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THE DISPUTE SETTLEMENT SYSTEMS OF WTO AND NAFTA - ANALYSIS AND COMPARISON

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by

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TO MY PARENTS
# TABLE OF CONTENTS

## CHAPTER

<table>
<thead>
<tr>
<th>I</th>
<th>INTRODUCTION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The Development of International Trade Agreements</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>National Economic Implications of Internationalized Trade</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>The Importance of Resolving Disputes Effectively</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>The Idea and Aim of the Thesis</td>
<td>13</td>
</tr>
</tbody>
</table>

| II | THE WORLD TRADE ORGANIZATION | 15 |
|    | The Weaknesses in the GATT 1947 Dispute Settlement System | 16 |
|    | Innovations by the WTO Treaty | 21 |
|    | Criticism and Reform Proposals | 37 |

| III | THE NORTH AMERICAN FREE TRADE AGREEMENT | 39 |
|     | NAFTA Institutions | 39 |
|     | The Side Agreements | 40 |
|     | The Dispute Settlement Regimes | 43 |
|     | Criticism and Reform Proposals | 76 |

| IV | COMPARATIVE ANALYSIS | 80 |

| V | CONCLUSION | 89 |

| BIBLIOGRAPHY | 92 |
CHAPTER I
INTRODUCTION

The pace of international economic activity and the developing interdependence of national economies is head spinning.¹
John H. Jackson

You are living the global economy from the minute you are woken up by your Japanese-brand radio alarm made in Malaysia. On with your Italian suit made from Australian wool and drink a cup of Colombian coffee while watching American news on television; then get into your German car (assembled in Slovakia) to come to your office in a multinational firm whose headquarters were designed by a Chinese architect. There, your office equipment comes from Korea, Taiwan, the United States, Europe - or sometimes all of these combined in the one machine. You might have lunch in a Mexican restaurant run by Moroccans, and go back for a tele-conference meeting that links up half-a-dozen national telecommunication systems.

I don't think I need to take you all the way back through the Finnish sauna to your Japanese futon bed. The point is clear. And it becomes clearer every day, as interdependence between economies increases.²
Renato Ruggiero

1. The Development of International Trade Agreements

The world’s economy is becoming more and more integrated.³ For the past 50 years, the number of transactions in the international economic and political spheres have

² World Trade Organization, Members of the WTO multilateral trading system must respect it and use it properly -- says director-general Ruggiero (Address delivered by WTO Director-General Renato Ruggiero to the Herbert Quandt Foundation on June 22, 1995) <http://www.wto.org/archives/3_17.htm>.
increased steadily. The enormous expansion of trade and commercial relations between different countries has lead to a situation today which could be described as "international commercial global village.".

Since 1945 there have been several initiatives aimed at abolishing or lowering border tariffs in order to facilitate the mutual exchange of commodities at the international level. The first, and probably one of the most ambitious treaties was the General Agreement on Tariffs and Trade\(^6\) (GATT). Created in the year 1947, the GATT attempted to facilitate tariff reductions between the participating countries.\(^7\) Even though the application of the GATT was based only on a Protocol of Provisional Application\(^8\),


\(^5\) Frank W. Swacker et al., World Trade Without Barriers (Vol.1): The World Trade Organization (WTO) and Dispute Resolution 103 (1995) [hereinafter World Trade Without Barriers (Vol. 1)].

For a general perspective on the further development of international trade law, see Carsten Thomas Ebenroth, Visionen für das internationale Wirtschaftsrecht [Visions concerning International Economic Law], 1995 Recht der internationalen Wirtschaft [RIW] 1.


\(^7\) The notions "members" or "member states" were not used in the GATT 1947, as the treaty was supposed to be bound into the organizational structure of the International Trade Organization (ITO) which never came into existence. This is why the GATT 1947 itself never had the status of an International Organization or consequently an institutional framework. "The only recognized body consists of representatives of the contracting parties. [And only a]n editorial device permits . . . a distinction between the contracting parties jointly and those parties acting merely in their individual capacities: the former are mandatorily referred to as the . . . ‘CONTRACTING PARTIES’ (Article XXV)." Dam, supra note 6, at 10-14, 21-22, 335-36. The CONTRACTING PARTIES were responsible for making decisions concerning the Agreement. GATT 1947 Art XXV.

its effect on the world wide commerce was immense.\footnote{In 1986 over four-fifths of world trade took place within the GATT. Trade Policies for a Better Future: The “Leutwiler Report”, the GATT and the Uruguay Round 67 (Kluwer Academic Publishers publ., 1987).} The World Trade Organization\footnote{Agreement Establishing the World Trade Organization, April 15, 1994, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].} (WTO), as the “successor”\footnote{The notion “successor” used in this context is not to be considered in its legal sense as implied by Art. 30 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 339, but in a more political sense meaning that the WTO came into existence as a result of the last GATT negotiation round. For an analysis concerning the legal relation between the “old” GATT 1947 and the WTO, see Gabrielle Marceau, Transition from GATT to WTO: A Most Pragmatic Operation, 29:4 J. World Trade 147 (1995), and Patrick M. Moore, The Decisions Bridging the GATT 1947 and the WTO Agreement, 90 Am. J. Int’l L. 317 (1996). In a nutshell, the WTO “represents a new organization open to those who agree to abide by the entire Uruguay Round package . . . Those countries that are not in a position to accept the entire package, will remain within the old GATT framework.” The Uruguay Round: Global Agreement -- Global Benefits 27 (Office for Official Publications of the European Communities ed., 1994). See also Paul Demaret, The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization, 34 Colum. J. Transnat’l L. 123 (1995).} to the GATT, is expected to be even more successful in terms of economic impact.\footnote{See The Uruguay Round: Global Agreement -- Global Benefits, supra note 11, at 8-9.} After seven years of negotiations between 117 nations, the Uruguay Round\footnote{The several negotiations initiated under the auspices of GATT 1947 took place in so-called rounds. The last one, the Uruguay Round, started in 1986. For a short description of the pre-Uruguay Rounds see A Brief History of the GATT, in Trade Policies for a Better Future: The “Leutwiler Report”, the GATT and the Uruguay Round, supra note 9, at 160-64.} ended with the approval of the Final Act\footnote{See The Uruguay Round: Global Agreement -- Global Benefits, supra note 11, at 8-9.} on April 15, 1994, thereby
creating the WTO. 15 It was said that this act "represents the most important change in the jurisprudence of the global economy in the second half of the twentieth century." 16 Some figures might show the widespread acceptance 17 amongst different countries that the GATT and the WTO have found. Although only 23 states signed the GATT 1947 initially, it had 105 contracting parties by the end of 1992. 18 When the WTO came into force on January 1, 1995, 76 countries were "eligible to become members on the first day". 19 Currently, the WTO has 130 members, with 29 additional countries (among them China and the Russian Federation) having submitted applications to join the new world trade body. 20 Analysts estimate the Uruguay Round Agreements will lower global tariffs by over $740 billion 21 while increasing world exports by $755 billion 22 and raising the

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15 The WTO Agreement is one of the five agreements contained in the Final Act. See infra n. 61.


17 One author criticizes that most books and articles on trade and trade policy regard trade only from a utilitarian perspective, whereas he generally questions the right of the government to regulate trade at all because, in his opinion, this might constitute a violation of individual rights. Robert W. McGee, The Fatal Flaw in NAFTA, GATT and all other Trade Agreements, 14 Nw. J. Int'l L. & Bus. 549 (1994).

18 GATT, Focus: GATT Newsletter, Sept. 1992, at 2 (Information and Media Relations Division of GATT publ.).


20 The figures are based on information gathered at World Trade Organization, WTO Membership (visited April 11, 1997) <http://www.wto.org/wto/memtab2_wpf.html> (this website shows a complete list of current members and governments having applied for membership).


22 The World is Born, Focus: GATT Newsletter, May 1994, at 1 (Information and Media Relations Division of GATT publ.).
world income yearly by $510 billion.\textsuperscript{23} The developed countries will reduce their tariffs by 40 per cent.\textsuperscript{24} "[M]ore than ninety percent of the world's trade in goods is conducted in the shadows of the trade agreements that constitute part of the [WTO]'s organic documents."\textsuperscript{25} For the United States, the Council of Economic Advisers estimates that national income will increase by $100 to 200 billion by the tenth year of the new agreement.\textsuperscript{26}

Efforts to foster international trade were not only made on a global, but also on a regional level.\textsuperscript{27} "[A]ttempts at regional economic integration have been numerous, with the failures far outnumbering the successes."\textsuperscript{28} Nevertheless, nations everywhere on the world have concluded agreements to form free trade areas or customs unions\textsuperscript{29}, and they

\textsuperscript{23} A $510 Billion Boost to World Income, Focus: GATT Newsletter, Nov. 1994, at 2 (Information and Media Relations Division of GATT publ.). This number is much higher than the Secretariat's prior estimate that the world income would rise by $230 billion as a result of the new agreements. The World is Born, supra note 22, at 6.

\textsuperscript{24} A $ 510 Billion Boost to World Income, supra note 23, at 6.

\textsuperscript{25} Philip M. Nichols, supra note 16, at 381 (citing Trade Body Launched, Fin. Times, Jan. 5, 1995, at 1).

\textsuperscript{26} Bob Beneson, With Health Care Receding, GATT Pact Gains Urgency, 52. Cong. Q. 2661, 2664 (1994). Doubting the validity of these figures, one author notes that the "[e]stimates of how much GATT would benefit the American economy . . . vary widely that they are almost useless." David E. Sanger, Clinton Pledges to Push for Vote on Trade Accord, N.Y. Times, Nov. 17, 1994, at A1.


\textsuperscript{29} The negotiating parties in a free trade area "agree to remove barriers to trade with each other, while each maintains its own differing schedule of tariffs applying to all other nations"; in a customs union, not only the trade barriers between the member states have been eliminated, but also goods imported from non-member countries are subject to just one uniform tariff regime. World Trade Without Barriers (Vol. 1), supra note 5, at 26 & 48.
continue to do so. Amongst these agreements are the European Union (EU), the Andean Group, the Caribbean Free-Trade Agreement (CARIFTA), and the African Common Market, for instance. One of the most recent treaties, concluded by the United States, Canada, and Mexico, is the North American Free Trade Agreement.


For instance, the states adhering to the Association of Southeast Asian Nations (ASEAN) are planning to establish a free trade zone. Asean Trade Zone Nears, Fin. Times, Feb. 25, 1997, at 1. Chile wants to become partner of the NAFTA. Nancy Dunne, Chile's NAFTA Hopes Fade as Trade Pacts Lose US Favour, Fin. Times, Feb. 26, 1997, at 6. A number of countries in central-east and south-east Europe are eager to join the European Union. The Universal Almanac 364 (John W. Wright ed., 1996). For the negotiations between 34 American countries about the creation of the Free Trade Area of the Americas (FTAA), see Geoff Dyer, Americas Free Trade Talks Get Green Light, Fin. Times, May 19, 1997, at 4. Plans exist to establish the TAFTA, the Transatlantic Free Trade Area to be formed by the U.S. and the EU. Oppermann, supra note 29, at 921.

For a complete overview of currently existing customs union and free trade area agreements that have been notified under GATT 1947 Art. XXIV or covered or notified under the 1979 Enabling Clause (GATT Decision, Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203), see Regionalism and the World Trading System, supra note 29, at 77-89. See also World Trade Without Barriers (Vol. 1), supra note 5, at 103-24. A selective collection of texts of regional agreements' dispute settlement systems, including explanatory notes, are found in Frank W. Swacker et al., World Trade Without Barriers (Vol. 2): Comparative Dispute Resolution -- Public and Private 49-691 (1995) [hereinafter World Trade Without Barriers (Vol. 2)].


(NAFTA). Analogous to the WTO, the NAFTA has its origins in another treaty, the former U.S.-Canada Free Trade Agreement\textsuperscript{33} (CFTA). By eliminating tariffs and other trade barriers the NAFTA is expected to create the world’s largest single market with over 360 million consumers and an output of over $6 trillion each year.\textsuperscript{34}

In relation with the NAFTA, two other accords, the so-called Side Agreements\textsuperscript{35}, have been signed, the North American Agreement on Environmental Cooperation\textsuperscript{36}


\textsuperscript{36} North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (hereinafter NAAEC); see Johnson, supra note 32, at 260; Steve Charnovitz, The NAFTA
(NAAEC) and the North American Agreement on Labor Cooperation37 (NAALC). This development shows that also other than “classical” trade related issues are nowadays brought into connection with economical treaties.38

2. National Economic Implications of Internationalized Trade

Why would a country enter into a contractual relation with other countries that obliges it to decrease its customs tariffs and open up its market? Does it not lose a source

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38 “The interface of trade with other seemingly unrelated issues (such as the environment) is an indicator that the world is becoming more of a single society instead of a group of separate and anarchic societies.” Winham, supra note 3, at 122.


of income for the national budget as a result of lower tariffs? Does the national economy not suffer from overwhelming foreign competition? Various responses might be given. A philosophical approach utilizes the theory that international trade helps to promote world peace. However, even from an economical, more secular point of view, transnational commercial relations are beneficial. Adam Smith had described the advantages of free trade for landed nations when he analyzed that “the most effectual expedient . . . for raising the value of . . . surplus produce, for encouraging its increase . . . would be to allow the most perfect freedom to the trade of all such mercantile nations.” Even modern economists believe that an unregulated trade results in lower prices, a greater variety of commodities to choose from, and in consumer welfare, whereas high tariffs and other means of protectionism lead to opposite result. However, it is not only

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40 In sum, the benefits of international trade can be described as follows: “International trade takes place because no single country can produce efficiently all of the commodities it needs, and some nations enjoy an advantage in producing certain kinds of products, either because of a comparative wealth of resources (capital, labor, natural resources) or more efficient production techniques. Even an economy with the most efficient technology has a limit on its resources, however, and rather than using them to produce all kinds of products, it concentrates its resources on what it makes most efficiently. It then trades those goods for other commodities, importing those it produces less efficiently. As a result, all countries are better off; specialization results in the expansion of the total supply of goods, and the cost of acquiring them falls accordingly.” The Universal Almanac, supra note 30, at 358.


42 The subject of this thesis does not allow a detailed analysis of economical reasoning. An overview summarizing the major arguments that have been put forth for and against free trade is found in Raj Bhala, International Trade Law 5-78 (1996); Robert McGee, The Trade Policy of a Free Society, 19 Cap. U.L. Rev. 301 (1990).
relevant to take a look at the consequences for the individual consumer, but also to note the outcomes for national economies as a whole. It may be useful to give two examples: the United States and Germany.\(^{43}\) In 1995, the United States exported goods worth $581.1 billion; its gross domestic product (GDP\(^{44}\)) was $7245.8 billion.\(^{45}\) This means that the exported goods account for eight percent of the GDP. At the same time, the United States imported goods worth $758.9 billion.\(^{46}\) The German GDP was $2407.5 billion in 1995\(^{47}\). During that year, Germany exported goods worth $506.4 billion, i.e., 21 percent of the GDP, while importing goods worth $441.4 billion.\(^{48}\) The numbers show the importance of international trade for the national economies. As can be seen, exports provide a significant number of jobs for these two countries. In addition, jobs are created in foreign countries through the import of their goods. Higher tariffs would diminish the sale of imported goods and affect the economy negatively. For instance, a recent study indicated that a 15 percent import quota on steel "would save 26,000 jobs in

\(^{43}\) The decision to pick these countries was made because the author has close links with both of them. Nevertheless, it has to be admitted that the impact on other nations' economies might be less important due to the fact that the United States and Germany were the world's leading importers and exporters in 1995. World Trade Organization, World Trade Expanded Strongly in 1995 for the Second Consecutive Year (visited April 3, 1997) <http://www.wto.org/wto/Pressrel/press44.htm>.

\(^{44}\) The gross national product (GNP) is the "total monetary value of all final goods and services produced in a country during a year"; and the gross domestic product (GDP) equals the "gross national product excluding payments on foreign investments". Webster's Encyclopedic Unabridged Dictionary of the English Language 843 (Gramercy Books publ., 1996).


\(^{46}\) Id.

\(^{47}\) Statistisches Bundesamt [Federal Census Bureau], Gesamtwirtschaft [Economy in its entirety] (visited April 14, 1997) <http://www.statistik-bund.de/basis/d/bd12.htm>. This conversion is based on the 1995 one U.S. dollar value which was worth 1.437 German marks on average.

\(^{48}\) Statistisches Bundesamt [Federal Census Bureau], Deutschland als Handelspartner [Germany as Trade Partner] (visited April 14, 1997) <http://www.statistik-bund.de/basis/d/bd18.htm>. For the conversion, see supra note 47.
the steel industry", but "destroy 93,000 in the industries that import steel for a loss/gain ratio of 3.6 to 1." A lot of studies show the detrimental economic consequences of protectionist measures. As these examples have demonstrated, both the individual consumer and the business community as a whole benefit from free trade.

3. The Importance of Resolving Disputes Effectively

In order for the trade agreements to achieve maximum benefit, they have to work as intended. This will only be the case if the parties respect the terms of the agreements and act accordingly. But what happens if one contracting country accuses another of adopting a national measure contrary to the agreed terms of the treaty? What if one party did not adapt its law conform to the agreement? To put it more generally, how do the treaties deal with disputes? Especially during the last decade, many countries have

49 McGee, supra note 17, at 554 (citing Arthur T. Denzau, American Steel: Responding to Foreign Competition, 66 Center for the Study of American Business (Washington University at St. Louis) (1985)).

50 See the various examples given by McGee, supra note 17, at 554.

51 "There is no real alternative to free trade -- admittedly an ideal -- which rests on the twin pillars of open world markets and the idea of comparative advantage." Thomas J. Schoenbaum, The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust, 19 N. C. J. Int'l L. & Com. Reg. 393, 416 (1994). The reason for this is that "[g]enerally, the total costs of protectionism well exceed its total benefits". Judith H. Bello, The WTO Dispute Settlement Understanding: Less is More, 90 Am. J. Int'l L. 416, 417 (1996). Nevertheless, there is still a widespread belief that, if protectionism rules, the domestic industry will be better off -- and demanding the application of protectionist measures is not unpopular in the political community. For instance, fearing that the United States' membership in the WTO will affect the domestic industry negatively, "prominent figures, such as the Rev. Jesse Jackson, billionaire [and presidential candidate] Ross Perot, consumer advocate Ralph Nader, . . . as well as distinguished members of Congress such as Senators Byrd (West Virginia), . . ., Hollings (South Carolina), Heflin (Alabama), and Brown (Colorado) [tried vigorously] to defeat the GATT-WTO Bill. Have they succeeded, they would have caused a monumental financial catastrophe for the United States." World Trade Without Barriers (Vol. 1), supra note 5, at 1. Despite the detrimental effects of protectionism "[e]ven staunch advocates of free trade must admit that trade liberalization results in net gains to an economy. There are 'winners' and 'losers', [even if] the gain to the winners more than offsets the pain to the losers." Bhala, supra note 42, at 935 (emphasis in original).
realized the importance of a dispute settlement regime for any treaty.\textsuperscript{52} Its role "is particular crucial for a treaty system designed to address today's myriad of complex economic questions and to facilitate the cooperation among nations that is essential to the peaceful and welfare-enhancing aspect of those relations."\textsuperscript{53}

Indeed, one of the essential questions is whether the dispute settlement functions in a beneficial way for the parties. This question may decide whether the arrangement is going to be a success or a failure. Will the parties rely on the institutions and means provided for or will they resort to unilateral action on the national level?\textsuperscript{54} "A well-designed, contextually responsive [dispute resolution mechanism] can minimize frustration and tension between parties by providing procedures suited to their goals and their internal and external political relationships. An ill-designed [dispute resolution mechanism] can generate friction and actually contribute to vitiation the trade agreement it was created to preserve."\textsuperscript{55} Therefore, member states will preferably accept an efficient and effective conflict resolution system. To reach this goal the dispute settlement mechanism has to be one that:

(1) investigates complaints on a timely basis and reaches principled conclusions that are binding and enforceable upon the parties;
(2) prevents multiple jeopardy in the form of commencement of a series of trade disputes until the domestic industry's result is achieved;


\textsuperscript{53} Id.


\textsuperscript{55} Michael Reisman and Mark Wiedman, Contextual Imperatives of Dispute Resolution Mechanisms, 29:3 J. World Trade 5, 35 (1995).
(3) eliminates tactical advantages to both parties so that disputes are not launched simply to obtain interim relief, which often may dictate the outcome; and

(4) eliminates the possibility of retaliatory trade legislation that is designed to punish the successful party and/or overturn the dispute settlement panel determination. 56

4. The Idea and Aim of the Thesis

The aim of this thesis is to determine whether the dispute settlement institutions of the WTO and the NAFTA meet the aforementioned standard, to compare the two systems, and to evaluate them. An issue that should be dealt with first is the question of comparability. Is it possible to compare the WTO and the NAFTA with regard to their conflict resolution procedures? Or are they too different because one agreement works on the global level and the other on a regional one? Their institutions and their scope may differ, but they are still conducive to comparison because the underlying structure of these two international treaties is quite similar. Secondly, even if major differences existed, the analysis of the dispute settlement regimes is conducted in a very narrow field. It is intended to find out the principles of how the agreements deal with conflict resolution. Since the area to be examined is very limited, a comparison would not be hindered by structural differences. 57

The topic has been chosen for several reasons: both the agreements are fairly new, and both have had “predecessors”. It will be interesting to see whether their drafters considered the “flaws” of other trade agreements and improved the dispute settlement systems accordingly. 58

56 Gastle, supra note 33, at 736.
58 For the mutual influence of international and regional agreements, see Louis B. Sohn, An Abundance of Riches: GATT and NAFTA Provisions for the Settlement of Disputes, 1 U.S.-Mex. L.J. 3,
A topic not to be dealt with is the access of private parties to the different conflict settlement regimes. It will not be analyzed if and how individuals have the possibility to initiate or take part in the proceedings. This thesis will concentrate strictly on the governmental participation during the procedures.

Both of the next chapters will be analyzing the WTO and the NAFTA separately. In chapter two, after giving a short overview the WTO, its dispute settlement regime will be examined. First, the old system under the GATT and its major weaknesses will be explained. Second, the new, reformed WTO dispute resolution mechanism will be explained. The following section will assess the new regime and suggest improvements. In the third chapter the institutions and scope of the NAFTA will be discussed. Consecutively, the different conflict settlement procedures instituted by the NAFTA will be portrayed, including short references to the former CFTA. Finally, this chapter will close with an evaluation of the procedures and improvement proposals. In chapter four, a comparison between the WTO and the NAFTA procedures will be made. The final chapter will conclude with the assumption that trade agreements which grow with respect to the number of members and subjects will have to establish a more rule-based dispute settlement mechanism in order to provide for an effective resolution procedure.

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CHAPTER II
THE WORLD TRADE ORGANIZATION

The World Trade Organization provides a "common institutional framework for the conduct of trade relations among its members."\(^{60}\) It works as a forum for multilateral trade negotiations, cooperates with the IMF and the World Bank, and is charged with the administration and operation of the Uruguay Round Agreements (the WTO Agreement, the Multilateral Trade Agreements, the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU), the Trade Policy Review Mechanism, and the Plurilateral Trade Agreements).\(^{61}\) Whereas the Plurilateral Trade Agreements are only binding for those WTO members that signed them, the other agreements form integral parts of the WTO Agreement and are binding on all members\(^{62}\).

The WTO Agreement establishes a complex structure of different institutions. The highest authority is the Ministerial Conference which consists of representatives of the members. Meeting at least once every two years it executes the functions of the WTO\(^{63}\).

\(^{60}\) WTO Agreement, Art. II (2).

\(^{61}\) WTO Agreement, Art. III. The Multilateral Trade Agreements include the Agreements on Trade in Goods (consisting of, e.g., the General Agreement on Tariffs and Trade 1994 [hereinafter GATT 1994] and the Agreement on Subsidies and Countervailing Measures), the General Agreement on Trade in Services [hereinafter GATS Agreement], and the Agreement on Trade-Related Aspects of Intellectual Property [hereinafter TRIPS Agreement]). The Plurilateral Agreements include, among other agreements, the Agreement on Trade in Civil Aircraft, and the Agreement on Government Procurement. The Multilateral Trade Agreements are located in Annex 1 of the WTO Agreement, the Dispute Settlement Understanding is located in Annex 2, the Trade Policy Review Mechanism in Annex 3, and the Plurilateral Trade Agreements in Annex 4. Final Act; WTO Agreement, Art. II (3)-(4).

\(^{62}\) WTO Agreement, Art. II (3)-(4).

\(^{63}\) WTO Agreement, Art. IV (1).
When the Conference is not in session, a General Council, also made up of member states’ representatives, carries out the Conference’s functions in order to guarantee the effective functioning of the Organization. One of the most essential tasks to be completed by the General Council is to determine the responsibilities of the Dispute Settlement Body. Furthermore, it also defines the Trade Policy Review Body’s responsibilities. Under the General Council’s guidance, various councils and committees with different tasks are installed. With respect to the administrative work of the Organization, the Agreement provides for a Secretariat of the WTO, whose Director-General is appointed by the Ministerial Conference.

1. The Weaknesses in the GATT 1947 Dispute Settlement System

Even if they worked well in the beginning, the dispute resolution procedures installed by the GATT 1947 had too many deficiencies which prevented effective conflict resolution in the later years. Initially, the GATT Articles XXII and XXIII

64 WTO Agreement, Art. IV (2).
65 WTO Agreement, Art. IV (3).
66 WTO Agreement, Art. IV (4).
67 WTO Agreement, Art. IV (5)-(8). A Council for Trade in Goods (for the Multilateral Agreements on Trade in Goods), a Council for Trade in Services (for the GATS), and a Council for TRIPS (for the TRIPS Agreement) are established. These Councils oversee the functioning of the different agreements. They “shall carry out the functions assigned to them by their respective agreements and by the General Council”. The membership in these Councils is open to representatives of all member states. The Ministerial Conference establishes a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions, and a Committee on Budget, Finance and Administration to “carry out functions assigned to them by [the WTO] Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council.” Id.
68 WTO Agreement, Art. VI. The Director-General and the staff of the secretariat are required to be impartial and not to accept any government’s instructions. Id., at Art. VI (2).
69 See Bhala, supra note 42, at 109; Jackson, in Stewart, The WTO, supra note 54, at 13-14; Pierre Pescatore, Drafting and Analyzing Decisions on Dispute Settlement, in Handbook of GATT/WTO Dispute Settlement, Part Two (William Davey et al. eds., 1996) [hereinafter Handbook (Part Two)] 3, 4; Peter
were the only texts dealing with dispute settlement, thus being "the most primitive mechanism for interpreting and enforcing [the GATT] provisions". As a result thereof,

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Art. XXII provides:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution under paragraph 1. GATT 1947, Art. XXII.

Art. XXIII provides:

1. "If any contracting party should consider that any benefit accruing to it . . . under this Agreement is being nullified or impaired . . . as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations of proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time . . . , the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate . . . If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to another contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free . . . to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement . . ." GATT 1947, Art. XXIII.

"[f]or almost 25 years, disputes were settled in a haphazard way."\textsuperscript{73} Panels were created in 1952 to take over the duty of resolving the disputes.\textsuperscript{74} For over 35 years the procedures remained based on customary principles\textsuperscript{75}, but in 1979, after the Tokyo Round, the traditionally followed procedures were codified.\textsuperscript{76} In addressing any complaint, the first phase was negotiation and consultation.\textsuperscript{77} If they remained unsuccessful, the party could request the establishment of a panel.\textsuperscript{78} It was the GATT Council's task\textsuperscript{79} to appoint the panel members and determine the panel's terms of reference.\textsuperscript{80} These decisions required unanimity with the principle of each country

\textsuperscript{73} Pescatore, in Handbook (Part Two), supra note 69, at 4.

\textsuperscript{74} Before the creation of the panels "the contracting parties carried out their responsibilities [to settle disputes] by forming working parties . . . In 1952, upon a suggestion of the chairman of the seventh session of the contracting parties, the working parties were transformed into panels and became more adjudicatory." Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats, 29 Int'l Law. 389, 393 (1995). The panels consisted of three or five experts in the field of GATT law. Sohn, supra note 58, at 7.


\textsuperscript{76} On Nov. 28, 1979, the GATT Contracting Parties approved the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance", and the "Annex: Agreed Description of Customary Practice of the GATT in the Field of Dispute Settlement" which is found at GATT B.I.S.D. (26th Supp.) at 210 (1980) [hereinafter Tokyo Round Understanding].


\textsuperscript{77} Tokyo Round Understanding, Para. 4.

\textsuperscript{78} Tokyo Round Understanding, Para. 10.

\textsuperscript{79} The GATT Council of Representatives was established in 1960 as the Contracting Parties' intersessional body; it was "composed of representatives of all contracting parties", and had the power "to deal with . . . matters with which the CONTRACTING PARTIES may deal at their sessions." Decision of 4 June 1960 establishing the Council of representatives, June 4, 1960, GATT B.I.S.D. (9th Supp.) at 8-9 (1961).

\textsuperscript{80} Tokyo Round Understanding, Para. 11.
having one vote.81 The panel would then hear the dispute and “usually come up with a reasoned conclusion“ with regard to the validity of the challenged measure under the GATT 1947.82 The panel report was subject to the unanimous approval by the GATT Council in order to have legal effect.83 Another change was made after the Tokyo Round. Whereas initially one procedure would be followed in resolving disputes occurring in all areas covered by the GATT, some of the non-tariff agreements negotiated during the Tokyo Round provided for their own settlement system84. However, these changes did not solve many problems and even created new ones85. During the last years, the way the GATT tried to resolve conflicts was criticized sharply86 because:

81 Backes, supra note 69, at 916; Lowenfeld, supra note 54, at 479. “The tradition of decision making by consensus has evolved in GATT practice, but is not specified in the rules of procedure.” Jeffrey P. Bialos & Deborah E. Siegel, Dispute Resolution under the NAFTA: The Newer and Improved Model, 27 Int'l Law. 603, 605 n. 10 (1993).

82 Lowenfeld, supra note 54, at 479. Before rendering their decision, “[t]he panels receive[d] written and oral submissions from the parties [and] prepare[d] findings of fact.” Id.


84 “While some of the codes are modeled more [or] less after the general regime established in the Understanding of 1979 (Codes on Technical Barriers to Trade, Government Procurement and Customs Valuation), others include a more detailed regulation (Codes on Subsidies and Countervailing Duties, and Anti-[D]umping). One includes specific norms but also refers to the general provisions of Article XXIII and those of the Understanding of 1979 (Agreement on Trade in Civil Aircraft). Another refers completely to the general regime (Code on Import Licensing Procedures) . . . [T]wo agreements . . . do not contain any provisions dealing with dispute settlement (Agreement on Bovine Meat and the International Dairy Agreement), thus leaving the general regime to apply.” Montana i Mora, supra note 75, at 124 n. 93 (citations omitted).


(1) as a result of the requirement of unanimity in the Council a party could easily block or at least delay the establishment of a panel;
(2) the adoption of the panel report could be blocked or delayed;
(3) there were no time limits during the panel process;
(4) there was basically no mechanism to survey the implementation of the panel reports, and at the end of 1994 compliance with the reports was less that 60 percent;
(5) the system of sanctioning a country in the case of non-compliance with the panel report did not work\(^\text{87}\);
(6) the quality and neutrality of panel members was sometimes of questionable value;
(7) panel reports were sometimes ambiguous and inconsistent;
(8) the Tokyo Round led to a fragmentation or "balkanization" of the law, so that several resolution procedures existed and a party was able to do "panel shopping", trying to obtain a desired result rather than an impartial and neutral panel decision.

Some deficiencies were corrected by the 1989 "Improvements Decision"\(^\text{88}\), but the situation was far from satisfactory, and the prevailing party could still not be sure that a successful complaint would make the losing party change its behavior.

It was mainly left to the Uruguay Round to improve the dispute mechanism. During the negotiations, the EU favored a pragmatic approach: a regime more based on negotiations and compromise. At the same time, the U.S. wanted a more legalistic, rule-

\(^{87}\) Only once a trade sanction was formally approved (Netherlands Measures of Suspension of Obligation to the United States, Nov. 8, 1952, GATT B.I.S.D. (1st Supp.) at 32 (1953)).

based system. It is noteworthy that the GATT 1947 Articles XXII and XXIII still remain the legal basis for dispute settlement in the WTO, but they are “silent as to which approach, adjudication or negotiation, might be appropriate”. In the end the U.S. was successful, and this is why the new DSU is much more adjudicatory than the GATT 1947 system.

2. Innovations by the WTO Treaty

a) The New DSU

The new Dispute Settlement Understanding, that is part of the basic framework of the WTO, sets up an elaborate regime of provisions still built upon the GATT Articles XXII and XXIII. This mechanism “is a central element in providing security and

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90 DSU, Art. 3 (1). The GATT 1994 Articles XXII and XXIII still are the same as in GATT 1947.


92 Young, supra note 74, at 391.

93 DSU, Art. 3 (1). See also supra n. 70 & 71. Art. XXIII enumerates the three situations when a party can initiate the dispute settlement procedures. GATT 1947, Art. XXIII.
predictability to the multilateral trading system". Its aim is to reestablish credibility of the member states into the WTO conflict resolution process.

(1) A Single Procedure

One major improvement is that member states have to follow only one settlement procedure once a conflict arises with regard to the covered agreements. The exclusivity of the system leads to more coherence because "panel shopping" is abolished, and there is no uncertainty in determining the applicable procedure. However, it seems impossible to centralize the procedures completely because some covered agreements contain altering provisions. Nevertheless, the general rules will control the majority of the conflicts. Interestingly, the Understanding encourages parties to resort to binding arbitration as an "alternative means of dispute resolution".

It has been observed that "unilateral action undermines the multilateral basis of the WTO [because it] challenges the WTO's credibility and encourages other countries to

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94 DSU, Art. 3 (2).
95 Jackson, in Stewart, The WTO, supra note 54, at 15. See also Rules-Based Dispute Settlement Called Useless without Enforcement, 12 Int'l Trade Rep. (BNA) No. 30, at 1267 (July 26, 1995).
96 The DSU covers the multi- and plurilateral agreements listed in its Appendix 1. DSU, Art. 1 (1).
98 Backes, supra note 69, at 917.
101 A list of the provisions derogating from the general rules is found in Appendix 2 to the DSU. Missing in the list are Art. 64 of the TRIPS Agreement and Art. 7 (3) of the Textiles Agreement. Vermulst & Driessen, supra note 100, at 138 n. 33 & 139 n. 34.
102 Vermulst & Driessen, supra note 100, at 139.
103 DSU, Art. 25.
act unilaterally as well.\textsuperscript{104} Therefore, the Understanding directs the member states to refrain from any unilateral action in connection with measures infringing rights under the WTO agreements, and instead requires them to resort always to the DSU proceedings.\textsuperscript{105}

(2) The Dispute Settlement Body

The drafters of the Understanding agreed to establish a Dispute Settlement Body (DSB) being responsible for administering the rules and procedures of the DSU, for establishing panels, adopting panel and Appellate Body reports, surveying the implementation of rulings and recommendation and for allowing disciplinary action in the case of non-complying member states.\textsuperscript{106} It is the General Council that meets also as DSB, but the DSB has its own chairman and rules of procedures.\textsuperscript{107} Therefore, an "integrated system"\textsuperscript{108} is created. The Understanding has the same legal authority as the

\textsuperscript{104} Tracy M. Abels, The World Trade Organization's First Test: The United States-Japan Auto Dispute, 44 UCLA L. Rev. 467, 469 (1996).

\textsuperscript{105} DSU, Art. 23.

Authors have noted that the DSU Article 23 is especially directed against Section 301, the "probably most effective unilateral trade sanction" of the U.S. See Backes, supra note 69, at 11-12; Lowenfeld, supra note 54, at 481.


\textsuperscript{106} DSU, Art. 2 (1).

\textsuperscript{107} WTO Agreement, Art. IV (3).

\textsuperscript{108} Cocuzza and Forabosco, supra note 85, at 27.
WTO Agreement itself, while the whole dispute resolution process is woven into the organic structure of the WTO.  

(3) The "Negative" Consensus

Another important attempt to speed up the settlement procedure involves the principle of "negative consensus". All decisions in the WTO are still taken by consensus, but "the idea of consensus applies to the DSB in a vastly different manner". A decision is deemed to be adopted by the DSB unless its members decide by consensus not to adopt the decision. This "most radical innovation" has already been hailed as an "ingenious solution" and "perhaps the most important advantage" to prevent a party from blocking the decision making process.

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109 Pescatore, in Handbook (Part Two), supra note 69, at 29.
111 Reitz, supra note 72, at 585. The introduction of the majority vote would have politicized the complete dispute settlement process. Jeffrey M. Waineymer, Revitalizing GATT Article XXIII-Issues in the Context of the Uruguay Round, 12:1 World Competition 5, 42-43 (1988).
112 DSU, Art. 6 (1), 16 (4), 17 (14), 22 (6). If a member formally objects to the proposed decision, the majority vote is introduced with one vote for each member. World Trade Without Barriers (Vol. 1), supra note 5, at 373-74.
113 Cocuzza & Forabosco, supra note 85, at 168.
114 Reitz, supra note 72, at 585.
115 Dillon, supra note 91, at 378.
(4) The Appellate Body

Finally, "perhaps the most definitive move in the direction of legalism"\(^{116}\) is the creation of a standing Appellate Body\(^{117}\) -- a "unique and unprecedented institution in international trade"\(^{118}\). Aiming at "broadly [representing] the membership in the WTO", it is composed of seven "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally[, and] unaffiliated with any government"\(^{119}\). The members are appointed for a four year term\(^{120}\), and, unlike the panel phase, the disputing parties cannot choose who is sitting on a case.\(^{121}\) Based on rotation, three of the seven members will hear a case.\(^{122}\) The working procedures that are to be drawn up contain the schedule determining who will serve.\(^{123}\)

\(^{116}\) Young, supra note 74, at 403. The establishment of the Appellate Body is even seen as a "significant step toward the creation of an international legal tribunal of trade." Dillon, supra note 91, at 379.

\(^{117}\) DSU, Art. 17.


\(^{119}\) DSU, Art. 17 (3). Prof. Lowenfeld made interesting deliberations concerning the quality of the Appellate Body members noting that "[t]he whole concept may well stand or fall on the skill and prestige of the first generation of members of the Appellate Body." Lowenfeld, supra note 54, at 484-85. By the same token, Prof. Nichols predicted that "the Appellate Body will become a focal point for scrutiny of the World Trade Organization." Nichols, supra note 16, at 453 (citations omitted). See also Reitz, supra note 72, at 602.

"The [Appellate Body] was constituted in December 1995, and it took up its function forthwith with the assistance of a small Secretariat . . . . The criterion of 'broadly representative' was met by appointing persons from the following [m]ember [s]tates (in alphabetical order): Egypt, Germany (European Union), Japan, New Zealand, Philippines, Uruguay, United States of America." Pescatore, in Handbook (Part Two), supra note 69, at 36 n. 57.

\(^{120}\) DSU, Art. 17 (2).

\(^{121}\) For the panel phase, see infra n. 142-46.

\(^{122}\) DSU, Art. 17 (1).

\(^{123}\) DSU, Art. 17 (1) & (9). The Appellate Body establishes the working procedures in consultation with the DSB Chairman and the Director-General. DSU, Art. 17 (9).
Inspired by common law systems\textsuperscript{124}, the Appellate Body reexamines the case with regard only to "issues of law . . . and legal interpretations\textsuperscript{125}, and not of fact.\textsuperscript{126}

As the decisions are now adopted "quasi-automatically\textsuperscript{127}, it became necessary to provide for a review mechanism.\textsuperscript{128} One might even say that the Appellate Body has been created in order to "compensate for the loss of a party's ability to block or delay implementation of panel reports\textsuperscript{129}"

It is very likely that the quality of the panel reports will improve.\textsuperscript{130} One has to bear in mind the stability of the Appellate Body and the limitation of its competence on legal issues, so that it must be able to build up a corpus of decisions assuring consistency in WTO jurisdiction and guiding the panels.\textsuperscript{131}

\textsuperscript{124} Montana i Mora, supra note 75, at 150.
\textsuperscript{125} DSU, Art. 17 (4) & (6).
\textsuperscript{126} The distinction between questions of law and questions of fact is not always obvious. Croley & Jackson, supra note 52, at 195; Lowenfeld, supra note 54, at 483-84.
\textsuperscript{129} Weeks, supra note 86. See also Jackson, in Stewart, The WTO, supra note 54, at 14. It seems that (only) in a few cases the loosing party blocked the adoption of the report in the Council because of an erroneous panel decision. Stoll, supra note 69, at 275 (citing Robert E. Hudec, Dispute Settlement, in Completing the Uruguay Round: A Results-Oriented Approach to the GATT Trade Negotiations 180, 183 (Jeffrey J. Schott ed., 1990)).
\textsuperscript{130} Horlick & DeBusk, supra note 33, at 40 (assuming that panelists will prepare better reports when they know of the possibility of appealing the decision).
\textsuperscript{131} Reitz, supra note 72, at 584; Edwin Vermulst & Bart Driessen, supra note 100, at 145.
b) Legalistic Procedure

Beside the establishment of new institutions detailed procedural provisions are laid down in the DSU in order to strengthen the settlement regime. Also, a tight time schedule for each of the different phases ensures "greater transparency and likelihood of success" for the settlement process.\(^\text{132}\)

(1) Consultations

When a member state alleges that the operation of any covered agreement is affected by another member's measure, it requests consultations and notifies the DSB.\(^\text{133}\) The language employed by the DSU makes it clear that consultations are to be taken seriously and "not simply exist as a formality before the establishment of a panel."\(^\text{134}\) Interestingly, the drafters of the DSU did not favor an adjudicative decision at all costs, but "a solution mutually acceptable to the parties to a dispute."\(^\text{135}\) By the same token, the

\(^{132}\) Aceves, supra note 105, at 439.

\(^{133}\) DSU, Art. 4 (2) & (4). In order to limit misuse, the DSU provides that "before bringing a case, a member shall exercise its judgment as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute." DSU, Art. 3 (7).

\(^{134}\) Dillon, supra note 91, at 380 (1995). To ensure that the consultation phase is in fact taken seriously, the Understanding states that "[m]embers affirm their resolve to strengthen and improve the effectiveness of the consultation process . . . [A]lso each [m]ember undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding the representations made by another [m]ember in view of any measure that could affect the operation of any covered agreement. DSU, Art. 4 (1) & (2). Members do take advantage of the possibility to consult, because "[m]ore disputes are being resolved by the parties themselves, even in cases already far advanced in the WTO dispute-settlement process". Several Disputes resolved "out of court", Focus: WTO Newsletter, Aug./Sept. 1996, at 4 (Information and Media Relations Division of the WTO publ.). A list showing the cases settled by consultation is found at World Trade Organization, Overview of the State-of-play of WTO Disputes (visited on April 27, 1997) <http://www.wto.org/wto/dispute/bulletin.htm>.

\(^{135}\) DSU, Art. 3 (7). See also DSU, Art. 12 (7).
DSU provides for the end of the conflict at any time during the procedure whenever the parties agree on a solution.\textsuperscript{136}

The Understanding suggests other ways of non-adjudicatory conflict resolution such as good offices, conciliation, and mediation, all of which may be offered by the Director-General ex officio.\textsuperscript{137} However, if a member does not reply to a consultation request within 10 days, if it does not begin consultations within 30 days, or if the dispute is not settled by consultations within 60 days, the complaining party can ask the DSB to establish a panel.\textsuperscript{138} In urgent cases, such as in those involving perishable goods, the time frame is shorter.\textsuperscript{139}

(2) Panel Phase

When the Dispute Settlement Body is asked by the complaining party to establish of a panel, it will decide the issue by “negative“ consensus.\textsuperscript{140} As a result of this voting mode, the complaining party practically obtains a “right to a panel.“\textsuperscript{141} The DSU

\begin{itemize}
\item \textsuperscript{136} DSU, Art. 3 (6) (emphasis added). To underline this principle the Understanding directs the panels to “give [the disputing parties] adequate opportunity to develop a mutually satisfactory solution." DSU, Art. 11.
\item \textsuperscript{137} DSU, Art. 5. Good offices, conciliation, and mediation are some of the traditional ways of settling disputes in the area of international law. Rainer Lagoni, Völkerrecht, Teil 1: Allgemeine Lehren und besondere Gebiete [International Law, Part I: General Doctrines and specific Fields] 55-56 (W. Mauke Söhne publ., Hamburg 1994).
\item Pescatore pointed out that “[n]o confusion should be admitted between good offices, conciliation and mediation, on the one hand, and ‘consultation’ on the other. Consultation is a mandatory prerequisite for the opening of contentious proceedings. Good offices, conciliation and mediation . . . are optional measures of amicable settlement." Pescatore, in Handbook (Part Two), supra note 69, at 39.
\item \textsuperscript{138} DSU, Art. 4 (3) & (7).
\item \textsuperscript{139} In urgent cases a request for consultations must be answered within 10 days, and disputes must be settled within 20 days. DSU, Art. 4 (8). If the complaint is directed against a developing country member, the parties can agree on extending these time limits. DSU, Art. 12 (10).
\item \textsuperscript{140} DSU, Art. 6.
\item \textsuperscript{141} Backes, supra note 69, at 917.
\end{itemize}
stipulates that the panel is to be established at the DSB meeting following the one in which the request was made.\footnote{DSU, Art. 6.} The Secretariat holds a list of “well-qualified governmental and/or non-governmental individuals“ from which the panelists are chosen by the disputing parties upon proposal of the Secretariat.\footnote{DSU, Art. 8 (1), (4) & (6). The “well-qualified individuals“ that sit on a panel include “persons who have served on or presented a case to a panel, served as a representative of a [m]ember of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a [m]ember.“ DSU, Art. 8 (1). The panelists are supposed to be selected “with a view to ensuring . . . a sufficiently diverse background and a wide spectrum of experience“ and should not interfere with the independence of the panel. DSU, Art. 8 (2) Consequently, panelists who are not citizens of the disputing nations are clearly preferred. DSU, Art. 8 (3). If one of the parties is a developing country and it requests so, one of the panelists must be also a citizen of a developing country. DSU, Art. 8 (10).} The qualification requirement obviously aims at increasing the quality as well as the authority of panel reports.\footnote{DSU, Art. 8 (5). The request for a five-member panel has to be made “within 10 days from the establishment of the panel“. Id. “Experience shows that three panelists can function more efficiently than five . . . [But] the input of five members during deliberations may be more effective in resolving the dispute to the satisfaction of all.“ World Trade Without Barriers (Vol. 1), supra note 5, at 380.} As under GATT a panel is usually made up of three persons, unless the parties to the dispute demand five panelists.\footnote{DSU, Art. 8 (7). The parties are supposed to reject proposals for panelists only for “compelling reasons“. DSU, Art. 8 (6). In case of disagreement on the panelists, the Director-General consults with the Chairman of the DSB and the Chairman of the Council or Committee involved for whom to choose. DSU, Art. 8 (7).} If the parties cannot agree within 20 days on whom to appoint, the Director-General will choose the panelists after being requested to do so by either party.\footnote{Khansari, supra note 99, at 192. The panel process is laid out in DSU, Art. 12.} Therefore, the parties lose another possibility to block the process.
It may occur that more than one member requests a panel regarding the same issue. In this case, the DSU recommends the establishment of only one panel.\textsuperscript{147} In attempting to “eliminate drawn-out disputes over the terms of reference”,\textsuperscript{148} the Understanding provides for compulsory Terms of Reference if the parties cannot agree on special terms.\textsuperscript{149} Also, as a result of the past experience under the GATT, the DSU lays down a very detailed panel process which is “marked by legalistic underpinnings.”\textsuperscript{150} The Understanding requires the complete panel phase to be completed within 6 months.\textsuperscript{151} This time frame is limited to 3 months in cases of urgency, and it may exceptionally be extended up 9 months.\textsuperscript{152}

As the panel’s function is to assist the DSB in discharging its responsibilities, the panel is required to objectively assess the case with regard to the facts as well as the legal issues involved, and to make other findings that support the DSB in making the appropriate rulings or recommendations.\textsuperscript{153} A panel is not allowed to interpret any of the provisions of the covered agreements.\textsuperscript{154} During its examination of the case, the panel follows detailed “Working Procedures”.\textsuperscript{155} After fixing the time table the panelists receive the parties’ submissions, hear their arguments, and, if necessary, request

\textsuperscript{147} DSU, Art. 9.
\textsuperscript{148} Young, supra note 74, at 402.
\textsuperscript{149} DSU, Art. 7.
\textsuperscript{150} Khansari, supra note 99, at 192.
\textsuperscript{151} DSU, Art. 12 (8).
\textsuperscript{152} DSU, Art. 12 (8) & (9). The DSB must be informed by the panel about the reasons of the delay. DSU, Art. 12 (9).
\textsuperscript{153} DSU, Art. 11.
\textsuperscript{154} “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations" of the covered agreements. WTO Agreement, Art. IX (2) (emphasis added).
\textsuperscript{155} Appendix 3 to the Understanding contains model Working Procedures that have to be followed if the panel does not decide otherwise. DSU, Art. 12 (1). These Working Procedures also contain a proposed time table for panel work. DSU Appendix 3 (12).
information from any source.\footnote{DSU, Art. 12 (3)-(6) & 13. More specifically, the procedural stage involving the parties consists of the following steps: first, the parties will submit their written submission, then have a first meeting with the panel for oral presentations, then submit written rebuttals, and finally meet the panel a second time. DSU, Art. 12 (6) and Appendix 3 (4)-(10). The provision stipulating that the panels have the “right to seek information . . . from any individual or body” seems far-reaching, but one has to bear in mind that “the right to seek information is not the same as the right to get information.” World Trade Without Barriers (Vol. 1), supra note 5, at 393.} In this context, the DSU provides that the reports of experts or committees, established under some of the agreements, may or, in some cases, shall be considered.\footnote{DSU, Art. 13 (2); see Art. 11 (2) of the Agreement on the Application of Sanitary and Photosanitary Measures; Art. 14 (2)-(4) of the Agreement on Technical Barriers to Trade; Art. 19 (3) & (4) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation); Art. 4.5 of the Agreement on Subsidies and Countervailing Measures. Annex IV of the DSU includes rules for the establishment of an expert review group and the procedures of its operation. For a description of the use of experts in the proceedings, see Vermulst & Driessen, supra note 100, at 131-34.} Also, the Understanding instructs the panel to hear the arguments of any member who is substantially interested in the matter\footnote{DSU, Art. 14. For information regarding the confidentiality of information given by an expert review group, see DSU Appendix 4 (5).} . Nevertheless, the panel deliberates confidentially and drafts the report in absence of the parties.\footnote{DSU, Art. 15 (1) & (2).}

An interim report containing the facts and parties' arguments as well as the panel's own findings and conclusions is issued to the parties for discussion with the panel.\footnote{Pescatore, in Handbook (Part Two), supra note 69, at 35-36. Pescatore feared that "[t]he 'interim review' . . . would constitute an outright intervention into the panel's independence." Letter from Pierre Pescatore to Kenneth W. Abbott, quoted in Kenneth W. Abbott, The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice, 1992 Colum. Bus. L. Rev. 111, 134 & n. 122.} If not misused for interfering with panel's internal working, the interim review stage "surely will constitute an incentive to more responsible reasoning and a guarantee against unpredictable arguments"\footnote{Pescatore, in Handbook (Part Two), supra note 69, at 35-36. Pescatore feared that "[t]he 'interim review' . . . would constitute an outright intervention into the panel's independence." Letter from Pierre Pescatore to Kenneth W. Abbott, quoted in Kenneth W. Abbott, The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice, 1992 Colum. Bus. L. Rev. 111, 134 & n. 122.}, because the parties get another, final chance to
argue before the panel.\textsuperscript{162} The quality of the panel and its acceptance would surely be enhanced.\textsuperscript{163}

Under the condition that no party requests a (third) meeting with the panel in time for commenting on the interim report, it becomes final and will be circulated to each member.\textsuperscript{164} After considering the final report, the DSB adopts it between 20 and 60 days after its issuance to the members unless either one of the disputing parties notifies the DSB of its decision to appeal or the DSB decides by consensus against adoption.\textsuperscript{165} The DSB is not empowered to change the reports' contents in any way.\textsuperscript{166} The only possibilities are acceptance or refusal.

(3) Appeal

An appeal has to be filed by a party to the dispute, whereas third party members do not have the right to appeal.\textsuperscript{167} However, their statements are considered by the Appellate Body.\textsuperscript{168} There is a strict time limit with regard to the proceedings. Normally, the period is 60 days, but in no case it is more than 90 days.\textsuperscript{169} Like the panel's, the

\textsuperscript{163} Abbott, supra note 161, at 135.
\textsuperscript{164} DSU, Art. 15 (2).
\textsuperscript{165} DSU, Art. 16.
\textsuperscript{166} Reitz, supra note 72, at 582.
\textsuperscript{167} DSU, Art. 17 (4). This restriction enhances the similarity of the panel proceedings with a tribunal procedure. Vermulst & Driessen, supra note 100, at 144.
\textsuperscript{168} DSU, Art. 17 (4). As in the panel phase, the condition for a third party to make written submissions and to be heard by the Appellate Body is to have a "substantial interest in the matter". Id.
\textsuperscript{169} DSU, Art. 17 (5). The period is counted from the day the disputing party notifies the DSB of its decision to appeal until the day the Appellate Body circulates its report. Id. For some authors "these deadlines seem unrealistic in view of the complex legal issues in many proceedings." Vermulst & Driessen, supra note 100, at 146. See also Backes, supra note 69, at 917.
Appellate Body's proceedings are confidential, and the report is drafted without the presence of the parties.\textsuperscript{170} The panel report is written unanimously, and yet the Appellate Body members may express individual opinions\textsuperscript{171} -- a tradition found in common law countries. It has been feared that including individual opinions weakens the "authoritative force of the reports."\textsuperscript{172} However, these opinions are anonymous\textsuperscript{173} so that an Appellate Body member cannot be accused of being biased, and "passive manipulation" with regard to composing the Appellate Body panels will not take place.\textsuperscript{174} The Appellate Body, in contrast to the DSB, has the power to "uphold, modify or reverse the legal findings and conclusions of the panel"\textsuperscript{175}, but it may not remand the case.\textsuperscript{176} The Appellate Body report is adopted without amendments unless the DSB votes by consensus to the contrary within 30 days after the report's circulation to the member states.\textsuperscript{177}

(4) Implementation and Enforcement of Decisions

If the panel or the Appellate Body find that the measure in question is consistent with the agreements, and the DSB decides the same way, the complaint will be

\begin{itemize}
\item\textsuperscript{170} DSU, Art. 17 (10).
\item\textsuperscript{171} DSU, Art. 17 (11).
\item\textsuperscript{172} Montana i Mora, supra note 75, at 152.
\item\textsuperscript{173} DSU, Art. 17 (11).
\item\textsuperscript{174} Dillon, supra note 91, at 386. An active manipulation of the composition of the Appellate Body panels is not possible since their members are not chosen by the parties. DSU, Art. 17 (1). Nevertheless, a party is allowed "to time its appeal, within provided limitations, to coincide with the next rotation of Appellate Body members." Dillon, supra note 91, at 386.
\item\textsuperscript{175} DSU, Art. 17 (13).
\item\textsuperscript{176} The exclusion of remanding a case is a unique limitation that does not exist in any other "multitiered system of legal decision making." Lowenfeld, supra note 54, at 484.
\item\textsuperscript{177} DSU, Art. 17 (14).
\end{itemize}
rejected. In case of an offending measure, the panel or Appellate Body conclude their reports by recommending the accused member state bring the measure into conformity with the concerned agreement and proposing how to implement the recommendation. After the DSB has adopted the report, a well laid-out system with respect to implementation and sanctions applies. As a majority of problems faced under the GATT 1947 dispute resolution mechanism were connected with the unwillingness of the parties to comply with the reports, three entire articles of the DSU contain stipulations related to this question. A new feature introduced in this context is the surveillance of the implementation by the DSB. Under the old system practically no institution observed whether the members complied with the recommendations and rulings. Therefore, the DSB will review the implementation after a six month period and continuously thereafter until the issue is completely resolved.

The Understanding favors the withdrawal of the inconsistent measure as the best solution. It emphasizes that the effectiveness of the dispute settlement system depends essentially on the "[p]rompt compliance with recommendations or rulings of the

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178 Cocuzza & Forabosco, supra note 85, at 181 (citing DSU, Art. 3). In case of a rejection, unilateral retaliatory actions of the member states are foreclosed. DSU, Art. 23; see also supra p. 23 n. 105.
179 DSU, Art. 19 (1). For non-violation complaints, specific procedures have been introduced; the panels and the Appellate Body are authorized to recommend only a "mutually satisfactory adjustment." DSU, Art. 26.
180 See GATT Dispute Settlement Stymied by Non-Implementation of Reports, Focus: GATT Newsletter, May-June 1991, at 1, 12-13 (Information and Media Relations Division of GATT publ.); Dispute Panels Jump from 1 to 11, Focus: GATT Newsletter, Nov.-Dec. 1991, at 1 (Information and Media Relations Division of GATT publ.).
181 The problem of implementation and sanctions is treated by DSU, Art. 21-23.
182 DSU, Art. 21 (6).
183 Lowenfeld, Preface to Handbook (Part One), supra note 10, at viii; Young, supra note 74, at 404.
184 DSU, Art. 21 (6).
185 DSU, Art. 3 (7).
DSB."\textsuperscript{186} The member is therefore given 30 days after the adoption of the report to notify the DSB if it intends to implement the recommendations and rulings.\textsuperscript{187} If an immediate compliance is not practical, a "reasonable period of time" not exceeding 15 months from the date of the establishment of the panel shall be granted.\textsuperscript{188} If it is unclear whether the measures undertaken to comply with the report are satisfying, a second procedure under the DSU shall be initiated, preferably with the original panel.\textsuperscript{189}

The Understanding notes that "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreement."\textsuperscript{190} However, if the country does not comply with the report within the given time, a graded scheme of sanctions will apply.\textsuperscript{191} As a first possibility the disputing parties may agree on the

\textsuperscript{186} DSU, Art. 21 (1).
\textsuperscript{187} DSU, Art. 21 (3).
\textsuperscript{188} DSU, Art. 21 (3). The 15 months period may be extended subject to an agreement between the disputing parties. Id.
\textsuperscript{189} Three alternative ways exist to determine the "reasonable period of time": first, the member concerned proposes it; if this proposal is not approved by the DSB the disputing parties try to agree on it; if an agreement cannot be reached, binding arbitration will be the last resort. Id. One author has observed correctly that the notion "reasonable period of time" is all but precise. Backes, supra note 69, at 917.
\textsuperscript{190} DSU, Art. 21 (5).
\textsuperscript{191} DSU, Art. 22 (1)

From an economical view point, imposing sanctions has questionable value because "generally everyone loses when a nation takes retaliatory action. Retaliation will never be the rule, only the exception to the rule. A single cycle of retaliation and counter-retaliation is enough to demonstrate an administration's political resolve, but also to incur substantial economic harm." Judith H. Bello & Alan F. Holmer, U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits, 28 Intl Law. 1095, 1103 (1994). Also noteworthy is the outcome of the only GATT panel decision that allowed retaliation (see n. 87). In 1947, the Netherlands were authorized to impose a 60,000-ton quota on flour from the USA, but it feared that the price of bread would increase and took no action. World Trade Without Barriers (Vol. 1), supra note 5, at 377-78.
payment of compensation. The Understanding states that compensation is voluntary\textsuperscript{192}, meaning that a country cannot be forced to pay it. However, almost nothing is said about the nature or measure of compensation.\textsuperscript{193} The parties have 20 days to reach a satisfactory agreement regarding compensation, otherwise the DSB can be requested to authorize the suspension of concessions or other obligations under the covered agreement.\textsuperscript{194} The DSB has 30 days to decide the issue by “negative” consensus\textsuperscript{195} which means that retaliatory measures are introduced almost automatically.\textsuperscript{196} The suspension should first be sought in the same sector in which the inconsistency was found.\textsuperscript{197} If this seems unpractical or ineffective, the suspension with regard to other sectors should be considered.\textsuperscript{198} If the complainant believes this to be insufficient, concessions or other obligations under another covered agreement can be suspended.\textsuperscript{199} Of course, the level of suspension must be equivalent to the level of the original nullification or impairment.\textsuperscript{200} Whenever a dispute arises in terms of the level or scope of suspension, an arbitrator shall

\textsuperscript{192} DSU, Art. 22 (1).
\textsuperscript{193} Reitz, supra note 72, at 590.
\textsuperscript{194} DSU, Art. 22 (2).
\textsuperscript{195} DSU, Art. 22 (6).
\textsuperscript{196} One author spoke of the creation of “a regime of ‘retaliation at request’.,” Montana i Mora, supra note 75, at 156.
\textsuperscript{197} DSU, Art. 22 (3)(a).
\textsuperscript{198} DSU, Art. 22 (3)(b).
\textsuperscript{199} DSU, Art. 22 (3)(c). When the complaining party considers in which sector it will suspend concessions and other obligations, it “shall take into account:

(i) the trade in the sector or under the agreement under which the panel or Appellate Body has found a violation or other nullification or impairment, and the importance of such trade to that party;

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations.” DSU, Art. 22 (3)(d).

The suspension of concessions or other obligations in other sectors is known as “cross-retaliation”.
\textsuperscript{200} Pescatore, in Handbook (Part Two), supra note 69, at 37.
\textsuperscript{200} DSU, Art. 22 (4).
examine the question within 60 days. Retaliatory measures are considered only temporary until the inconsistent measure has been removed or a "mutually satisfactory solution is reached." \[202\]

3. Criticism and Reform Proposals

Even authors who think that the more rule-oriented approach of the DSU is a step in the right direction have already expressed their discontent with some stipulations and have come up with suggestions on how to improve the dispute settlement system. \[203\] The major ones will be discussed below.

Professor Jackson has claimed that the process is too secret and it should become more transparent. \[204\] Likewise, it has been stated that the confidentiality of the proceedings is not favored by "many groups whose interests are immediately and directly affected by . . . decisions" of the DSB (as an example discussions after decisions involving environmental matters are cited). \[205\]

A second point of criticism is the fact that no DSU provision determines any condition of admissibility to the Appellate Body. In order to "discourage frivolous

\[201\] DSU, Art. 22 (6). The arbitrators are either the original panel or an individual or group appointed by the Director-General. Id.

\[202\] DSU, Art. 22 (8).

\[203\] See Bhalia, supra note 42, at 145-46; Jackson, in Stewart, The WTO, supra note 54, at 14-16; Dillon, supra note 91, at 399-402; Khansari, supra note 99, at 195-197; Montana i Mora, supra note 75, at 176-180; Reitz, supra note 72, at 598-600; Young, supra note 74, at 406-09. See also Alan Wm. Wolff & John A. Ragosta, How the Uruguay Round will change the Practice of International Trade Law in the United States: Two Views, View One, in Stewart, The WTO, supra note 10, 695,701-710.

\[204\] Jackson, in Stewart, The WTO, supra note 54, at 14.

\[205\] Young, supra note 74, at 406-07. Conversely one author argued that "[i]t is difficult to conceive that serious issues of state economic policy between countries can best be resolved in a public forum." World Trade Without Barriers (Vol. 1), supra note 5, at 394.
appeals\textsuperscript{206} (appeals without substantive reason), which would result in an overload of work for the Appellate Body delaying the adoption of the reports, a minimum threshold should be established.\textsuperscript{207}

Another objection concerns the system of sanctions. It is questionable to what extent compliance with the panel and Appellate Body rulings and recommendations can be enforced.\textsuperscript{208} Termination of infringing measures is, of course, more desirable than the introduction of retaliation.\textsuperscript{209} Furthermore, the retaliatory measures only work effectively when member states of similar economic power are involved.\textsuperscript{210} In order to effectively render a claim of a small and poorer country against a large and wealthier country, it has been suggested that the WTO itself should be authorized to bring complaints and enforce them.\textsuperscript{211}

The extent to which the aforementioned issues will be debated on the political level in the near future is unclear. A result of “the judicialization of the dispute settlement system is that it will be much more difficult to reach an agreement on the substantive rules.”\textsuperscript{212} Pursuant to a Ministerial Decision, the Dispute Settlement Understanding is subject to review within four years after the entry into force of the WTO.\textsuperscript{213}

\textsuperscript{206} Dillon, supra note 91, at 385.

\textsuperscript{207} Id.; Cocuzza & Forabosco, supra note 85, at 179; Montana i Mora, supra note 75, at 151. It is even feared that the overload of work would finally lead to paralyzing the Appellate Body. Cocuzza & Forabosco, id. Another author sees the danger in the to-date mechanism of being “likely to encourage regular appeals, and therefore to weaken the panel authority.“ Lei Wang, Some Observations on the Dispute Settlement System in the World Trade Organization, 29:2 J. World Trade 173, 178 (1995).

\textsuperscript{208} Young, supra note 74, at 407-08.

\textsuperscript{209} Lowenfeld, supra note 54, at 487.

\textsuperscript{210} Cocuzza & Forabosco, supra note 85, at 185; Khansari, supra note 99, at 196.

\textsuperscript{211} Dillon, supra note 91, at 400 (giving the example of a mosquito biting an elephant).

\textsuperscript{212} Montana i Mora, supra note 75, at 177.

\textsuperscript{213} Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, April 15, 1994, reprinted in 33 I.L.M. at 1259.
CHAPTER III
THE NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement is "preeminently" a trade agreement. Its main purpose is the establishment of a free trade zone between Canada, Mexico and the United States. The agreement enumerates its objectives as the elimination of trade barriers with respect to goods and services; the furthering of conditions of fair competition; the extension of investment possibilities; the protection of intellectual property rights; the creation of effective procedures concerning its implementation, application, joint administration, and dispute settlement; and the set-up of a framework for further cooperation.

1. NAFTA Institutions

As the principal institution of the NAFTA, a Free Trade Commission (FTC) consisting of trade ministers or their designees has been created. It meets at least once a year. Among its functions are the supervision of the NAFTA's implementation, its further elaboration, and the resolution of disputes concerning interpretation or

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214 Saunders, supra note 35, at 278.
216 NAFTA, Art. 102 (1). Beside the "classical" areas of a trade agreement that are related to the trade in goods the NAFTA also covers investment (Chapter 11), trade in services (Chapter 12), telecommunications (Chapter 13), financial services (Chapter 14), and intellectual property (Chapter 18)
218 NAFTA, Art. 2001 (5).
application. The Commission also establishes committees or working groups and supervises them. Decisions of the Commission are taken by consensus. The FTC is assisted by a Secretariat which also renders support to the Chapter 19 and Chapter 20 panels to settle disputes and the Extraordinary Challenge Committee. The Secretariat is composed of national sections, for which each member nation is responsible.

Outside the main agreement, the parties agreed to establish a North American Secretariat in charge of coordinating the work of the NAFTA Secretariat's national sections by, e.g., translating and archiving documents.

2. The Side Agreements

After signing the NAFTA, the parties concluded the two Side Agreements on Environmental Cooperation and Labor Cooperation which set up their own institutions. The negotiation of these agreements became necessary when concerns were raised in the U.S. that the NAFTA "would spur excessive environmental degradation and job loss".

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219 NAFTA, Art. 2001 (1). Furthermore, the Commission "consider[s] any other matter that may effect the operation of [the] Agreement." Id. NAFTA dispute resolution panels are bound by the FTC's interpretations of the NAFTA provisions. Appleton, supra note 32, at 146.

220 Id. The committees and working groups that are established under different provisions of the NAFTA are listed in Annex 2001.2.

221 NAFTA, Art. 2001 (4).

222 NAFTA, Art. 2002 (1) & (3). The Secretariat also supports the work of committees and working groups established under the NAFTA. Id.

223 NAFTA, Art. 2002 (2).

224 Grijalve & Brewer, supra note 217, at 2, 4-5. "The North American Trade Secretariat . . . was created . . . at a meeting of the trade ministers at the first meeting of the FTC on January 4, 1994." Id. at 4.

Environmentalists feared that Mexico would serve as a "pollution haven". Workers were concerned that the elimination of tariff and non-tariff barriers, the liberalization of investment rules, the low labor costs, and the lower labor and environmental standards would result in a movement of U.S. capital towards Mexico and the loss of U.S. jobs. Therefore, the Environmental and Labor Side Agreements "were instrumental in securing passage of the NAFTA [in the United States]." At the same time, however, Mexico feared that under a regime of free trade environmental and labor standards could be used as a means of protectionism.

Both Side Agreements "do not contain labor or environmental norms; they constitute legal process." One of their aims is to make the countries enforce their own labor or environmental laws. The concept underlying the agreements has generated controversy.


229 Saunders, supra note 35, at 303.


231 NAAEC, Art. 3, 5 & 6; NAALC, Art. 2-4. Under both agreements, the parties are directed to ensure that their laws provide for high standards of environmental protection or for high labor standards, respectively, and to strive for an improvement of those standards. NAAEC, Art. 2 & 3; NAALC, Art. 1 & 2. The agreements also provide for the exchange of information and cooperation between the parties. NAAEC, Art. 1 & 10; NAALC, Art. 1, 10 & 11. "This was the most that the member states, jealously
a) The Environmental Side Agreement

The NAAEC stipulates the establishment of a Commission for Environmental Cooperation made up of a Council, a Secretariat, and a Joint Public Advisory Committee.233 The Council, the governing body of the ECE, consists of "cabinet-level or equivalent representatives".234 It convenes at least once a year and, among other issues, "address[es] questions and differences that may arise between the [p]arties regarding the interpretation or application of [the] Agreement".235 The Council arrives at its decisions by consensus.236 Assistance to the Council is provided by the Secretariat237 and advice by the Joint Public Advisory Committee, which is composed of 15 members appointed in equal numbers by the parties.238

b) The Labor Side Agreement

A Commission for Labor Cooperation consisting of a Council and a Secretariat is set up under the Labor Side Accord.239 The Commission is governed by the Council, a body safeguarding their own sovereign prerogatives, were willing to concede to each other." Darby, supra note 32, at 15.


NAAEC, Art. 8.

NAAEC, Art. 9 (1), 10 (1).

NAAEC, Art. 9 (3), 10 (1)(d). Some of the Council’s responsibilities also include strengthening the cooperation on the development and continuing improvement of environmental laws, observing the implementation of the Agreement, and furthering the cooperation between the parties regarding environmental matters. NAAEC, Art. 10 (1)(b) & (f), 10 (3).

NAAEC, Art. 9 (6).

NAAEC, Art. 11 (5).

NAAEC, Art. 16 (1) & (4).

NAALC, Art. 8.
consisting of the labor ministers which convenes at least once a year.\textsuperscript{240} As is true under the Environmental Side Agreement, one of the Council's responsibilities is to address disputes concerning the Agreement's interpretation and application.\textsuperscript{241} Decision-making is subject to consensus.\textsuperscript{242} The Secretariat supports the Council in "exercising its functions".\textsuperscript{243} The Commission is assisted by National Administrative Offices (NAO), which each party is directed to establish at the federal level.\textsuperscript{244}

3. The Dispute Settlement Regimes

The North American Free Trade Agreement establishes dispute resolution systems depending on the subject at stake.\textsuperscript{245} Usually, conflicts are covered by the general dispute settlement mechanism described in Chapter 20\textsuperscript{246}, excluding investment and related matters (Chapter 11) and cases of antidumping and countervailing duty\textsuperscript{247} (AD/CVD)

\textsuperscript{240} NAALC, Art. 9 (1) & (3).
\textsuperscript{241} NAALC, Art. 10 (g). For the other of the Council's functions, see NAALC, Art. 10,11.
\textsuperscript{242} NAALC, Art. 9 (6).
\textsuperscript{243} NAALC, Art. 13 (1).
\textsuperscript{244} NAALC, Art. 8 (1),15. "Each NAO shall serve as a point of contact with . . . governmental agencies of that [p]arty, . . . NAOs of other [p]arties, . . . the Secretariat." NAALC, Art. 16 (1).
\textsuperscript{246} NAFTA, Art. 2003-22.
\textsuperscript{247} "[D]umping is . . . a form of price discrimination [that] occurs when foreign buyers are charged lower prices than domestic buyers for an identical product." Robert J. Carbaugh, International Economics 112 (2nd ed., 1985). The importing country levies antidumping duties in order to protect its domestic industry from injury. Id. at 115. The amount of the AD duty equals the dumping margin, i.e., the difference between the producer's home market price and the price charged for sales in the importing country. Id. at 115-16.
(Chapter 19)\textsuperscript{248}, for which particular provisions are in place.\textsuperscript{249} Also, both the Environmental and the Labor Side Agreement set up separate dispute resolution mechanisms, which, however, are very similar to the Chapter 20 system.\textsuperscript{250}

a) Experiences under the CFTA

Generally stated, the scattered conflict settlement procedures of the NAFTA reflect the system that has already been in existence under the CFTA.\textsuperscript{251} This treaty provided for

\begin{footnotesize}

Also with the intention to protect the domestic industry, countervailing duties are applied to goods that are produced with the aid of a foreign subsidy. Id. at 130. 
\textquoteleft\textquoteleft[A] countervailing duty equal to the amount of the subsidy is to be levied upon import of the [subsidized] goods.\textquoteright\textquoteright Id. at 130.

For a very detailed and critical analysis of U.S. and WTO AD and CVD provisions, see Bhala, supra note 42, at 601-842.

\textsuperscript{248} NAFTA, Art. 2004.

\textsuperscript{249} For investment disputes, see NAFTA, Art. 1101-39 & Annexes; for AD/CVD cases, see NAFTA, Art. 1901-11 & Annexes. Chapter 11 will not be discussed because it deals with disputes between a private investor and the country of investment. NAFTA, Art. 1115 & 1116.

\textsuperscript{250} NAAEC, Art. 22-36; NAALC, Art. 27-41.


\textquoteleft\textquoteleft[T]he basic principles of dispute resolution embodied in the FTA are largely based on those incorporated in the GATT. Of course, the dispute resolution mechanisms in the FTA considerably broaden and extend those in the GATT, and tailor the process to better fit the bilateral relationship.\textquoteright\textquoteright The Canada-U.S. Free Trade Agreement, supra note 33, at 65.

\end{footnotesize}
a general framework for settling disputes in Chapter 18, excepting financial services and AD/CVD cases, for which a special arrangement existed.

Chapter 18 installed the Canada-U.S. Trade Commission, bilaterally composed of cabinet-level representatives. The Commission facilitated consultations and negotiations between parties when a dispute arose. If these efforts remained unsuccessful, the Commission would establish a panel of experts. Three types of panel proceedings were possible: binding arbitration in safeguard cases and in cases when the governments mutually agreed, and panel recommendations. In the third case, the Commission would try to find an agreement in order to achieve a final resolution of the dispute. If the disagreement continued, the party whose rights were being infringed upon was entitled to retaliation until a resolution was found.

The system installed by Chapter 19 in connection with AD/CVD cases was "unusual". The CFTA did not contain any stipulation in terms of harmonizing AD and CVD laws; instead, every country still applied its national law. A party could request

**Footnotes:**

252 The agreement stipulates clearly that "[n]o other provision . . . confers rights or imposes obligations on the [p]arties with respect to financial services." CFTA Art. 1701 (1).

253 Chapter 19 contains the dispute settlement system for AD/CVD cases.

254 CFTA Art. 1802.

255 CFTA Art. 1802 (1), 1805.

256 CFTA Art. 1807 (2). The panels established under Chapter 18 and 19 consisted of five persons. CFTA Art. 1807 (3) & Annex1901.2 (2).

257 CFTA Art. 1103.

258 CFTA Art. 1806 (1). No panels came together under the Art. 1103, so did not play any role in practice. Harry B. Endsley, Dispute Settlement under the CFTA and NAFTA: From Eleventh-hour Innovation to Accepted Institution, 18 Hastings Int'l & Comp. L. Rev. 659, 666 n. 34 (1995).

259 CFTA Art. 1807.

260 CFTA Art. 1807 (8).

261 CFTA Art. 1807 (9).

262 William J. Davey, Dispute Settlement under the Canada-U.S. Free Trade Agreement, in Trade-Offs on Free Trade, supra note 33, 173, 177.

263 CFTA Art. 1902 (1). The U.S. and Canada were not able to agree on the harmonizing their AD/CVD laws, "despite, for example, their common intention at the start of the negotiations to develop a
the establishment of a panel to review either an AD or a CVD statutory amendment, or the AD/CVD decisions of a national authority (instead of a review by a national court).\textsuperscript{264} In the latter case, the panel had to apply the standard review and general legal principles of the importing country.\textsuperscript{265} The panel decisions were binding on the parties.\textsuperscript{266} An appeal was not possible, but the agreement provided for an “Extraordinary Challenge Procedure”\textsuperscript{267} designed for “issues of impropriety which bring the entire system of panel review into question.”\textsuperscript{268}

Generally, the CFTA dispute settlement system worked “extraordinarily well“, with the Chapter 19 process being “more successful“ than the Chapter 18 process.\textsuperscript{269} It was considered that in both sets of procedures, qualified panelists fulfilled their task well by maintaining a high level of knowledge and expertise, issuing well-thought-out decisions, respecting nevertheless the strict time limits set by the CFTA, and not being divided

new body of rules regulation government subsidies.” Bello et al., supra note 251, at 494. Therefore they established a working group to take care of the matter. CFTA Art. 1907. The fate of this Working Group remains an open question because “[t]here has been very little activity by [it].” Paul et al., North American Free Trade Agreement: Summary and Analysis 108 (1993).

For the negotiating history of the CFTA, see Bello et al., supra note 251, at 493-95; Winham, supra note 33, at 23-42.

\textsuperscript{264} CFTA Art. 1903, 1904.

\textsuperscript{265} CFTA Art. 1904 (3). This method of AD/CVD review has been chosen because it promised an objective and fair application of the national laws in the politically sensitive field of antidumping and subsidies. Andreas F. Lowenfeld, Binational Dispute Settlement under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal, 24 NYU J. Int’l L. & Pol. 269, 270 (1991).

It seems that Canada and the U.S. were not sure whether this new mechanism would fulfill the expectations because its application was limited to five years (CFTA Art. 1906). But at the end of those five years, the NAFTA was signed already. See supra note 32.

\textsuperscript{266} CFTA Art. 1904 (9).

\textsuperscript{267} CFTA Art. 1904 (13) & Annex 1904 (13).

\textsuperscript{268} Appleton, supra note 32, at 140. This safeguard mechanism, which consisted of a three-member committee of Canadian and U.S. judges or former judges, was accessible but under very restricted conditions. See CFTA Art. 1904 (13) & Annex 1904 (13)(1). In the only two challenges filed the Committee unanimously upheld the original panels’ decisions. Huntington, supra note 162, at 437.

\textsuperscript{269} Lowenfeld, supra note 265, at 334.
along national lines. Also, compliance with the decision did not constitute a problem. A sign that even politicians appreciated the panels' work is that the CFTA rules for the general procedure and the AD/CVD procedure were taken over into the NAFTA with only minor changes.

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270 Bello et al., supra note 251, at 516; Horlick & DeBusk, supra note 33, at 31-32; Endsley, supra note 258, at 675; Huntington, supra note 162, at 414; Johnson, supra note 32, at 520; Lowenfeld, supra note 265, at 334; Homer E. Moyer, Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, 27 Int'l Law. 707, 726 (1993); Comments of former U.S. FTA Secretary James Holbein, Forum: Binational Dispute Resolution Procedure under the Canada-United States Free Trade Agreement -- Experiences to Date and Portents for the Future, Washington, D.C., April 23, 1991, 24 N.Y.U. J. Int'l L. & Pol. 341, 349 (1991). For instance, Prof. Lowenfeld noted: "[T]he panelists have been thoughtful; their opinions have been thorough and articulate, and their conclusions on the whole persuasive. Taking all the cases together one could not detect a bias in favor of protectionism of unrestricted trade . . ." Lowenfeld, supra note 265, at 334.

An "exception" to the well-accepted decisions seems to be the "Softwood Lumber III" case, which was "the first dispute in which both the binational panel and the extraordinary challenge committee divided along national lines." Charles M. Gastle & Jean-G. Castel, Q.C., Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases Be Reformed in the Light of Softwood Lumber III?, 26 Law & Pol'y Int'l Bus. 823, 823-24 (1995). See also Zsolt K. Bessko, CFTA-NAFTA Dispute Resolution on the Rocks?: The Softwood Lumber Case, 15 J.L. & Com. 335 (1995); Johnson, supra note 32, at 520.

For further criticism and reform proposals see Bello et al., supra note 251, at 515-16; John Moss, Summary of Proceedings of the Seminar on Dispute Resolution under the Canada-United States Free Trade Agreement, 26 Stan. J. Int'l L. 153, 176-79, 189-91, 195-97 (1989). Proposals that were made in order to enhance the dispute resolution process included the participation of private parties, the reduction of the number of different procedures, and the creation of a North American Trade Tribunal that "should have jurisdiction with respect to disputes involving the interpretation and application of the North American Free Trade Agreement." Joint ABA/CBA/BM Working Group on Dispute Settlement, American Bar Association Section of International Law and Practice Reports to the House of Delegates, 26 Int'l Law. 855, 863 (1992).


b) The General Dispute Settlement Mechanism

The NAFTA opens up an interesting option for a complaining party: when a dispute arises under the provisions of the NAFTA as well as the GATT, the complaining party may select either forum for settlement. But once the procedures have started under one forum, generally the other one is excluded. On the other hand, a party cannot enforce any NAFTA provision against another party in a domestic court, but only by the means described in the NAFTA itself.

"To promote efficiency" the complete Chapter 20 process is marked by time limits that allow the parties to find a resolution within eight months.

(1) Consultations

The resolution of a conflict under Chapter 20, i.e. with regard to the NAFTA except AD/CVD and investment cases, begins with consultations. The Agreement requests that the parties "make every attempt to arrive at a mutually satisfactory resolution . . .

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For the differences between CFTA and NAFTA dispute settlement provisions, see James R. Holbein & Gray Carpentier, Trade Agreements and Dispute Settlement Mechanisms in the Western Hemisphere, 25 Case W. Res. J. Int'l L. 531, 560-65 (1993); Rojas, supra note 245, at 19; Rosa, supra note 245, at 260-283.

NAFTA, Art. 2005. This option has already existed under the CFTA (CFTA Art. 1801 (2)). For certain matters the parties may only have recourse to the NAFTA provisions. NAFTA, Art. 2005 (3) & (4).

NAFTA, Art. 2005 (6), but see also NAFTA, Art. 2005 (2) with regard to the involvement of a third party.

Bhala, supra note 42, at 186.

Bhala, supra note 42, at 186.

NAFTA, Art. 2006 (1). A party can initiate the Chapter 20 mechanism in three situations: when a dispute exits with regard to the interpretation or application of the agreement, when a party believes "that an actual or proposed measure of another [p]arty is or would be inconsistent with" the agreement, or when a party considers such a measure to cause nullification or impairment of a benefit that it could have reasonably expected under many NAFTA provisions. NAFTA, Art. 2004 & Annex 2004. One author has it called a "step backward" that the CFTA provision requiring the notification of proposed measures which could negatively effect the agreement is left out in the NAFTA. Rojas, supra note 245, at 21.
through consultations”²⁷⁸, thus “clearly emphasiz[ing] the prevention of disputes in the first instance or their cooperative resolution through consultations”²⁷⁹. Thus, it can be said that “the underlying principle of Chapter 20 is that of amicable agreement”²⁸⁰. An interested third party can already participate in the consultations.²⁸¹

(2) Special Commission Meeting

If the parties are not able to reach an accord after 45 days at the latest, any party may ask the Free Trade Commission for a meeting²⁸², which is required to take place within the following 10 days.²⁸³ In order to “resolve the dispute promptly”, i.e., to assist the parties in finding a solution, the Commission can employ good offices, conciliation and

²⁷⁸ NAFTA, Art. 2006 (5). The CFTA, however, did not contain a similar provision. Rojas, supra note 245, at 20. It has been noted that this “new provision constitut[es] an international obligation of the three parties.” Id.

²⁷⁹ Endsley, supra note 258, at 663. See also Winham, supra note 272, at 266. But is not clear whether a lot of disputes will be settled by consultations. “As of December 1996, only eight disputes formally entered the Chapter 20 consultations phase. . . . Chapter 20 consultations could be credited with resolving only one of these eight controversies . . . Consultations failed to resolve five other conflicts . . . [They] formally advanced to the second dispute settlement stage, a meeting of the Free Trade Commission.” David Lopez, Dispute Resolution Under NAFTA: Lessons from Early Experience, 32 Tex. Int'l L.J. 163, 168, 170-71 (1997).

²⁸⁰ Siqueiros, supra note 245, at 387. It is noteworthy that the NAFTA eliminated binding arbitration which the CFTA required in certain instances. Id. at 385. “Although this elimination seems a bold stroke, the change is not of great importance [because] neither arbitration process has been used at all under [the CFTA], and there is no reason to believe there would be a great demand for them under [the] NAFTA.” Rosa, supra note 245, at 285.

²⁸¹ NAFTA, Art. 2006 (3).

²⁸² NAFTA, Art. 2007 (1). The regular period is 30 days from the delivery of request for consultations; it is limited to 15 days when perishable agricultural goods are involved, and extended to 45 days if another party has asked for or participated in consultations on the same matter. Id.

²⁸³ NAFTA, Art. 2007 (4).
the like, call on technical experts, establish working groups, and make recommendations. 284

(3) Panel Phase

If the parties still disagree, either can request to set up a panel 30 days after the Commission’s meeting. 285 A third party that considers having a substantial interest in the matter is entitled to join as a complaining party. 286 The Agreement stipulates that “the Commission shall establish an arbitral panel.” 287 Despite consensus being required for decision making, 288 “the mandatory nature of the language suggests that the representatives of the three [p]arties are legally bound to approve the establishment of a panel” 289, which means that the requesting party has, in fact, a right to a panel. 290 A panel consists of five persons, usually chosen from a pre-established roster of “individuals who are willing and able to serve as panelists.” 291 In case of a two-party dispute, the parties

284 NAFTA, Art. 2007 (4) & (5). The NAFTA text asks the Commission to use “good offices, conciliation, mediation or such other dispute resolution procedures” to resolve the dispute. NAFTA, Art. 2007 (5)(b). Thus, one could assume that the “Commission may choose to refer a dispute to arbitration as simply another means” of alternative dispute resolution. Huntington, supra note 162, at 418.

285 NAFTA, Art. 2008 (1). This period may be modified if the parties agree on a reduction or extension. Id.

286 NAFTA, Art. 2008 (3).

287 NAFTA, Art. 2008 (2).

288 NAFTA, Art. 2001 (4).

289 Huntington, supra note 162, at 419.


291 NAFTA, Art. 2009 (1), 2011 (1). The individuals listed in the roster have to meet the certain requirements; they “shall:

(a) 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;

(b) be independent of, and not be affiliated with or take instructions from, any [p]arty; and
have 15 days to agree on the chair of the panel; otherwise one of the disputing parties selected by lot nominates the chair, who must not be a citizen of that party.\textsuperscript{292} Within the next fifteen days each party chooses two citizens of the other party as panelists\textsuperscript{293} -- a so-called "reverse selection process"\textsuperscript{294} which is "designed to ensure impartiality".\textsuperscript{295} If no panelist is chosen before the deadline, the selection will be done by lot.\textsuperscript{296} For a three-party dispute, the Agreement slightly modifies the method of selection.\textsuperscript{297} It has been observed that the possibility for a party to block the selection process is very limited, a situation which promotes the integrity of the settlement system.\textsuperscript{298}

Unless the parties agree otherwise, the panel has to follow Model Rules of Procedure set up by the Commission as well as the Terms of Reference laid down in the

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\textsuperscript{292} NAFTA, Art. 2011 (1)(b). Even if the system works well theoretically, some obstacles occurred during its practical application. The experience made with the only dispute that reached the panel phase (as of December 1996) reveals these obstacles. "Although four panelists were selected by early October 1995, the parties experienced substantial difficulty in agreeing upon an fifth panelist, the chairperson. Canada and the United States finally agreed on a chairman . . . in January 1996." Lopez, supra note 279, at 172 (citations omitted). It seems that in this case neither the deadlines were respected nor the stipulated procedure (selection by lot) was followed.

\textsuperscript{293} NAFTA, Art. 2011 (1)(c).

\textsuperscript{294} Holbein & Carpentier, supra note 272, at 562; Johnson, supra note 32, at 523.

\textsuperscript{295} Endsley, supra note 258, at 682.

\textsuperscript{296} NAFTA, Art. 2011 (1)(d).

\textsuperscript{297} In case of three-party disputes, the parties have to agree on the chair; if they are unable to do so within 15 days, "the [p]arty or [p]arties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such [p]arty . . . [T]he [p]arty complained against shall select two panelists, one of whom is a citizen of a complaining [p]arty, and the other of whom is a citizen of another complaining [p]arty. The complaining [p]arties shall select two panelists who are citizens of the [p]arty complained against." NAFTA, Art. 2011 (2)(b) & (c).

\textsuperscript{298} Bialos & Siegel, supra note 81, at 617.
Agreement. Pursuant to the latter ones, the panel has to examine the case regarding its factual and legal aspects. With respect to information or technical advice, the panel may question any person or body deemed appropriate if the disputing parties so agree. Furthermore, the Agreement provides for a written report of a scientific review board for any scientific matter if so requested by a party or initiated by the panel (unless a party objects).

Third parties are authorized to participate in the hearings and make submissions to the panel. Nevertheless, the entire panel proceedings except the final report must be confidential.

A time limit of 90 days starting after the selection of the last panelist is set for the panel to produce an interim report which includes factual findings, legal determinations, recommendations, and the report of a scientific review board, if one has been requested.

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299 NAFTA, Art. 2012 (1)-(3). The NAFTA enumerates several principles that have to be included in the Model Rules of Procedure: the right for at least one hearing before the panel; the opportunity to provide initial and rebuttal written submissions; confidentiality for basically the whole procedure. NAFTA, Art. 2012 (1). The Model Rules of Procedures are a new concept that has not existed under the CFTA. Siqueiros, supra note 245, at 386.

One author has noted that “it is in . . . connection [with the way of selecting arbitrators] that NAFTA’s dispute resolution procedures may be most worth studying.” Johnson, supra note 32, at 2189.

300 NAFTA, Art. 2012 (3), 2016 (2).

301 NAFTA, Art. 2014. The panel can seek information either on its own initiative or at the request of a party. Id.

302 NAFTA, Art. 2015 (1). It is stipulated that the board consists of “highly qualified, independent experts” selected by the panel. NAFTA, Art. 2015 (2). The provision that “panels may . . . solicit reports from scientific review boards on issues concerning environmental, health, safety or other scientific measures . . . was obviously designed to meet criticism from the environmental lobby, but it apparently fell short of the demands of that lobby.” Winham, supra note 272, at 258 (citation omitted).


304 NAFTA, Art. 2012 (1)(b).
established. Separate opinions may be drafted on matters to which there has been no unanimous agreement, but the identity of their authors remains undiscovered. Thus protests with respect to a possible national bias are avoided, and the integrity of the process is ensured.

Within a stipulated period of 14 days a disputing party may comment on the initial report; such comment may lead the panel to make further inquiries and reconsider its report. Thirty days after presenting the initial report, the panel must issue its final report including anonymous separate opinions and reports of scientific review boards. Thus, “[p]anels will only issue determinations and recommendations, and not arbitral awards.”

(4) Implementation and Enforcement of Panel Reports

Once the final report has been issued, it is up to the parties find a resolution to the dispute, which “normally shall conform with the determinations and recommendations of the panel” although conformity is not a requirement. Nevertheless, even a

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305 NAFTA, Art. 2015 (4), 2016 (1) & (2). The possible advantages or disadvantages of this interim review stage are the same as already described for the WTO, see supra p. 31 & n. 161-63. For the experience made with regard to the deadlines, see infra n. 309.


307 Bialos & Siegel, supra note 81, at 617-18.

308 NAFTA, Art. 2016 (4) & (5).

309 NAFTA, Art. 2017 (1)-(3). The final report shall be transmitted to the Commission. NAFTA, Art. 2017 (3). In the only case that had reached the panel phase (as of December 1996), the deadlines for the initial and the final report were not respected. “Pursuant to NAFTA Articles 2016 and 2017, the panel should have issued an initial report on the dispute by no later than April 1996 . . . and a final report by not later than May 1996 . . . Nevertheless, the panel did not present an initial report . . . until July 1996 and a final report until December 1996.” Lopez, supra note 279, at 172-73 (citations omitted).

310 Siqueiros, supra note 245, at 386.

311 NAFTA, Art. 2018 (1).

312 Consequently, one author has observed that “[i]n terms of sovereign discretion . . . the [p]arties will have little to lose by resorting to panel adjudication”. Huntington, supra note 162, at 426.
non-binding panel report has a certain influence on the disputing parties.\textsuperscript{313} When the report finds that the measure in question causes an infringement, the Agreement proposes either non-implementation or removal of that measure or compensation as possible solutions.\textsuperscript{314} If the parties are unable to agree on a solution or if no compensation is offered within the 30 days following the receipt of the final report, the complaining party is allowed to apply sanctions, i.e. to “suspend the application . . . of benefits of equivalent effect“\textsuperscript{315} Thus, the use of retaliatory measures can be regarded as an “automatic right“ because no further authorization is needed.\textsuperscript{316} But this retaliation (and its temporal limitation) is the “same sanction that customary international law would provide to the offended party even in the absence of an arbitration procedure.“\textsuperscript{317} The suspension must first be sought in the sector or sectors affected.\textsuperscript{318} If the complaining party believes this to be impracticable or ineffective, it can suspend benefits in other sectors.\textsuperscript{319} The application of sanctions has to be discontinued when a mutually agreed upon solution to the dispute is found.\textsuperscript{320} In addition, the parties’ actions during the

\textsuperscript{313} O. Thomas Johnson, Jr., Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement, 46 SMU L. Rev. 2175, 2180-81 (1993). “Even though an arbitrator’s report may not be viewed as binding, it radically alters the relative positions of the parties to the dispute. It does so by stating who is right and who is wrong, thereby changing the question at issue. With a report in hand, the question becomes not whether a particular action violated the agreement but, if it did, whether the offending party takes the agreement seriously . . . Moreover, as a basis for retaliation, a nonbinding opinion is virtually the equivalent of a binding one, particularly when the agreement expressly authorizes retaliation in cases of non-compliance.“ Id. at 2180-82 (citation omitted).

\textsuperscript{314} NAFTA, Art. 2018 (2). Under the CFTA it was mainly the Commission’s task to agree on the resolution of a dispute after the issuance of the final report. CFTA Art. 1808.

\textsuperscript{315} NAFTA, Art. 2019 (1). With respect to the economic effect of sanctions, see supra n. 191.

\textsuperscript{316} Huntington, supra note 162, at 425.

\textsuperscript{317} Johnson, supra note 313, at 2181.

\textsuperscript{318} NAFTA, Art. 2019 (2)(a).

\textsuperscript{319} NAFTA, Art. 2019 (2)(b).

\textsuperscript{320} NAFTA, Art. 2019 (1).
implementation phase are not monitored by any NAFTA institution. But should any party believe that the "level of benefits suspended by a party . . . is manifestly excessive", the Commission establishes a panel to investigate the issue. The effectiveness of this provision has been questioned because the reviewing panel only recommends, whereas any action has to be taken by the disputing parties or the FTC, and "[s]ince the party levying 'manifestly excessive' sanctions will necessarily be a member of both groups, it will be able to block any action because both bodies act by consensus.

c) Antidumping and Countervailing Duty Cases

Just as happened during the CFTA talks, the parties which negotiated the NAFTA were unable to agree on harmonized rules and standards regulating the investigation and imposition of antidumping and countervailing duties. Therefore, as was the rule under the CFTA, every country keeps its own AD and CVD laws. The NAFTA also provides

322 NAFTA, Art. 2019 (3) & (4).
323 Rosa, supra note 245, at 286.
324 James R. Cannon, Resolving Disputes under NAFTA Chapter 19 169-70 (1994); Debra P. Steger, Dispute Settlement, in Trade-Offs on Free Trade, supra note 33, 182, 183. "Both Canada and Mexico (like Canada in the 1988 FTA talks) wanted to use the NAFTA negotiations to win substantial relief from the U.S. AD and CVD laws. The United States, in contrast, was not prepared to accept any substantive weakening of its trade laws." Paul et al., supra note 263, at 107. For an overview of the parties' different aims during the negotiations, see Cannon, supra, at 167-68, and Oelstrom, supra note 245, at 793-96, 804-05.
325 NAFTA, Art. 1902 (1). Consequently, one author has called this principle the "cornerstone of dispute resolution under Chapter 19." Cannon, supra note 324, at 7. Unlike the CFTA the NAFTA "has no sunset provision limiting the continuation of the Chapter 19 binational process, and it drops the working party established in the [C]FTA to develop different rules for subsidies and antidumping procedures." Winham, supra note 272, at 266. "The absence of a NAFTA Working Group or any required studies of the AD/CVD issue might result from the U.S. position that this issue should only be addressed in the context of the GATT." Paul et al., supra note 263, at 108. One author has criticized that the NAFTA does not
a formal mechanism for resolving disputes involving the review of statutory amendments to the parties' laws326 and for the review of final AD and CVD duty determinations made by the relevant national authorities.327 "[P]roblems that may arise with respect to the implementation or operation of . . . Chapter [19]" are to be solved by annual consultations.328 Furthermore, Chapter 19 requires the parties to adapt their laws to the NAFTA provisions according to a schedule.329 It also obliges any party to notify the others if it amends its AD or CVD laws.330

(1) Review Of Statutory Amendments

An amendment to one party's AD or CVD law may undergo a review by a two-nation panel if another party suspects these amendments to violate the WTO Antidumping Agreement or the object and purpose of the NAFTA, irrespective of the amendment having the "function and effect of overturning a prior [panel] decision" regarding AD and CVD duties.331

contain any provision dealing with the harmonization of AD and CVD laws. Huntington, supra note 162, at 441.

326 NAFTA, Art. 1903.
327 NAFTA, Art. 1904.
328 NAFTA, Art. 1907 (1).
329 NAFTA, Art. 1904 (15) & Annex 1904.15. All three parties are required to alter their laws, but most of the changes have to be made by Mexico. Cannon, supra note 324, at 88, 95-100.
330 NAFTA, Art. 1902 (2). Consultations prior to the enactment of the amendment can be requested. NAFTA, Art. 1902 (2)(c).

It became a necessity to include a special chapter that contains "more elaborate procedures for dispute resolution concerning the imposition of antidumping and countervailing duties" than Chapter 20 because as a result of "the reduction and elimination of tariffs and non-tariff barriers under NAFTA, it may be expected that the [p]arties will more frequently resort to AD and CVD measures in reaction to trade friction." Cannon, supra note 324, at 4-5.

331 NAFTA, Art. 1903 (1). The panel analyzes whether
"(a) the amendment does not conform to the provisions of Article1902 (2) (d) (i) or (ii); or

"(b) the amendment results in a change which is not consistent with the provisions of Article 1902 (2) (d) (i) or (ii)."
The five panelists, of whom the majority "shall be lawyers in good standing", are to be chosen from a roster established by the parties in advance. The qualification requirements for the panelists have been questioned, because, while the condition that they be expert in trade law is laudable, "their expertise does not necessarily imbue them with judicial qualities." Consulting with the other party involved, each disputing party

(b) such amendment has the function and effect of overturning a prior decision of a panel [with respect to final antidumping and countervailing duty determinations by national authorities] and does not conform to the provisions of Article 1902 (2) (d) (i) or (ii)." Id.

Art. 1902 (2) (d) requires an amendment to an AD or CVD law not to be "inconsistent with

(i) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code) or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party, or

(ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the [p]arties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the [p]arties." NAFTA, Art.1902 (d).

NAFTA, Art. 1901 (2), Annex 1901.2 (1) & (2). It is stipulated that "[t]he roster shall include judges or former judges to the fullest extent practicable." NAFTA, Annex 1901.2 (1). This provision which was not contained in the CFTA was added at the request of the United States "expressing the view that panels containing judges are less likely to create an independent jurisprudence in AD and CVD cases that would otherwise be the case." Endsley, supra note 258, at 684 (citation omitted). The change was appreciated insofar that "panelists with a judicial background will help ensure that the panels apply the proper standard of review and directly follow the appropriate countervailing duty of anti-dumping laws." Bessko, supra note 270, at 353.

The Agreements requires "all candidates [on the roster to] be citizens of Canada, Mexico or the United States. Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law. Candidates shall not be affiliated with a [p]arty, and in no event shall a candidate take instructions from a [p]arty." NAFTA, Annex1901.2 (1).

has 30 days to nominate two candidates. It has to propose alternative candidates if its opponent exercises its right to four preemptory challenges within 45 days after the request to establish a panel. Thus the selection process “will encourage the selection of fair panelists.” If one of the deadlines is not met the missing candidate is chosen by lot. The parties are required to agree on a fifth panelist within 55 days of the request for a panel. If no agreement can be reached, the drawing of lots will determine which party is to select the fifth panelist. Like the appointment of the chairman, the panel takes all decisions by majority vote.

To conduct the review of statutory amendments, the panel establishes rules of procedure. The panel conducts its deliberations in confidentiality. Based upon the parties’ hearings and submissions, the panel issues an “initial written declaratory opinion containing findings of fact and its determinations” within 90 days of the appointment of the chairman. The panel may recommend “appropriate” modifications to the amendments if it has found a violation of the said provisions.

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334 NAFTA, Annex 1901.2 (2). The Agreement allows also persons who are not on the roster, but who fulfill the criteria named in Annex 1901.2 (1) to be nominated as candidates. Id.
335 NAFTA, Annex 1901.2 (2).
336 Horlick & DeBusk, supra note 33, at 31.
337 NAFTA, Annex 1901.2 (2).
338 NAFTA, Annex 1901.2 (3).
339 NAFTA, Annex 1901.2 (3).
340 NAFTA, Annex 1901.2 (5). The five panelists select a chairman “from among the lawyers on the panel by majority vote [; otherwise] by lot . . .” NAFTA, Annex 1901.2 (4).
341 NAFTA, Art. 1903 (2) & Annex 1903.2 (1). This and some of the following provisions may be altered if the parties to the dispute agree so. See NAFTA, Annex 1903.2 (1), (2), (5) & (6), for instance.
342 NAFTA, Annex 1903.2 (1).
343 NAFTA, Annex 1903.2 (1) & (2).
344 NAFTA, Annex 1903.2 (3).
A time limit of 14 days is set for the parties to object to the initial report; otherwise it becomes final.\textsuperscript{345} In case of an objection, the panel has 30 days to reconsider its initial report and to reexamine the issue.\textsuperscript{346} Then the panel must present its “final opinion“ which might, like the initial report, include dissenting and concurring opinions.\textsuperscript{347}

The panel’s report is not binding on the parties but just “declaratory“.\textsuperscript{348} Therefore, if the panel makes recommendations, the parties are to start consultations immediately with the aim of arriving at a “mutually satisfactory solution . . . within 90 days.“\textsuperscript{349} The complaining party may resort to self-help if within nine months following the end of the consultations, no modifications to the amendment has been made and no other agreement has been reached.\textsuperscript{350} Self-help consists of either the enactment of “comparable legislative of equivalent executive action“ or the termination of the Agreement regarding the violating party.\textsuperscript{351}

(2) Review of Final AD and CVD Determinations

Although the NAFTA parties could not agree on harmonizing their AD and CVD laws, at least they replaced the review of national AD and CVD duties by national courts with a review by independent binational panels.\textsuperscript{352} Such panels are considered to be less

\textsuperscript{345} NAFTA, Annex 1903.2 (3) \& (4).

\textsuperscript{346} NAFTA, Annex 1903.2 (4).

\textsuperscript{347} NAFTA, Annex 1901.2 (5), Annex 1903.2 (4). The introduction of dissenting or concurring opinions in the panel’s decision results from the common law background of Canada and the United States.

\textsuperscript{348} NAFTA, Art. 1903 (1); Annex 1903.2 (4).

\textsuperscript{349} NAFTA, Art. 1903 (3)(a).

\textsuperscript{350} NAFTA, Art. 1903 (3)(b).

\textsuperscript{351} NAFTA, Art. 1903 (3)(b).

\textsuperscript{352} NAFTA, Art. 1904 (1). Once a party has chosen the panel procedure, a national judicial review is excluded. NAFTA, Art. 1904 (11).
biased than the national courts. Moreover, the panels use simpler procedures and act more expeditiously than national courts.

(a) Panel Phase

Once a final determination concerning the application of an AD or CVD duty for goods of one NAFTA party has been published in the official journal of the importing party, the exporting party has 30 days to request the establishment of a panel. The selection of the panelists and the establishment of the panel is carried out exactly the same way as for the panels to review amendments to AD and CVD laws.

The panel carries out its investigation pursuant to the rules of procedure established by the parties. The rules include a tight time schedule because the aim is to have a final decision within the 315 days following the date when the request for the panel was made. The panel inspects the record of the national authority that imposed the duty,

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353 Johnson, supra note 313, at 2185. See also Deyling, supra note 333, at 359-60. As two authors noted, "[t]here is a need to control the exercise of the broad discretion granted to administrative tribunals by the complex web of domestic trade laws." Gastle & Castel, supra note 270, at 829.


355 Cannon, supra note 324, at 35, 44; Horlick & DeBusk, supra note 33, at 30.

356 NAFTA, Art. 1901 (1); 1904 (4) & (14). If the final determinations are not published in the official journal, the Agreement directs the importing party to notify its counterpart. Id. The time limit has to be strictly observed, because "[f]ailure to request a panel within the time specified in this paragraph shall preclude review by a panel." Id.

To get an overview of the Canadian, Mexican and U.S. AD and CVD procedures, see Johnson, supra note 32, at 525-31.


358 NAFTA, Art. 1904 (6) & (14). The Agreement prescribes in very meticulous manner what provisions have to be contained in the rules of procedure. It seems that the negotiating parties were very eager not to leave anything unsaid as AD and CVD law is a highly politicized area.

359 NAFTA, Art. 1904 (14).
receives briefs and reply briefs of the parties, and hears their oral arguments.\textsuperscript{360} These proceedings are limited to 195 to 210 days.\textsuperscript{361} Because this tight timetable is the same as under the CFTA, NAFTA AD/CVD panels have been expected to “issue prompt decisions“, because this was what happened under the CFTA.\textsuperscript{362} The panel determines whether the imposition of the duty was correct under the national law of the importing party.\textsuperscript{363} It has to “apply the standard of review \ldots and the legal principles that a court of the importing [p]arty otherwise would apply“.\textsuperscript{364} With respect to the qualifications of the panelists, it has been asked whether the requirement of being an expert in trade law is sufficient to conduct such a judicial review, since “non-judge panelists may lack expertise in [the other party's] administrative law“ and they “may have little expertise in the art of judging.“\textsuperscript{365} It has also been feared that interpretations of the standard of review might develop differently between the panels and the courts.\textsuperscript{366} Interestingly, the same arguments have been brought forth against CFTA panels, which, however, worked well

\textsuperscript{360} NAFTA, Art. 1904 (14). The Agreement confers on the national authority that applied the AD or CVD duty “the right to appear and be represented by counsel before the panel.“ NAFTA, Art. 1904 (7).

\textsuperscript{361} NAFTA, Art. 1904 (14). “[T]he rules [of procedure] \ldots shall allow: \ldots

(b) 30 days for designation or certification of the administrative record and its filings with the panel;

c) 60 days for the complainant to file its brief;

d) 60 days for the respondent to file its brief;

e) 15 days for the filing of reply briefs;

(f) 15 to 30 days for the panel to convene and hear oral arguments \ldots “ Id.

\textsuperscript{362} Horlick & DeBusk, supra note 33, at 29. The authors consider that “[t]he many interim deadlines prevent the panels from falling behind schedule.“ Id.

\textsuperscript{363} NAFTA, Art. 1904 (1) & (2).

\textsuperscript{364} NAFTA, Art. 1904 (3); Annex 111. For an overview of the different standards of review in Canadian, Mexican and U.S final determinations, see Cannon, supra note 324, at 61-75; Johnson, supra note 32, at 532-33.

\textsuperscript{365} Deyling, supra note 333, at 364-67. On the other hand, “[t]o such panelists issues that may be arcane to lawyers of judges not specialized in the complex filed of trade law are readily understandable. This level of expertise, not always available in an appellate court, can both inform the panel and serve as an important check on counsel.“ Moyer, supra note 270, at 714.

\textsuperscript{366} Burke & Walsh, supra note 354, at 541-44; Cannon, supra note 324, at 35, 50.
and did not exceed their competence.\textsuperscript{367} And there are no indications why the system should not work well under the NAFTA.

The panel is given 90 days to write its report.\textsuperscript{368} Only the panelists take part in the confidential deliberations.\textsuperscript{369} The panel's decisions are made according to majority rule, but the report may contain concurring and dissenting opinions.\textsuperscript{370} The panel has two choices: either to confirm the determination of the national authority, or to remand it\textsuperscript{371}, i.e., the panel is not authorized to change the amount of the duty imposed or to alter the

\textsuperscript{367} See supra p. 46-47 & n. 269-71. "At the outset of the [CFTA], some commentators predicted that a distinctive body of binational law would emerge in spite of the different standards... The hope was that this binational law would bring the [p]arties closer to legal uniformity in the areas of dumping and subsidies. Experience, however, has not borne out these predictions. The [CFTA] panels have stayed strictly within their limited role as interpreters of national law, resisting the temptations to develop a distinctive jurisprudence." Huntington, supra note 162, at 434 (citations omitted).

It is true that the Mexican legal order as a civil law system differs from the common law systems in the U.S. and Canada. On the other hand, one could mention that also there are differences between Canadian and the U.S. law, but, as experience under the CFTA shows, "Canadian panelists have adeptly grasped U.S. trade law issues and shown no hesitancy in quizzing counsel on their position [, and t]he questions of U.S. panelists have reflected their 'informed experience'." Horlick & DeBusk, supra note 33, at 33 (citation omitted). However, all in all, "[t]he commonalities and mutual understanding that served so well in the Canada-U.S. context do not have an analogue in the Mexican context... Nevertheless, these challenges will also be successfully dealt with..." Endsley, supra note 258, at 695. See also Moyer, supra note 270, at 714. One has to bear in mind that the AD and CVD laws are also written codes in the U.S. and in Canada, and, secondly, it is just a question of becoming familiar with each other's system. Comments of Prof. Andreas W. Lowenfeld, Forum: Binational Dispute Resolution Procedures Under the Canada-United States Free Trade Agreement -- Experiences to Date and Portents for the Future: Washington, D.C., April 23, 1991, supra note 270, at 430-31. See also Johnson, supra note 32, at 541. However, it has been asked if it is "realistically possible" to require the panelists to have the same competence as a judge, especially as panels are created on an ad hoc basis. Burke & Walsh, supra note 354, at 544.

\textsuperscript{368} NAFTA, Art. 1904 (14).


\textsuperscript{370} NAFTA, Annex 1901.2 (5).

\textsuperscript{371} NAFTA, Art. 1904 (8).
determination in another way. Whatever the panel decides, the parties are bound by it.\textsuperscript{372} In case of a remand, the panel is asked to "establish as brief a time as is reasonable for compliance with [it]."\textsuperscript{373} It may became necessary to review what the national authority undertook on remand. The same panel will conduct this review and "shall normally issue a final decision within 90 days . . . after such remand action is submitted to it."\textsuperscript{374}

The NAFTA employs two mechanisms to ensure the proper functioning of the panel process concerning obstacles from outside and disturbances from inside the panel. The first category is dealt with by the Safeguard Mechanism\textsuperscript{375}, the second by the Extraordinary Challenge Procedure.\textsuperscript{376}

\textsuperscript{372} NAFTA, Art. 1904 (9). This means also that national law must not install a domestic procedure for appeals from a panel decision. NAFTA, Art. 1904 (11). Although panels' decisions do not have an explicit precedential effect, United States courts are allowed to consider them as persuasive authority (19 U.S.C. 1516a (b) (3)). One author observed that "[t]he nature of chapter 19 panel decisions reflects the inherent tension between legalistic and pragmatic conceptions of the binational review system. On the one hand, these decisions are considerably more 'binding' that decisions made under chapter 20 . . . At the same time, panel decisions are quite limited in scope [as] chapter 19 restricts the binding effect of panel decisions to 'the involved parties with respect to the particular matter between the [p]arties that is before the panels, [i.e., these decisions] will be accorded no precedential value." Huntington, supra note 162, at 434-36. (Citations omitted).

\textsuperscript{373} NAFTA, Art. 1904 (8). When calculating the time the panel is directed to "tak[e] into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall [this] time . . . exceed an amount of time equal to the maximum amount of time . . . permitted by statute for the competent investigating authority in question to make a final determination in an investigation." Id.

\textsuperscript{374} NAFTA, Art. 1904 (8).

\textsuperscript{375} NAFTA, Art. 1905. The Safeguard Mechanism will be displayed only very briefly since the aim of this procedure is less connected with the resolution of actual disputes than it is to securing a domestic legal environment in which a panel can operate.

Consultations can be requested when "a [p]arty alleges that the application of another [p]arty's domestic law:

(a) has prevented the establishment of a panel requested by the complaining [p]arty;
(b) has prevented a panel requested by the complaining [p]arty from rendering a final decision;
(c) has prevented the implementation of the decision of a panel requested by the complaining [p]arty or denied it binding force and effect with respect to the particular matter that was before the panel; or
(b) Implementation and Enforcement of Panel Reports

The Agreement tries to safeguard the panel review system by providing for consultations and the creation of a special committee when a party alleges that another party's domestic law "has prevented the implementation of the decision of a panel . . . or denied it binding force and effect" or has frustrated the proceedings in other ways. In such a case the complaining party can ask for consultations, which are to start within 15 days following the request. If the consultations do not lead to a result after 45 days, a "special committee" is established within 15 days after the complaining party requests its formation.

The three special committee members are selected from the same roster and in the same way as the Extraordinary Challenge Committee members. The parties submit briefs and make submissions and oral arguments upon which the committee bases its initial report, due 60 days after its members are selected. A final report including separate, anonymous opinions is to be issued 30 days thereafter.

If the committee holds the party complained against is responsible for non-compliance with the panel report or otherwise impairing the panel process, the parties are

(d) has resulted in a failure to provide opportunity for review of a final determination by a[n independent] panel or court . . . ." NAFTA, Art. 1905 (1). The CFTA did not contain similar "safeguarding" provisions. Winham, supra note 272, at 268.


377 NAFTA, Art. 1905 (1). A party can call for consultations also when it alleges that the other party's law denied it the possibility to obtain panel review, prevented establishment of a panel or prevented a panel from rendering final decision. Id.

378 NAFTA, Art. 1905 (1).

379 NAFTA, Art. 1905 (2) & (3).


381 NAFTA, Art. 1905 (6); Annex 1905.6. See also Cannon, supra note 324, at 105. For the special committee's rules of procedure, see NAFTA Annex 1905.6. A schedule for the Safeguard Procedure is found in Cannon, supra note 324, at 105.

382 NAFTA, Art. 1905 (6); Annex 1905.6.
invited to start consultations.\textsuperscript{382} The complaining party is entitled to suspend benefits or the operation of NAFTA Art. 1904 if, after 60 days, the parties are unable to agree on a mutually satisfactory solution or the responding party does not correct the problem.\textsuperscript{384} The suspensions are subject to revision by the special committee whether the suspension of benefits is “manifestly excessive“ or the problem has already been corrected.\textsuperscript{385} In the case that the complaining party is suspending the operation of NAFTA Art. 1904, the violating party is allowed to suspend the other party’s benefits as a countermeasure.\textsuperscript{386} The effectiveness of the Safeguard Mechanism has been doubted because its use would indicate a failure of the entire Chapter 19 process.\textsuperscript{387}

\textsuperscript{382} NAFTA, Art. 1905 (7).
\textsuperscript{384} NAFTA, Art. 1905 (8).
\textsuperscript{385} NAFTA, Art. 1905 (10).
\textsuperscript{386} NAFTA, Art. 1905 (9).
\textsuperscript{387} Winham, supra note 272, at 269. “[I]t appears that given the successful history of Chapter 19 in the [C]FTA it is unlikely a Special Committee would arise between Canada and the United States, but it may form a useful sanction to ensure that Mexico . . . adopts the domestic practices necessary to implement Article 19. However, it is unlikely that the extension of Chapter 19 to Mexico could survive any substantial use of Article 1905, since that article essentially signals a breakdown of the undertakings of Chapter 19 itself.” Id. Conversely, another author finds that this mechanism “should provide added reinforcement for the binational review system” as “the safeguard mechanism is both more formal and more specific than the general provisions of chapter 20.” Huntington, supra note 162, at 438. See also Cannon, supra note 324, at 107. Yet the first opinion seems more realistic. If a party in fact sets up legal obstacles with respect to the establishment of a panel or the implementation of its decision, this party shows no interest at all in a well-functioning process and will try to obstruct the process wherever it can. Under these circumstances, the Agreement is practically terminated. See Huntington, supra note 162, at 438. At the present, this scenario is not very likely to happen because “the NAFTA countries are taking their obligations under the NAFTA and its side agreements seriously and are willing to take steps to resolve the disputes, which is what the dispute resolution process is intended to achieve.” Gonzalez, supra note 228, at 366.
(c) The Extraordinary Challenge Procedure

A party may attack a panel's final decision only under the very restricted conditions of the Extraordinary Challenge Procedure. The NAFTA does not provide for routine appeals because they would not be "consistent with the general objective of providing expeditious procedures for settling [AD] and [CVD] matters." 388 But of course, one could ask if only speed should matter with in light of the complex nature of the cases. 389 The Extraordinary Challenge Procedure must not be considered as a regular appeal; it is in fact far from that. 390

The cause of the complaint, which has to be filed within a "reasonable time" after the panel's final decision, must fall within one of the three categories listed in the Agreement, i.e., personal failure of a panel member, a serious disregard by the panel of a principal procedural provision, or an obvious misuse of its limited powers. 391 Secondly, it

388 Johnson, supra note 32, at 535. See also Moyer, supra note 270, at 716.
389 Burke & Walsh, supra note 354, at 539-41 (stating that "[i]f one chooses to look any deeper than the simple issue of speed, however, the elimination of routes to appeal is clearly troublesome").
390 Appleton, supra note 32, at 140; Huntington, supra note 162, at 437. "Extraordinary challenges are not designed to act as an appeal court for disputants who are displeased with the result of the panels. Rather, [they] are designed to consider issues of impropriety which bring the entire system of panel review into question."
Appleton, supra note 32, at 140. Already under the CFTA, the ECC was not to function as an appellate tribunal. In re Fresh, Chilled or Frozen Pork from Canada, ECC 91-1904-01 USA, opinion (June 14, 19910, reprinted in 13 ITRD (BNA) 1859, 1865; Testimony of M. Jean Anderson, then Chief Counsel for International Trade, U.S. Dept. of Commerce Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary, U.S. House of Representatives, 100th Cong., 2nd Sess. 69, 75-76 (1988).
391 NAFTA, Art. 1904 (13). The article requires a party to allege that
"(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 out in ... Article [1904], for example by failing to apply the appropriate standard of review ..." Id. It is noteworthy that the CFTA did not contain the failure to apply the correct standard of review as an example of an act beyond the panel's competence. This was added at the demand of the U.S. Cannon, supra note 324, at 229-30. "The purpose
is necessary that "any of [these] actions . . . has materially affected the panel's decision and threatens the integrity of the binational panel review process." 392

Thus, in contrast to the Chapter 19 panels which work within the limits of the existing domestic law, "challenge committees construing and applying [the aforementioned provision] are fashioning a new jurisprudence." 393 The functioning of the panel process will "undoubtedly" be affected by the newly created case law. 394 Therefore, it has been predicted that "the arbitral model of nonreviewable dispute resolution will remain intact" if the decisions issued by the ECE "continue to limit recourse to extraordinary challenges to truly extraordinary abuses of the Chapter 19 panel process." 395

Once a complaint has been filed, the parties are given 15 days to set up a three-person Extraordinary Challenge Committee (ECE). 396 The committee members are "judges or former judges" listed in a pre-established roster. 397 Every party nominates one committee member, and the drawing of lots decides which party is to select the third

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of the change is to maximize the uniformity of panel decisions, with each other and with established U.S. law." Endsley, supra note 258, at 685 (citation omitted).

392 NAFTA, Art. 1904 (13). Given the aforementioned restrictive conditions, it is very doubtful whether the "ECC review is intended to promote uniformity between panel decisions", as one author wrote. See Deyling, supra note 333, at 370.

393 Moyer, supra note 270, at 724.

394 Moyer, supra note 270, at 724.

395 Moyer, supra note 270, at 724.

396 NAFTA, Annex 1904.13 (1).

397 NAFTA, Annex 1904.13 (1). Compare to the NAFTA Chapter 20 panel roster of up to 30 persons and the Chapter 19 panel roster of 75 persons, the 15-person roster for the extraordinary challenge committee is relatively small, which may also indicate that the negotiating parties did not consider the extraordinary challenge procedure to be used very often. Nevertheless, they gave high priority to the qualifications of the committee members requiring to be or have been judges. Just the same, one author has criticized that, in contrast to Chapter 19 panelists, the ECE members "are not supposed to be specialists in trade law [but] generalists [which] leave[s] the problem of [their] unfamiliarity with the other countries' standard of judicial review." Bessko, supra note 270, at 353-54.
member. Even though this selection process is thorough and attempts to eliminate bias by leaving the deciding ECC to . . . lottery, it still does not completely eliminate potential bias.

Rules of procedure that have to be established by the parties “shall provide for a decision . . . within 90 days.” The ECE analyzes the legal and factual aspects of the initial case as well as the panel’s findings and conclusions, and it determines whether the extraordinary challenge is justified. If they are not, the committee will deny the challenge, thereby upholding the original panel’s decision. But if the ECE finds that the complaint is justified, the panel’s decision will be remanded or vacated. In the latter situation, a panel composed of new members will reinvestigate the case.

d) Dispute Settlement under the Environmental and the Labor Side Agreements

The Side Agreements distinguish between disputes arising out of a “persistent pattern of failure by [a] party to effectively enforce” its environmental laws or particular labor standards and all other disputes (“enforcement matters and non-enforcement

398 NAFTA, Annex 1904.13 (1).
399 Bessko, supra note 270, at 354.
400 NAFTA, Annex 1904.13 (2).
401 NAFTA, Art. 1904 (13) & Annex 1904.13 (3). “By expanding the period of review [which was 30 days under the CFTA] and requiring ECCs to look at the panel’s underlying legal and factual analysis [which was not contained in the CFTA], the changes to Annex 1904 clarify that an ECC’s responsibilities do not end with simply ensuring that the panel articulated the correct standard of review. Rather, ECCs are to examine whether the panel analyzed the substantive law and underlying facts.” Statement of Administrative Action, at 197, reprinted in North American Free Trade Agreement, Texts of Agreement, Implementing Bill, Statement of Administrative Action, and Requiring Supporting Statements, H.R. Doc. No. 159, 103d Cong., 1st Sess., at 663 (1993).
402 NAFTA, Annex 1904.13 (3).
403 NAFTA, Annex 1904.13 (3).
404 NAFTA, Annex 1904.13 (3).
405 NAAEC, Art. 20 (1) & 22 (1); NAALC, Art. 20 & 27 (1). A “persistent pattern of failure” means “a sustained or recurring course of action or inaction, . . . and does not include a single instance of case.”
In order to resolve the latter ones, the NAAEC and the NAALC simply encourage the parties to "make every attempt through consultations and cooperation to resolve [the] matter" without further specification.\textsuperscript{407} The way both Side Agreements deal with the first category of conflicts is "far more intricate".\textsuperscript{408} Their system is nearly identical when it comes to the consultation phase of the settlement procedure, which is why they will be analyzed together for the most part. But in contrast to the Environmental Side Accord, the NAALC requires the parties to follow an initial process before the dispute resolution concerning "enforcement matters" begins the consultation phase.

(1) The Pre-Stage under the Labor Side Agreement

Under the Labor Side Agreement, an NAO may ask for consultations with another NAO concerning "the other [p]arty's labor law, its administration, or labor market conditions".\textsuperscript{409} Also, a meeting at ministerial level may be requested "regarding any matter within the scope of [the] Agreement".\textsuperscript{410} Should the ministerial consultations not lead to a resolution, the Council for Labor Cooperation, upon request of any consulting party, establishes an Evaluation Committee of Experts (ECE).\textsuperscript{411} The ECE's analysis is

NAAEC, Art. 45; NAALC, Art. 49. One author has noted correctly that it still remains unclear what exactly constitutes a "persistent pattern of failure". Bhala, supra note 42, at 1349.

\textsuperscript{406} Lopez, supra note 279, at 185.

\textsuperscript{407} NAAEC, Art. 20 (1); NAALC, Art. 20.

\textsuperscript{408} Lopez, supra note 279, at 185.

\textsuperscript{409} NAALC, Art. 21 (1). "As of December 1996, seven controversies were formally submitted to the NAOS . . . Two of [those seven] progressed to the level of ministerial consultations." Lopez, supra note 279, at 195.

\textsuperscript{410} NAALC, Art. 22 (1).

\textsuperscript{411} NAALC, Art. 23 (1). An ECE can only be established if the matter is either "trade-related" or "covered by mutually recognized labor laws." NAALC, Art. 23 (3). Friction might occur when it comes to decide what is meant by these expressions as no further definition is given by the agreement itself. Bhala, supra note 42, at 1353.
limited to "patterns of practice by each [p]arty in the enforcement of its occupational safety and health and other technical labor standards". Following the Rules of Procedure established by the Council, the three ECE members, who have to meet certain qualifications, are chosen from a roster whenever possible.

After gathering information from all possible sources and receiving comments thereon and submissions from the parties, the ECE issues a draft report within 120 days after it is established. In this report, the ECE assesses the matter in question, draws its conclusions, and recommends solutions. Considering the parties' views on its draft, the ECE has 60 days to present a final report to the Council. Thereafter the parties may respond to the ECE's recommendations, and "[t]he final report and such written responses shall be tabled for consideration at the next regular session of the Council [which] may keep the matter under review".

For actual developments within the scope of the CEC, see its website at Commission for Environmental Cooperation (visited July 12, 1997) <http://www.cec.org>. "As of December 1996, no ECE had been convened to review any labor dispute between the NAFTA countries." Lopez, supra note 279, at 195.

412 NAALC, Art. 23 (2).

413 NAALC, Art. 24 (1)(a)-(c). The Agreement provides that the chair is chosen by the Council from a roster of experts established in consultation with the ILO, and, "where possible, other members shall be selected from a roster developed by the [p]arties". Id. But no stipulation prescribes exactly the method of how to choose the other ECE members. Compare to NAFTA, Art. 2011. Qualifications for the ECE members are expertise or experience in labor matters or other appropriate disciplines; they have to be chosen only "on the bases of objectivity, reliability and sound judgment [, and have to] be independent of, and not affiliated with or take instructions from, any [p]arty or the Secretariat." NAALC, Art. 24 (1)(c).

414 NAALC, Art.24 (1)(d)-(f), 25 (1).

415 NAALC, Art. 25 (1).

416 NAALC, Art. 25 (2), 26 (1).

417 NAALC, Art. 26 (3) & (4).
(2) Consultations under the Two Side Agreements

Under the NAAEC, the resolution of a dispute of “non-enforcement matters“ starts with a request for consultations between the parties, whereas under the Labor Side Accord, such a request is possible only after the ECE has presented its final report. NAAEC, Art. 22 (1); NAALC, Art. 27 (1). A dispute under both agreements arises when a party alleges that “there has been a persistent pattern of failure by [another party] to effectively enforce“ its environmental laws or certain labor standards which means “a sustained or recurring course of action or inaction beginning after the date of entry into force of [the Agreements].” Id.; NAAEC, Art. 45 (1); NAALC, Art. 49 (1).

It is noteworthy that “[t]he NAAEC contains no environmental injury test, and the complaining country does not have to show environmental injury to it or to the scofflaw country.” Charnovitz, supra note 36, at 267.

The Labor Side Accord only allows consultations with respect to “occupational safety and health, child labor or minimum wages." NAALC, art. 27 (1). Hence the issue is further limited in comparison to what the ECE is allowed to analyze. See supra p. 69-70 & n. 411-12. The reason for this limitation and the one stipulated by the NAAEC might be that “[s]ince the process could result in the imposition of trade sanctions [and monetary penalties] . . . , it has been restricted to the most serious cases of enforcement failure." Christopher Thomas & Gregory A. Tereposky, The NAFTA and the Side Agreement on Environmental Co-operation, 27:6 J. World Trade 5, 27 (1993). Nevertheless, one author criticized that “the wording of Article 27:1 is confusing, and the result is anomalous.“ Bhala, supra note 42, at 1354.

As of December 1996, “[n]o NAFTA country formally has alleged that another country has engaged in a persistent pattern of failure to effectively enforce its environmental laws." Lopez, supra note 279, at 188 (citation omitted). No dispute under the NAALC has reached the stage of party consultation. Id., at 195. One author has observed that “the Side Accord[s] substantially increased the threshold requirement to begin [the arbitration] process" because of possible trade sanctions or monetary penalties. Kelly, supra note 225, at 82.

NAAEC, Art. 22 (4); NAALC, Art. 27 (4).
(3) Special Council Session

If no accord is reached after 60 days, any party may ask the respective Council to convene for a special session within 20 days.\textsuperscript{420} The Councils are to "resolve the dispute promptly"\textsuperscript{41} by using the advice of experts, by employing alternative ways of dispute resolution, or by making the appropriate recommendations.\textsuperscript{421}

(4) Panel Phase

If the parties are not able to reach a mutually satisfactory resolution within 60 after the Councils' meetings, the Council establishes an arbitral panel upon request and by a two-thirds vote.\textsuperscript{422} The introduction of a two-thirds vote (in contrast to the usual consensus) obviously aims at preventing the accused party of blocking the process. But, in contrast to the framework in Chapter 20 of the NAFTA, a "panel cannot be formed absent a majority vote of the Council."\textsuperscript{423} The panelists who have to meet certain qualifications will be chosen from a roster.\textsuperscript{424} The provisions for the selection process and

\textsuperscript{420} NAAEC, Art. 23 (1) & (3); NAALC, Art. 28 (1) & (3). The Councils are the Council for Environmental Cooperation and the Council for Labor Cooperation, respectively. See supra page 42.

\textsuperscript{421} NAAEC, Art. 23 (3); NAALC, Art. 28 (3).

\textsuperscript{422} NAAEC, Art. 24 (1); NAALC, Art. 29 (1). Both Side Agreements limit the scope of the panels' investigations. The Environmental Side Accord authorizes a panel to examine only a case where a persistent pattern of failure of effectively enforcing the environmental law "relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services: (a) traded between the territories of the [p]arties; or (b) that compete, in the territory of the [p]arty complained against, with goods and services produced or provided by persons of another [p]arty." NAAEC, Art. 24 (1). By the same token, under the NAALC a panel must not investigate more than the enforcement failure regarding "occupational safety and health, child labor or minimum wage technical labor standards [that] is: (a) trade-related; and (b) covered by mutually recognized labor laws." NAALC, Art. 29 (1).

\textsuperscript{423} Lopez, supra note 279, at 187. See also supra p. 50 & n. 288-89.

\textsuperscript{424} The panelists shall have expertise or experience in environmental or labor law, respectively, or "its enforcement, or in the resolution of disputes arising under international agreements, or other relevant scientific, technical or professional expertise or experience; . . . be chosen strictly on the basis of objectivity, reliability and sound judgment; . . . be independent of, not affiliated with or take instructions
the possibility for a third party to join as complainant are the same as the NAFTA Art. 2008 (3) and 2011. The Councils establish Model Rules of Procedure containing certain procedural guarantees, and the Agreements set up the Terms of Reference; both are valid until the parties agree otherwise. The role of experts is regulated as it is in the NAFTA.

Based on information gathered from the parties, experts, or other appropriate persons or bodies, the panels distribute an initial report within 180 days after the last panelist is selected. The initial report contains findings of fact, determines whether there has been a "persistent pattern of failure" by a party in effectively enforcing its domestic environmental or labor laws, and, if so, recommends how "to remedy the pattern of non-enforcement." Separate opinions are possible, but they are anonymous. A time limit of 30 days is set for the parties to make comments on the initial report.

Taking such comments into account, the panels may reexamine the case and reconsider the draft, asking the view of another party, before issuing a final report within 60 days after the presentation of the draft.

from any [p]arty, the [relevant] Secretariat, or -- for disputes on environmental issues only -- the Joint Public Advisory Committee. NAAEC, Art. 25 (2), 26 (1); NAALC, Art. 30 (2), 31 (1).

NAAEC, Art.24 (2), 27; NAALC, Art. 29 (2), 32. See supra p. 50 & n. 286, p. 51 & n. 297.

NAAEC, Art. 28; NAALC, Art. 33.

NAAEC, Art. 29, 30; NAALC, Art. 34, 35. See supra p. 52 and n. 302. In contrast to the NAFTA the Side Agreements do not provide for the establishment of scientific review boards.

NAAEC, Art. 31 (1) & (2); NAALC, Art. 36 (1) & (2). The agreements name the sources of information for the panels, but "[h]ow a panel may ascertain whether there has been a failure of enforcement remains unclear . . . Is a high percentage of enforcement convictions a sign of effective or ineffective enforcement? Are repeat violations a sign of enforcement failure? The [Agreements do] not answer these questions." Charnovitz, supra note 36, at 268 (citation omitted).

NAAEC, Art. 31 (2); NAALC, Art. 36 (2).

NAAEC, Art. 31 (3); NAALC, Art. 36 (3).

NAAEC, Art. 31 (4); NAALC, Art. 36 (4).

NAAEC, Art. 31 (5), 32; NAALC, Art. 36 (5), 37.
(5) Implementation and Enforcement of Panel Reports

If the panel finds a "persistent pattern of failure" regarding the enforcement of environmental or labor laws by the party complained against, the Agreements propose a "mutually satisfactory action plan" agreed upon by the parties in the first place.433 Three articles and three annexes in each agreement lay down a very meticulous scheme concerning implementation and sanctioning.434 The detailed stipulations try to cover every imaginable situation. A variety of possibilities, including time frames of not more than 60 days up to at least 180 days, is described in a scrupulous but also "bewildering" manner.435

Basically, there are two situations for a complaining party to request the relevant Council to reconvene the panel. The first occurs when the parties do not agree on an action plan.436 In this case, the reconvened panel analyzes whether the plan is sufficient.437 If it is not, the panel develops its own action plan.438 Additionally, it has the power but not the duty to impose a monetary enforcement assessment.439 Secondly, the panel may be reassembled when the full implementation of an action plan is in doubt, no matter if it is an agreed-upon or a panel-developed plan.440 In the case that the panel determines that the implementation is insufficient, it is required to impose a monetary enforcement

433 NAAEC, Art. 33; NAALC, Art. 38.
434 NAAEC, Art. 34-36 & Annexes 34-36B; NAALC, Art. 39-41 & Annexes 39-41B.
435 Reisman & Wiedman, supra note 55, at 32. In order to make the confusing treaty provisions easier to understand, they are simplified in the following description, leaving out the time limits and some details that are not necessary to understand how the system generally works. A helpful floating chart is displayed in Reisman & Wiedman, supra note 55, at 36-38.
436 NAAEC, Art. 34 (1)(a) & (2); NAALC, Art. 39 (1)(a) & (2).
437 NAAEC, Art. 34 (4)(a) & (6); NAALC, Art. 39 (4)(a) & (6).
438 Id.
440 NAAEC, Art. 34 (1)(b) & (3); NAALC, Art. 39 (1)(b) & (3).
assessments.\textsuperscript{441} All assessments are limited with respect to their amount.\textsuperscript{442} If a party does not pay, the complaining party is entitled to suspend NAFTA trade benefits "in an amount no greater than that sufficient\textsuperscript{443} to collect the assessment through tariffs."\textsuperscript{443} Once the reconvened panel decides that either the monetary enforcement has been paid or the action plan has been fully implemented, the "suspension of benefits . . . shall be terminated."\textsuperscript{444} Should the recalcitrant party suspect that the suspension of benefits is "manifestly excessive\textsuperscript{444}, the panel may be reconvened on request.\textsuperscript{445}

Summarizing the process, one scholar noted that

the feature that characterizes it is political adjustment. Despite the provision for arbitration, modalities of consultation, negotiation, and mediation are employed at every possible opportunity, even after the arbitrators have presented their final report. Further, at virtually every stage, even after an arbitration ruling, the party complained against is responsible for a solution short of sanctions. The

\textsuperscript{441} NAAEC, Art. 34 (5), (6), 35 & Annex 34; NAALC, Art. 39 (5), (6), 40 & Annex 39. The fines are to be paid into funds established by the respective councils and to be used to improve the enforcement of environmental or labor laws in the party complained against. NAAEC, Annex 34 (3); NAALC, Annex 39 (3).

\textsuperscript{442} For the first year after the agreements entered into force the monetary enforcement assessment must not exceed $20 million; "[t]hereafter [it] shall be no greater than .007 percent of total trade in goods between the [p]arties during the most recent year for which data are available." NAAEC Annex 34; NAALC Annex 39. In 1995, total trade in goods between the three NAFTA parties equaled approximately $383 billion. . Thus, the maximum monetary enforcement assessment that could have been imposed during 1996 on any party was .007 percent of that amount, or $26.8 million." Lopez, supra note 279, at 187 n. 255 (citation omitted).

\textsuperscript{443} NAAEC, Art. 36 (1)-(3), Annexes 36 A & 36B; NAALC, Art. 41 (1)-(3), Annexes 41 A & 41 B. The

\textsuperscript{444} NAAEC, Art. 36 (4); NAALC, Art. 41 (4).

\textsuperscript{445} NAAEC, Art. 36 (5); NAALC, Art. 41 (5). "'Manifestly excessive' will likely be construed to mean that the suspension of benefits is greater than the monetary enforcement assessment issued by the panel." Kelly, supra note 225, at 88.

Questioning the purpose of the monetary penalty, one author predicted that "[p]ublicity and transparency will prove to be more effective enforcement than the symbolic $20 million fine. In fact, most disputes will be effectively resolved by the council, the ECE or the arbitral panels, so monetary and trade sanctions will not be relied upon as the primary means of enforcement." Schoenbaum, supra note 34, at 483.
respondent is encouraged at every stage to improve its enforcement of environmental, health and labor standards, without having to appear to be responding to threats from the other governments. The process is designed to avoid coercive measures, but the possibility of sanctions, and all the negative political implication they entail, stands at the end of the line to provide incentive for mediated and negotiated resolution.  

4. Criticism and Reform Proposals

a) NAFTA in General

Numerous suggestions have been proposed, some of which have already been made for the CFTA. Among them was the proposal of the Joint Working Group of the Canadian, Mexican, and United States bar associations to establish a permanent and independent Free Trade Tribunal for the interpretation of the NAFTA.  

However, the NAFTA negotiators considered such an institution undesirable or politically damaging.  

After the conclusion of the NAFTA, the Joint Working Group nevertheless reissued the proposal for a permanent tribunal responsible for interpretation.

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446 Garvey, supra note 230, at 444. Interestingly, another author arrived at a partly different conclusion when he reasoned that “each stage of the process provides an opportunity to apply pressure to get countries to enforce their environmental [and labor] laws ... [Their obligations] can be enforced by trade sanctions ... Moreover, [Canada, Mexico and the United States] are physical neighbors and interact continuously in many ways. Therefore, the countries have ... a variety of means to attempt to persuade each other to comply with the provisions.” Magraw, Jr., supra note 226, at 204.

447 Joint ABA/CBA/BM Working Group on Dispute Settlement, supra note 270, at 863.


Similarly, some authors suggested the introduction of a right to appeal and, consequently, the establishment of a standing Appellate Tribunal for disputes arising under NAFTA and the side agreements.\textsuperscript{450} Such an appellate tribunal was considered to "facilitate uniformity and coherence in the interpretation of regional norms."\textsuperscript{451}

By the same token, it has been proposed to establish a permanent panel for Chapter 19 and 20 disputes which "would relieve the Secretariat of having to find eligible panelists."\textsuperscript{452} A permanent tribunal would "develop a consistent jurisprudence" more easily than ad hoc panels.\textsuperscript{453} But the creation of a permanent tribunal might also cause problems. Given the fact that the arbitration procedures under the CFTA has been used only five times, it is hard to believe that a permanent institution "would have enough work to justify its existence."\textsuperscript{454} Also, the possible damage done by "an uncongenial tribunal" is much greater than that from an ad hoc panel which is dissolved after one dispute.\textsuperscript{455}

Another point of criticism concerns the secrecy of the proceedings.\textsuperscript{456} It was proposed to open them more so that the public can have access not only to the final panel report but also to, e.g., party submissions.\textsuperscript{457}

Furthermore, the effectiveness of sanctions in the form of retaliatory measures has been questioned.\textsuperscript{458} "[B]ecause of the size difference and relative trade dependence of

\textsuperscript{450} Cannon, supra note 324, at 224; Burke & Walsh, supra note 354, at 561-62; Deyling, supra note 333, at 370; Fitzpatrick, supra note 28, at 91-94. See also Darby, supra note 32, at 15.

\textsuperscript{451} Fitzpatrick, supra note 28, at 92. See also Cannon, supra note 324, at 174.

\textsuperscript{452} Rosa, supra note 245, at 301-02. See also Castel, supra note 251, at 126; Johnson, supra note 313, at 2185-86.

\textsuperscript{453} Johnson, supra note 313, at 2185.

\textsuperscript{454} Johnson, supra note 313, at 2186. See also Garvey, supra note 230, at 452.

\textsuperscript{455} Johnson, supra note 313, at 2186. See also Oelstrom, supra note 245, at p. 790 n. 68.

\textsuperscript{456} See Oelstrom, supra note 245, at 790.

\textsuperscript{457} See Bialos & Siegel, supra note 81, at 620.
Mexico and Canada on the United States[. a] retaliatory suspension of benefits of 'equal
effect' would hurt [the first two countries] proportionately more than the [latter one].”

b) The Side Agreements

The Side Agreements have been criticized for establishing too lengthy and too
cumbersome a procedure before finally arriving at a solution. In the case of a losing
party that “continues to shirk implementation”, it can take up to 1,485 days (i.e., nearly
four years) from the initiation of the procedure until the imposition of a sanction. Due
to the time it takes to bring a complaint under the Side Agreements, “the abuses can
continue unchecked.”

Some critics have doubted if the relatively small monetary enforcement assessments
will contribute to a country’s willingness to enforce its labor or environmental laws. However, one author who observed that “[t]he remedy of retaliation through the
suspension of benefits has never proven effective” welcomed the “unique damages

458 Hage, supra note 251, at 375-76; Rosa, supra note 245, at 298. Of course, the same arguments can
be used to oppose the present system of sanctions under the WTO.
459 Rosa, supra note 245, at 289-99. See also Barber, supra note 321, at 1016.
460 Champion, supra note 227, at 229; Charnovitz, supra note 36, at 270; Kelly, supra note 225, at 96;
Reisman & Wiedman, supra note 55, at 33; Alicia A. Samios, NAFTA’s Supplemental Agreement: In
461 Reisman & Wiedman, supra note 55, at 33. “At a minimum, it would take 755 days from the
initiation of a complaint to the attainment of a trade sanction [under the NAAEC]. While this is lengthy --
the same procedure under the NAFTA dispute settlement process takes only 240 days -- it is summary
justice compared to the extremely prolonged and complex procedures to reach in the [NAALC]. Indeed,
some commentators have suggested that complaints about child labor enforcement will be rendered moot
because the victims will no longer be children by the time the Labor Commission would permit trade
sanctions.” Charnovitz, supra note 36, at 270 (citations omitted).
462 Champion, supra note 227, at 229.
463 Charnovitz, supra note 36, at 269 (citing an Administration official who said that the value of the
penalties “would rather be symbolic”); Reisman & Wiedman, supra note 55, at 32-33. See also Patton,
supra note 226, at 109-11; Saunders, supra note 35, at 303.
remedy". It has also been noted that "[p]ublicity and transparency will prove to be more effective enforcement tools than the symbolic . . . fine[s]."

Another object for criticism is the possibility for politicians to intervene at practically every stage of the settlement process. Nevertheless, this possibility has been justified by the fact that including labor and environmental issues in the framework of a trade agreement is "still-unique" because considerable controversy exists with regard to these issues. Therefore, politicians prefer a system based on cooperation over one based on adjudication.

Even if more countries are joining the NAFTA (or a succeeding agreement), it is still not sure whether any of the reform proposals will become part of that agreement.

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464 Gastle, supra note 33, at 811, 821.
465 Schoenbaum, supra note 34, at 483.
466 Kelly, supra note 225, at 96 (speaking of "political trapdoors"); Samios, supra note 460, at 75. See also Garvey, supra note 230, at 452.
467 Garvey, supra note 230, at 452; Reisman & Wiedman, supra note 55, at 33.
468 Saunders, supra note 35, at 303-04.
CHAPTER IV

COMPARATIVE ANALYSIS

This chapter compares the WTO DSU and the various NAFTA settlement procedures.

A major difference between the Agreements is that for any conflict that arises under any of the WTO agreements, a single procedure is to be chosen\(^{469}\), whereas in the NAFTA, Chapter 19, Chapter 20, and both Side Agreements set up their own systems and institutions.\(^{470}\) However, with the exception of Chapter 19, it can also be seen as a commonality that the DSU, NAFTA Chapter 20, and the Side Agreements establish permanent institutions that are distinguishable from the contracting parties, even if composed thereof.\(^{471}\) These bodies (DSB, FTC, Council for Labor Cooperation, and Council for Environmental Cooperation) play an important role in the settlement process in that they convene arbitral panels.\(^{472}\) It is unique that the DSB, in this regard the most powerful institution, adopts the panel reports\(^^{77}\); under the other agreements (with the exception of Chapter 19\(^{74}\)) it is left to the parties to decide\(^{473}\). The voting modus in the bodies differs: the DSB decides by “negative” consensus\(^{476}\), the FTC and both Side Agreement Councils basically by consensus.\(^{477}\)

\(^{469}\) DSU, Art. 1 (1).


\(^{471}\) DSU, Art. 2 (1); NAFTA, Art. 2001 (1); NAAEC, Art. 8 (1); NAALC, Art. 8 (1).

\(^{472}\) DSU, Art. 6 (1); NAFTA, Art. 2008 (2); NAAEC, Art. 24 (1); NAALC, Art. 25 (1).

\(^{473}\) DSU, Art. 16 (1) & (4).

\(^{474}\) NAFTA, Art. 1904 (9).

\(^{475}\) NAFTA, Art. 2018 (1); NAAEC, Art. 33; NAALC, Art. 38 (1).

\(^{476}\) DSU, Art. 6 (1), 16 (4), 17 (14), 22 (6).

\(^{477}\) NAFTA, Art. 2001 (4); NAAEC, Art. 9 (6); NAALC, Art. 9 (6).
A second commonality is that at the beginning of a resolution procedure, nearly all agreements require the disputants to start consultations in order to try to settle the dispute as early as possible. 478 The exception is Chapter 19, which does not require consultations. It has to be noted that under the NAAEC, consultations stand at the end of a long pre-panel stage that involves meetings of the NAOs, meetings on the ministerial level, and the establishment of an ECE. 479

Between the consultation and the panel phase the agreements work differently. Provided that consultations have failed, the parties ask the DSB to establish a panel. 480 Under Chapter 20, the parties have to ask for an FTC meeting; under the NAAEC and the NAALC, they must request a special Council session; only in case of their failure to reach a solution can a request for a panel be made. 483 The wording of Chapter 20 and especially Chapter 19 suggests that the parties have a right to a panel. 484 The same is basically true for the DSU because the DSB decides the establishment of a panel by "negative" consensus. 485 However, the Side Agreements require a two-thirds vote by the Councils to set up a panel; i.e., a right to a panel does not exist under these Agreements. 486 All systems except Chapter 19 propose additional means of resolving disputes like good offices, conciliation, and the like -- the DSU during the consultation phase, Chapter 20 and the Side Agreements during the Commission or the Council.

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478 DSU, Art. 4 (2); NAFTA, Art. 2006 (1); NAAEC, Art. 22 (1); NAALC, Art. 27 (1).
479 NAALC, Art. 21-26.
480 DSU, Art. 5 (4).
481 NAFTA, Art. 2007 (1).
482 NAAEC, Art. 23 (3); NAALC, Art. 28 (3).
483 NAFTA, Art. 2008 (1); NAAEC, Art. 24 (1); NAALC, Art. 29 (1).
484 NAFTA, Art. 1901 (2), Annex 1901.2 (2); Art. 2008 (2).
485 DSU, Art. 6 (1).
486 NAAEC, Art. 24 (1); NAALC, Art. 29 (1).
487 Reisman & Wiedman, supra note 55, at 32.
488 DSU, Art. 5.
meeting, respectively.499 Thus, the drafters encourage the parties again to try to settle their disputes as early as possible.

It is interesting to see that the DSU allows only the allegedly affected party to issue a request for the establishment of a panel492, whereas Chapter 19, Chapter 20, and the Side Agreements entitle both parties to do so.491

All agreements provide for the establishment of a roster from which the panelists are usually selected.492 They all require the panelists to meet certain conditions which, of course, are not similar,493 and under all agreements the parties choose the panelists. However, the method of selection differs. Chapter 20 and the Side Agreements employ a "reverse selection": first, the chair of the panel has to be agreed upon, and then two citizens of the other party are to be selected by the disputants.494 Under Chapter 19 each party selects two panelists, and both parties have to agree on a fifth, whereas the chairman is appointed by majority vote of the panelists.495 The DSU stipulates that the disputing parties find an accord with respect to the panelists which are proposed by the WTO Secretariat.496 Not all agreements provide for panels of five persons497: the DSU prefers three persons, and a five-member panel is considered exceptional.498 In case the

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489 NAFTA, Art. 2007 (5)(b); NAAEC, Art. 23 (4)(b); NAALC, Art. 28 (4)(b).
490 DSU, Art. 5 (4), 6 (1).
491 NAFTA, Art. 1904 (2), (5), 2008 (1); NAAEC, Art. 24 (1); NAALC, Art. 29 (1).
492 DSU, Art. 8 (4); NAFTA, Art. 1901 (2), Annex 1901.2 (1) & (2), Art. 2009 (1) & (3); NAAEC, Art. 25 (1) & (3); NAALC, Art. 30 (1) & (3).
493 DSU, Art. 8 (1) & (2); NAFTA, Art. 1901 (2), Annex 1901.2 (1) & (2), Art. 2009 (2), 2010 (1); NAAEC, Art. 25 (2), 26 (1); NAALC, Art. 30 (2), 31 (1).
494 NAFTA, Art. 2011 (1)(b) & (c); NAAEC, Art.27 (1)(b) & (c); NAALC, Art.32 (1)(b) & (c).
495 NAFTA, Art. 1901 (2), Annex 1901.2 (2).
496 DSU, Art. 8 (6) & (7).
497 NAFTA, Art. 1901 (2), Annex 1901.2 (2) & (3), Art. 2011 (1)(a); NAAEC, Art. 27 (1)(a); NAALC, Art. 32 (1)(a).
498 DSU, Art. 8 (5).
parties are unable to agree on the panelists, each agreement contains a safety mechanism in order to prevent a blockage of the process.\textsuperscript{499}

Very similar are the panel proceedings. Under all agreements the parties are accorded the rights to present their arguments in written form and orally\textsuperscript{500} in order to ensure a fair process. Nearly all of the proceedings are confidential\textsuperscript{501}, which is necessary to guarantee that the panels function well; otherwise the panelists would be exposed to influences from outside.

In contrast to the purely binational process employed by Chapter 19\textsuperscript{502}, third parties are entitled under the other agreements either to participate during hearings and to make and receive submissions or to join a panel proceeding as a complaining party.\textsuperscript{503} The reason may be that a Chapter 19 panel has to supervise the correct application of national law, usually an unknown field for a third party. Also under the NAAEC and NAALC, national law is involved but under a different perspective. First, here the question is whether it has been enforced and not if it has been applied correctly. Second, the determination of AD and CVD duties and the standards of review are highly complex

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\textsuperscript{499} DSU, Art. 8 (7); NAFTA, Art. 1901 (2), Annex 1901.2 (2)-(4), Art. 2011 (1)(b) & (d); NAAEC, Art. 27 (1)(b) & (d); NAALC, Art. 32 (1)(b) & (d).

\textsuperscript{500} DSU, Art.12 (1), Appendix 3 (4) & (5); NAFTA: Rules of Procedure for Article 1904, Rule 55-69, supra note 369, at 8694-97; NAFTA, Art.2012 (1)(a); NAAEC, Art. 28 (1)(a) & (b); NAALC, Art. 33 (1)(a) & (b).

\textsuperscript{501} DSU, Art. 14, Appendix 3 (2) & (3); NAFTA: Rules of Procedure for Article 1904, Rule 18, supra note 369, at 8690; NAFTA, Art. 2012 (1)(b). Unfortunately, it is not clear whether confidentiality also plays a role for NAAEC and NAALC proceedings. The agreements do not deal with this issue, i.e., it is not a compulsory matter to be included in the Model Rules of Proceedings that are to be established by the Councils. NAAEC, Art. 28; NAALC, Art. 33. It seems that those Model Rules have not been established yet because research in this direction did not lead to a positive result. It cannot be predicted whether those Model Rules will contain a rule dealing with the confidentiality of the process.

\textsuperscript{502} NAFTA, Art. 1904 (1).

\textsuperscript{503} DSU, Art. 9, 10; NAFTA, Art. 2006 (3), 2008 (3) & (4), 2011 (2), 2013; NAAEC, Art. 24 (2), 27 (2), 29; NAALC, Art. 29 (2), 32 (2), 34.}

and complicated, thus demanding a very thorough knowledge of the national law in question.

In cases brought under the DSU, Chapter 20, NAAEC, and NAALC, the panel issues an initial and a final report.\textsuperscript{504} Only Chapter 19 instructs the panelists to write a single report\textsuperscript{505}, probably to speed up the procedure. With the exception of the DSU the agreements allow separate opinions to be drafted.\textsuperscript{506} Thus, the common law tradition of dissenting opinions did not find a place within the confines of the WTO.

The force granted to panel reports varies from agreement to agreement, and thus the agreements are very different in handling the acceptance and implementation of reports. Chapter 19 panel reports are the “strongest“ because they are binding on the parties and do not need to be accepted by another body.\textsuperscript{507} Furthermore, the only way to attack such a report is through the very restrictive Extraordinary Challenge Procedure.\textsuperscript{508} NAAEC, NAALC, and Chapter 20 panel reports are not adopted, either, but they are not accorded any binding force at all. The parties are encouraged only to use them as suggestions for a mutually agreed-upon solution.\textsuperscript{509} Therefore, politicians can exercise the largest influence in these cases, because, basically, the disputing parties have to agree on a solution and are not required to conform to the panel report. Under the DSU, it is the Dispute Settlement Body, and not the parties, which adopts the report by “negative consensus“ without the possibility of altering it.\textsuperscript{510} Thus, the losing party has only a very limited possibility to block the adoption of the report.

\textsuperscript{504} DSU, Art. 15 (2); NAFTA, Art. 2016, 2017; NAAEC, Art. 31, 32; NAALC, Art. 36, 37.
\textsuperscript{505} NAFTA, Art. 1904 (8).
\textsuperscript{506} NAFTA: Rules of Procedure for Article 1904, Rule 72, supra note 369, at 8697; NAFTA, Art. 2016 (3), 2017 (1) & (2); NAAEC, Art. 31 (3), 32 (1); NAALC, Art. 36 (3), 37 (1).
\textsuperscript{507} NAFTA, Art. 1904 (9).
\textsuperscript{508} NAFTA, Art. 1904 (13), Annex 1904.13.
\textsuperscript{509} NAFTA, Art. 2018 (1); NAAEC, Art. 33; NAALC, Art. 38.
\textsuperscript{510} DSU, Art. 16 (4).
Chapter 19 and the DSU present two unique features, the Extraordinary Challenge Committee\(^\text{511}\) and the Appellate Body\(^\text{512}\), which, however, are not comparable. No other of the agreements has similar procedures for judicial review of a panel decision. A reason might be that the other agreements still enable the parties to exercise a much larger influence on the process, i.e., block or delay it, or find a solution different from the panel’s proposition.

Another common factor is the question of sanctioning the non-implementation of final reports (issued by the panels and -- in case of the DSU -- also by the Appellate Body) or of an agreed-upon solution. In the end, all agreements provide for the suspension of benefits, i.e., self-help.\(^\text{513}\) Under the NAAEC and the NAALC, self-help is possible only if the other party does not pay the fine imposed on it.\(^\text{514}\) The DSU and Chapter 20 offer voluntary compensation as an alternative solution to the suspension of benefits.\(^\text{515}\) All agreements also entitle the parties to ask for checking the amount of the suspended benefits.\(^\text{516}\) Usually it is left to the parties to supervise if the complained-against party has taken appropriate action in order to comply with the agreed-upon solution or the final report.\(^\text{517}\) Thus, it is an exception that the Dispute Settlement Body exercises this function for disputes arising under the WTO agreements.\(^\text{518}\)


\(^{\text{512}}\) DSU, Art. 17.

\(^{\text{513}}\) DSU, Art. 22; NAFTA, Art. 19; NAFTA, Art. 20; NAAEC, Art. 36, Annex 36 B; NAALC, Art. 41, Annex 41 B.

\(^{\text{514}}\) NAAEC, Art. 34; Annex 34; NAALC, Art. 39, Annex 39.

\(^{\text{515}}\) DSU, Art. 22 (1); NAFTA, Art. 2018 (2).

\(^{\text{516}}\) DSU, Art. 22 (6); NAFTA, Art. 1905 (10); NAFTA, Art. 2019 (3); NAAEC, Art. 36 (5); NAALC, Art. 41 (5).

\(^{\text{517}}\) NAFTA, Art. 1905 (1)(d) & (2), 2018 (1), 2019 (1); NAAEC, Art. 33 & 34 (1); NAALC, Art. 38 & 39 (1).

\(^{\text{518}}\) DSU, Art. 21.
Very different are the maximum time frames from the initiation of a dispute settlement procedure until the delivery of the final report. Chapter 20 establishes the shortest time limits. It aims at having the panel issue its report after not more than 255 days.\textsuperscript{519} After another 30 days, the winning party is allowed to suspend benefits.\textsuperscript{520} Chapter 19 requires the panel to issue its report after 315 days at the latest.\textsuperscript{521} It takes another 210 days for the winning party to suspend benefits.\textsuperscript{522} The reason why Chapter 19 panel proceedings take longer than those under Chapter 20 might be that AD and CVD issues are highly complex and -- as the CFTA experience has shown -- need more time. The usual time under the DSB is six months, with a maximum of 9 months\textsuperscript{523} (plus, at the most, another 60 days for the adoption of the report\textsuperscript{524}). If an appeal is filed, the entire procedure will last 15 months at the very most\textsuperscript{525} (plus not more than 30 days for the adoption of the Appellate Body report\textsuperscript{526}). With up to nearly 16 months, the period until sanctions can be applied is comparatively long. The lengthiest procedures are established under the NAFTA Side Agreements. Barely any time limit is specified for the NAALC pre-panel phase.\textsuperscript{527} The NAALC and the NAAEC provide that the settlement

\textsuperscript{519} NAFTA, Art. 2007 (1), 2008 (1), 2011 (1)(b) & (c), (3), 2016 (2), 2017 (1) (In this and some of the following cases the individual time frames given in the respective articles have been added up to calculate the complete time limit.)

\textsuperscript{520} NAFTA, Art. 2019 (1).

\textsuperscript{521} NAFTA, Art. 1904 (14).

\textsuperscript{522} NAFTA, Art. 1905 (2), (3), (6), (7), (8), Annex 1905.6.

\textsuperscript{523} DSU, Art. 12 (9).

\textsuperscript{524} DSU, Art. 16 (4).

\textsuperscript{525} DSU, Art. 12 (9), 17 (5).

\textsuperscript{526} DSU, Art. 17 (14).

\textsuperscript{527} The only time limit mentioned are 120 days for the Evaluation Committee to present its draft report, and 60 days for the final report. NAALC, Art. 25 (1), 26 (1).
procedure from its initiation until the panel presents its final report may last up to 445 days.\textsuperscript{528} In the worst case it can take another 1060 days to impose a sanction.\textsuperscript{529}

Another question in this context is if the parties are able not only to alter the given time limits, which might make the procedures even longer, but also to depart from other procedural stipulations. With this regard, Chapter 19 contains the strictest regime. There exists no way for the disputing parties to deviate from the established provisions by simple accord.\textsuperscript{530} The parties have somewhat more freedom under the DSU because they may determine the panel’s Terms of Reference\textsuperscript{531}, but all other provisions (including the time limits) have to be followed. Chapter 20 allows the parties to modify most of the stipulations with the exception of those governing the establishment of a panel and the application of sanctions.\textsuperscript{532} The same is true for both Side Agreements.\textsuperscript{533} Consequently, the possibility for the parties to take deviations from the course described in the agreements because of, e.g., political considerations varies a lot.\textsuperscript{534}

\textsuperscript{528} NAAEC, Art. 23 (1), 24 (1), 27 (1)(b) & (c), (3), 31(2), 32 (1), NAALC, Art. 28 (1), 29 (1), 32 (1)(b) & (c), (3), 36 (2), 37 (1).

\textsuperscript{529} NAAEC, Art. 34 (1)-(4), 35, 36 (1); NAALC, Art. 39 (1)-(4), 39, 41 (1).

\textsuperscript{530} See NAFTA, Art. 1904. However, the Safeguard Mechanism allows the parties to make individual agreements. See NAFTA, Art. 1905 (2) & (3).

\textsuperscript{531} DSU, Art. 7 (1).

\textsuperscript{532} NAFTA, Art. 2007 (1)(d), 2008 (1)(c), 4 (b), 2012 (2), 2016 (1) & (2), 2017 (1).

\textsuperscript{533} NAAEC, Art. 23 (1), 24 (3), 28 (2) & (3), 31 (1) & (2); NAALC, Art. 28 (1), 29 (3), 33 (2) & (3), 36 (1) & (2). Interestingly, deviations from the stipulations governing the NAALC pre-panel phase do not depend on agreements by the parties but on a Council decision. See NAALC, Art. 25 (1), 26 (1).

\textsuperscript{534} At least early events under NAFTA show not only that deviations from the Agreement are made, but that “NAFTA parties will violate the Agreement under sufficient pressure from domestic political forces. Certainly this is the case in the U.S.-Mexico trucking dispute (which is the product of pressure by the U.S. trucking industry) and the Helms-Burton Act (which is the result of legislation designed to satisfy the demands of Cuban-Americans during an election year) . . . A NAFTA party could take a hard line approach to another country’s politically motivated breaches of the Agreement by immediately demanding consultations and rapidly escalating the dispute to panel proceedings; however, the early NAFTA experience shows that that is not what is happening. Rather, the NAFTA parties have displayed
Generally it can be said that for a comparative study, the DSU panel proceedings as well as the system of Chapter 20 and the Side Agreements should be regarded as being on one level, whereas Chapter 19 and the DSU appeal process on another. The reason is that both the Chapter 19 panel and the Appellate Body review an initial process, whereas in the other cases it is the first proceeding. Thus, Chapter 19 differs in most aspects from the other agreements which have, very basically, the same structure. The most distinctive points of difference between the first-mentioned agreements are:

(1) the way the DSB is taking decisions;
(2) the possibility of an appeal under the DSU;
(3) the imposition of a monetary fine under the Side Agreements;
(4) the big differences with respect to the time limits; and
(5) the possibility to deviate from the treaty provisions under Chapter 20 and the Side Agreements.

Thus, politicians do not have any chance to interfere during a Chapter 19 process. Under the DSU it exists but is very limited because of the "negative consensus" stipulation. Under Chapter 20 and the Side Agreements, politicians might intervene practically every moment. This means that, in the end, the agreements are -- with the exception of Chapter 19 -- politically controlled to varying degrees.

With regard to the conditions that an efficient and effective conflict resolution system has to fulfill, the Chapter 19 dispute settlement procedure meets these requirements. The DSU and Chapter 20 come close, but the systems established under the Side Agreements are far from that.

tremendous sensitivity to the domestic electoral pressures faced by their fellow trading partners. Lopez, supra note 279, at 206.

CHAPTER V
CONCLUSION

The analysis conducted in this thesis shows that most of the systems for settling disputes “seem to reflect the continuing subordination of law to politics in the realm of international trade.”536 The degrees, of course, vary significantly. On the other hand, it was demonstrated that there is a general tendency to reduce the political influence and to become more adjudicatory the longer the agreement exists, the more complex and complicated it gets, and the more signatories it has. It is a development away from the negotiation-based settlement process. For the GATT, it was a necessity to render the dispute settlement mechanism more rule-based537 because the negotiation-based system failed and was not longer able to resolve disputes effectively. The same cannot be said for the NAFTA, of course, but the NAFTA has two important features distinctive from either the WTO or the GATT. First, the NAFTA itself is more adjudicatory than the GATT ever was (even if it is less adjudicatory than the WTO mechanism). Nevertheless, there were three possibilities under the CFTA for going through the general dispute settlement mechanism, whereas under NAFTA there is only one. Insofar as it is possible to speak of straightening the procedure of dispute settlement procedure, the NAFTA has

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536 Trebilcock & Howse, supra note 38, at 406.

537 The step from the GATT to the WTO was the most definite with regard to making the resolution system more legalistic, but “[i]f one looks over a longer period, one sees a trend towards judicialization of the GATT regime. This can be seen in the development of a legal staff at the GATT, and in the increasing length and complexity of legal arguments of GATT panels. However, the most important indicator is simply the frequency of GATT panels. In the first ten years of the GATT, there were some twenty rulings made by GATT panels resulting from complaints brought by contracting parties. This number dropped off sharply during the 1960s, and then began to climb again in the 1970s. In the decade 1980-9, the number increased to forty-four rulings.” Winham, supra note 3, at 63. See also Huntington, supra note 162, at 443.
done a step in this direction. The second feature that distinguishes the NAFTA and the WTO is the number of signature states. The WTO currently counts 130 members, the NAFTA "only" three. For a system that relies heavily on negotiations, it is easier to reach an agreement between three than between 130 states.\textsuperscript{538} The need for a strict rule-based system is not as urgent for the NAFTA as it was for the WTO.\textsuperscript{539}

A yet unresolved issue is the problem of how to deal with a recalcitrant party that refuses to comply with a ruling. On the level of international economic treaties, it seems difficult to coerce a country to respect the provisions.\textsuperscript{540} The suspension of benefits is the usual sanction, which, however, does not work effectively.\textsuperscript{541} The imposition of a monetary fine is a new approach which still has to prove its effectiveness. Nevertheless, there are serious doubts if such a fine can force a violator to "play by the rules".\textsuperscript{542} A third (and the strictest) possibility is simply to cancel the membership of that country.\textsuperscript{543} But it seems that politicians do not want to go so far, fearing that it might be their own country which, for whatever reason, cannot -- or does not want to -- comply with a ruling and then finds itself excluded.\textsuperscript{544}

It is interesting to see how countries are dealing with the introduction of new, formerly "trade-unrelated" issues into an international trade agreement as it was the case

\textsuperscript{538} It is easier to use personal influence and to exercise political pressure with a small number of countries. And it makes a difference whether it is 129 or two partners who have to be convinced. See Oelstrom, supra note 245, at 788-89; Straight, supra note 291, at 78. One might also remember that, in the first years, with fewer members and less complex matters, the GATT 1947 system worked well.

\textsuperscript{539} See Huntington, supra note 162, at 443.

\textsuperscript{540} Cocuzzza & Forabosco, supra note 85, at 188.

\textsuperscript{541} Bello & Holmer, supra note 191, at 1103; Gaste, supra note 33, at 811.

\textsuperscript{542} See those authors referred to in note 463.

\textsuperscript{543} Cocuzzza & Forabosco, supra note 85, at 188.

\textsuperscript{544} None of the analyzed treaties contains a provision that allows other member states to exclude a recalcitrant party. And this author does not know of any treaty that provides a possibility of canceling the membership of another party.
with the NAAEC and the NAALC. The parties were very cautious in choosing a "soft law" approach where they retain considerable on the whole procedure.\textsuperscript{545} Also, the scope of the agreements is very limited. In such "new" fields, the parties obviously did not want to give up their power. Therefore, the settlement system is very much based on negotiations.

Another question is, of course, whether the pragmatic approach or the legalistic approach is preferable. Without a doubt, the adjudicatory way is the more effective process. On the other hand, it always results in a "winner and loser" situation, which can generate friction.\textsuperscript{546} Furthermore, it becomes more difficult to amend or change any provision in the agreements because the parties are unable to make "adjustments" during the dispute settlement procedure.

Nevertheless, even if effectiveness is only one aspect of evaluating a conflict resolution system, it is one of the major aspects. It is very important that the system works in order not to create frustration just because of its non-functioning. With this respect, the WTO seems well equipped even to accept more member states, to govern more agreements, and still to provide an effective mechanism to conflict resolution. In the event that significantly more countries become parties to the NAFTA (or a succeeding agreement), however, the treaty will have to change its general dispute settlement system and put more emphasis on a legalistic approach; otherwise it is very likely that whole system will block and fail.

\textsuperscript{545} See Reisman & Wiedman, supra note 55, at 33.

\textsuperscript{546} Manley O. Hudson, International Tribunals: Past and Future 213 (1944).
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