

## **DISPUTE SETTLEMENT UNDER THE CFTA AND THE NAFTA: FROM ELEVENTH-HOUR INNOVATION TO ACCEPTED INSTITUTION**

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*Summary: I. Introduction and Overview; II. Structure of the CFTA's Dispute Resolution System; III. Safety Valves; IV. Operation of the CFTA Dispute Settlement System; V. The NAFTA's Dispute Settlement Provisions; VI. Chapter 20 Provisions; VII Chapter 19 Provisions; VIII. Chapter 11 Provisions; IX. Provisions for Private Commercial Disputes; X. Conclusions.*

### **I. INTRODUCTION AND OVERVIEW**

The question of dispute resolution in international agreements has in recent years advanced to the forefront of concern for governments, for business and for international organizations. The heightened sensitivity of this issue has been due in large part to dissatisfaction (in some quarters) with the record of dispute resolution in the GATT, to the enhanced role of regional or plurilateral trade agreements in the world economy<sup>1</sup>, and to international trade's ever-expanding dimension in the national economies of the major trading nations. As the latest and clearly one of the most important instances of a regional trade agreement, the NAFTA<sup>2</sup> negotiators were sensitive to the need to build on the successful precedent of the CFTA<sup>3</sup> and to further

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<sup>1</sup> In an address given on September 16, 1993, Director-General Peter Sutherland of the GATT noted that there were 85 regional arrangements in existence, fully 28 of which had been set up since the beginning of 1992. **GATT Press Release**, No.1596.

<sup>2</sup> North American Free Trade Agreement (NAFTA), signed December 17, 1992; supplemental agreements signed September 14, 1993; entered into force January 1, 1994; reprinted in Holbein and Musch, **North American Free Trade Agreements** (Oceana Publications, Dobbs Ferry, 1994), Treaties Binder I, Booklet 3, and in 32 I.L.M. 605, 1993.

<sup>3</sup> Canada-U.S. Free Trade Agreement (CFTA), done January 2, 1988; entered into force January 1, 1988; reprinted in 27 I.L.M. 281 (1988).

enhance the perception that the CFTA's novel dispute settlement mechanisms had largely accomplished their goal of settling disputes in a fair and effective manner, eliminating political biases from the process, and reinforcing the rule of law in international trade <sup>4</sup>.

The negotiators recognized that not only was the dispute settlement system established by the CFTA generally successful in achieving these goals <sup>5</sup>, it was a system that was sufficiently well conceived that it could be expanded to cover not only two common law, economically advanced nations, but a civil law, developing nation as well. Moreover, it was also judged capable of extending the frontiers of dispute resolution by covering many of the new or non-traditional subjects of international trade law, such as financial services, environmental, health and safety standards, foreign investment and intellectual property. In these respects, however, the NAFTA's dispute settlement system will clearly be presented with challenges and

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<sup>4</sup> Wilson, Arlene, **The Canada-U.S. Free Trade Agreement: Lessons for the NAFTA**, Congressional Research Service 93-153-E (Washington, DC: The Library Of Congress, Feb., 1993).

<sup>5</sup> The dispute settlement mechanism adopted in the CFTA was actually critical to the very existence of that Agreement and, as a consequence, the continued employment of that mechanism in the NAFTA. The CFTA negotiations were in their eleventh-hour and facing total collapse when the U.S. negotiators brought forward the concept of having independent binational panels review antidumping (AD) and countervailing duty (CVD) determinations of U.S. negotiators and to prevent the collapse of the negotiations. The U.S. goal in the negotiations had been to obtain some discipline over Canadian subsidies and the Canadian goal was to obtain preferential treatment under U.S. AD and CVD law.

The negotiators essentially ran out of time to achieve these goals, Canada being unwilling to relinquish its subsidies and the U.S. willing to derogate from its AD/CVD laws in the absence of an agreement by Canada to do so, which could not be reached prior to the negotiating deadline. In what was conceived as a temporary solution only, the negotiators agreed to put off their *substantive* disagreements and institute immediately a *procedural* mechanism to resolve trade disputes between the two countries, which would remain in force until the resolution of the substantive issues made this new mechanism no longer necessary. This procedural mechanism was binational panel review. This system was sufficiently attractive to both sides that it was able to salvage the negotiations. From the U.S. perspective, it preserved our existing AD/CVD laws and established a form of review that applied the same standards of judicial review as applied by our national courts. Moreover, it required Canada to submit to panel review certain types of agency decisions that therefore had not been subject to appeal in Canada. From the Canadian perspective, Canadian exporters obtained assurances of a speedy review of U.S. agency determinations and avoided review by the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit, which courts the Canadians perceived to be overly deferential to U.S. agency determinations.

opportunities for growth not contained in the CFTA. Whether the challenges can be overcome, and the opportunities seized, will depend on the effectiveness of the institutions created by the NAFTA and the efforts of the public and private sectors in all three of the NAFTA Parties <sup>6</sup>.

As suggested above, to a great extent, the NAFTA's dispute settlement system is modeled directly upon the provisions in the CFTA, building upon the now well-accepted provisions of that agreement. However, the NAFTA provisions are more comprehensive than those of the CFTA and should operate more effectively to help the NAFTA Parties prevent and resolve disputes concerning the interpretation and application of the Agreement, the specific unfair trade practices of dumping and subsidization, and cross-border investment <sup>7</sup>.

The NAFTA contains three primary mechanisms for the resolution of disputes, including:

<i>Chapter 20:</i>	Resolution of general disputes concerning the NAFTA's interpretation and application.
<i>Chapter 19:</i>	Resolution of disputes arising under each Party's antidumping or subsidy laws.
<i>Chapter 11:</i>	Resolution of disputes between a Party and an investor of another Party.

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<sup>6</sup> The operation of the NAFTA's dispute settlement system, currently serving the interests of three governments, may be expanded to cover other Western Hemisphere countries as well under the NAFTA's accession clause, Article 2204. Manifestly, any new accessions will add to the complexities of, and pressures upon, the NAFTA's dispute settlement mechanisms.

<sup>7</sup> The NAFTA negotiators were also well tuned to the important developments taking place simultaneously with their own in Geneva under the rubric of the Uruguay Round. These efforts led to the adoption of an Agreement Establishing the World Trade Organization (WTO Agreement) and an Understanding on Rules and Procedures governing the Settlement of Disputes (DSU). These multilateral agreements, governing all WTO Members, came into force on January 1, 1995. In order to permit the reader a separate perspective on the subject matter of this article, a tabular comparison of the general dispute settlement mechanism of the NAFTA (Chapter 20) and of the WTO appears as an appendix hereto.

## 1. Chapter 20

The Chapters 19 and 11 mechanisms are narrowly defined and deal with precisely drawn subject matters. However, the Chapter 20 mechanism—the general dispute resolution mechanism for the NAFTA—claims much broader reach<sup>8</sup>. Designed to address all general disputes that may arise, it must necessarily deal with the Agreement's «new issues» such as enforcement of intellectual property rights (Chapter 17), financial services (Chapter 14), standards-related measures (Chapter 9), and environmental measures (Chapter 7).

Moreover, Chapter 20 may deal with issues that do not even involve a *breach* of the NAFTA. Pursuant to Article 2004 of the Agreement, the Chapter 20 dispute resolution mechanism must address:

«The avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004».

Thus, with the exceptions particularly of Chapter 19<sup>9</sup>, Chapter 20 is intended to cover all disputes regarding (a) the interpretation or application of the Agreement; (b) domestic measures of a Party that are or might be inconsistent with the Agreement; and (c) domestic measures of a Party that might cause «nullification or impairment» of

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<sup>8</sup> Chapter 19 of the NAFTA is the direct successor of Chapter 19 of the CFTA, with only minor change. Chapter 20 of the NAFTA represents a substantial redrawing of the CFTA's Chapter 18. Chapter 11 of the NAFTA had no counterpart in the CFTA.

<sup>9</sup> Article 2004 excepts from coverage under Chapter 20 matters covered in Chapter 19 and matters «otherwise provided» for in the NAFTA. Such other matters would include the Chapter 11 dispute settlement mechanism for investment disputes and the provisions of Chapter 5, which provide for review and appeal of origin determinations and advance rulings by customs officials to at least one level of administrative officials above the customs official making the initial ruling or determination, followed by judicial or quasi-judicial review under the domestic law of the importing party of the determination or decision taken at the final level of administrative review. Another exception would be that contemplated by Article 804, which provides that «[n]o Party may request the establishment of an arbitral panel under Article 2008... regarding any proposed emergency [safeguard] action». Finally, it is expected that the bid challenge mechanism in government procurement matters (Chapter 10) will operate independently from the Chapter 20 system.

certain benefits arising under the Agreement. The latter phrase –nullification or impairment of benefits– is accepted GATT terminology and under **Annex 2004** may be applied, with certain exception, to denial of benefits that a Party might reasonably expect to arise under selected provisions of the NAFTA even in the absence of a clear violation of the Agreement <sup>10</sup>.

As a cooperative, rule-based regime, the NAFTA's Chapter 20 mechanism clearly emphasizes the *prevention* of disputes in the first instance, or their cooperative resolution through consultations. In the event that such consultations are unavailing, however, member governments are able under the Agreement to employ impartial, independent panels to assist in dispute resolution.

As will be discussed more extensively below, the framework of a Chapter 20 dispute involves the following:

- a) Consultations, either at the staff or Free Trade Commission level;
- b) referral of the dispute to a panel of independent experts;
- c) dissemination of the panel findings and recommendations; and
- d) resolution of the dispute by the complaining Party.

Overall, Chapter 20 of the NAFTA will be seen to have improved upon the CFTA's general dispute resolution mechanism by modifying the panel selection process, by extending its coverage to financial services issues, and by specifying special procedures for the resolution of environmental, health, and safety disputes.

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<sup>10</sup> These provisions include Part Two of the NAFTA (Trade in Goods), except for the provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment; Part Three (Technical Barriers to Trade); Chapter Twelve (Cross-Border Trade in Services); or Part Six (Intellectual Property). See, generally, Petersmann, Ernest-Ulrich, «Violation Complaints and Non-violation Complaints in Public International Trade laws», **German Yearbook of International Law**, 34, 175-229, 1991.

## **2. Chapter 11**

Uniquely, in its Chapter 11 provisions, the NAFTA has created a system of arbitration for resolving investment disputes between foreign investors and host governments. The Chapter 11 dispute settlement mechanism provides for consultations and binding arbitration to settle disputes between private foreign investors and host governments, a subject matter which has not traditionally been dealt with in trade agreements.

## **3. Chapter 19**

Finally, in its Chapter 19 provisions, the NAFTA addresses disputes over AD and CVD determinations by federal government authorities in the three countries. Each NAFTA country has laws governing certain unfair foreign trade practices<sup>11</sup>. Prior to the adoption of the CFTA, Canada had argued that these unfair trade laws were not always applied uniformly. Since both dumping and subsidy cases are politically sensitive, the charge was that both the administering agency and even the courts were subject to political pressures. To reduce the frictions involved in these cases, and to enhance public perception of a fair and balanced trade system, the CFTA established binational panel review of antidumping and countervailing duty cases as a temporary procedural solution, while the two CFTA Parties acted separately to negotiate new substantive rules on dumping and subsidies.

Under Chapter 19 of the CFTA, and now under Chapter 19 of the NAFTA as well, binational panels of judges and trade experts are

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<sup>11</sup> Under these laws, the government investigates producers' claims that they have been injured by imports that are considered to be unfairly priced («dumped») or subsidized by foreign governments. If dumping or subsidization is found, the government may decide to impose a duty that will offset the margin of the dumping or the rate of the subsidization. Under the GATT and now the WTO, this extra AD or CVD is the only remedy that may be imposed for this purpose. In the United States, if a party desires to appeal an administrative decision made under these foreign trade laws, it may do so by filing an appeal with the U.S. Court of International Trade. A similar procedure exists in Canada and, very recently, in Mexico.

established to review a member government's administrative decision following an investigation of an unfair foreign trade practice. Strict time limits and various due process procedures are incorporated in this review process, but the *substantive* law of each NAFTA country remains unchanged.

The goal of achieving an entirely new system of substantive rules on dumping and subsidization is still being considered, but the CFTA's «temporary» solution to the problem –binational panel review– has become, in effect, a «permanent» solution in the NAFTA.

#### **4. Scope of Article**

In the following section of this article, the structure and operation of the CFTA's dispute settlement provisions will first be reviewed, as those provisions provide the indispensable context in which the NAFTA was created and will itself operate<sup>12</sup>. The changes brought to those provisions by the NAFTA will then also be reviewed. In addition, largely by means of an attachment to this article, a comparison will be drawn to the dispute settlement provisions of the recently concluded Uruguay Round.

## **II. STRUCTURE OF THE CFTA'S DISPUTE RESOLUTION SYSTEM**

The CFTA provided two separate mechanisms for settling trade disputes, which appear in Chapters 18 and 19 of the Agreement. With two exceptions, Chapter 18 established the general procedures that applied in resolving disputes under the Agreement and was broad in

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<sup>12</sup> The CFTA's dispute settlement mechanism applied, and continue to apply, to cases brought before the entry into force of the NAFTA. At this writing, only one NAFTA case been brought to a close, this through agreement of the parties to the dispute and without a panel opinion. Thus, essentially all conclusions to be drawn about the operation of the CFTA/NAFTA dispute settlement system must necessarily, for some time to come, be based upon CFTA data and experiences.

scope. In addition to setting out the necessary institutional provisions for joint management of the CFTA, it provided for the use of arbitration and *ad hoc* panels to resolve disputes that may arise with respect to most matters of interpretation of the Agreement and nullification or impairment of benefits conferred by the Agreement.

Chapter 19 was much narrower in focus. It established special *ad hoc* panels to review final AD and CVD determinations issued by the relevant administrative agencies in each country, as well as proposed amendments to either country's AD or CVD statutes. Binational panel review supplanted judicial review of such agency determinations.

### **1. Chapter 18 Institutional Provisions**

Chapter 18 shaped the resolution of general disputes arising under the CFTA into a multi-tiered process, commencing with notification and consultation, followed by reference to a new intergovernmental binational commission, followed yet again by one of three forms of dispute resolution conducted by independent, non-governmental arbitrators or panels of experts.

A skeletal review of these processes follows:

- a) Mandatory notification by either government of any measure that might affect the operation of the CFTA (Art. 1803)
- b) Mandatory response to questions or requests for information by the other government, whether or not notified (Art. 1803)
- c) Consultations at the request of either party concerning any measure or any other matter affecting the operation of the CFTA (Art. 1804)
- d) Referral to the Canada-U.S. Trade Commission («Commission»), headed by the respective cabinet officials responsible for trade matters, should such consultations fail (Art. 1805).

e) Invocation of one of three forms of panel proceeding, should the Commission fail to resolve the matter:

1. Compulsory arbitration, binding on both parties, in safeguards («escape clause») cases (Art. 1103).
2. Binding arbitration in all other disputes where the two governments mutually agree (Art. 1806) 13.
3. Panel recommendations to the Commission, which was specifically required to agree on a resolution of the dispute (Art. 1807).

Article 1807 of the CFTA allowed for five-member panels of experts<sup>14</sup> to render advisory opinions and recommendations for settlement of disputes referred by the Parties. Under this provision, the Parties had to agree upon the terms of reference, select the binational panel and its chairman, and agree upon a timetable for the conduct of the panel review. The panels were obligated to follow the procedures set out in the **Model Rules of Procedure for Chapter 18 Panels**, including the deadlines set out therein and in the Agreement itself. The rules of procedure provided for written submissions by each Party, oral argument, an initial report, comments on that report by the Parties, and a final report, which would normally issue within 120 days of the formation of the panel. The final report would normally be made public, unless the Parties decided to the contrary.

Out of dozens of issues and disagreements which arose between the two Parties after the CFTA came into effect, only five such cases reached the stage of binational panel review under Chapter 18 of the Agreement. These included **Canada's Landing Requirement for**

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<sup>13</sup> In practice, no panels were ever convened under Articles 1806 or 1103 of the CFTA.

<sup>14</sup> Under Article 1807 (1), panelists were to be chosen «strictly on the basis of objectivity, reliability and sound judgment and, where appropriate, have expertise in the particular matter under consideration». Panelists could not be affiliated with or take instructions from either Party.

**Pacific Coast Salmon and Herring**, CDA-89-1807-01 (October 16, 1989)<sup>15</sup>; **Lobsters from Canada**, USA-89-1807-01 (May 21, 1990)<sup>16</sup>; **Treatment of Non-Mortgage Interest Under Article 304**, USA-92-1807-01 (June 8, 1992)<sup>17</sup>; **Puerto Rico Regulations on the Import, Distribution and Sale of Ultra-High Temperature Milk**, USA-93-1807-01 (June 3, 1993)<sup>18</sup>; and **The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales**, CDA-92-1807-01 (February 8, 1993)<sup>19</sup>. No Chapter 18 cases under the CFTA are pending at this writing, and all cases of this kind initiated after January 1, 1994 must be brought under the NAFTA's Chapter 20 provisions.

## **2. Chapter 19 AD/CVD Cases and Pending Legislation**

Chapter 19 of the CFTA set forth provisions for the creation and use of binational panels to review final administrative determinations in AD and CVD cases as well as for certain other purposes. Essentially, a three-track set of obligations was established by Chapter 19, as follows:

- a) The development over a five- to seven-year period of a new set of rules governing government subsidies and dumping, which practices are now governed by each country's existing AD and CVD laws (Art. 1907).
  
- b) Binational panel review of statutory amendments in existing AD or CVD laws for their consistency with the GATT, the relevant GATT Codes, and the object and purpose of the CFTA (Art. 1903).

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<sup>15</sup> 1989 FTAPD LEXIS 6, October 16, 1989.

<sup>16</sup> 1990 FTAPD LEXIS 11, May 25, 1990.

<sup>17</sup> See Holbein and Musch, **NAFTA: North American Free Trade Agreements, Dispute Settlement**, Binder 2, Booklet B.17, Oceana Publications, Dobbs Ferry, 1994.

<sup>18</sup> 1993 FTAPD LEXIS 18, June 3, 1993.

<sup>19</sup> See Holbein and Musch, **NAFTA: North American Free Trade Agreements, Dispute Settlement**, Binder 2, Booklet B.18, Oceana Publications, Dobbs Ferry, 1994.

c) Replacement of judicial review by domestic courts of AD or CVD orders with review by a binational panel of experts (Art. 1904).

### **2.1. Development of a «substitute system»**

The development of a «substitute system» to deal with the problems of dumping and subsidization did not progress, largely because of the energies being spent in revising the Tokyo Round Antidumping Code<sup>20</sup> and the Subsidies Code<sup>21</sup> in the then on-going Uruguay Round<sup>22</sup>. As a practical matter, neither Canada nor the United States were able to give meaningful attention to the question of developing a *substitute bilateral* system during a period when they were essentially fully engaged in revising the *existing multilateral* system. Nevertheless, the Canadian government continues to go on record in favor of such a development and considers the absence of such a substitute system to be a part of the NAFTA's unfinished business<sup>23</sup>.

### **2.2. Review of changes to existing legislation**

Canada and the United States agreed in Article 1903 of the CFTA that changes to either country's existing AD or CVD laws would apply to the other country only after consultation and only if specifically provided for in the new legislation. To enforce this obligation, either country could request that a binational panel issue a declaratory

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<sup>20</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Doc. No. MTN/NTM/W/232, opened for signature April 9, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, B.I.S.D. 26th Supp. 127-145 (entered into force January 1, 1980).

<sup>21</sup> Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Doc. No. MTN/NTM/W/236, opened for signature April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 969, 1186 U.N.T.S. 204 B.I.S.D. 26th Supp. 56-83 (entered into force January 1, 1980).

<sup>22</sup> Article 1907 contemplated the formation of a Working Group designed, in principal part, to seek to develop more effective. Rules and disciplines concerning the use of government subsidies (this was of particular interest to the United States) and to seek to develop a substitute system of Rules for dealing with unfair pricing and government subsidization (of particular interest to Canada). Although the Working Group was formed, no significant work product emerged.

<sup>23</sup> Address by the Honorable Roy MacLaren, Canadian Minister for International Trade, San Francisco, September 9, 1994.

opinion as to whether the proposed amendment to the other country's AD or CVD statutes conforms to the GATT, the GATT Subsidies and Antidumping Codes, or the object and purpose of the CFTA itself. The panel could also consider whether the proposed amendment was designed to overturn a prior panel decision.

No panels were ever convened under this provision, largely because proposed trade bills in both countries tended to include language exempting the other country from their coverage.

### **2.3. Replacement of domestic judicial review of AD/CVD cases**

The binational panels for settling disputes involving AD and CVD law or cases operated wholly separate from the general dispute settlement mechanism under chapter 18, with a different roster of panelists and unique procedures. Either government could upon its own volition request a binational panel review under Chapter 19. However, any person who would otherwise be entitled under the law of the importing country to commence domestic procedures for judicial review of a final determination could also request such a review and this request had to be granted (Art. 1904 (5)). Thus, both U.S. importers and exporters of a product which had been subject to an agency determination in the United States or Canada, provided that they were an «interested party» to such proceeding, were entitled to trigger a Chapter 19 binational panel review proceeding<sup>24</sup>. Requests for a panel had to be made in writing by one government to the other within 30 days following the date of publication of the final determination in question in the **Canada Gazette** or the **Federal Register** (Art. 1904(4)). Failure to request a panel within that time precluded a review but a timely request by an interested party was deemed to be a request by the United States under the applicable provisions.

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<sup>24</sup> 19 U.S.C. §1516a.

Binational panels reviewed final AD and CVD determinations rendered by any of four different agencies, including the **Canadian International Trade Tribunal**<sup>25</sup>, the **Deputy Minister of National Revenue for customs and Excise**, the **U.S. International Trade Commission and the International Trade Administration of the U.S. Department of Commerce** (Art. 1911).

Each panel was required to apply the standard of judicial review<sup>26</sup> and the law applicable in the country investigating the AD or CVD claim<sup>27</sup>. Thus, each country was judged in terms of whether it lived up to its own rules, not the rules of the other country.

In the United States, a panel would hold an agency determination unlawful if it was:

- «Unsupported by substantial evidence on the record»:
- «otherwise not in accordance with law».

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<sup>25</sup> The Canadian International Trade Tribunal was formerly known, and designated in the CFTA, as the Canadian Import Tribunal.

<sup>26</sup> Article 1904 (e) provides that «[t]he panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority». The phrase «general legal principles» was defined in Article 1911 as including principles such as standing, due process, Rules of statutory construction, mootness, and exhaustion of administrative remedies. Pursuant to these Articles, the applicable standard of review in the United States under the CFTA is that set forth in Section 516A (b)(1)(B) of the Tariff Act of 1930, 19 U.S.C. § 1516a (b)(1)(B). Under this standard of review binational panels could hold unlawful any determination by an agency found to be (i) unsupported by substantial evidence on the record, or (ii) otherwise not in accordance with law. In Canada, pursuant to the Federal Court Act, R.S.C., Ch. F-7, § 28(1) (1985), amended by Ch. 8 § 18.1 (4), 1990 S.C. 113, the test is whether the agency: (i) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction; (ii) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe; (iii) erred in law in making a decision or order, whether or not the error appears on the face of the record; (iv) based its decision or order on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it; (v) acted, or failed to act, by reason of fraud or perjured evidence; or (vi) acted in any other way that was contrary to law.

<sup>27</sup> Article 1904 (2) states that «the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority».

Panels had the authority to *uphold* the agency determination or to *remand* the decision to the relevant agency with specific instructions (Art. 1904(8)). Although the panels could not technically *reverse* an agency determination, panels often took it upon themselves to remand such determinations with very specific instructions, which in certain cases was the functional equivalent of a reversal. Panel decisions were final and binding on the relevant agencies<sup>28</sup> but were not precedential (they may be cited only for their persuasive merit).

Importantly, strict timetables governed the procedures for filing complaints and hearing disputes. For example, each binational panel in principle had to issue its decision within 315 days of the request for a panel (Art. 1904 (14)). Under the provisions of Article 1909, the two governments established a small but ably managed secretariat to administer these procedures, with offices in both Ottawa and Washington, D.C.

The panels themselves consist of five panelists chosen from a roster of fifty qualified candidates, twenty-five selected by each government (**Annex 1901.2**). In the United States, the candidate list, which in practice was expanded beyond the 25 minimum, was submitted to the House Committee on Ways and Means and the Senate Committee on Finance for approval. The candidates could not be affiliated with either government and because of the judicial nature of the panel review process, a majority of the panelists, including its chairman, had to be lawyers.

Panelists on particular panels had to be acceptable to both sides. Each government would choose two panelists and they would jointly choose the fifth. If the two governments could not agree on the fifth candidate, the four original panelists would pick a fifth from the roster: failing that, the choice would be made by lot. Each government was able to exercise two peremptory challenges of panelists chosen

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<sup>28</sup> Article 1904 (9) made the decision of a panel «binding on the Parties with respect to the particular matter between the Parties that is before the panel». Article 1904 (11) made a final determination by a panel non-reviewable by a court.

by the other side. Panelists were subject to high ethical standards; they had to comply with specific codes of conduct and were required to sign protective orders for proprietary business and other privileged information. Violations were subject to sanction.

### **III. SAFETY VALVES**

#### **1. Constitutionality of the Panel Review System**

Two Safety valves were built into the CFTA's dispute settlement system. One, added by Congress, was the opportunity to raise a challenge to the constitutionality of the binational review process. Section 401 (c) of the United States-Canada Free-Trade agreement Implementation act of 1988 <sup>29</sup> provided that:

«An action for declaratory judgment or injunctive relief, or both, regarding a determination on the grounds that any provision of, or amendment made by, the United States-Canada Free-Trade Implementation Act of 1988 implementing the binational panel dispute settlement system under chapter 19 of the Agreement violates the Constitution may be brought in the United States Court of Appeals for the District of Columbia Circuit».

During the leadup to the final adoption and implementation of the CFTA, congress was concerned about, and considered in detail, the possibility that the binational panel dispute settlement system contemplated by the Agreement might violate one or another of several clauses of the United States Constitution, including Articles I, II and III, as well as the due process clause of the Fifth Amendment <sup>30</sup>. The

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<sup>29</sup> Pub. L. 100-449, 102 Stat. 1879 [codified at 19 U.S.C. § 1516a (g)(4)].

<sup>30</sup> The argument with respect to article I involves the ceding, abdicating or delegating to binational panels the judicial power encompassed within the sovereignty of the United States. The Article II violation concerns the possible violation of the Appointments Clause (Art. II, §2, col. 2), which specifies that «officers of the United States» are to be appointed by the President and approved by the Senate. Article III, § 1 could be said to be violated because the binational panels have been vested with adjudicatory powers yet are not covered by the protections of that clause. Finally, the Fifth Amendment concern is that U.S. citizens may be deprived of their rights to due process and equal protection of the law as a result of the lack of judicial review of the decisions of the binational panels.

Committee on the Judiciary of the House of Representatives, in addition to conducting a public hearing, received the views of several leading constitutional scholars on the issues and stated that «[t]he Committee, after extensive analysis, has concluded that the FTA is constitutional»<sup>31</sup>. The Committee's report is a valuable summary of the constitutional issues in question and the views expressed by the Committee appear to be in accord with the general views expressed by most constitutional scholars and trade law practitioners.

In August, 1992, a labor-dominated trade association, the **National Council for Industrial Defense, joined by the American engineering Association**, filed the first constitutional challenge in the U.S. District court, requesting a declaratory judgment on the issues noted above<sup>32</sup>. Although the timing of this action suggests that the suit may have been filed in an attempt to torpedo the then pending NAFTA negotiations, the action was later dismissed on procedural grounds, including lack of jurisdiction.

A more serious constitutional challenge was filed on September 14, 1994 by the U.S.-based **Coalition for Fair Lumber Imports**. This action was filed in the Court of Appeals for the District of Columbia Circuit<sup>33</sup>, as the statute requires, and was the outgrowth of the Coalition's failure to prevail in the binational panel proceeding involving Certain softwood Lumber Products from Canada, USA-92-1904-01 and ECC-94-1904-01USA. In its complaint, the Coalition attacked the constitutionality of the panel system on an overall basis and as applied in the softwood lumber proceeding. This attack was short-lived, however, as on December 15, 1994, the Coalition announced that it was withdrawing the litigation as a result of a political settlement reached between the governments of Canada

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<sup>31</sup> United States-Canada Free Trade Agreement Implementation Act of 1988, 100th Cong., 2d Sess., H. Rep. 100-816, Part 4 (August 4, 1988).

<sup>32</sup> **National Council for Industrial Defense v. United States**, Civ. Act. No. 92-1989 (RCL) (1993 USD LEXIS 6789 (oc 5125193)). See also **Inside U S. Trade**, August 21, 1992, at 3.

<sup>33</sup> **Coalition for Fair Lumber Imports v. United States**, Civ. Action No. 94-1627, September 14, 1994.

and the United States pursuant to which regular consultations on trade in lumber are to be held <sup>34</sup>.

## 2. Extraordinary Challenge Procedure

The second safety valve adopted in the CFTA was the extraordinary challenge procedure established by Chapter 19. As set out in Article 1904.13:

«Where, within a reasonable time after the panel decision is issued, a Party alleges that:

a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,

ii) the panel seriously departed from a fundamental rule of procedure, or

iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and

b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13».

**Annex 1904.13** contemplates the formation of a three-member extraordinary challenge committee (ECC) to hear such allegations. ECC members are taken from a special ten-person roster comprised

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<sup>34</sup> See the Coalition's Press Release dated December 15, 1994 and the Press Release of United States Trade Representative Michael Kantor also dated December 15, 1994.

of judges or former judges of a federal court of the United States or a court of superior jurisdiction of Canada <sup>35</sup>.

The extraordinary challenge procedure has been invoked in three instances, including **Fresh, Chilled and frozen Pork from Canada**, ECC-91-1904-01 USA, June 14, 1991; **Live swine from Canada**, ECC-93-1904-01 USA, April 8, 1993 <sup>36</sup>; and **Certain Softwood Lumber Products from Canada**, ECC-94-1904-01-USA, August 3, 1994 <sup>37</sup>.

#### **IV. OPERATION OF THE CFTA DISPUTE SETTLEMENT SYSTEM**

The CFTA's dispute settlement system, Chapters 18 and 19, has generally drawn high marks. After the CFTA first came into effect, there was considerable apprehension about this novel new system of dispute resolution <sup>38</sup>. Concerns were expressed about the development by the panels of an independent jurisprudence in AD and CVD cases, about the quality and consistency of the decision-making, about whether there would be too many cases for the system to handle, and about whether the panel discussions would tend to break along national lines. As it has operated, however, these concerns have largely been laid to rest. While the underlying subsidy and preferential treatment issues remain unresolved by the two governments, the binational panel review mechanism, particularly in Chapter 19 cases, has received almost uniformly high marks for the manner in which it has operated <sup>39</sup>.

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<sup>35</sup> 1991 FTAPD LEXIS 8, March 29, 1991, and 1991 FTAPD LEXIS 7, June 14, 1991.

<sup>36</sup> 1993 FTAPD LEXIS 1, April 8, 1993.

<sup>37</sup> 1994 FTAPD LEXIS 11, August 3, 1994.

<sup>38</sup> Lowenfeld, Andreas F., **Binational Panel Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal**, N.Y.U.J. Int'l Law & Pol, Vol.24, No.1 (1991).

<sup>39</sup> Moyer Jr., Homer E., **Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort**, 27, Int'l Lawyer 707, 1993.

It is generally perceived, for example, that the panels have *not* developed an independent jurisprudence from that developed by the U.S. Court of International Trade (CIT), although certain panel decisions have differed from specific CIT decisions on the same issue. It should be recognized, however, that CIT judges differ among themselves on certain issues and it should not be surprising that individual panels may differ from the CIT or from other panels on a specific question <sup>40</sup>.

The quality and consistency of the decision-making has largely been a nonissue, as the trade bar considers the panel opinions to be unusually thorough and of a generally very high quality. Moreover, despite the *ad hoc* character of the panel process, its credibility has benefited from the consistency of the panel decisions from one case to another.

In addition, the case load has been managed quite effectively. As of January 1, 1995, there have been 54 cases brought under the CFTA Chapter 19 provisions. These include 32 cases involving U.S. agency determinations, 19 cases involving Canadian agency determinations, and 3 extraordinary challenge committees involving U.S. agency determinations. A total of 11 NAFTA cases, one has been filed, 3 in Mexico, 3 in the United States, and 5 in Canada. Of the 5 Canadian NAFTA cases, one has been terminated <sup>41</sup>.

Finally, the concern that the panelists would divide along national lines has also proven to be a nonissue. Nearly all decisions have been unanimous, although some panelists have availed themselves of the opportunity to prepare separate assenting or dissenting remarks.

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<sup>40</sup> Although decisions of the Court of Appeals of the Federal Circuit and the Supreme Court are binding on binational panels (Art. 1904(2)), decisions of the CIT do not constitute binding precedent. See «Rhône Poulenc v. United States», 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984). (A decision of the CIT is «valuable, though non-bidding, precedent unless and until it is reversed»); «Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada», USA-89-1904-03, at 3-5 (March 7, 1990). Likewise, a decision of one article 1904 panel is non binding on future panels (Art. 1904 (9)).

<sup>41</sup> Telephone interview conducted February 7, 1995 with James R. Holbein, United States NAFTA Secretary.

The operation of the Chapter 18 process is generally more closed, and less visible, than the operation of the Chapter 19 process. The purpose of Chapter 18 panels is to provide reports and recommendations to the two governments with the view in mind of assisting the governments in their own efforts to settle the ongoing dispute. With this point in mind, the Chapter 18 panels have clearly been beneficial in that the solutions ultimately reached by the governments have often closely approximated those recommended by the panel. Even where this was not the case, the panels no doubt have played an important role in helping define and resolve the issues as well as in moderating or eliminating the political stresses that might well have exacerbated the disputes in question.

The three extraordinary challenge committees have undertaken their work in deliberate fashion. The first two committees rendered unanimous opinions, in language that has in some instances proved helpful to the panels. On the other hand, the last committee broke sharply, with the three-member committee issuing three separate, sometimes sharply worded opinions that unfortunately will not have the same beneficial impact.

At this writing the U.S. General Accounting Office is preparing a report on the CFTA/NAFTA panel process, which will be the most thorough review to date of that effort.

## **V. THE NAFTA'S DISPUTE SETTLEMENT PROVISIONS**

### **1. From the CFTA to the NAFTA**

The dispute settlement provisions of Chapters 19 and 20 of the NAFTA parallel their comparable provisions (Chapters 19 and 18) in the CFTA. Chapter 19 of the NAFTA largely duplicates, on a trilateral basis, the provisions of Chapter 19 of the CFTA, effectuating such changes as were necessary by virtue of the change to a tripartite structure and the incorporation of a few additional changes. Chapter 20 of

the NAFTA, however, expands the scope of the CFTA's Chapter 18 provisions and makes some other important innovations.

Overall, the most important changes made by the NAFTA in the dispute settlement area may be highlighted as follows:

1. The addition of a mechanism for settlement of disputes between a Party and an investor of another Party (Chapter 11).
2. The potential use of alternative dispute settlement mechanisms such as good offices, conciliation, mediation, and expert advice (Article 2007).
3. The use of scientific review boards, which are permitted to study and report to the Parties or to Chapter 20 panels on factual issues concerning environmental, health, safety or other scientific matters (Article 2015).
4. The addition of financial services disputes under the Chapter 20 dispute resolution mechanism (Article 1414).
5. The elimination of binding arbitration contemplated by Article 1806 of the CFTA, which concept was not brought forward into the NAFTA.
6. A new method of panel selection (i.e., reverse panel selection) in Chapter 20 cases, pursuant to which the panel chairman is decided jointly by the Parties (who may be from the third NAFTA Party), and then each of the disputing Parties selects two panel members from the other country (Article 2001).
7. The creation of two new advisory committees, one entitled **de Advisory Committee on Private Commercial Disputes** (Article 2022) and the other entitled the **Advisory Committee on Private Commercial Disputes regarding Agricultural Goods** (Article 707).

## **2. The NAFTA's General Dispute Settlement Procedures**

As a general matter, the dispute settlement procedures of the NAFTA are intended to provide expeditious and effective means for the resolution of disputes, building upon the comparable provisions of both the WTO<sup>42</sup> and the CFTA. The table at the end of this article illustrates the overall structure of the NAFTA's dispute settlement procedures.

Source External Affairs and International Trade Canada, NAFTA: **What's It All About?**, (1993), at 94.

## **3. Election of Remedies: WTO v. NAFTA**

As suggested by the table, certain disputes between the NAFTA Parties may conceivably lie in either the WTO or in the NAFTA, as all three countries are party to both agreements<sup>43</sup>. In these situations, Article 2005 of the NAFTA provides generally that if a dispute could be brought under both the WTO and the NAFTA it is within the discretion of the complaining Party to choose either forum. However, if the complaining Party has selected the WTO and, following the requisite notification, the third NAFTA Party wants to bring the same case in the NAFTA, the two complaining Parties must consult, with a view to agreeing on a single forum. If those Parties cannot agree, the dispute settlement proceeding normally will be heard by a NAFTA panel. Once selected, the chosen forum must be used to the exclusion of the other.

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<sup>42</sup> Attached as an Appendix to this article is a comparison of the dispute settlement provisions reached in the recently concluded Uruguay Round negotiations with the Chapter 20 dispute settlement provisions of the NAFTA. Additional appendices (Figures 1-2) contain the timelines for dispute resolution in both the WTO and the NAFTA.

<sup>43</sup> The United States and Canada were original founding members of the GATT, joining on January 1, 1948, while Mexico joined the GATT on August 24, 1986. Each of Canada, Mexico and the United States completed their ratification of the WTO (Uruguay Round) Agreements as of December 31, 1994, and therefore joined the WTO as of January 1, 1995.

In addition, if a dispute involves factual issues regarding certain standards-related environmental, health, safety or conservation measures or if the dispute arises under specific environmental agreements, the responding Party may elect to have the dispute considered by a NAFTA panel, which would become the exclusive forum.

#### **IV. CHAPTER 20 PROVISIONS**

##### **1. The NAFTA's Institutional Arrangements**

Keeping in place the structure created by the CFTA, the NAFTA establishes two institutions which are collectively responsible for implementing the Agreement, ensuring its joint management, and for preventing and settling any disputes between the NAFTA countries regarding the Agreement's interpretation and application.

##### **1.1 The Free Trade Commission**

The central institution of the NAFTA is the Free Trade Commission («Commission»), which is comprised of Ministers or cabinet-level officers designated by each NAFTA country<sup>44</sup>. Under Article 2001 of the Agreement, the Commission is charged with the obligation to supervise the implementation of the Agreement, oversee its further development, resolve disputes regarding its interpretation or application, supervise the work of the various committees and working groups, and consider any other matters affecting the operation of the Agreement. Regular meetings of the Commission are to be held annually, alternating between the three countries, although its day-to-day work will as a practical matter be carried out at the staff level through the various committees and working groups established by the Agreement. The Agreement specifically calls for decisions of the Commission to be taken by consensus, unless otherwise agreed.

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<sup>44</sup> In practice, the Commission will be made up of the Canadian Minister for International Trade, the United States Trade Representative, and the Mexican Secretary of Commerce and Industrial Development.

Article 2001 makes plain that the Commission may establish and delegate responsibilities to *ad hoc* or standing committees, working groups or expert groups and, indeed, to operation of these committees and groups will no doubt prove to be central to the operation and administration of the Agreement as a whole. While the Commission may create such committees and groups at any time, a significant number of them were agreed upon at the time the NAFTA came into force. **Annex 2001.2** establishes 8 committees, with 5 designated subcommittees, and 6 working groups, with one designated subgroup<sup>45</sup>.

Article 2001 also makes clear that the Commission may seek the advice of non-governmental experts or groups and can take other actions in the exercise of its functions as the Parties may agree.

## **1.2. NAFTA Secretariat**

Article 2002 of the NAFTA also establishes (in effect, makes permanent) a Secretariat to serve the Commission as well as other subsidiary bodies and to serve the dispute settlement panels. The Secretariat is a unique organization, consisting of «mirror-image» offices in the three capital cities, each of which works together in administering both Chapter 20 and Chapter 19 dispute settlement panels<sup>46</sup>. The Secretariat also serves as administrator for the extraordinary challenge committees and, broadly, acts as the clerk of court and institutional memory for the entire panel process.

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<sup>45</sup> The chairs of these committees will be senior government officials and the participants will be the appropriate officials from each government. Although no provision was expressly made for private sector participation in the committees, it appears to be the case that committees are free to form working groups and subcommittees which will be able to include private sector advisors and experts. See Holbein, James F., *NAFTA: Administration of the Agreement*, 1993, at 3. See also Villarreal, M. Ángeles, *NAFTA: Committees, Working Groups, and Other Organizations*, Congressional Research Service 94-290E, Washington, DC: The Library of Congress, April 1994.

<sup>46</sup> *Ibidem* at 2.

## **2. The Chapter 20 Dispute Resolution Procedure**

### **2.1. Consultations**

Under the NAFTA, clear priority is given to the resolution of disputes through amicable consultations. In the first clause of the dispute settlement section (Article 2003), the Parties declare that they:

«(...) shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation».

Under Article 2006, requests for consultation may be made in writing of any actual or proposed measure or any other matter by one NAFTA Party that another Party considers might affect the operation of the Agreement. If a third Party believes that it too has substantial interest in the matter, it will be entitled to participate in the consultations or seek its own consultations. The Agreement requires that the consulting Parties «make every attempt to arrive at a mutually satisfactory resolution» of the matter in dispute (Article 2006(5)).

### **2.2. Review by the Commission**

Should the Parties own efforts at consultation fail to resolve the matter within 30 to 45 days, any Party may call a meeting of the Commission with all three countries present. Article 2007 of the Agreement directs the Commission to seek to settle the dispute promptly, requiring the Commission to convene within 10 days of the request. The Commission is permitted by the Agreement to call on technical advisers or working groups or expert groups as it deems necessary, in addition, it may use good offices, mediation, conciliation or other means of alternative dispute resolution as a means of achieving a mutually satisfactory resolution of the dispute (Article 2007(5)).

### **2.3. Initiation of Panel Proceedings**

If the work of the Commission proves to be unavailing in resolving the dispute, Article 2008 of the Agreement permits any consulting

country to submit a request for an arbitral panel and thus to initiate panel proceedings. The Commission is required to establish such a panel upon delivery of the appropriate request. A third Party that considers it has a substantial interest in the matter is entitled to join as a complaining Party on delivery of the requisite notice of intention to participate. The third Party may choose, however, to limit its participation to the making of oral and written submissions.

The panel will typically be charged with making findings of fact and determining whether the action taken by the defending country is inconsistent with its obligations under the NAFTA, and may make recommendations for resolution of the dispute <sup>47</sup>.

Chapter 20 panels will be composed of five members, who will normally be chosen from a trilaterally agreed roster of eminent trade, legal and other experts, including from countries outside the NAFTA <sup>48</sup>. The NAFTA provides for a special roster of experts for disputes involving financial services <sup>49</sup>.

Chapter 20 panels are chosen through a process of «reverse selection», designed to ensure impartiality. Under Article 2001, the chair

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<sup>47</sup> In the United States, Chapter 20 panel reports will have no direct effect on domestic law or agencies. Neither federal agencies nor state governments will be bound by any finding or recommendation included in such reports. Thus, panel reports will not provide legal authority for federal agencies to change their regulation or procedures or refuse to enforce particular laws or regulations, such as those related to human, animal or plant health, or the environment. In all cases following a panel report, the NAFTA in effect makes discretionary any change in U.S. law and leaves to the United States the manner in which any such change would be implemented whether through the adoption of legislation, a change in regulation, judicial action, or otherwise. Statement of Administrative Action, at 214, reprinted in **North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements**, H. Doc. 103-159, Vol. 1, 103d Cong., 1st Sess., at 663, 1993.

<sup>48</sup> Article 2009 requires the Parties to establish and maintain a roster of up to 30 individuals to serve as panelists. These roster members are to «have expertise or experience in law, international trade, other matters covered by this agreement or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment». These must also be independent of, and not affiliated with or take instructions from, any Party. Finally, the roster members must comply with the applicable Code of conduct established by the Commission.

<sup>49</sup> Article 1414(3).

of the panel will be selected first, either by agreement of the disputing countries or, failing agreement, by designation of one disputing side, chosen by lot. The chair may not be a citizen of the side making the selection, and may be a non-NAFTA national. Each side will then select two additional panelists who are citizens of the country or countries on the *other* side. Whenever an individual not on the roster of panelists is nominated, any other disputing NAFTA country may exercise a peremptory challenge against that individual.

In accordance with the NAFTA's Article 2012 requirement, the Commission is to adopt **Model Rules of Procedure**, which provide for written submissions, rebuttals, and at least one oral hearing<sup>50</sup>. There are strict time limits to ensure prompt resolution.

Two other provisions of the NAFTA permit the panels or the Parties themselves to consult various experts to help resolve the disputes. Article 2014 is a general provision permitting the panels to seek information and technical advice from any persons or body deemed appropriate, while Article 2015 permits scientific review boards to provide expert advice to panels on factual questions related to the environment and other scientific matters.

Under Article 2016, unless the disputing Parties have otherwise decided, the panel will present to the Parties within 90 days of a panel's selection its initial report, which will be confidential. The Parties will then have 14 days in which to provide comments to the panel. Within 30 days of the presentation of its initial report, the panel will present its final report to the Parties concerned. The report will be transmitted to the Commission, which will normally publish it.

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<sup>50</sup> Although Article 2012:1 requires the Commission to establish **Model Rules of Procedure** by January 1, 1994, such rules still have not issued. Informed reports indicate that the three governments do not see eye to eye on the degree to which the dispute settlement process will be subject to public scrutiny, the Canadian and Mexican governments tending to favor a greater degree of confidentiality than does the United States.

### 3. Implementation and Non-Compliance

Pursuant to Article 2018, upon receiving the panel's report, the disputing Parties are to agree on the resolution of the dispute, which will normally conform to the recommendations of the panel. If a panel determines that the responding Party has acted in a manner inconsistent with its NAFTA obligations, and the disputing Parties do not reach agreement within 30 days or other mutually agreed period after receipt of the report, the complaining Party, under Article 2019, may suspend the application of equivalent benefits until the issue is resolved. Any Party that considers the retaliation to be excessive may obtain a panel ruling on this question.

## VII. CHAPTER 19 PROVISIONS

### 1. Highlights

Chapter 19 of the NAFTA also incorporates several new innovations, including a preference for judges as panelists and a new «safeguard» mechanism to protect the panel process. Other new elements include improvements in the standard for extraordinary challenges and requirements that all three countries incorporate predictability, transparency and fairness into both their administrative and judicial processes.

Although the U.S. and Canada were not required to make significant changes in their law to accommodate the revised Chapter 19 structure, Mexico was required to make extensive changes, which it has already accomplished <sup>51</sup>.

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<sup>51</sup> In **Annex 1904.15**, Mexico committed to changing its AD and CVD laws in 21 specific ways. These included fundamental steps designed to ensure due process, such as written notice to interested parties of the initiation of an investigation; full participation for such parties in the administrative process, including the right to administrative appeal and judicial review; written notice of any decisions rendered by the investigating authority; and a detailed statement of the basis for any final decisions made. Mexico's new Foreign Trade Law (*Ley de Comercio Exterior*), published in the **Diario Oficial de la Federación** on July 27, 1993, and amended on December 22, 1993, implemented many of the required changes. See Craig Raymond Gieszc, **Mexico's New Antidumping and Countervailing Duty System: Policy and Legal Implications, as well as Practical Risks and Realities, for United States Exporters to Mexico in the Era of the North American Free Trade Agreement**, 25 St. Mary's Law J. 889 (1994).

## 2. Article 1904

### 2.1. Operation of NAFTA Chapter 19 Panels

As was the case with respect to the CFTA, Articles 1901 and 1902 of the NAFTA make it clear that each country retains its own antidumping and countervailing duty laws, which it can amend at any time. Article 1903 also provides that a NAFTA Party can request a binational panel to review whether an amendment to another NAFTA Party's antidumping or countervailing duty statutes is consistent with Chapter 19.

Article 1904 is once again the source of authority for the creation of independent binational panels, composed of judges and experts from the two NAFTA countries involved, which panels will review final AD and CVD determinations made by the relevant administering authorities in one country with respect to products from one of the other two countries. Notwithstanding the fact that NAFTA is now a tripartite Agreement, Chapter 19 panels will continue to be binational in composition. Thus, if a final determination is reached with respect to identical products being simultaneously imported into one NAFTA country from the other two NAFTA countries, two NAFTA panels would be established in the context of an appeal of that determination, one for each exporting country.

**Annex 1901.2** of the NAFTA sets out the detailed standards for the formation of binational panels, contemplating that each of the three countries will select at least 25 candidates but providing, in this instance, that the roster for binational panels «shall include judges and former judges to the fullest extent practicable». The United States has been the principal actor in attempting to secure sitting and retired judges as panel members, expressing the view that panels containing judges are less likely to create an independent jurisprudence in AD/CVD cases than would otherwise be the case<sup>52</sup>, but at this writing no judges, sitting or retired, have been placed on the Chapter 19 roster.

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<sup>52</sup> Statement of Administrative Action, *supra* n.47, at 195, 199-201.

## 2.2. Extraordinary Challenge Procedure

Another significant change to Article 1904 in the NAFTA, as compared to its predecessor CFTA provision, is the change to the extraordinary challenge committee provision (Article 1904 (13)) which clarifies and emphasizes that failure by a binational panel to apply the appropriate standard of review would qualify as a ground for ECCs review<sup>53</sup>. By this change, it was intended to make clear that a binational panel that failed to apply the appropriate standard of review would *per se* be considered to have manifestly exceeded its powers, authority or jurisdiction. The purpose of the change is to minimize the possibility of any disuniformity of panel decisions with each other and with established U.S. law<sup>54</sup>.

Two additional changes from the CFTA procedures for ECCs, also found in **Annex 1904.13** of the NAFTA, require ECCs, if convened, to examine the legal and factual analysis underlying the findings and conclusions of the panel's decision, and provide ECCs with 90 days (30 days under the CFTA) from the date of their establishment to render a decision. As stated by Congress, this first change is intended to «clarify that an ECCs responsibilities do not end with simply ensuring that the panel articulated the correct standard of review». ECCs *must* examine whether the panel analyzed the substantive law and underlying facts<sup>55</sup>.

## 2.3. Safeguard Provision

The last important innovation to the NAFTA Chapter 19 provisions was the addition of Article 1905, entitled «Safeguarding the Panel Review System». Under this provision, a Party may request consultations whenever another Party:

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<sup>53</sup> Article 1904 (13)(a)(iii), as it now amends the comparable CFTA provision, reads: «The panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review».

<sup>54</sup> Statement of Administrative Action, *supra* no.47.

<sup>55</sup> *Ibidem* at 197.

- a) Has prevented the establishment of a panel requested by the complaining Party;
- b) has prevented a panel requested by the complaining Party from rendering a final decision;
- c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel; or
- d) has resulted in a failure to provide opportunity for review of a final determination by a panel or court of competent jurisdiction that is independent of the competent investigating authorities, that examines the basis for the competent investigating authority properly applied domestic antidumping and countervailing duty law in reaching the challenged determination, and that employs the relevant standard of review identified in Article 1911.

The consultations under this provision must begin within 15 days of the making of the request and if not resolved within 45 days of the request, or such later date as the consulting Parties may agree, the complaining Party may request the establishment of a special committee. Such special committee must be formed within 15 days of a request and each of its three members will be picked from a special roster established under **Annex 1904.13**. The special committee must follow rules of procedure established by the Parties.

If the special committee makes an affirmative finding with respect to one or another of the above grounds, then the Parties must commence consultations on this finding within 10 days of the issuance of the committee's report with the view of reaching a «mutually satisfactory solution» within 60 days. However, if the Parties are unable to reach such a solution, and the problem is not corrected, the complaining Party may then suspend either

- a) the operation of Article 1904 with respect to the Party complained against; or
- b) the application to the Party complained against of appropriate benefits under the Agreement.

### **VIII. CHAPTER 11 PROVISIONS**

The NAFTA is unique among trade agreements because of its comprehensive regime for settling disputes between foreign investors and host governments. Section B of Chapter 11 of the NAFTA sets out a mechanism for an investor to pursue a claim against a host government that has breached its obligations under Section A of that chapter. This mechanism for an investor to pursue a claim against a host government that has breached its obligations under Section A of that chapter. This mechanism<sup>56</sup> entitles an investor to submit its claim to binding arbitration under internationally accepted rules.

Obligations set forth in Section A that might be the subject of a claim by an investor for binding arbitration include:

- a) Failure by the host government to accord an investor national treatment with respect to the establishment, acquisition, expansion, management, conduct operation, and sale or other disposition of investments (Article 1102).
- b) Failure by the host government to accord a foreign investor most-favored-nation treatment with respect to such activities (Article 1104).

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<sup>56</sup> The Chapter 11 dispute settlement mechanism is patterned after the mechanism utilized in the various U.S. bilateral investment treaties (BITs). See McKinstry Robin, Patricia, **The BIT Won't Bite: The American Bilateral Investment Treaty Program**, 33 Am. U.L. Rev. 931, 1984.

- c) Failure by the host government to accord a foreign investor a minimum standard of treatment under international law (Article 1105).
- d) Imposition by the host government of specific performance requirements such as minimum export levels, domestic content rules, preferences for domestic sourcing, trade balancing, exclusive supply, and technology transfer requirements (Article 1106).
- e) Imposition by the host government of a requirement that the senior management be of a particular nationality<sup>57</sup> (Article 1107).
- f) Failure by the host government to permit free transfers of profits, payments and other investment returns in a Freely usable currency<sup>58</sup>, or to permit the conversion of local currency into foreign currency at prevailing market rates<sup>59</sup> (Article 1109).
- g) Noncomplying expropriation of the investment by the host government<sup>60</sup> (Article 1110).

The protections afforded by Section A of Chapter 11 are subject to certain important limitations, including the fact that financial services (Chapter 14) are excluded, as are various laws and sectors identified in **Annexes I** through **IV** of the NAFTA. **Annex 1138.2** also excludes from dispute settlement under Chapter 11 decisions made in Canada under the **Investment Canada Act** and in Mexico by the National

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<sup>58</sup> This provision also covers arbitral awards or settlements and any compensation due as a result of expropriation by the host government.

<sup>57</sup> However, a host government may require that the majority of a board of an enterprise located in its territory be of a particular nationality, and may require that investors be residents in that territory, as long as control of the enterprise and protections afforded the investors are not materially impaired. Articles 1107 and 1111.

<sup>59</sup> Transfers may be made at the prevailing market rates, but will be subject to the equitable and non-discriminatory application of securities, bankruptcy, criminal and reporting laws.

<sup>60</sup> Under Article 1110, expropriation may only be done (i) for a public purpose; (ii) on a non-discriminatory basis; (iii) in accordance with due process of law and minimum standards of international law; and (iv) on payment of compensation. Neither of the terms «compensation» or «public purpose» is defined.

Commission on Foreign Investment (**Comisión Nacional de Inversiones Extranjeras**).

Historically speaking, trade agreements that treat investment issues have generally provided only for government-to-government dispute settlement proceedings but do not have any direct rights under such agreements. Mexico and numerous other Latin American countries have traditionally required foreign investors to waive any right of diplomatic protection from their governments and to seek only remedies available under domestic law. This practice, and example of the *Calvo Doctrine*, has served as an impediment to investment in Mexico and much of Latin America<sup>61</sup>. Thus, the inclusion in the NAFTA of the Chapter 11 dispute resolution mechanism represents a significant change in attitude on the part of Mexico and a potential significant improvement in outlook for the settlement of disputes through arbitration.

## 1. Nature of Claims

Articles 1116 and 1117 of the NAFTA set forth the kinds of claims that may be submitted to arbitration. To invoke a claim, the investor must allege a direct injury to himself or an indirect injury to a firm in the host country that is owned or controlled by the investor. In either case, the claim must involve an allegation of breach of Section A or of certain provisions governing the behavior of government monopolies in Chapter 15. All claims must be brought within three years of the date on which the investor knew, or should have known, of the alleged

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<sup>61</sup> Article 27 of the Mexican Constitution embodies the *Calvo Doctrine* in the following language (quoting pertinent part):

«Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their easements, or to obtain concessions for the exploitation of mines or waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Affairs to consider themselves as nationals and not to invoke the protection of their governments in matters relating thereto; under penalty, in the case of noncompliance with this agreement, of forfeiture of the property they had acquired to the benefit of the nation».

The *Calvo Doctrine* in effect provides that foreigners are not entitled to any rights or privileges that are not available to nationals of the country invoking it. Thus, foreigners must submit any claims involving property or the like to the jurisdiction of its national courts and waive protection of their home country's laws.

breach of the NAFTA and resulting damage but, to allow the disputing parties time for consultations and negotiations, the claim may not be submitted until six months have elapsed from the date of the breach (Article 1120).

Article 1138 (1) will exclude from Chapter 11 dispute settlement a decision by a host government to prohibit or limit investment on national security grounds. In addition, Article 1138 (2), when read together with **Annex 1138.2**, makes it clear that decisions taken by Canada or Mexico to prohibit or restrict an acquisition under their laws providing for screening of foreign investment will be excluded from dispute settlement under either Chapter 11 or Chapter 20.

## **2. Initiation of Dispute Settlement Proceedings**

The NAFTA emphasizes consultations and negotiations as the first step in handling an investment dispute (Article 1118). Articles 1119 and 1120 set forth the process leading up to the submission of a dispute to an arbitral panel, Article 1119 specifying in particular that an investor must provide notice of its intention to submit a claim to arbitration at least 90 days before doing so, and specifying further the content of such notice. Article 1120 provides that once six months have elapsed from the events giving rise to a claim, the investor may submit the claim for arbitration to:

- a) The **International Centre for the Settlement of Investment Disputes (ICSID)**, provided both the country of the investor and the host country are parties to the ICSID Convention<sup>62</sup>,

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<sup>62</sup> **Convention on the Settlement of Investment Disputes Between States and Nationals of Other States** (ICSID Convention), done at Washington, D.C., March 18, 1965, entered into force for the United States on October 14, 1966, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (1965), Doc. ICSID /15 (1985), reprinted in 4 I.L.M. 532 (1965). In the United States, see Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. 89-532, 80 Stat. 344 (codified at 22 U.S.C. §§ 1605-1605a), reprinted in 5 I.L.M. 820 (1966). Neither Canada or Mexico currently is a party to the ICSID Convention, which prevents its current use in connection with NAFTA-related investment disputes.

b) ICSID's «Additional Facility», in the event one such country is not a party to the Convention<sup>63</sup>; or

c) and *ad hoc* arbitral tribunal established under the arbitration rules of the **United Nations Commission on International Trade Law (UNCITRAL)**<sup>64</sup>.

### 3. Jurisdictional Requirements

Articles 1121 and 1122 set out Rules for establishing the requisite mutual consent for arbitration. Article 1121 requires the investor to consent in writing to arbitration, and to waive the right to initiate or continue any actions in local courts or other *fora* relating to the disputed measure, except for actions for injunctive or other extraordinary relief. To ensure that a host country cannot frustrate an arbitration by withholding its own consent, Article 1122 itself constitutes advance consent by the three NAFTA governments to arbitration.

### 4. Appointment of Arbitrators

Article 1123 of the NAFTA provides generally for the establishment of three-member arbitral tribunals, one member to be appointed by each of the disputants, and the presiding arbitrator to be appointed by agreement between the disputants. If, within ninety days of the

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<sup>63</sup> **ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings**, Doc. ICSID/11 (Washington: International Centre for the Settlement of Investment Disputes, 1979). At this writing, the Additional Facility could be used only if the United States were the host government in an investment dispute or if a national of the United States was involved in a dispute in which Canada or Mexico was the host government. No arbitrations have ever been conducted under the Additional Facility rules.

<sup>64</sup> See Report of the United Nations Commission on International Trade Law on the Work of Its Ninth Session, 31 U.N. GAOR Supp. (no.17) at 34, U.N. Doc. A/31/17, para. 57 (1976, reprinted in 15 I.L.M. 701 (1976)). Arbitration under the UNCITRAL rules, under the current situation, would be mandatory for arbitrations between Canada and Mexico and optional in cases where the United States was the host government or a U.S. investor was involved.

submission of the claim to arbitration, a disputant fails to appoint an arbitrator, or the two disputants fail to agree on a presiding arbitrator, Article 1124 provides for arbitrators to be named by the ICSID Secretary-General<sup>65</sup>.

Article 1126 addresses the possibility that more than one investor might submit to arbitration claims arising out of the same event. It provides for the appointment by the ICSID Secretary-General of a special three-member tribunal to consider whether such multiple claims share questions of fact or law in common, in which case that tribunal may assume jurisdiction over, and decide, all or part of any such claims.

## 5. Arbitral Proceedings

Articles 1127 through 1129 enable a NAFTA government that is not involved in the arbitration to be apprised of relevant facts and other information and, if it wishes, to submit views to the tribunal on questions of NAFTA interpretation. To help ensure the enforceability of an award, Article 1130 provides that unless otherwise agreed, the arbitration must take place in a country that is a party to the **United Nations Convention on the Recognition and Enforcement of Arbitral Awards** («New York Convention»)<sup>66</sup>.

Articles 1131 and 1132 address the substantive law to be applied in arbitral proceedings. Article 1131 (1) provides that arbitral tribunals

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<sup>65</sup> The Secretary-General may use his discretion in making appointments. However, with respect to the appointment of the presiding arbitrator, he must choose first from a roster of 45 qualified individuals agreed upon by the three NAFTA governments. The Secretary-General may select from ICSID's standing Panel of Arbitrators only in the event that no person on the roster is available and may choose only non-NAFTA nationals.

<sup>66</sup> Done at New York, June 10, 1958, entered into force for the United States on June 7, 1959, and for Canada effective August 10, 1986 (implemented through various statutes in all 13 jurisdictions), 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. Mexico is also party to the New York Convention.

are to decide questions in accordance with the NAFTA and applicable international law rules. Article 1131 (2) makes binding on NAFTA arbitration Tribunals any interpretation of the Agreement by the Free Trade Commission established under Article 2001.

Under Article 1133, a tribunal may seek advice from experts on environmental, health, safety or other scientific matters under certain conditions. Article 1137 (3) provides that a country cannot assert, as a defense or set-off, that the investor has been compensated for its losses by insurance or similar means.

Article 1137 (2), read together with **Annex 1137.2**, requires each NAFTA government to designate in its official register the agency to which notices and other arbitration documents are to be delivered. For the United States, this will be the Department of State.

## **6. Nature of Relief**

Under Article 1134, a tribunal may order interim protective measures to preserve existing rights of the disputants, including the preservation of evidence. A tribunal cannot, however, order attachment of assets or enjoin the government from applying any measure that is the subject of the dispute.

Article 1135 limits a final award to money damages or restitution, or a combination of both; awards of restitution must offer the alternative of paying damages. No punitive damages may be awarded.

## **7. Enforcement of Arbitral Awards**

Article 1136 sets forth rules government enforcement of final awards. Paragraph one restates the traditional rule that an arbitral award has no precedential effect and is binding only on the particular disputants in the matter. Paragraph two obliges a disputant to abide by

and comply with the award. Paragraph three provides a disputant the opportunity to seek revision or annulment of the award before enforcement may be sought <sup>67</sup>.

Paragraph four requires each Party to provide for enforcement of an award in its territory <sup>68</sup>. In the event that a country does not comply with an award, paragraphs five and six provide that the investor's government may request a government-to-government arbitration panel under Article 2008 to consider the matter. The initiation of such proceedings would not prevent the investor from seeking enforcement of the award.

The NAFTA allows a disputing investor to seek enforcement of an award under the ICSID Convention, the New York Convention, or the **Inter-American Convention on International Commercial Arbitration** (Panama convention) <sup>69</sup>. By declaring that claims submitted to NAFTA arbitration will be considered to arise out of a commercial relationship or transaction, paragraph seven satisfies prerequisites of the New York Convention and the Panama Convention for the enforcement of awards under those agreements.

## 8. Publication of Awards

Article 1137 (4) and Annex 1137 (4) govern the publication of awards. For arbitrations involving the United States or Canada, either

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<sup>67</sup> No standards are established in Chapter 11 for annulment proceedings; thus, the Rules of the relevant arbitral regime will be applicable. Annulment proceedings are common and may involve allegations that (i) the tribunal was improperly constituted; (ii) the tribunal manifestly exceeded its powers; (iii) a panel member was subject to bias or corruption; (iv) the panel engaged in a serious departure from a fundamental rule of procedure; or (v) the award failed to state the reasons on which it was based.

<sup>68</sup> The Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) satisfies the requirement for the enforcement of non-ICSID awards in the United States. The Convention on the Settlement of Investment Disputes Act of 1966 (22 U.S.C. §§ 1650, 1650a) provides for the enforcement of ICSID awards.

<sup>69</sup> Done at Panama City, January 30, 1975, entered into force for the United States, June 16, 1976, O.A.S.T.S. No.42, reprinted in 14 I.L.M. 336 (1975). Mexico, but not Canada is party to the Panama Convention.

disputant may make the awards public; for arbitral proceedings involving Mexico, the applicable arbitration rules will govern.

## **IX. PROVISIONS FOR PRIVATE COMMERCIAL DISPUTES**

The NAFTA is the first U.S. trade agreement that deals with the resolution of purely private International commercial disputes. Under Article 2022 (1), each NAFTA Party is, to the maximum extent possible, to

«encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area».

In support of this effort, an advisory committee will report to the Commission on alternative dispute resolution procedures in the free trade area. Although the Agreement does not prescribe or establish particular arbitration procedures. It takes note of the New York Convention and the Panama Convention, and it can be expected that various outreach programs will be established to educate business in all three countries on the nature and importance of arbitration of private commercial disputes <sup>70</sup>.

## **X. CONCLUSIONS**

Despite an infirm beginning, two constitutional attacks, expressions of judicial concern <sup>71</sup>, and the occasional cries of disappointed

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<sup>70</sup> Ginger Lew, **NAFTA and the Resolution of Private Commercial Disputes**, International Law News, Section of International Law Practice, American Bar Association, vol.24, No.1, Winter 1995, at 1.

<sup>71</sup> In a now famous, but clearly good natured, remark, the Honorable Mr. Justice Willard Z. Estey of Canada said during the Extraordinary Challenge Committee hearing on **Fresh, Chilled, or Frozen Pork from Canada**, ECC-91-1904-01USA, that «These panels are pick-up squads who are roving around like a ubiquitous band of Indians». The somewhat turgid review of the panel process by U.S. Circuit Judge (Ret.) Malcom Wilkey in **Softwood Lumber Products from Canada**, ECC-94.1904-01USA, was much less generous («Foreigners can't be expected to understand or correctly apply U.S. law»).

litigants, it seems fair to say that the dispute settlement mechanisms created by the CFTA and expanded in the NAFTA are here to stay. As noted above, most of the initial concerns about the process, particularly the chapter 19 dispute settlement mechanism, have been laid to rest<sup>72</sup>. While the *ad hoc* character of the panel process, and the lack of significant institutional support for it, present a continuing challenge as well as concern, the panelists have shown exceptional commitment to that process and have produced opinions which have consistently been thoroughgoing and of a very high quality. While this is in principal part due to their own efforts, in fairness it must also be said that it is in significant part due to the efforts of government counsel and of the members of the trade Bar arguing these cases, which have consistently acted with an extraordinary level of efficiency, ability and competence in a highly complex area of the law.

Over the 7-year period since the CFTA came into force, the three secretariats have dealt with some 70 cases (Ch. 18/20, Ch. 19 and ECC)<sup>73</sup>. Those cases have been dealt with, and are continuing to be dealt with, in a manner that is fair, effective, and fully congruent with the goals of the original CFTA negotiators. In Chapter 19 cases, the «temporary» system put in place by the CFTA has become a «permanent» fixture in the NAFTA<sup>74</sup>. The Chapter 18/20 structure has been

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<sup>72</sup> Horlick, Gary and F. Amanda DeBusk (1992), **Disputes Resolution Panels of the U.S.-Canada Free Trade Agreement: The first Two and One-Half Years**, McGill Law Journal, 37, 575-96; Lowenfeld, Andreas F., **Binational Panel Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: an Interim Appraisal**, N.Y.U.J. Int'l Law & Pol., Vol.26, No.1 (1991), Moyer, Jr., Homer E., **Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort**, 27 Int'l Lawyer 707 (1993).

<sup>73</sup> It may be noted in contrast, that in the 47-year history of GATT jurisprudence, the total number of cases is approximately 200, which figure was characterized by Professor John H. Jackson as «the largest significant body of case-law experience developed for a model multilateral treaty of broad purpose and application». Paper presented at the Tokyo Conference on **The Uruguay Round: Appraisal and Implications for International Trade and Investment**, April 20-21, 1992. Clearly, the NAFTA will generate cases at a much faster rate and thus will become an important crucible for the examination and resolution of international trade disputes.

<sup>74</sup> Whether the AD and CVD laws themselves prove to be «permanent» is another question. It has been widely noted that the problems of AD and CVD enforcement as a source of trade disputes would disappear if the countries involved shifted their investigations away from AD and CVD enforcement to a system of domestic competition or antitrust type enforcement. While many regard this approach as an inevitable adjunct to ongoing multilateral and regional trade liberalization, the time frame in which it could actually occur remains problematic.

improved significantly with the adoption of the NAFTA and has even proved to have favorably influenced the WTO dispute resolution system, which was recently finalized in the Uruguay Round <sup>75</sup>.

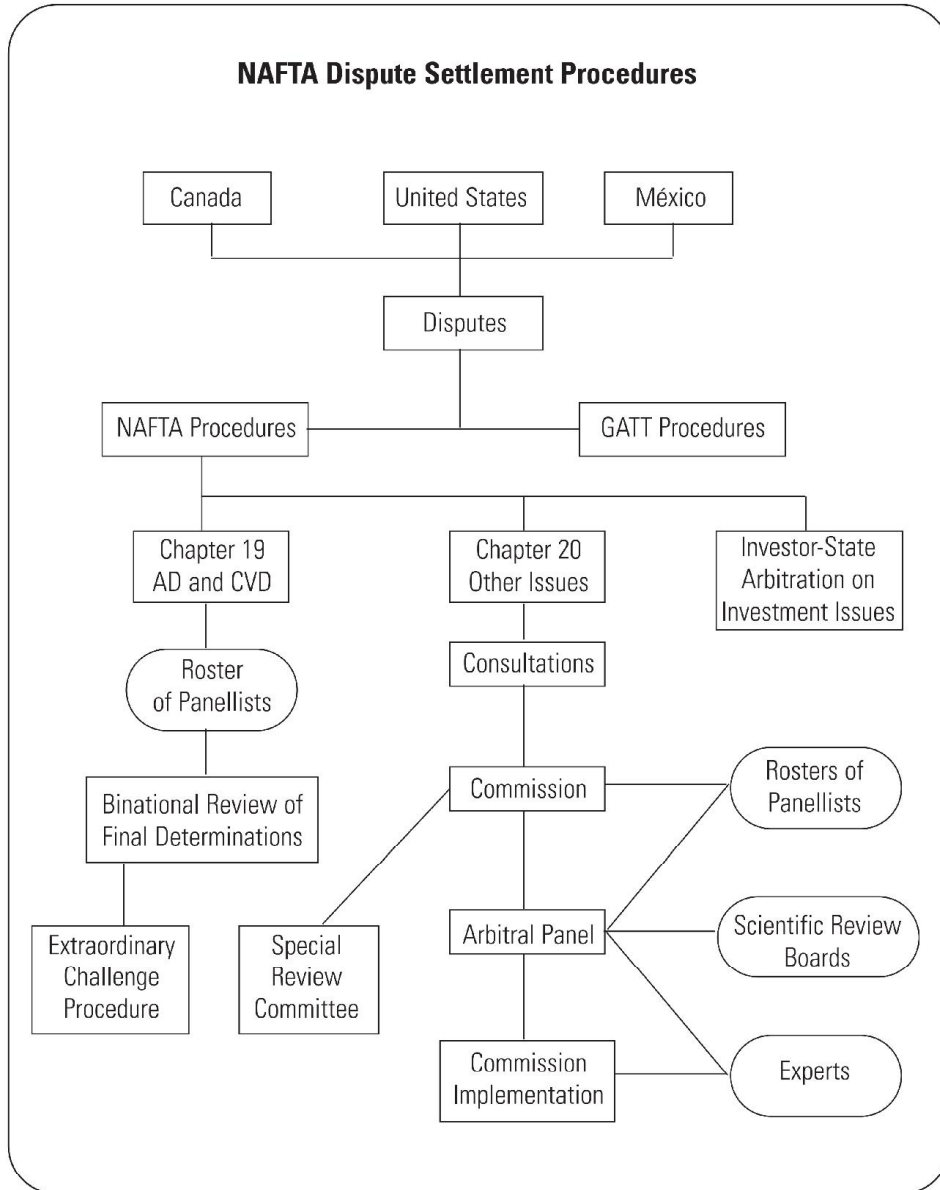
In the immediate future, the principal challenge for the NAFTA's dispute settlement mechanisms will be to effectively deal with the new Mexican cases. These cases arise in a jurisdiction which is grounded in the civil law, not the common law, and one in which so-called «trade law» is still in its infancy. The commonalities and mutual understanding that served the process so well in the Canada-U.S. context do not have an analogue in the Mexican context, despite the attempts of Mexico to formally harmonize its trade law with that of its northern neighbors. The practical difficulties of conducting a proceeding in two languages will also place a new burdens on the secretariats.

Nevertheless, in the opinion of this frequent panelist <sup>76</sup>, these challenges will also be successfully dealt with, and the NAFTA's dispute resolution mechanisms will continue to prove to be a viable framework for trade integration and peaceful trade relations among all of the NAFTA countries.

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<sup>75</sup> See Statement of Administrative Action, at 345 reprinted in **Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements**, H. Doc. 103-316, Vol.1, 103-316, Vol.1, 103d Cong., 2d Sess. (1994) at 1014 (noting that Article 15 of the DSU creates a new procedure based in part of Ch. 18/20, providing that the panel must furnish the parties with a complete draft of the panel's report—including the panels findings and conclusions— before it is made final).

<sup>76</sup> The author has served on five Chapter 19 panels, three of which are ongoing at this writing. These cases include: **Cut-to Length Plate Products from the United States**, MEX-94-1904-02; **Certain Corrosion-Resistant Carbon Steel Plate from Canada (AD)**, USA-93-1904-04; **Certain Softwood Lumber Products from Canada (injury)**, USA-92-1904-02; and **Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada (AD)**, USA-90-1904-01.



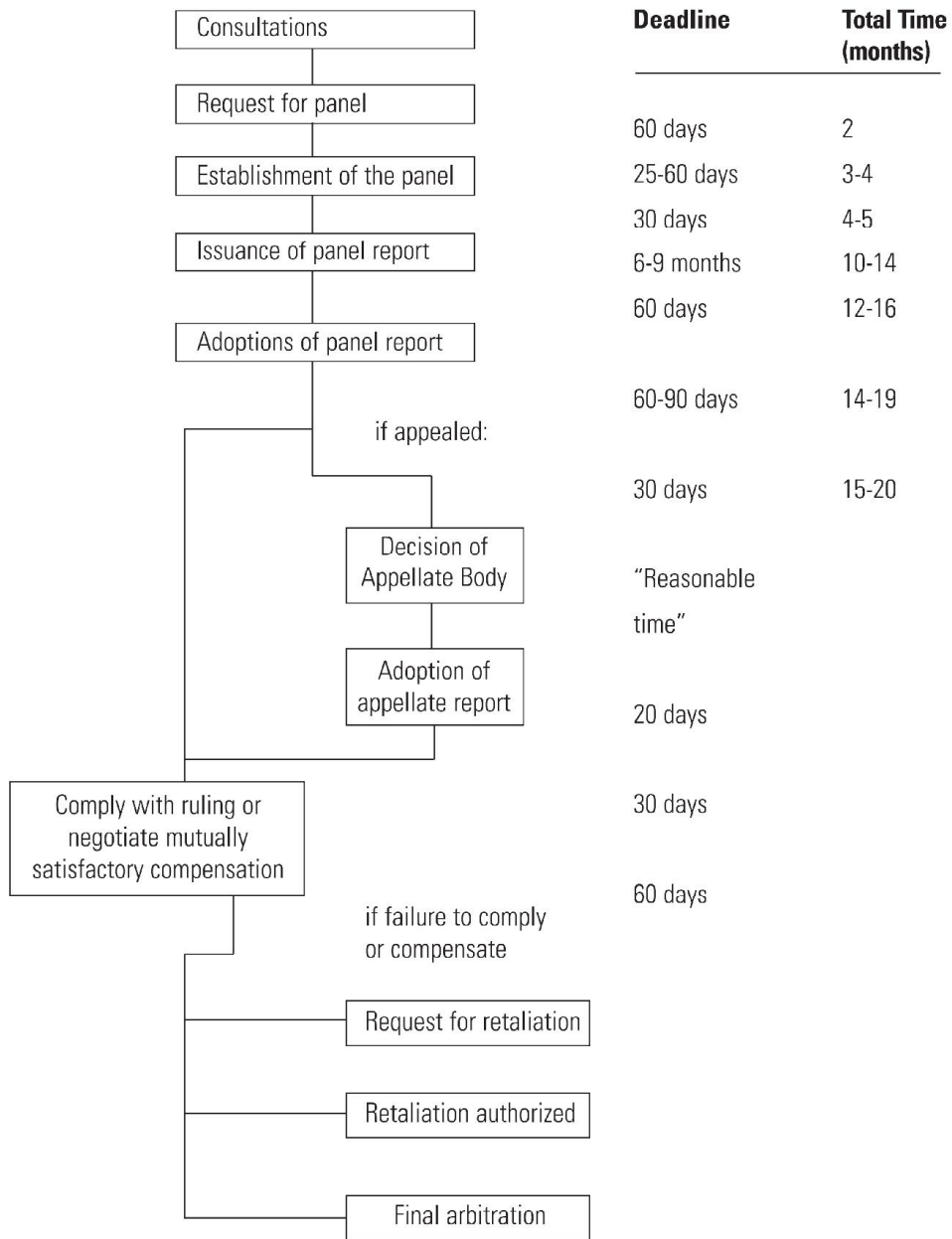


Figure 1. Dispute settlements procedures and deadlines under the WTO.

DISPUTE SETTLEMENT UNDER THE CFTA AND THE NAFTA:  
FROM ELEVENTH-HOUR INNOVATION TO ACCEPTED INSTITUTION

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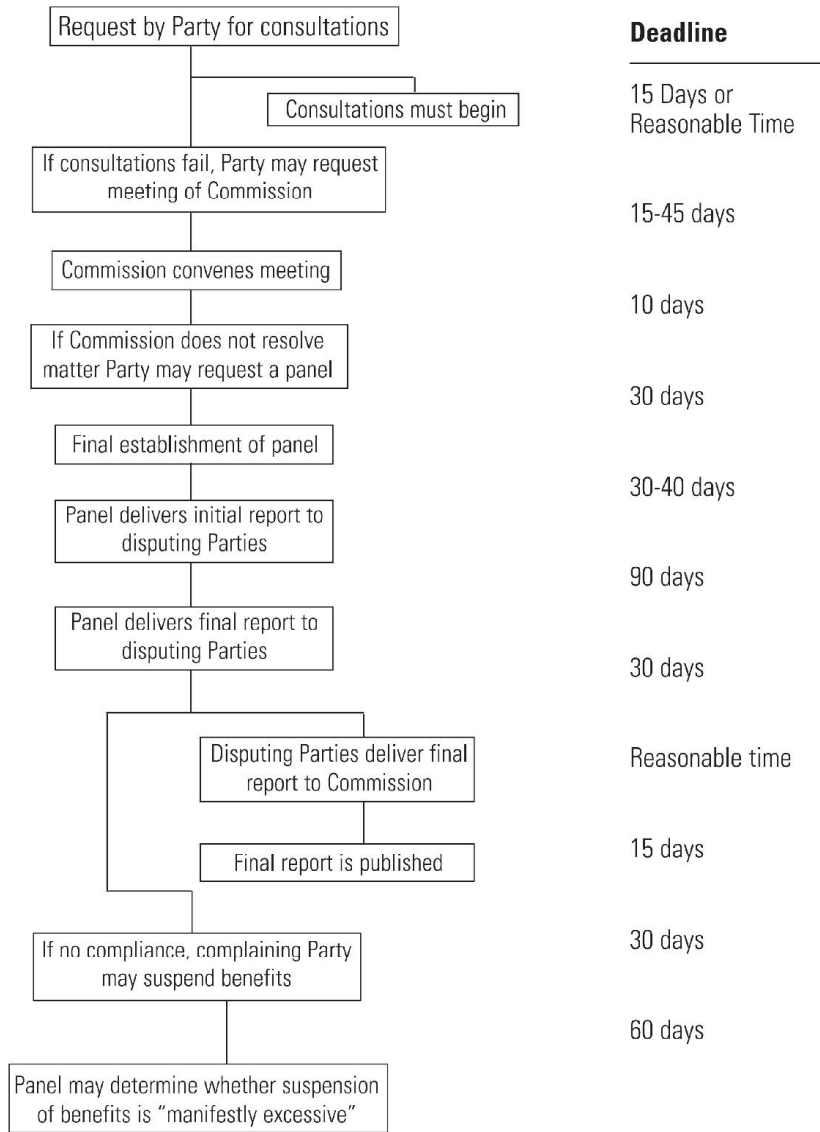


Figure 2. Dispute settlements procedures and deadlines under the NAFTA Ch. 20

## COMPARISON OF GENERAL DISPUTE SETTLEMENT PROVISIONS: THE NAFTA AND THE WTO

### TOPIC

### NAFTA

### WTO

Governing Institution and Modality for Decision Making.

Parties establish the Free Trade Commission («Commission»), comprising cabinet-level representatives of the Parties or their designees (Art. 2001:1)\*. The Commission acts to resolve disputes that may arise regarding the NAFTA's interpretation or application (Art. 2001:2 (c)). It also establishes and oversees a Secretariat comprising national Sections (Art. 2002:1), which provides administrative assistance to dispute settlement panels (Art. 2002:3 (b)).

Unless otherwise agreed, all decisions of the Commission must be taken by consensus (Art. 2001:4).

Members establish the Dispute Settlement Body («DSB»), which oversees the Understanding on Rules and Procedures Governing the Settlement of Disputes («DSU»). The DSB is empowered to (1) establish panels; (2) adopt panel and Appellate Body reports; (3) oversee the implementation of panel recommendations adopted by the DSB; and (4) authorize retaliation (Art. 2:1)\*\*.

The DSB must reach all decisions by «consensus» (Art. 2:4).

The DSB establishes a standing Appellate Body to hear Appeals from panel cases (Art. 17:1).

Scope of Application of Dispute Settlement Provisions.

With limited exceptions, must notably involving dispute settlement in antidumping and countervailing duty matters (Ch. 19) and investment disputes (Ch. 11), Chapter 20 applies (1) to the avoidance or settlement of all disputes regarding the interpretation or application of the NAFTA (2), wherever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the NAFTA, or (3) wherever such a measure, whether or not it conflicts with the NAFTA, causes nullification or impairment of benefits reasonably expected to accrue to that Party, directly or indirectly, under the NAFTA (Art. 2004; Annex 2004).

The DSU establishes the framework for dispute settlement procedures for each of the Uruguay Round Agreements, including the Agreement Establishing the World Trade Organization (WTO), the DSU itself and the various other multilateral agreements (Art. 1:1). (See list of Agreements covered by the DSU set out in Appendix I, referred to herein as «covered Agreements»). The precise manner in which the DSU will apply to the four «plurilateral» agreements (including civil aircraft, government procurement, dairy, and bovine meat) will be decided by the Parties to those agreements (Art. 1:2). Certain of the multilateral trade agreements contain special or additional rules that will supersede those of the DSU for matters arising under those agreements (Appendix 2). In the event of rule conflict, the Chairman of the DSB will decide the issue (Art. 1:2).

Concurrent Jurisdiction of the NAFTA and the WTO.

Disputes arising under both the NAFTA and the WTO may be settled in either forum, at the discretion of the complaining Party (Art. 2005:1). With limited exception, once dispute settlement is initiated under either NAFTA or the WTO, the forum selected shall be used to the exclusion of the other forum (Art. 2005: 6). Before the WTO may be invoked, third Parties must be notified, if a third Party wants to use the NAFTA procedures, the Parties must agree on a single forum; if there is no agreement, the dispute normally will be settled under the NAFTA (Art. 2005: 2).

Where the complaining Party has requested a WTO panel and the respondent claims that the complained-of action is subject to the NAFTA exception for trade-related measures in conservation agreements (Art. 104), or that the dispute involves sanitary or phytosanitary (S&P) measures (Ch. 7) or standards-related measures (Ch. 9), and raises factual issues as to the environment, health, safety or conservation, including directly related scientific matters, the responding Party has 15 days to deliver a request to the other Parties and to the NAFTA Secretariat that the matter be considered under the NAFTA; upon receipt of the request, the complaining Party must promptly withdraw from the WTO proceedings and may initiate proceedings under the NAFTA (Art. 2005:3-5; 2007).

Consultations.

Each Party may request in writing consultations with any other Party regarding any actual or proposed measure or other matter that it considers might affect the operation of the NAFTA (Art. 2006:1). Consultations involving perishable agricultural commodities must begin within 15 days of the request (Art. 2006:4). The consulting Parties are to «make every attempt to arrive at a mutually satisfactory resolution of [the] matter through consultations» (Art. 2006:5).

No provision.

A Member must seek consultations with the government whose measure is in dispute before requesting the DSB to form a panel. The Member must wait 60 days after it makes a request for consultations before requesting the establishment of a Panel (Art. 4:7); shorter timetables are provided for disputes concerning perishable goods (Art. 4:8). Other Members may join the consultations or request separate consultations (Art. 4:11). If request for consultations is made, the Member to which the request is made must reply within 10 days and enter into good faith consultations within days, with a view to reaching a «mutually satisfactory solution» (Art. 4:3).

Good Offices, Conciliation, and Mediation.

If consultations have not resolved a dispute within 30 days of a request (15 days of the request in the case of perishables; 45 days if a third Party is involved), a Party may request a meeting of the Commission (Art. 2007:1). A Party may also request a meeting of the Commission where that Party has initiated WTO dispute settlement regarding conservation or certain S&P or standards-related matters, or where NAFTA consultations have been held on rules of origin or S&P or standards-related measures (Art. 2007:4). The Commission must convene within 10 days and endeavor to resolve the dispute promptly (Art. 2007:2). The Commission may call on technical advisers or create working or expert groups as it deems necessary, have recourse to good offices, conciliation, mediation or other such procedures, or make recommendations as may assist the consulting Parties in resolving their dispute in a mutually satisfactory fashion (Art.2007:5).

Initiation of Panel Proceedings.

If the Commission has not resolved a matter ordinarily within 30 days, any consulting Party may request the establishment of an arbitral panel (Art. 2008:1).

Composition of the Panels.

The Commission must establish the arbitral panel on delivery of the request (Art. 2008:2).

Good offices, conciliation, and mediation may be requested by any par to a dispute at any time, although recourse to such procedures is by mutual consent and they may be terminated at any time (Art. 5:3). Once procedures for good offices, conciliation or mediation are terminated, complaining Party may then proceed with a request for the establishment of a panel (Art. 5:3). If the parties to a dispute agree, these procedures may continue even while the panel process is proceeding (Art. 5:5). Good offices, conciliation, and mediation are to be confidential and without prejudice to the rights of either party to the dispute in any further proceedings (Art. 5:2).

The WTO Director-General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation (Art. 5:6).

If the matter has not been resolved through consultations, a request for the establishment of a panel may be presented to the DSB. The request must be in writing and provide specified information on the dispute (Art. 6:2).

A dispute settlement panel must be established no later than the DS meeting following the meeting at which the request for a panel is first placed on the agenda, unless there is a consensus to reject the request (Art. 6:1). If the complaining party requests, the DSB must convene within 15 days after that Member presents its request for a panel, although the DSB must provide at least 10 day's advance notice of the meeting (Art. 6:1, n.5).

Rules of Procedure.

Panels are to consist of 5 members, generally to be chosen from a roster (Art. 2011:3). Where there are two Parties to a dispute the Parties are to choose a chair within 15 days of the date a request for the establishment of a panel is delivered; if there is a failure to agree on the chair, the disputing Party chosen by lot must select within 5 days an individual who is not a citizen of that Party. Within 15 days of the selection of a chair, each Party is to choose two panelists who are citizens of the other Party; if a Party fails to do so, such panelists are to be selected by lot from among roster members who will be citizens of the other Party (Art. 2011:1). A disputing Party may exercise a peremptory challenge against an individual not on the roster within 15 days after that panelist is proposed (Art.2011:3).

The Parties are to maintain a roster of up to 30 individuals to be appointed by consensus for a 3-year term (Art. 2009:1). They must be experienced in law, international trade, other matters covered by the NAFTA, or dispute resolution under international trade agreements and are to be chosen strictly on the basis of their «objectivity reliability and sound judgment»; they must be «independent of, and not be affiliated with or take instructions from, any Party», and they must comply with the Commission's code of conduct (Art. 2009:2).

Establishment of a Panel.

The Commission must establish, and conduct proceedings in accordance with, Model Rules of Procedure, which procedures must assure a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions (Art. 2012:1-2).

Panels are to consist of 3 members, unless the Parties to the dispute agree within 10 days on a 5-member panel (Art. 8:5). The WTO Secretariat is propose nominations, which the Parties to the dispute may not oppose except for compelling reasons (Art. 8:6). If there is no agreement on the composition of the panel within 20 days from the date of its establishment either Party to the dispute may request the WTO Director-General appoint the panelists, which he must do within 10 days from the making the request (Art. 8 :7). Panelists normally may not be citizens of any of the Parties to the dispute, unless those governments agree (Art. 8:3).

Panelists must be «well qualified governmental and/or non-governmental individuals», such as persons who have served on or presented a case to a panel, represented a government in the WTO or the GATT, served with the Secretariat, taught or published in the international trade field, or served as a senior trade policy official (Art. 8:1). To facilitate panel selection, the Secretariat is to maintain an «indicative list» of governmental and non-governmental individuals who possess these qualifications (Art. 8:4).

Panelists serve in their individual capacities and not as government representatives, nor as representatives of any organization (Art. 8:9).

Panels must comply with the Panel Procedures set out in Art. 12 and are to follow the Working Procedures set out in Appendix 3 to the DSU, unless the panel decides otherwise after consulting the parties to the dispute (Art. 12:1). The panel fixes its own timetable (Art. 12:3).

Terms of Reference of the Panels.

Panels are to use the following standard terms of reference, unless the parties to the dispute agree otherwise within 20 days after the establishment of the panel:

«To examine, in the light of the relevant provisions in [name of the covered agreement(s)] cited by the parties to the dispute, the matter referred to the DSB by [name of Party] in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rules provided for in that/those agreement(s)». (Art. 7:1).

In requesting a panel, however, the complaining Party may request special terms of reference and propose their text (Art. 7:2). The DSB may also authorize the panel Chairman to draw up the terms of reference in consultation with the Parties to the dispute. If other than standard terms are used, any Member may raise any point relating to these terms of reference in the DSB (Art. 7:3).

Multiple Complainants and Third Party Participation.

Where there are multiple complaints by Members regarding the same subject matter, the DSU reflects a strong preference for convening a single panel to hear such multiple complaints (Art. 9:1). Where that is not possible, the DSB is to ensure as much uniformity as possible in panelists, timetables, and procedures (Art. 9:3).

Any third party having a substantial interest in a matter before a panel, and having so notified the DSB, is entitled to be heard by the panel and to make written submissions; these submissions are to be given to the parties to the dispute and to be reflected in the panel report (Art. 10:2). Such third Parties are entitled to receive the submissions of the Parties to the dispute to the first meeting of the panel (Art. 10:3).

Panels are to use the following standard terms of reference, unless Parties agree otherwise within 20 days from the date of delivery of request to establish a panel:

«To examine, in the light of the relevant provisions of the [NAFTA], the matter referred to the Commission (as set out in the request for a Commission meeting), and to make findings, determinations and recommendations as provided in Article 2016 (2)».

If the complainant argues that a matter has nullified or impaired benefits to which it is entitled under the NAFTA, the terms reference are to so indicate; the terms must also indicate any request by a disputing Party that the panel make findings as to the degree of adverse trade effects on any Party of any measure found not conform with the obligations of the NAFTA or to have caused nullification or impairment in the sense of Annex 2004 (Art. 2012:3-5).

To encourage uniformity of decision making, a dispute will be referred to the same panel, wherever possible, if a Member seeks redress of a dispute in which it previously participated as a third party (Art. 10:4).

A third Party that considers it has a substantial interest in the matter in dispute is entitled to join a panel proceeding as a complaining Party; it must deliver a written notice of such intent to the disputing Part and its Section of the NAFTA Secretariat no later than 7 days after a Party has delivered its request for the establishment of a panel (Art. 2008:3). If a third Party does not join as a complaining Party in a dispute, it «normally shall refrain» from initiating or continuing a dispute settlement procedure regarding the same matter under either the NAFTA or the WTO (under the latter, on grounds substantially equivalent to those available under the NAFTA) in the absence of a «significant change in economic or commercial circumstances» (Art. 2008:4). A third Party that is not a disputant is entitled to attend all hearings, to make written and oral submissions to the panel, and to receive the written submissions of the disputing Parties (Art. 2013).

#### Function of the Panel.

The general function of a panel is to assist DSB in discharging its own functions (i.e., resolving the dispute) (Art. 11).

The general function of a panel is to assist (he Commission in discharging its own functions (i.e., resolving the dispute) (Art. 2001:2; 2003).

#### Confidentiality.

The panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential (Art. 2012:1(b)). The final report will normally be published (Art. 2017:4).

Written submissions to the panel and all panel deliberations are to be confidential (Art. 14:3; Working Procedures, 3). A Party to a dispute may disclose statements of its own positions to the public, but Members must treat as confidential information submitted by another Member to the panel which that Member has designated as confidential (Working Procedures, 3). Where a party to a dispute submits a confidential version of its written submissions to the panel, it must, upon the request of a Member, provide a non-confidential summary of the information for public disclosure (Working Procedures, 3).

**Panel Procedures:  
From Initial Report  
to Final Report.**

Unless the disputing Parties otherwise agree, within 90 days after the last panelist is selected, the panel must present to the disputing Parties its *initial report* containing (1) findings of fact, including any findings of a requested scientific review board; (2) a determination whether the disputed measure is inconsistent with the relevant NAFTA obligations or causes nullification and impairment, or any other determination requested in the terms of reference; and (3) its recommendations for resolution of the dispute (Art. 2016:2). A disputing Party then has 14 days to submit written comments to the panel (Art. 2016:4); in the event of such comments, the panel may request the views of either Party, reconsider its report, or make a further examination (Art. 2016:5). Unless otherwise agreed, the panel's *final report* is due within 30 days of the initial report (Art. 2017: 1).

The panel may not either in its *initial report* or its *final report*, disclose which panelists are associated with majority or minority opinions (Art. 2017:2).

**Panel Procedures:  
Expert Opinion.**

A panel may seek and consider expert opinion if the Parties agree and subject to any terms and conditions the Parties may impose (Art. 2014). A Party and the panel (unless the Parties disapprove) may also request the report of a scientific review board on factual issues involving environmental, health and safety or other scientific matter, subject to any terms and conditions set by the Parties (Art. 2015).

The reports of panels are to be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made (Art. 14:2). Opinions expressed in the panel report by individual panelists are to be anonymous (Art. 14:3).

Following consideration of the written submissions and oral arguments, the panel must issue a descriptive (factual and argument) sections of its draft report to the parties in dispute for comment (Art. 15:1). Following expiration of the comment period, the will issue its *interim report* to the Parties, including both the descriptive sections and the panel's findings and conclusions, allowing a period of time for comment by the parties (Art. 15:2). If no comments are received from any party within the comment period, the *interim report* becomes the *final report* and is circulated to the Members (Art. 15:2).

The period from the date the panel is composed and terms of reference are established to the date the *final report* is issued to the Members should not exceed 6 months (3 months where urgency or perishables are involved) (Art. 12:8), although this may be extended to 9 months (Art. 12:9).

A panel may seek and consider information and technical advice from any individual or body it deems appropriate. Members are to respond promptly and fully to any request by a panel for such information (Art. 13:1). Panels may also consult experts to obtain their technical opinions on matters before them (Art. 13:2; Appendix 4).

Appeals.	No provision.	<p>The DSU creates a new procedure, appellate review of panel decisions, which should help ensure uniform interpretation of the Uruguay Round Agreements (Art. 17:1). Three-person appellate panels, drawn from an «Appellate Body» of seven independent experts, will review the <i>legal</i> issues presented in any panel report appealed by one of the disputing Parties (Art. 17:6). The Appellate Body will have the authority to uphold, modify, or reverse the legal findings and conclusions of the panel (Art. 17:13).</p>
		<p>Although only Parties to a dispute may appeal a panel report, third parties may make written submissions to the Appellate Body and may be given an opportunity to be heard (Art. 17:4). Normally, the Appellate Body will render its findings within 60 days after a disputing Party has filed an appeal, although the Appellate Body may take up to 30 more days where necessary (Art. 17:5). The DSB is required to adopt an Appellate Body report within 30 days after it is issued, unless there is a consensus not to do so (Art. 17:14).</p>
Panel Procedures: Adoption and Implementation of Panel Reports.		<p>The Appellate Body shall compose persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally (Art. 17:3).</p>
		<p>In order to provide time for Members to consider panel reports, they may not be considered for adoption by the DSB until 20 days after the date they have been circulated to Members (Art. 16:1). Members having objections to a panel report may state their objections in writing at any time up to 10 days in advance of the DSB meeting at which the panel report will be considered (Art. 16:2).</p>
		<p>Panel and appellate reports must recommend that measures determined to be inconsistent with a Uruguay Round Agreement be brought into conformity with the Agreement and may suggest ways to accomplish this (Art. 19:1). In «non-violation» disputes (those involving practices that do not conflict with the GATT but that nullify or impair GATT benefits), however, Members may not be obligated to remove a disputed measure. The DSB must adopt all panel reports within 60 days after they are issued unless one of the Parties to the dispute notifies the DSB that it will</p>
		<p>The disputing Parties must transmit the panel's <i>final report</i> to the Commission on a confidential basis within a reasonable time after it is presented to them (Art. 2017:3) and, unless the Commission decides otherwise, the <i>final report</i> must be published with 15 days (Art. 2017:4), publish the report within 15 days (Art. 2017).</p>
		<p>On receiving the panel report, the disputing Parties must «agree on the resolution of the dispute», which should normally conform to the panel's determinations and recommendations (Art. 2018:1); wherever possible, resolution should be non-implementation or removal of a measure that does not conform with the NAFTA or that causes nullification or impairment, or, failing such a resolution, compensation (Art. 2018:2).</p>

appeal the decision or the DSB decides by consensus to reject the report. If a panel report is appealed, the DSB will consider the report for adoption after the appeal process is completed (Art. 16:4).

The period from the establishment of a panel until the DSB considers the panel or appellate report should generally not exceed 9 months (12 months in case of appeal) (Art. 20).

Surveillance of  
Implementation/  
Implementation Plan.

No provision.

Prompt compliance with recommendations or rulings is deemed «essential» (Art. 21:1). The DSB must hold a meeting within 30 days of the adoption of a panel or appellate report at which the Member concerned must inform the DSB of how and when it will comply with the ruling. If immediate compliance is «impracticable», the Member will have a «reasonable period of time» in which to act, to be determined as follows: (1) a period proposed by the Member, provided it is approved by the DSB; (2) if not approved, a period mutually agreed upon by the Parties to the dispute within 45 days after adoption of the panel report; (3) if no such agreement, a period, generally not to exceed 15 months, as determined by binding arbitration, which arbitration is to be completed within 90 days of the adoption of the panel report (Art. 21:3). Disagreements as to the existence or consistency with Uruguay Round Agreements of measures taken to comply with the rulings and recommendations are to be resolved under these same dispute settlement procedures, with resort to the original panel wherever possible (Art. 21:5).

The period from the establishment of the panel until the determination of a reasonable period of time for compliance should generally not exceed 15 months. If the panel or the Appellate Body extends the time for providing their report and in the absence of exceptional circumstances (as agreed by the Parties), this period should not exceed 18 months (Art. 21:4).

#### Suspension of Benefits or Concessions.

If the panel's *final report* determines that a measure is inconsistent with the NAFTA or that it causes nullification or impairment, and the Party complained against has not reached agreement with the complaining Party on a mutually satisfactory resolution within 30 days of receiving the *final report*, the complaining Party may suspend the application to the other Party of benefits of «equivalent effect» until the Parties have resolved the dispute (Art. 2019:1).

A disputing Party may request a panel to determine whether the level of benefits suspended by a Party is «manifestly excessive» (Art. 2019:3). This panel is to operate under the NAFTA's Model Rules of Procedure and must present its determination within 60 days after the last panelist is selected or such other period as agreed to by the Parties (Arts. 2019:4).

The DSB is to keep the implementation of adopted panel reports under surveillance. This issue is to be on agenda of the DSB meeting 6 months following the establishment of the compliance period and will remain there until the issue is resolved. At least 10 days before each such DSB meeting, the Member concerned is to provide the DSB with a status report of its progress in implementing the report (Art. 21:6).

Compensation and the suspension of concessions are deemed to be temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. Neither are to be preferred over the full implementation of a recommendation to bring a measure into conformity with the covered Agreements (Art. 22: 1).

If a Member fails to bring an offending measure into compliance with a covered Agreement, the Member must, if so requested, enter into the negotiation of a compensation agreement with any Party to the dispute with the view of developing mutually acceptable compensation. If agreement is not reached within 20 days after the expiry of the reasonable period, any Party to the dispute may request the DSB to authorize the suspension of concessions or other obligations applicable to the Member concerned (Art. 22:2). The request will be automatically granted within 30 days of the expiry of the reasonable period, unless the DSB decides by consensus to reject it (Art. 22:6).

If the non-complying Member objects to the level of suspension proposed, the matter will be referred to binding arbitration. Such arbitration shall be carried out by the original panel, if available, or

by an arbitrator appointed by the WTO Director-General, and shall be completed within 60 days after the date of expiry of the reasonable period of time (Art. 22:6). The Parties to the dispute must accept the arbitrator's decision as final (Art. 22:7).

Suspensions are to be temporary, to be applied only until the violative measure is removed, or the Member implements a solution to the problem of nullification or impairment of benefits, or a mutually satisfactory solution is reached (Art. 22:8).

#### Cross-Sectoral Retaliation.

A complaining Party should first seek to suspend benefits in the same sector(s) as that affected by the offending measure or other matter found to be inconsistent with the NAFTA or to have caused nullification or impairment. Should the complaining Party consider this not to be «practicable or effective», it may suspend benefits in other sectors (Art. 2019:2).

If authorized by the DSB, a Member may suspend concessions across sectors under the following sequence: (1) the Member must first seek to suspend concessions in the same sector(s) as that in which the violation occurs; (2) if this is not practicable or effective, the Member may seek to suspend concessions in other sectors covered by the same Uruguay Round Agreement; (3) if this is impracticable or ineffective, the Member may seek to suspend concessions under another Agreement (Art. 22:3).

\* All citations are to the text of the NAFTA.

\*\* All citations are to the text of the DSU.