected to issue rules soon which will allow scheduled Mexican buses to obtain operating authority. The principal concern is, again, safety, but U.S. officials believe that because Mexican standards for buses are higher than for trucks, the problem is less complex. *Id.*

52. NAFTA, *supra* note 1, Annex 1904.15 (Schedule of Mexico), 32 I.L.M. at 689-90.

53. *Mexico, Canada to Seek Halt to U.S. Antidumping Action*, Int'l Trade Daily (BNA), at D-4 (Dec. 24, 1996).

54. See, e.g., *In the Matter of the Mexican Antidumping Investigation into Imports of Cut-to-Length Plate Products from the United States*, Panel No. MEX-94-1904-02 (Aug. 30, 1995); *In the Matter of Poliestereo Crystal e Impacto from the United States and Germany*, Panel No. MEX-94-1904-03 (Sept. 12, 1996); *Imports of Flat Coated Steel Products from the United States*, Panel No. MEX-94-1904-01 (Sept. 27, 1996).

significant new anti-dumping cases was an action brought by Florida growers against Mexican tomatoes, which ultimately resulted in a suspension agreement in which Mexican growers agreed to raise the prices on tomatoes imported into the U.S.⁵⁵ The first ever safeguards action brought by U.S. broom corn manufacturers under NAFTA Chapter 8 resulted in tariff relief for a three-year adjustment period.⁵⁶ However, Mexico exercised its right to retaliate, increasing tariffs on table wines, wine coolers, brandy and bourbon whiskey; wood office and bedroom furniture; flat glass; telephone number notebooks; and sugar, fructose, and syrup products.⁵⁷ It is not coincidental that all of these products were items for which the Clinton Administration had sought accelerated tariff reductions beyond the levels guaranteed under the NAFTA.⁵⁸ Mexico has also sought consultations under the dispute resolution provisions of NAFTA Chapter 20.⁵⁹

F. Qualifying for Preferential Tariff Treatment

Duty-free or preferential duty treatment is available only for goods that are considered of NAFTA origin ("originating goods").⁶⁰ The calculations required to demonstrate a particular regional value content for originating goods—necessary under the NAFTA rules of origin for some import-sensitive products—have proved to be onerous, particularly for smaller exporters and importers which lack extensive in-house expertise in accounting. A decision to claim NAFTA benefits, if mistaken, exposes the importer not only to a difficult and expensive audit, but also to subsequent payment of duties, interest, and possible penalties. Anecdotal evidence suggests that many smaller traders, whose goods would be subject to low U.S. tariffs even without the NAFTA, are foregoing NAFTA tariff benefits because of the costs of record-keeping requirements and the risks of audits.⁶¹

55. Fresh Tomatoes from Mexico; Investigation Suspension, 61 Fed. Reg. 58,217 (1996); *see also* Fresh Tomatoes from Mexico, USITC Pub. 2967, Inv. No. 731-TA-747 (Preliminary) (1996) (determining that there is a reasonable indication of material injury to a U.S. industry as a result of imports of tomatoes from Mexico).

56. Action Under Section 203 of the Trade Act of 1974 Concerning Broom Corn, 61 Fed. Reg. 64,439 (1996). Action was taken under sections 202 and 203 of the Trade Act of 1974, as amended, and section 311(a) of the North American Free Trade Agreement Implementation Act. *Id.*

57. *Mexico Raises Tariffs on U.S. Goods in Response to Broom Corn Safeguard*, Int'l Trade Daily (BNA), at D-8 (Dec. 16, 1996).

58. INSIDE NAFTA, Dec. 25, 1996, at 5.

59. *Mexico Calls for NAFTA Panel on U.S. Broom Corn Safeguards*, Int'l Trade Daily (BNA), at D-7 (Jan. 16, 1997).

60. NAFTA, *supra* note 1, art. 302(2), 32 I.L.M. at 300.

61. *See* David A. Gantz, *Implementing the NAFTA Rules of Origin: Are the Parties Helping or Hurting Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 367, 396 (1995).

G. Investment

The NAFTA, particularly Chapter 11, was designed to encourage foreign investment in Mexico and for Mexico may well be the most important chapter of the Agreement. However, Mexico, as a condition of the NAFTA, was required to agree to phase out the "maquiladora" program, a duty-drawback based system that, during the period 1965-1994, resulted in the establishment of more than 2,000 factories, primarily but not exclusively in the border region, with production valued at over \$26 billion annually.⁶² While the longer-term effects of the NAFTA may be to encourage movement of foreign-owned factories away from the border—particularly if the attractiveness of the Mexican domestic market increases—the trend for the past two years has been toward increased investment and employment for all maquilas, including those in the border area.⁶³ Employment in the maquila industry grew 20.3% in the first eleven months of 1996 to a total of over 811,000 workers.⁶⁴ Direct foreign investment in Mexico during the three year period 1994-96, including but not limited to the border plants, is estimated by the Mexican government at \$25 billion.⁶⁵ This is undoubtedly due in part to the peso devaluation, resulting in a reduction of Mexican wage costs by more than one third in dollar terms. However, tariff benefits, NAFTA's stringent rules of origin with local content requirements, the elimination of duty drawback in the year 2001,⁶⁶ and, more recently, Mexico's resurging popularity as a destination for both direct and portfolio

62. U.S.-MEXICO FREE TRADE REP., Sept. 1, 1994, at 4 (citing 1994 data, Research Department, El Paso Branch-Federal Reserve Bank of Dallas).

63. EL FINANCIERO (Int'l Edition), May 27-June 2, 1996, at 14. Maquila employment increased by 98% in 1995 over 1994, to approximately 639,000 workers, according to the National Council of Maquila Industries. *Id.* Total direct investment declined from approximately \$10.972 billion to \$6.984 billion in 1995—still a very impressive figure—and although there are no separate data it is reasonable to assume that a substantial portion was in the maquila industries. *Id.* (citing Bank of Mexico data).

64. *Maquiladora Employment Rose 20.3 Percent in November*, J. COM., Jan 31, 1997, at 3A (citing Mexican government data).

65. Dr. Luis de la Calle, *Mexico's View on the NAFTA*, 14 ARIZ. J. INT'L & COMP. L. 295. (speech given by Dr. de la Calle, Director of the NAFTA Office, Embassy of Mexico, Washington, D.C., on Feb. 28, 1997 in Tucson, Arizona).

66. NAFTA, *supra* note 1, art. 303, 32 I.L.M. at 300. Under duty drawback and similar duty deferral programs, import duties on parts and components may be refunded to the importer when the finished goods using the parts and components are exported. Under the NAFTA, for parts and components imported from outside the region, such refunds after January 1, 2001, are limited to the smaller of the duties on the finished goods exported to another NAFTA country, or the duties on the imported parts and components. Thus, if the finished goods are duty free under the NAFTA, as will be the case with most intra-regional trade by 2001, no duty refunds on parts and components will be available, and duty-free parts and components from within the region will gain a significant comparative advantage. *Id.*

investment,⁶⁷ obviously helped. The NAFTA's growing impact on parts and components suppliers is reflected in the fact that Mexican value added by maquilas in the aggregate is growing at a much more rapid rate—63% in 1996 over 1995—than maquila employment.⁶⁸ Ownership of the maquilas remains overwhelmingly U.S. and Mexican.⁶⁹

Asian investment has also increased in Mexico. For example, the Korean television industry has invested in excess of \$500 million in television and picture tube facilities since 1991, and total electronics industry employment in the Tijuana area alone is estimated at 24,576.⁷⁰ Two of the Korean giants, Daewoo and Samsung, have or are establishing highly capital-intensive color picture tube manufacturing facilities in Mexico, in addition to television assembly facilities. This is arguably due to the fact that, for most large screen televisions, NAFTA duty-free import status when the televisions enter the U.S. is available only when the picture tube is of North American origin.⁷¹ Whether this is desirable or not depends on one's point of view: The NAFTA has helped create jobs in Mexico, in this instance largely at the cost of jobs in Asia, by shifting color picture tube production from Korea and Malaysia (among others) to Mexico or the U.S. However, economists might well argue that the diversion of television component production from Asia to Mexico is a distortion of the principle of comparative advantage, if an Asian picture tube can be produced more cheaply than one produced in Mexico or the U.S. as a result of the NAFTA rules of origin. In any event, increased regional production of parts and components was the result envisioned by the NAFTA.

H. U.S. Employment

Perhaps nowhere has the impact of the NAFTA been more controversial than with regard to its impact on U.S. employment. Proponents and opponents initially predicted job gains or losses, respectively, in the hundreds of thousands. U.S. adjustment assistance to workers has resulted in certification of NAFTA-

67. See David Wessel, *Flow of Capital to Developing Nations Surges Even as Aid to Poorest Shrinks*, WALL ST. J., Mar. 24, 1997, at A13. The World Bank reports that total private capital flows to Mexico were \$28.1 billion in 1996, second only to China in the developing world. *Id.*

68. *Maquiladora Employment Rose 20.3 Percent in November*, *supra* note 64.

69. *Fed Economist Credits NAFTA with Job Growth in Textile Apparel Maquiladoras*, Int'l Trade Daily (BNA), at D-6 (Jan. 9, 1997) (citing Mexican Ministry of Trade data). For 1995 registrations, 37.7% were U.S. owned, 14% were mixed U.S. and Mexican ownership, 42.6% were Mexican owned, 2% were Japanese, and 3.7% were owned by others. *Id.*

70. See Anthony DePalma, *Economics Lesson in a Border Town, Why that Asian TV has a 'Made in Mexico' Label*, N.Y. TIMES, May 23, 1996, at C1, C5.

71. NAFTA, *supra* note 1, Annex 401, 8508.10(bb), 32 I.L.M. at 435.

related job losses in the range of 109,000 through January 1997,⁷² largely through U.S. factories closing and moving to Mexico. Even today, there is no conclusive data on net U.S. job losses and gains, in part because job losses when a plant closes are easier to document than incremental job gains, and in part because so many extraneous factors affect U.S. employment. A recent Congressional Budget Office study suggests that the net job gains as a result of the NAFTA approach 250,000,⁷³ and other administration officials have suggested that the NAFTA has brought 311,000 new jobs.⁷⁴ However, an independent study has recently suggested that both job losses and job gains have been significantly overstated by analysts, that the impact of the NAFTA on U.S. employment overall is negligible, and that the top priority for protecting and increasing U.S. jobs "is to implement policies to ensure that Mexican growth is sustainable."⁷⁵ Anecdotal evidence suggests that factories in Mexico are generating new demand for high-tech U.S.-source parts and components, with increasing job opportunities for well-trained U.S. workers, but not for those with minimal skills.⁷⁶

I. Resolution of Disputes

Most of the various NAFTA dispute resolution mechanisms are being used. A total of twenty-four cases had been filed under the trade dispute review mechanism provided by Chapter 19 as of December 30, 1996. Eight of those challenged U.S. final dumping or countervailing duty determinations, nine challenged Canadian government decisions (one of which was withdrawn), and seven challenged Mexican determinations. Proceedings have been completed in six U.S., four Canadian, and two Mexican cases; proceedings have been terminated by the parties' requests in one U.S., two Mexican, and four Canadian actions, and are continuing in the rest.⁷⁷ The U.S. and Canadian decisions appear in most

72. See Letter from Richard Gephardt, U.S. House of Representatives Minority Leader, to Democratic Colleagues 11 (Feb. 26, 1997) [hereinafter Gephardt Letter]; Raul Hinojosa Ojeda et al., *North American Integration Three Years After NAFTA: A Framework for Tracking, Modeling and Internet Accessing the National and Regional Labor Markets* 5 (Dec. 1996) (unpublished research, North American Integration and Development Center) (on file with author).

73. Bob Christman, *NAFTA-Sparked Job Loss a Myth, Trade Chief Says*, ARIZ. DAILY STAR, May 29, 1996, at B3 (quoting USITC Chairman Peter Watson citing Data from the Congressional Research Service).

74. INSIDE U.S. TRADE, Mar. 7, 1997, at 6.

75. Ojeda, *supra* note 72, at 5.

76. Helene Cooper, *Labor Mismatch: Nogales, Arizona Throws a Post-NAFTA Party, But Locals Miss Out*, WALL ST. J., Mar. 21, 1997, at A1.

77. See NAFTA SECRETARIAT, U.S. SECTION, STATISTICAL SUMMARY OF DISPUTE SETTLEMENT PANELS UNDER THE NAFTA AND THE CUSFTA (1997) [hereinafter STATISTICAL SUMMARY].

material respects to be similar to those issued under the CUSFTA. The first three Mexican cases break new ground in the sense that there is no jurisprudence in Mexican courts relating to review of unfair trade practice decisions by administrative agencies, and the binational panels have had difficulties in resolving controversies over the panels' jurisdiction and standard of review, as well as functioning in two languages.⁷⁸ As the U.S., Mexico and, to a lesser extent, Canada, are among the world's most frequent users of the anti-dumping laws, the volume of cases can be expected to continue to grow. Forty-nine panel review cases were filed during six years under the CUSFTA, and three extraordinary challenge procedures were filed.⁷⁹

Several actions have been or are being brought under the investment protection provisions of Chapter 11. An action by the Ethyl Corporation seeks \$150 million from the government of Canada as a result of new Canadian legislation that blocks imports of the gasoline-enhancing product MMT. Arbitration has been requested under the UNCITRAL rules.⁸⁰ The second, brought by Metalclad Corporation, charges a taking by Mexican authorities as a result of that government's alleged breach of contractual arrangements authorizing the installation and operation of a hazardous waste disposal site in San Luis Petosi.⁸¹ A third relates to a landfill project in Mexico, where it is alleged that the municipality breached the contract and "appropriated" the enterprise.⁸² To date, no cases have been brought under the financial dispute settlement provisions of Chapter 14 of the NAFTA.

In August 1995, the U.S. sought recourse under Chapter 20, charging that the NAFTA required Canada to eliminate duties on certain dairy products, notwithstanding certain "tarification" (conversion of quantitative restraints to tariffs) steps taken by Canada pursuant to the WTO agreements. A five person panel preliminarily decided in favor of Canada's position,⁸³ and ultimately determined that Canada's actions were consistent with the NAFTA.⁸⁴ Chapter 20 consultations have been requested formally or informally in several other matters,

78. See Gustavo Vega-Canovas, *Disciplining Anti-dumping in North America: Is NAFTA Chapter Nineteen Serving its Purpose?*, 14 ARIZ. J. INT'L & COMP. L. 481, at 499-501.

79. *Id.* The extraordinary challenges related to pork, live swine, and softwood lumber. *Id.*

80. See *Ethyl Col Files Claim Against Canada Citing Ban on Fuel Additive*, WALL ST. J., Apr. 15, 1997.

81. Telephone interview with Mr. Grant Kessler, Metalclad Corporation (Jan. 23, 1997).

82. *First Chapter 11 Requests for Arbitration with Mexico Filed*, Int'l Trade Daily (BNA), at D-2 (Mar. 26, 1997).

83. *U.S. Sees Little Hope of Reversing NAFTA Dairy, Poultry Ruling*, INSIDE U.S. TRADE, July 19, 1996, at 4 (discussing the interim NAFTA Panel Decision on US./Canada Dairy/Poultry Dispute of July 15, 1996).

84. *NAFTA Panel Upholds Canada in Dispute over High Tariffs on US. Dairy Products*, Int'l Trade Daily (BNA), at D-3 (Dec. 4, 1996).

including the U.S. Helms-Burton legislation and the U.S. safeguards applied to broom corn brooms.⁸⁵ The volume of consultation requests under Chapter 20 suggests that the number of inter-governmental disputes requiring binding resolution under the Chapter 20 mechanism will be far greater than was the case under the CUSFTA, where only five disputes in five years resulted in panel reviews.⁸⁶

IV. NAFTA AS A MODEL—OR STARTING POINT—FOR OTHER HEMISPHERIC AGREEMENTS

At the Summit of the Americas at Miami in 1994, the presidents of the Western Hemisphere nations (except Cuba) agreed as follows:

We, therefore, resolve to begin immediately to construct the "Free Trade Area of the Americas" (FTAA) in which barriers to trade and investment will be progressively eliminated. We further resolve to conclude the negotiations of the "Free Trade Area of the Americas" no later than 2005, and agree that concrete progress toward the attainment of this objective will be made by the end of this Century.⁸⁷

It is apparent that the leaders of the Western Hemisphere nations, led by the U.S., were prepared in December 1994 as never before to seek multilateral elimination of tariffs and non-tariff barriers as a means of promoting "democracy, free trade and sustainable development in the Americas." The U.S., Canada, and Mexico, flush from the early success of the NAFTA (and just prior to the Mexican peso devaluation), had made bold plans to expand the NAFTA, first to Chile, then to other hemispheric nations. Two years and two ministerial summit meetings later, that level of enthusiasm seems very naive. U.S. leadership has faltered, NAFTA expansion has proven impossible, and the idea of a U.S.-led FTAA seems very unrealistic. What happened to dampen this North American enthusiasm, and what prospects remain for a Free Trade Area of the Americas?

85. The U.S. has contended that Mexico's limits on the size of the delivery trucks permitted to United Parcel Service in Mexico are inconsistent with Chapter 12 (Services) of the NAFTA, and has requested consultations under the NAFTA, Article 2006. The case has been under discussion for some time, but has not been resolved. STATISTICAL SUMMARY, *supra* note 77. Mexico has requested Chapter 20 dispute resolution for broom corn. *Id.*

86. NAFTA SECRETARIAT, US. SECTION, STATISTICAL SUMMARY, PANEL REVIEWS UNDER CUSFTA CHAPTER 18 (Dec. 1996).

87. Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808 (1995).

A. Political Gridlock and Protectionism in the United States

The Republican Congress which took office in January 1995, and the Clinton Administration were unable for two years to agree on the enactment of any significant trade or trade-related legislation.⁸⁸ The so-called "fast-track" negotiating authority for trade agreements, which provides for a congressional vote in favor of or against a trade agreement but precludes amendment,⁸⁹ expired June 30, 1994, and has not been renewed. Most significantly, the Clinton Administration and Congress have been unable to agree on the extent, if any, to which labor and environmental concerns should be incorporated in trade negotiations. The Clinton Administration, under pressure from the Democratic Party's liberal wing,⁹⁰ has pressed for the inclusion of labor and environmental rules in any expansion of the NAFTA to include Chile, as well as in the planned Free Trade Area of the Americas,⁹¹ with Latin American reaction ranging from lukewarm to hostile.⁹² Republican congressional reaction has been similarly unenthusiastic.⁹³ Undoubtedly, domestic political concerns during an election year also contributed to the failure to obtain fast-track legislation authorizing

88. Miscellaneous Trade and Technical Corrections Act of 1996, H.R. 3815, 104th Cong., 142 CONG. REC. D1025, D1028 (1996). In the final days of the 104th Congress, Congress enacted a technical corrections and miscellaneous tariff bill (the latter the first in several years). Also, in July, Congress extended the generalized system of preferences through May 1997.

89. 19 U.S.C. §§ 2901-06 (1988).

90. See Gephardt Letter, *supra* note 72, at 9-10.

91. INSIDE NAFTA, Mar. 20, 1996, at 7. "Like any other trade issue [labor and environment] need to be addressed if we're going to move to open trade and fair rules by . . . 2005 . . ." (quoting then U.S. Trade Representative Mickey Kantor, speaking to reporters on March 18, 1996); see also *Fast Track Legislation Could be Ready by March*, Int'l Trade Daily (BNA), at D-3 (Feb. 27, 1997).

92. Summit of the Americas, Second Ministerial Trade Meeting, Cartagena, Colombia, March 21, 1996, para. 15, available in <<http://www.ustr.gov/agreements/cartagena.html>>. At the FTAA ministerial meeting in Colombia, in March 1996, a decision as to whether to create a study group on the environment was postponed until 1997. *Id.*; INSIDE U.S. TRADE (Special Report), Mar. 25, 1996, at 5. While the other ministers agreed with the U.S. to keep labor issues "under consideration," they refused to create a working group on labor. *Id.*; *U.S. Revises WTO Plan, Offering to Open Telecom Markets to Foreigners*, Int'l Trade Daily (BNA), at D-3 (Feb. 26, 1996). Parallel efforts to convince the World Trade Organization to include labor rights in its agenda have been met with equal reluctance, according to Richard Eglin, Director of the WTO's trade and investment division. *Id.*

93. Congressman Jim Kolbe (R-Arizona), Speech to the Tucson Metropolitan Chamber of Commerce (Jan. 27, 1997) [hereinafter Kolbe Speech]. Congressman Kolbe, a principal congressional supporter of expanded free trade, has suggested that labor and environmental concerns are extraneous concerns that should not be addressed in the context of trade agreements, although he does not object to their being treated elsewhere. *Id.*

negotiations with Chile on accession to the NAFTA, and with other Latin American countries on a Free Trade Area of the Americas, both of which were effectively abandoned by the Clinton Administration early in 1996.⁹⁴

The U.S.' near paralysis on legislatively-based trade issues in 1995-97 has not been limited to NAFTA expansion authority. The generalized system of preferences, which provides preferential tariff access to the U.S. market for the products of developing countries,⁹⁵ expired July 31, 1995. It was renewed, retroactively, in July 1996, but only through May 1997.⁹⁶ The Export Administration Act, which regulates exports of commodities and technical data that may be sensitive for foreign policy or national security concerns, expired August 20, 1994.⁹⁷ It has not been renewed, largely because of disagreements as to how to deal with software encryption programs.⁹⁸ Bipartisan efforts to afford the small countries of Central America and the Caribbean "parity" with the NAFTA through legislation, so that trade and investment would not be shifted from those nations to Mexico, have been unsuccessful.⁹⁹ The Clinton Administration's 1996 fast-track proposals, apparently pandering to the labor union wing of the Democratic Party, contained so many onerous conditions that it was unlikely that any sovereign Caribbean Basin nation would have sought the benefits provided.¹⁰⁰ Recent studies suggest that some 123,000 jobs have been lost in the Caribbean as a result of investment and trade diversion to Mexico, principally in the textile and apparel industries.¹⁰¹

Arguably, the bipartisan coalition that assured the passage of the NAFTA and the Agreement Creating the World Trade Organization no longer exists in Washington. Even previously staunch free traders such as Robert Dole hedged

94. *McLarty Says Fast Track Ruled out in 1996 for Chilean NAFTA Accession*, Int'l Trade Daily (BNA), at D-2 (May 7, 1996) (quoting White House Counsel Thomas F. McLarty).

95. 19 U.S.C. §§ 2461-65 (1988).

96. *See Generalized System of Preference Needs Reauthorization Funding*, Int'l Trade Daily (BNA), at D-12 (Jan. 28, 1997).

97. Export Administration Act of 1979, as amended by 50 U.S.C. apps. §§ 2401-20 (Supp. V 1993), expired Aug. 20, 1994 [hereinafter Export Act]. The provisions are currently enforced under authority of the International Emergency Economic Powers Act, 50 U.S.C. app. § 1701 (Supp. V 1993); see 19 C.F.R. §§ 768-99 (1996).

98. Export Act, 50 U.S.C. apps. §§ 2401-20.

99. Doreen Hemlock, *Buffeted by Free Trade*, J. COM., Jan. 15, 1997, at 6A (quoting from interview with Richard Bernal). Richard Bernal, U.S. Ambassador to Jamaica, notes that Mexico has displaced the Caribbean Basin countries as the largest source of garment exports to the U.S. as a result of the NAFTA, creating dangerous competition for Jamaica and the Dominican Republic in particular. *Id.*

100. *Industry Support for Administration Parity Plan Fades*, INSIDE NAFTA, Apr. 3, 1996, at 1, 15; see also *Administration Drops CBI Parity Bill from GATT Bill After Union Pressure*, INSIDE NAFTA, Oct. 5, 1994, at 1.

101. Larry Rohter, *Blows from NAFTA Batter Caribbean Economy*, N.Y. TIMES, Jan. 30, 1997, at A1.

their bets, perhaps reacting in part to the isolationist challenges of Patrick Buchanan and Ross Perot, and a Dole Administration would have been expected to "go very slowly on APEC [Asia Pacific Economic Cooperation forum] and the FTAA."¹⁰² The Clinton Administration, perhaps showing the heavy hand of former U.S. Trade Representative and Commerce Secretary Mickey Kantor, was in 1996 clearly more concerned with placating anti-trade labor and environmental groups within the Democratic Party than furthering the cause of open markets and reduction of trade barriers. Ambassador Kantor, among other things, has criticized the U.S. International Trade Commission—an independent agency that determines objectively whether injury to domestic industry exists in dumping, subsidy, and other trade cases—precisely for being independent and objective!¹⁰³

While former White House Counselor Mac McLarty had gone out of his way to praise the NAFTA and Mexico's economic recovery,¹⁰⁴ until recently he was one of the few high-level members of the Administration expressing such sentiments. Mr. McLarty's appointment as the President's special envoy to the Americas is certainly a positive step,¹⁰⁵ as is that of William Daley as Secretary of Commerce.¹⁰⁶ Both the Clinton Administration and members of Congress have professed support for prompt enactment of fast-track negotiations and termed it a "very important issue"¹⁰⁷ and a "high priority."¹⁰⁸ Senior Clinton Administration officials are staunchly defending the NAFTA's benefits to the U.S.¹⁰⁹ However, a much broader shift in political wills will be necessary if current U.S. inaction is to be reversed. Among other things, the Administration will have to be willing to do battle with the leadership of its own party in the House of Representatives, who have indicated that they will support fast-track

102. INSIDE NAFTA, Apr. 17, 1996, at 1 (quoting an un-named Dole advisor).

103. *Kantor Says ITC Criticism Does Not Signal Effort to Reorganize*, INSIDE U.S. TRADE, May 24, 1996, at 17.

104. *McLarty Speech Touts NAFTA, Praises Mexican Debt Repayment*, Int'l Trade Daily (BNA), at D-2 (Apr. 22, 1996).

105. Ambler Moss, *New Hope for Free Trade*, J.COM., Jan. 23, 1997, at 6A.

106. Robert G. Reuters, *William Daley Sworn in as Commerce Secretary*, J. COM., Jan. 31, 1997, at 3A. Dailey, a Chicago attorney who is the brother of Mayor Richard Dailey, assisted President Clinton with obtaining congressional support for the NAFTA in the fall of 1993 and was sworn in as Secretary on Jan. 30, 1997. *Id.*

107. *Negotiating Congress Will Not be Able to Approve Fast Track Bill by May*, *Eizenstat Says*, Int'l Trade Daily (BNA), at D-8 (Jan 15, 1997) (quoting Under-Secretary of Commerce Stuart Eizenstat).

108. *Administration Seeks Quick Action on Fast Track Authority*, Int'l Trade Daily (BNA), at D-9 (Jan. 27, 1997) (quoting an unnamed Republican source in the House of Representatives, speaking for House Ways and Means Committee Chairman Bill Archer (R-Texas) and Trade Subcommittee Chairman Philip Crane (R-Illinois)).

109. *Administration Defends NAFTA Performance in Preview of July Report*, INSIDE U.S. TRADE, Mar. 7, 1997, at 6.

only under conditions that would eliminate any chance of Republican backing.¹¹⁰ It will also have to be prepared to further defend the NAFTA's performance against critics in both parties in a legislatively-mandated report due July 1, 1997.¹¹¹

Unrelated problems, such as the investigation of possible foreign government influence-buying during the 1996 presidential campaign and further revelations of corruption of Mexican government officials entrusted with drug interdiction will likely influence congressional support for (or opposition to) fast-track legislation.¹¹² Under-Secretary of Commerce Stuart Eizenstat has acknowledged that the lack of negotiating authority has had a "dampening effect" on the momentum for a Free Trade Area of the Americas.¹¹³ Nevertheless, delays most recently as a result of budget negotiations continue, making it increasingly unlikely that trade negotiating authority will be obtained in 1997, or even in 1998, barring a major change in Administration and congressional priorities.¹¹⁴

One obvious result of this impasse, a direct result of the lack of fast-track negotiating authority, is the fact that serious negotiations with Chile on NAFTA accession are in limbo. Mexico already has a bilateral free trade agreement with Chile, and Canada has recently concluded negotiations to that end, in part to secure better protection of Canadian mining investments in Chile.¹¹⁵ In the U.S., there is to date insufficient governmental, public, and business support for NAFTA membership for a small nation 8,000 miles away to justify expenditure of the political capital necessary to expand free trade there. Chile's ardor for NAFTA membership has predictably cooled. The Chilean government has taken pains to indicate that it is not in a "rush" to join the NAFTA, and will continue to strengthen trade relations with other countries, such as Mexico and Canada.¹¹⁶

110. Gephardt Letter, *supra* note 72, at 9-10. Gephardt would require coverage of labor and environmental rules in the core of the agreement itself rather than in "side" agreements as at present, and extensive changes in Chile's environmental laws. *Id.* at 7-10.

111. NAFTA Implementation, *supra* note 1.

112. *Non Trade Issues Could Thwart Fast Track*, *Legislative Aides Warn*, INSIDE U.S. TRADE, Mar. 14, 1997, at 1-2.

113. *U.S. Official Admits Lack of Fast-Track Has Dampened FTAA Talks*, Int'l Trade Daily (BNA), at D-2 (Mar. 11, 1997).

114. *See* John Maggs & Tom Connors, *Budget Talks Push 'Fast Track' Off Track*, J. COM., Apr. 18, 1997, at 3A.

115. *McLauren Says Canada to Negotiate Pact with Chile to Ease NAFTA Accession*, Int'l Trade Daily (BNA), at D-7 (Jan. 4, 1996). According to Canadian Trade Minister Roy McLauren, the initial focus of the Canadian-Chilean negotiations would be on trade goods, services, and investment, in the context of the resource-based economies of both nations. *Id.*

116. *Chile Not in Rush to Join NAFTA Foreign Minister Says*, Int'l Trade Daily (BNA), at D-6 (Jan. 17, 1997) (quoting Chilean Minister of Foreign Affairs Jose Miguel Insulza).

B. Chile's Agreements with MERCOSUR and Canada

Chile has also reacted to U.S. inaction by seeking a free trade relationship with the MERCOSUR countries (Argentina, Brazil, Paraguay, and Uruguay) and with Canada. An "association" agreement with MERCOSUR was signed in June 1996, for entry into force October 1, 1996.¹¹⁷ The accord reportedly provides for elimination of duties on 90% of traded goods within ten years.¹¹⁸ Specific rules of origin apply only to about 350 products, including textiles, footwear, and some capital goods.¹¹⁹ In some instances, the regional content for textiles and footwear is only 30%, compared to 60% for most other sectors and 56% under the NAFTA. Most tariffs are to be phased out over eight years from an initial tariff level that is 40% below the current level. Other products are subject to ten and fifteen year phase-out periods, with wheat and certain agricultural products subject to an eighteen year phase-out.¹²⁰ The Agreement does not deal with services or intellectual property to any significant degree. The Agreement is apparently structured in such a manner as to permit Chile to become a member of the NAFTA without putting Chile in violation of its "most favored nation" status and other obligations to the MERCOSUR group, in part because Chile will not be required to adopt MERCOSUR's common external tariff. Chile also has concluded a framework agreement with the European Union, and reports nearly thirty agreements for economic cooperation in all.¹²¹

A Canada-Chile Free Trade Agreement was signed in November 1996, and is scheduled to enter into force in June 1997.¹²² This Agreement appears to track the NAFTA in most significant respects; it includes, for example, sections on investment, services, communications, and temporary entry for business purposes in addition to the usual treatment of trade in goods,¹²³ and contains detailed rules of origin.¹²⁴ The areas in which it apparently departs significantly from the NAFTA are in excluding government procurement and financial services¹²⁵ and in providing for the elimination of anti-dumping and countervailing duty cases between the parties immediately for goods traded duty-free, and in other instances

117. INSIDE NAFTA, June 26, 1996, at 16-17.

118. *Id.*

119. *Id.*

120. *Id.*; see also U.S. Int'l Trade Commission, *Chile Mercosur Union Creates Enlarged South American Free Trade Area*, INT'L ECON. REV., Oct.-Nov. 1996, at 24-25.

121. Chilean President Eduardo Frei, Speech to United States Congress (Feb. 28, 1997), in 143 CONG. REC. H672-01, 673-74 (1997).

122. Canada-Chile Free Trade Agreement, Article P-03 available at <<http://www.dfait-maeci.gc.ca/ENGLISH/GEO/lac/cda-chili/menu.htm> [hereinafter Canada-Chile FTA].

123. *Id.* chs. C (trade in goods), G (investment), H (services), I (telecommunications), and K (temporary entry).

124. *Id.* ch. D (rules of origin), Annex D-01 (specific rules of origin).

125. *Id.* ch. H, art. H-01(2)(a).

within six years.¹²⁶ A binational panel process similar to the NAFTA's Chapter 19 is applicable during the interim period.¹²⁷ Thus, again presumably by design, the potential substantive conflicts with the NAFTA are limited.

C. Technical Challenges in the Expansion of the NAFTA

Apart from the adverse political climate in the U.S., it is becoming increasingly evident that the NAFTA as presently structured is too complex and ponderous an instrument to expand to a large group of additional state parties. The problems include not only the difficulty of dealing with labor and environmental issues in a trade agreement, a concept which elicits little enthusiasm among hemispheric nations,¹²⁸ but such basic aspects of the NAFTA as more than a dozen different tariff phase-out schedules eliminating tariffs as quickly as immediately or over periods as long as fifteen years,¹²⁹ multiple schedules for phasing in market access for services,¹³⁰ and an enormously complex set of rules of origin. These provisions are functioning adequately with three member nations, but it is difficult to imagine a NAFTA of five, ten, or more members in which each pair of members has a separate set of tariff schedules and phase-outs.

The rules of origin are of particular concern because of the complexity of demonstrating compliance, particularly where regional value calculations are required. Moreover, such a complex system can be viewed as discriminating in favor of those countries—primarily the U.S. and Canada—whose customs services have the necessary sophistication and resources to ensure compliance. There are few other governments in the hemisphere that can hope to adequately issue rulings and conduct compliance audits. The U.S. and Canada can thus assure that only qualifying goods receive NAFTA benefits, but most other countries cannot. The rules in operation consequently favor the U.S. and Canada at the expense of their trading partners.¹³¹ It is thus not surprising that negotiation of acceptable rules of origin was one of the major hurdles facing Canada and Chile in their bilateral negotiations, although ultimately Canada

126. *Id.* ch. M, arts. M-01 to M-03.

127. *Id.* art. M-07.

128. Even the formation of a labor/environment study group has been controversial in the FTAA context.

129. NAFTA, Annex 302.2, Mex.-U.S.-Can. NAFTA Tariff Schedules, *passim*, 32 I.L.M. at 309-11. For example, Appendix 2.1 of Annex 300-B (Textiles) provides for tariff elimination for various products based on a four-part schedule, subject to three pages of exceptions in schedule 2.1.B!

130. *See, e.g.*, NAFTA, Annex I (Mexico), Cross-Border Telecommunications Services, at I-M-18, 32 I.L.M. at 721.

131. *See* Gantz, *supra* note 61, at 397-98; Kevin G. Hall, *OAS Official Says Poverty Must be Addressed in Hemispheric Talks*, J. COM., Mar. 27, 1996, at 5A.

apparently prevailed in convincing Chile to adopt the NAFTA rules.¹³² MERCOSUR rules of origin are less complicated and more liberal and, in any event, different,¹³³ in part because a common external tariff eliminates much of the concern over trans-shipment of goods, by eliminating the incentive to enter the goods initially into the member country with the lowest tariff.¹³⁴

Given that the Free Trade Area of the Americas implies a merging, or at least linking, of the NAFTA and MERCOSUR countries, and perhaps the Andean Group nations as well,¹³⁵ additional structural concerns arise. The NAFTA is a free trade area, in which the three nations remain free to set their own external tariffs, subject only to GATT/WTO limitations. MERCOSUR contemplates a customs union, vastly more difficult to achieve politically, in which the member states apply a uniform common external tariff to all imports from outside the group. The two are not compatible, yet MERCOSUR apparently has no intention of abandoning the common external tariff that had been negotiated with extreme difficulty over more than four years, even though it has not yet been implemented. The NAFTA could of course adopt a common external tariff, but for GATT reasons (avoiding an increase of duties),¹³⁶ this would require Canada and Mexico to reduce most of their import duties, Canada modestly, Mexico by a substantial degree. Even with that understanding, U.S. tariffs—which will average about 3.5% after the Uruguay Round reductions are fully implemented in the year 2000—will be substantially lower than those of the other nations of the hemisphere.¹³⁷ (The Andean Group agreements include arrangements both for

132. Canada-Chile FTA, *supra* note 122, ch. D, art. D-01; INSIDE NAFTA, May 15, 1996, at 1, 15. Chile preferred the simpler "tariff-shift" rules of the Latin American Integration Association (ALADI). *Id.*

133. See Thomas Andrew O'Keefe, *Potential Conflict Areas in Any Future Negotiations Between MERCOSUR and NAFTA to Create a Free Trade Area of the Americas*, 14 ARIZ. J. INT'L & COMP. L. 305 at 314 (1997).

134. For example, in a free trade area, if the U.S. tariff on color televisions is 5%, but the Mexican tariff is 15%, an exporter of televisions to Mexico might try to enter them into the U.S. and then trans-ship them to Mexico, in order to incur the lower U.S. duty. In that situation (e.g., NAFTA) rules of origin are required to assure that goods that are trans-shipped do not evade Mexican duties. However, if the NAFTA were a customs union, and the common external tariff for the U.S., Mexico, and Canada was 10% on televisions, trans-shipment would be unlikely because there is no financial incentive to enter the television initially into the U.S.

135. Bolivia, Colombia, Ecuador, Peru, and Venezuela.

136. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIV(5)(b), 61 Stat. A-3, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. GATT Article XXIV(5)(b), provides in pertinent part that when a customs union is established, the "duties and other regulations of commerce maintained in each of the constituent territories . . . shall not be higher or more restrictive" than those maintained before the formation of the customs union. *Id.*

137. Mark R. Sandstrom, *Market Access*, in THE WORLD TRADE ORGANIZATION 123 (Terence P. Stewart ed., 1996). Developed country tariffs (including those of the U.S. and Canada) were reduced by an average of 40% as a result of the GATT "Uruguay

elimination of most internal tariffs and for establishment of a common external tariff, but apparently neither has been fully implemented to date).¹³⁸ One veteran U.S. official has suggested that the negotiation of a Free Trade Agreement of the Americas should contemplate eventual status as a customs union with a common external tariff, precisely to eliminate some of these difficulties.¹³⁹ Ultimately, this approach, or a "hybrid" system in which a common external tariff applies to trade in major product sectors, may be essential to avail otherwise impossible conflicts.

Other differences between the NAFTA and MERCOSUR would also make conforming the two a difficult legal task. For example, NAFTA Chapter 11 incorporates a comprehensive set of investment protections, including binding international arbitration of disputes between foreign investors and host countries; MERCOSUR does not.¹⁴⁰ At the urging of Mexico, the trade ministers of the hemisphere have agreed to create a working group on dispute settlement mechanisms for the FTAA in 1997.¹⁴¹ While the lack of investment protection provisions would not be a problem for Argentina, which has a bilateral investment treaty with the U.S. with provisions substantially similar to NAFTA Chapter 11,¹⁴² or for Chile, with its acceptance of similar provisions in the Canada-Chile Free Trade Agreement,¹⁴³ many other Latin American nations will be reluctant to accept binding international arbitration of investment disputes. Yet it is difficult to envision the U.S. accepting a FTAA without the equivalent of Chapter 11. MERCOSUR also lacks comprehensive government-to-government dispute settlement mechanisms such as those found in the NAFTA.¹⁴⁴ Nor does MERCOSUR deal with government procurement (market access for sales to government entities for foreign sellers), services generally,

Round" of tariff negotiations, while developing country tariffs (all hemispheric countries except the United States and Canada) were reduced by 20%. *Id.*

138. See Jonathan Adams, *A New Andean Agreement: Rules of Origin Replace the Investment Code*, 11 ARIZ. J. INT'L & COMP. L. 395 (1994); O'Keefe, *supra* note 133, at 311.

139. *NAFTA Negotiator Says FTAA Should be Bridge to Customs Union*, Int'l Trade Daily (BNA), at D-11 (Mar. 12, 1997) (quoting John A. Simpson, Deputy Assistant Secretary of the Treasury for Regulatory, Tariff and Trade Affairs, the principal U.S. negotiator of the NAFTA rules of origin).

140. Treaty of Asunción Establishing a Common Market Among Argentina, Brazil, Paraguay and Uruguay, Mar. 26, 1991, Annex III, 30 I.L.M. 1041 (1991); Interview with Lic. Matilde Carreau, Uruguayan attorney (Sept. 17, 1996). Annex III creates a consultation mechanism for resolution of disputes among the members, but it does not require binding arbitration. Paragraph. 3 of Annex III obliges the member states to adopt a permanent system for resolution of controversies by December 31, 1994, but this apparently has not occurred. *Id.*

141. INSIDE NAFTA (Special Report), Mar. 25, 1996, at 6.

142. Treaty Between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, 31 I.L.M. 124 (1992).

143. Canada-Chile FTA, *supra* note 122, ch. G.

144. See discussion *supra* Part II on the NAFTA dispute settlement mechanisms.

financial services, or telecommunications, all of which are treated under the NAFTA. As Canadian Trade Minister Art Eggleton has suggested, "[t]hese two agreements have fundamentally different objectives and could not be merged without one or the other dispensing with its core objectives."¹⁴⁵ Canada apparently favors negotiation of a separate, thirty-four-nation agreement that would be less comprehensive than the NAFTA but which would contain more extensive obligations than the WTO agreements.¹⁴⁶

Yet another important potential problem is treatment of anti-dumping and countervailing duty actions. Despite strong Canadian and Mexican pressure, the U.S. refused to eliminate unfair trade actions within the NAFTA, or even to provide special, more lenient rules for the NAFTA partners. Canada continues to view reducing disputes over anti-dumping or countervailing duties as unfinished NAFTA business.¹⁴⁷ Special treatment under the NAFTA is largely procedural: review of national administrative decisions under the anti-dumping and subsidies laws is by binational arbitral panels rather than national courts, but the substantive law of the importing country continues to apply.¹⁴⁸ A working group was created as part of the NAFTA to develop a more acceptable framework for application of anti-dumping and countervailing duty laws within the NAFTA, but to date has failed to agree on any reforms.¹⁴⁹

MERCOSUR does not deal directly with intra-regional unfair trade cases, but apparently no such actions have been brought by either Argentina or Brazil against one of the other members.¹⁵⁰ Given the frequency with which Brazilian firms have been respondents in U.S. unfair trade cases,¹⁵¹ it seems likely that the MERCOSUR countries will side with Mexico and Canada in insisting on special unfair trade rules for a FTAA. This could include a bar to anti-dumping actions against regionally produced goods that are traded duty-free, on the grounds that price discrimination—the essence of dumping—cannot occur when there are no barriers to intra-regional trade.¹⁵² The new Canada-Chile Agreement departs

145. INSIDE NAFTA, Mar. 25, 1996, at 1, 3.

146. *Id.* at 5.

147. *Agriculture, Mexican Buses*, *supra* note 51 (quoting unnamed Canadian official).

148. NAFTA, *supra* note 1, art. 1904(2), 32 I.L.M. at 683.

149. *Agriculture, Mexican Buses*, *supra* note 51, at D-10; *see* Minutes of Dec. 3-4, 1996 FTAA Meeting on AD/CVD, *reproduced in* INSIDE U.S. TRADE, Dec. 25, 1996, at 12-14.

150. Interview with Lic Marianna Silveira, Uruguayan attorney (Jan. 30, 1997). The Mercosur Counsel has, however, enacted regulations to deal with dumping by nations outside the group, but it states only principles, not procedures, apparently for application by the member governments individually.

151. Major U.S. trade action cases against Brazil include: footwear; steel and steel products; frozen orange juice; and civil aircraft.

152. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.1, annex 1A, Agreement Establishing the World Trade Organization, Apr. 15, 1994, *reprinted in* H.R. DOC. NO. 103-16, at 1453 (1994). "A

significantly from the NAFTA in that it provides for elimination of anti-dumping and countervailing duty actions between the members immediately for goods that are traded duty free and after a period of six years for the rest, subject to review after five years.¹⁵³ While this is not technically a precedent for expansion of the NAFTA or for conclusion of a separate FTAA, it represents a significant step away from long-standing U.S. policy, and Canada has taken pains in discussing the Canada-Chile Free Trade Agreement to characterize these provisions as "consistent with the Canadian government's long-standing public commitment to minimizing and eventually eliminating the use of anti-dumping duties within NAFTA."¹⁵⁴

It is widely assumed that because the dominant regional trading blocs in the hemisphere are the NAFTA and MERCOSUR, an FTAA will somehow be either an amalgamation of those two existing entities, or a completely new entity combining key elements of each. However, at least one other entity, the Andean Pact, may yet be a significant factor. This group—currently Ecuador, Venezuela, Bolivia, and Colombia—is reported to have concluded a series of amendments to the Agreement which would, for the first time, designate a secretary general to head the existing secretariat and would create both a parliament and court of justice within five years.¹⁵⁵ If these plans are implemented, and if, as some expect, the time-table for the FTAA extends beyond the current target of 2005, the structure of this third-most-significant Western Hemisphere entity might also have to be taken into account.

D. External Political Challenges in the Expansion of the NAFTA

Even if strong bipartisan support for the Free Trade Area of the Americas existed today in the U.S., achieving a NAFTA-centric FTAA would be highly problematic. Most significantly, Brazil exists as an economic and political power in the hemisphere, and Brazil's internal market combined with those of the other MERCOSUR nations (Argentina, Paraguay, and Uruguay), represents a formidable economic unit. Brazil is apparently even less interested than the U.S. in moving rapidly toward a new free trade arrangement, and instead has clearly indicated that it wishes to move slowly.¹⁵⁶ Recently, Brazil proposed on behalf of the MERCOSUR group that the negotiations on market access—tariffs and non-

product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." *Id.*

153. Canada-Chile FTA, *supra* note 122, ch. M.

154. DEP'T OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE (CANADA), PRESS RELEASE No. 211, at 6 (Nov. 18, 1996).

155. INSIDE NAFTA, Mar. 20, 1996, at 16.

156. INSIDE NAFTA (Special Report), Mar. 25, 1996, at 5.

tariff barriers—not begin until the year 2000,¹⁵⁷ and has refused to commit to serious talks unless the U.S. agrees in advance or is willing to improve U.S. market access for Brazilian orange juice, textiles, footwear, tobacco, sugar, and steel products.¹⁵⁸ Presumably, Brazil also favors a “go slow” approach in order to give neighboring countries, including Chile and Bolivia, the opportunity to form closer links with MERCOSUR before (or in lieu of) relations with the NAFTA. The Andean Pact nations and Peru have also raised the possibility of closer relations with MERCOSUR,¹⁵⁹ and a series of Chile-like association agreements between MERCOSUR and most if not all of the remaining Andean Pact countries over the next several years may be both politically and economically feasible.

It is thus not surprising that there was no consensus on setting a definitive schedule for the actual negotiation of a FTAA at the March 1996 trade ministers’ meeting in Cartagena, or eleven months later at a sub-ministerial meeting in Rio de Janeiro, Brazil. However, that issue is to be in the forefront of the May 16, 1997 ministerial meeting in Belo Horizonte, Brazil.¹⁶⁰

E. Risks and Consequences of U.S. Inaction

Now that the U.S. presidential election is over, the question is whether the U.S. has the political will to enact fast-track trade negotiating authority and, equally important, to demonstrate support among members of the government, Congress, the business community, and the public for further expansion of hemispheric free trade. For the reasons cited earlier, there is little reason for optimism.

If the U.S. government has not obtained fast-track negotiating authority by the time of the Presidential Summit scheduled for March 1998 in Chile, the U.S. hemispheric trading partners are likely to conclude that the U.S. is once again turning its back on its own initiative, the creation of a FTAA.¹⁶¹ Even though the inclusion of Chile in the NAFTA is of negligible economic significance for

157. *Mercosur Suggests Three Stages for FTAA's Negotiating Process*, Int'l Trade Daily (BNA), at D-2 (Sept. 25, 1996).

158. INSIDE U.S. TRADE, Mar. 6, 1997, at 1-2.

159. *Argentina, Peru Presidents to Press for Trade Liberalization Integration*, Int'l Bus. & Fin. Daily (BNA), at D-5 (Feb. 6, 1996). President Fujimori of Peru, while reaffirming Peru's support for the Andean Pact, states that “there will be increasingly close relations between the Andean Pact and MERCOSUR.” *Id.*

160. INSIDE NAFTA (Special Report), Mar. 25, 1996, at 6; *see* INSIDE NAFTA, Mar. 6, 1997, at 1, 19; *U.S. Listing of Goods to Lose GSP Benefits Spurs Anger in Argentina*, INSIDE NAFTA, Apr. 17, 1997, at 1, 26. The U.S. has sided with the majority of Western Hemisphere nations—except MERCOSUR—that favor simultaneous launching of negotiations of all aspects of the FTAA. *Id.*

161. Memories of the Alliance for Progress of the 1960s, the Spirit of Tlateloco of 1972-73, and the “Forgotten Decade” of the 1980s are still strong in much of Latin America.

the U.S., it is seen as a measure of U.S. resolve and is thus a pre-condition to further expansion of the NAFTA or of a Free Trade Area of the Americas with active U.S. participation. While the U.S. is and will remain a sufficiently dominant economic player in the hemisphere that it could influence the shape of a FTAA even if its "sits out" the negotiations over the next few years, key decisions on the nature and scope of the negotiations and the form and content of the FTAA agreement may be made in 1997, 1998, and 1999. A U.S. delegation without negotiating authority will be severely hampered in protecting U.S. interests and furthering U.S. views on these issues, particularly if by the time the U.S. is willing and able to negotiate it faces a MERCOSUR representing all or almost all of the nations of South America through full membership or association agreements.

However, unlike earlier-abandoned U.S. initiatives, lack of U.S. leadership is not likely this time to result in a cessation of the process even if the U.S. inability to negotiate persists well into the twenty-first century. Many Latin American governments, particularly Mexico, Argentina, Chile, and Peru, have an enormous economic and political commitment to increased trade and competition, market opening, and encouragement of foreign investment. Canada, as evidenced by the 1996 Canada-Chile Free Trade Agreement, is now an active participant in Western Hemisphere free trade and is exploring an agreement directly with MERCOSUR.¹⁶² Mexico, for example, is continuing discussions with the European Union on a bilateral agreement that would define economic, trade, and political relations. Mexico has also indicated that it wishes to hold free trade or market-opening negotiations with Nicaragua, Peru, Ecuador, Panama, El Salvador, Guatemala, Honduras, and MERCOSUR.¹⁶³

Thus, the most likely result of continued U.S. inaction is a MERCOSUR-centric movement toward greater hemispheric integration, with/the timetable set largely by a Brazil-dominated MERCOSUR, in which Brazil wishes to move slowly with the FTAA negotiations unless and until the U.S. is willing and able to make major concessions, and to a lesser extent by Mexico, Canada, and Chile.¹⁶⁴ Presumably, such a pace would allow MERCOSUR to expand and consolidate its economic and trade ties with Chile, Bolivia, and other South American nations, and to establish more beneficial mutual trade ties between MERCOSUR and Europe based on the cooperative "framework" agreement

162. Courtney Tower, *Brazil, Canada Work on Nailing Down Trade Pact; U.S. Left Without a Hammer*, J. COM., Apr. 21, 1997, at 3A.

163. Mary Sutter, *Mexico, EU agree to Negotiate Political, Economic, Trade Accord*, J. COM., Apr. 16, 1997, at 2A; INSIDE NAFTA, Apr. 3, 1997, at 23.

164. INSIDE U.S. TRADE, Mar. 7, 1997, at 3. Brazilian Foreign Minister Luis Lampeira has indicated that Brazil wishes a guaranty of reciprocity from the more-developed trading partners in the hemisphere (U.S. and Canada) and assurances that the U.S. has authority to make concessions to Brazil in areas of interest. *Id.*

concluded in October 1995,¹⁶⁵ giving it a position of greater strength when and if the U.S. is in a position to negotiate. (While the EU-MERCOSUR is obviously a basis for further cooperation and agreement rather than a definitive trade pact, one of its stated objectives is the "preparation of conditions for the creation of an inter-regional [trade] association . . . including the fields of commerce, the economy and regional integration.")¹⁶⁶

In any event, the U.S. will risk being relegated to a subsidiary role so long as the current political impasse in Washington continues.

There is also a significant risk that Chile will formally abandon its expressed interest in NAFTA membership, and simply continue to strengthen its ties with MERCOSUR and with Canada and Mexico individually. In the short term, lack of U.S. leadership probably means an expansion of bilateral free (or freer) trade arrangements, such as the agreement between Chile and Canada and perhaps Chile and MERCOSUR, an increasing number of agreements between Mexico and Chile and their hemispheric trading partners and the European Union, and expanded "hub and spoke" association agreements between MERCOSUR and its neighbors. Mexico already has agreements with Colombia, Chile, Venezuela, Costa Rica, and Bolivia, and is expected to conclude similar agreements with the remaining Central American and some Andean countries during 1997.¹⁶⁷ The agreements already concluded are believed to include most of the NAFTA-level commitments,¹⁶⁸ although they use differing rules of origin and may not deal effectively with protection of investment, financial services, telecommunications, and other areas of great importance to the U.S. MERCOSUR, having already concluded agreements with Bolivia and Chile, is as noted expected to expand its network to the other major countries of South America and to Mexico.¹⁶⁹

The NAFTA, of course, should continue to be a beneficial, viable entity to the three existing parties, particularly if the Mexican economic recovery continues this year, as many believe is likely,¹⁷⁰ and if protectionist attacks stemming from the required July 1, 1997, progress report to Congress can be beaten back, as has been the case in the past. Moreover, the NAFTA benefits for the immediate region could be enhanced if the U.S. enacts NAFTA "parity" legislation in 1997, thus affording the Caribbean Basin nations similar access to the U.S. market for a

165. Acuerdo Marco Interregional de Cooperacion Entre la Comunidad Europea y sus Estados Miembros y el Mercado Comun del Sur y Sus Estados Partes, 6 de octubre de 1995.

166. *Id.* art. 2; *see supra* text accompanying note 163.

167. Moss, *supra* note 105.

168. *Id.*

169. *Id.* Those agreements are likely to be limited primarily to reduction of traditional tariff barriers, rather than more comprehensive agreements such as Mercosur itself or the NAFTA. *Id.*; *see Free Trade in the Americas; Addressing How and When*, Int'l Trade Daily (BNA), at D-11 (Jan. 27, 1997).

170. *Mexico: OECD Cautiously Optimistic in Outlook for Mexican Economy*, Int'l Bus. & Finance Daily (BNA), at D-2 (Jan. 10, 1997). The OECD predicts economic growth at a rate of six percent in 1997, one percent better than in 1996. *Id.*

five-to-ten year period, which could be viewed as time to prepare for full membership in the NAFTA or a FTAA.¹⁷¹ Unlike MERCOSUR, the U.S. remains the largest and most important market for Central American and Caribbean goods, and these small nations are likely to have little to gain economically from an association with MERCOSUR, Mexico, or Chile.

On the other hand, failure to enact legislation providing equivalent access to the NAFTA for the Central American and Caribbean nations will be further highly public evidence of a loss of commitment to freer trade in the hemisphere. Such a failure would also exacerbate the already significant economic downturn in the region over the last several years, itself in part a result of those nations' inability to compete with Mexico in the U.S. market. The U.S., by neglecting this region, may undo fifteen years of its own efforts to encourage democratic governments and economic reforms through the Caribbean Basin Initiative, which brought greater U.S. market access beginning in 1983¹⁷² and was effective until the NAFTA provided yet more favorable treatment to Mexico. Hopefully, another left-leaning government in Grenada, Jamaica, or Guyana will not be necessary to counter U.S. inaction, as it was fifteen years ago.¹⁷³

Even if these limited efforts are successful, the "demonstration effect" of the U.S. failure to support Chile's accession to the NAFTA will be powerful indeed. U.S. influence over the form and extent of the expansion of free trade in South America will be drastically reduced. In addition to the political and strategic implications of ceding economic leadership in the hemisphere to others, these developments have significant risks for U.S. firms, which are likely to find their exports to countries with which competing producers have free trade arrangements to be subject to higher duties. For example, U.S. apple growers are experiencing difficulties in competing with Chilean apples in third-country Latin American markets, including Brazil, Colombia, Venezuela, Ecuador, and Peru, countries that have preferential trading relationships with Chile.¹⁷⁴ Similarly, Southwestern Bell has chosen to source the telecommunications equipment for a \$180 million Chilean project from Canada's Northern Telecom rather than from U.S. producers because under the Canada-Chile Free Trade Agreement, the Chilean import duties will be \$20 million less if the equipment is brought in from Canada.¹⁷⁵ Should the European Union be able to negotiate a more comprehensive trade agreement with Mexico—a Mexico discouraged with lack of

171. *Central American Ministers Advocate FTA Negotiation with U.S.*, INSIDE NAFTA, Mar. 20, 1997, at 1, 18. A recent Central American proposal for a free trade agreement between the region and the U.S. seems unrealistic given the likely absence of fast-track negotiating authority for the next year or more. *Id.*

172. See HOUSE COMMITTEE ON WAYS AND MEANS, 104TH CONG. OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 19-26 (Comm. Print 1995).

173. See Senator John S. McCain, *The Benefits of NAFTA for the U.S., Mexico, and the Caribbean*, 14 ARIZ. J. INT'L & COMP. L. 287 at 289 (1997).

174. *Chile's Trade Pacts Imperil Washington Apple Exports*, *Lawmakers Say*, INSIDE NAFTA, Jan. 8, 1997, at 1.

175. INSIDE U.S. TRADE, Mar. 14, 1997, at 2 (quoting Stuart Eizenstat).

progress under the NAFTA—the U.S. and Canada's current preferential access to the Mexican market under the NAFTA could be significantly diluted.

V. CONCLUSION

It is, unfortunately, no exaggeration to suggest that the U.S. faces the loss of a once-in-a-generation opportunity to influence the shape of Western Hemisphere economic integration in a manner that broadly benefits and protects U.S. interests. Instead, the U.S. may ultimately be shut out or forced to "negotiate eventually with trade blocs whose rules it did not write."¹⁷⁶ Ironically, the U.S. faces this situation after a period of unprecedented success in convincing the world's trading nations through the NAFTA, the World Trade Organization and other means that open markets, lower tariffs, greater competition, and increased foreign investment *are* beneficial not only to the U.S. but to the world at large. As Arizona Congressman Jim Kolbe, a tireless supporter of hemispheric free trade, recently observed, "[w]ith free trade, the United States can go forward or fall backward, but we can't stand still."¹⁷⁷



176. Borrus, *supra* note 39.

177. Kolbe Speech, *supra* note 93.