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

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Contents

I. INTRODUCTION ........................................ 60
   A. The Development of International Trade Agreements .... 60
   B. The Importance of Resolving Disputes Effectively .... 65
   C. The Idea and Aim of the Article .................... 67
   D. Domestic Economic Implications of Internationalized Trade 68

II. THE WORLD TRADE ORGANIZATION .................... 70
   A. The Weaknesses in the GATT 1947 Dispute Settlement System 72
   B. Innovations by the WTO Treaty .................... 77
      1. The Structure of the New Dispute Settlement Mechanism 77
         a. A Single Procedure .......................... 77
         b. The Dispute Settlement Body ................. 79
         c. The “Negative” Consensus .................. 79
         d. The Appellate Body .......................... 80
      2. The New Dispute Settlement Procedure ............. 81
         a. Consultations .............................. 81
         b. Panel Phase ............................... 83
         c. Appeal .................................... 86
         d. Implementation and Enforcement of Decisions 87
   C. Criticism and Reform Proposals .................... 90

III. THE NORTH AMERICAN FREE TRADE AGREEMENT ........... 91
    A. NAFTA Institutions ............................. 92

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II. Dispute Settlement under the Environmental and the Labor Side Agreements ........................................... 129
   A. The Pre-Stage under the Labor Side Agreement ........ 130
   B. Consultations under the Two Side Agreements .......... 131
   C. Special Council Session .................................. 132
   D. Panel Phase .................................................. 132
   E. Implementation and Enforcement of Panel Reports ...... 134

III. Criticisms of the Side Agreements .......................... 136
I. INTRODUCTION

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.¹

Renato Ruggiero

A. The Development of International Trade Agreements

The world's economy is becoming more and more integrated.² For the past 50 years, the number of transactions in the international economic and political spheres has increased steadily.³ The enormous expansion of trade and commercial relations between different countries has lead one scholar to describe the situation as an “international commercial global village.”⁴

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 (GATT). Created in the year 1947, the GATT attempted to facilitate tariff reductions between the participating countries. Even though the application of the GATT was based only on a Protocol of Provisional Application, its effect on the world wide commerce was immense. The World Trade Organization (WTO), as the “successor” to the GATT, is expected to be

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5 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT 1947]. The official amended text is found in 4 GATT B.I.S.D. 1 (1969). In this article the term GATT is used to refer to the broader GATT trading system including various institutions and procedures established pursuant to the General Agreement.


6 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. [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 5, at 10-14, 21-22, 335-36. The contracting parties were responsible for making decisions concerning the Agreement. GATT 1947, supra note 5, at art. XXV.


For actual developments within the framework of the WTO, see its website at World Trade Organization (visited July 12, 1997) <http://www.wto.org>.
even more successful in terms of economic impact.\textsuperscript{11} The WTO was created after seven years of negotiations between 117 nations, with the approval of the Final Act\textsuperscript{12} on April 15, 1994 at the Uruguay Round of GATT negotiations.\textsuperscript{13} 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."\textsuperscript{14}

Efforts to foster international trade were not only made on a global level, but also on a regional level.\textsuperscript{15} "[A]ttempts at regional economic integration

\textsuperscript{10} 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 to mean 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 generally Gabrielle Marceau, Transition from GATT to WTO—A Most Pragmatic Operation, J. WORLD TRADE, Aug. 1995, at 147, 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).

\textsuperscript{11} See THE URUGUAY ROUND: GLOBAL AGREEMENT—GLOBAL BENEFITS, supra note 10, at 27.

\textsuperscript{12} Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter Uruguay Round Final Act]. The WTO Agreement is one of the five agreements contained in the Final Act. See infra note 46.


\textsuperscript{13} 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, supra note 8, at 157, 160-64.

\textsuperscript{14} Philip M. Nichols, GATT Doctrine, 36 VA. J. INT'L L. 379, 380 (1996).

have been numerous, with the failures far outnumbering the successes."\(^{16}\)

Nevertheless, nations everywhere in the world have concluded agreements to form free trade areas or customs unions,\(^{17}\) and they continue to do so.\(^{18}\) Among these agreements are the European Union (EU), the Andean Group, the Caribbean Free-Trade Agreement (CARIFTA), and the African Common Market.\(^{19}\) One of the most recent treaties, concluded by the United States,


\(^{17}\) 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. 1 SWACKER ET AL., supra note 4, at 26, 48.


\(^{18}\) For instance, the states adhering to the Association of Southeast Asian Nations (ASEAN) are planning to establish a free trade zone. See Asean Trade Zone Nears, FIN. TIMES, Feb. 25, 1997, at 1. Chile wants to become a partner of NAFTA. See 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. See 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. See Oppermann, supra note 17, at 921.

\(^{19}\) For a complete overview of currently existing customs unions and free trade area agreements that have been notified under GATT 1947 Art. XXIV or covered or notified under the 1979 Enabling Clause see *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980); see also REGIONALISM AND THE WORLD TRADING SYSTEM, supra note 17, at 77-89; 1 SWACKER ET AL., supra note 4, at 103-25. A selective collection of texts of regional agreements’ dispute settlement systems, including explanatory notes, are found in 2 FRANK W. SWACKER ET AL., *WORLD TRADE WITHOUT BARRIERS: COMPARATIVE DISPUTE
Canada, and Mexico, is the North American Free Trade Agreement (NAFTA). Like the WTO, NAFTA also has its origins in another treaty, the former U.S.-Canada Free Trade Agreement (CFTA). By eliminating tariffs and other trade barriers 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.

Two other accords, the so-called Side Agreements, have been signed in conjunction with NAFTA: the North American Agreement on Environment-


23 Even if the Side Agreements do “not constitute a part of the NAFTA as such, [they] must nevertheless be viewed as part of the NAFTA package.” J. Owen Saunders, NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and Environment, 5 COLO. J. INT’L ENVTL. L. & POL’Y 273, 284 (1994).
mental Cooperation\textsuperscript{24} (NAAEC) and the North American Agreement on Labor Cooperation\textsuperscript{25} (NAALC). This development shows that in addition to "classical" trade related issues, now other non-trade issues are being included in traditional treaties.\textsuperscript{26}

B. The Importance of Resolving Disputes Effectively

In order for trade agreements to achieve maximum benefit, they have to work as intended. This will only be the case if the parties respect the terms


\textsuperscript{26} "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 2, at 122.


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 to conform to the agreement? Many countries have come to realize the importance of a dispute settlement regime for any treaty. Its role “is particularly 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.”

Indeed, one of the essential questions is whether disputes are settled 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? “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 of the trade agreement it was created to preserve.” Therefore, member states will preferably accept an efficient 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;
(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

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28 Id.
designed to punish the successful party and/or overturn the dispute settlement panel determination.\textsuperscript{31}

C. The Idea and Aim of the Article

The aim of this article 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. Both the agreements are fairly new and both have predecessors. The 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 between the trade regimes, analysis of the dispute settlement regimes is a narrow field that would not be hindered by structural differences.\textsuperscript{32} This article aims to discover the principles of how the agreements deal with conflict resolution.

This chapter will conclude with an analysis of domestic economic implications of international trade. Each of the next chapters will analyze the WTO and NAFTA separately. In chapter two, after a short overview of the WTO, the dispute settlement regime and its creation will be examined. First, the old system under the GATT and its major weaknesses will be presented. Second, the new, reformed WTO dispute resolution mechanism will be discussed. The following section will assess the new regime and suggest improvements.

In the third chapter the institutions and scope of NAFTA will be analyzed. The different conflict settlement procedures instituted by NAFTA will be examined, 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 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.


\textsuperscript{32} For the conception, aims and methods of comparative legal studies, see 1 \textit{Konrad Zweigert & Hein K"otz, An Introduction to Comparative Law} 1-41 (1977).
D. Domestic 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 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.\(^{33}\) However, even from an economical, more secular point of view, transnational commercial relations are beneficial.\(^{34}\) Adam Smith described the advantages of free trade for landed nations by writing 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.”\(^{35}\) Even modern economists believe that an unregulated trade results in lower prices, a greater variety of

\(^{33}\) Immanuel Kant developed the idea that “[t]he spirit of trade cannot coexist with war”. Immanuel Kant, To Perpetual Peace: A Philosophical Sketch, in PERPETUAL PEACE AND OTHER ESSAYS 107, 125 (Ted Humphrey trans., Hackett Publishing 1983) (1795). For John Stuart Mill, trade is “the principal guarantee of the peace of the world.” JOHN STUART MILL, Principles of Political Economy, in 3 COLLECTED WORKS OF JOHN STUART MILL 594 (John M. Robson ed., Univ. of Toronto Press 1965) (1884). However, “the assumption that [trade] reduces the probability of war between nations is . . . not proven, and much evidence exists to the contrary.” HUNTINGTON, supra note 15, at 67, 218.

\(^{34}\) 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.


commodities to choose from, and in consumer welfare, whereas high tariffs and other means of protectionism lead to opposite result.\textsuperscript{36} However, it is not only 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.\textsuperscript{37} In 1995, the United States exported goods worth $581.1 billion; its gross domestic product (GDP\textsuperscript{38}) was $7245.8 billion.\textsuperscript{39} The exported goods accounted for eight percent of the GDP. At the same time, the United States imported goods worth $758.9 billion.\textsuperscript{40} The German GDP was $2407.5 billion in 1995.\textsuperscript{41} During that year, Germany exported goods worth $506.4 billion, i.e., 21 percent of the GDP, while importing goods worth $441.4 billion.\textsuperscript{42} These numbers show the importance of international trade for 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.\textsuperscript{43} Both the

\textsuperscript{36} The subject of this article 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).

\textsuperscript{37} 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>.

\textsuperscript{38} 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 (1996).

\textsuperscript{39} United States Department of Commerce, International Trade Administration. U.S. Aggregate Foreign Trade Data (visited April 14, 1997) <http://www.ita.gov/industry/otea/usfth/t05.pm>.

\textsuperscript{40} Id.

\textsuperscript{41} 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.

\textsuperscript{42} 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 41.

\textsuperscript{43} For instance, a recent study indicated that a 15 percent import quota on steel “would save 26,000 jobs in the steel industry,” but “destroy 93,000 in the industries that import steel for a loss/gain ratio of 3.6 to 1.” Robert W. McGee, The Fatal Flaw in NAFTA, GATT and
individual consumer and the business community as a whole benefit from free trade.  

II. THE WORLD TRADE ORGANIZATION

The World Trade Organization provides a "common institutional framework for the conduct of trade relations among its members." 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).

All Other Trade Agreements, 14 NW. J. INT'L L. & BUS. 549, 555 (1994) (citation omitted).

44 "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 "generally, 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. Had they succeeded, they would have caused a monumental financial catastrophe for the United States." 1 SWACKER ET AL., supra note 4, 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,' and the gain to the winners more than offsets the pain to the losers." BHALA, supra note 36, at 935 (emphasis in original).

45 WTO Agreement, supra note 9, at art. II(2).

46 Id. at 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
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.47

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.48 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.49 One of the most essential tasks to be completed by the General Council is to determine the responsibilities of the Dispute Settlement Body.50 Furthermore, it also defines the Trade Policy Review Body’s responsibilities.51 Under the General Council’s guidance, various councils and committees with different tasks are installed.52 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.53 Currently, the WTO has 133 members, with 29 additional countries (among them China and the Russian


47 See WTO Agreement, supra note 9, at art. II(3)-(4).
48 See id. at art. IV(1).
49 See id. at art. IV(2).
50 See id. at art. IV(3).
51 See id. at art. IV(4).
52 See id. at 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. Id. at para. 5. 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. at para. 7.
53 See WTO Agreement, supra note 9, at art. VI para. 1-2. The Director-General and the staff of the secretariat are required to be impartial and not to accept any government’s instructions. Id., at para 4.
Federation) having submitted applications to join the new world trade body. Analysts estimate the Uruguay Round Agreements will lower global tariffs by over $740 billion while increasing world exports by $755 billion and raising the world income yearly by $510 billion. The developed countries will reduce their tariffs by 40 percent. As a result “more 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.” 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.

A. The Weaknesses in the GATT 1947 Dispute Settlement System

Because the WTO Dispute Settlement System is built on the dispute settlement system of the GATT 1947, analysis of the WTO’s Dispute Settlement System appropriately begins with that of the GATT 1947. 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

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54 See World Trade Organization, WTO Membership (visited Jan. 23, 1999) <http://www.wto.org/wto/about/organsn6.htm> (this website shows a complete list of current members and governments having applied for membership).


56 See The World is Born, Focus: GATT Newsletter, May 1994, at 1 (Information and Media Relations Division of GATT publ.).

57 See 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. See The World is Born, supra note 56, at 6.

58 See A $ 510 Billion Boost to World Income, supra note 57, at 6.

59 See Nichols, supra note 14, at 381 (citing Trade Body Launched, FIN. TIMES, Jan. 5, 1995, at 1).

60 See Bob Benenson, 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.

61 See BHALA, supra note 36, at 109; Jackson, supra note 29, at 13-14; Pierre Pescatore, Drafting and Analyzing Decisions on Dispute Settlement, in 2 HANDBOOK OF GATT/WTO DISPUTE SETTLEMENT, 3-54 (William Davey et al. eds., 1996); Peter Backes, Die neuen Streitbeilegungsregeln der Welthandelsorganisation (WTO) [The New Dispute Settlement
Articles XXII\textsuperscript{62} and XXIII\textsuperscript{63} were the only texts dealing with dispute settlement, thus being "the most primitive mechanism for interpreting and
enforcing [the GATT] provisions.”64 “[D]isputes were settled in a haphazard way” for the first 25 years of GATT’s existence.65 Panels were created in 1952 to take over the duty of resolving the disputes.66 The procedures operated on customary principles67 until 1979, after the Tokyo Round, when the traditionally followed procedures were codified.68

In addressing any complaint, the first phase of the procedure established under the Tokyo Round was negotiation and consultation.69 If they remained unsuccessful, the party could request the establishment of a panel.70 It was the GATT Council’s task71 to appoint the panel members and determine the panel’s terms of reference.72 These decisions required unanimity with the principle of each country having one vote.73 The panel

65 See Pescatore, supra note 61, at 4.
66 Before the creation of the panels “the contracting parties carried out their responsibilities [to settle disputes] by forming working parties. . . . In 1952, upon the 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).
68 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].
69 See Tokyo Round Understanding, supra note 68, at para. 4.
70 See id. at para. 10.
71 The GATT Council of Representatives was established in 1960 as the Contracting Parties’ intercessional 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).
72 See Tokyo Round Understanding, supra note 68, at para. 11.
73 Backes, supra note 61, at 916; Lowenfeld, supra note 29, 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:
would then hear the dispute and decide on a conclusion with regard to the validity of the challenged measure under the GATT 1947. The panel report was subject to the unanimous approval by the GATT Council in order to have legal effect.

The Tokyo Round created different procedures for dispute settlement based on the nature of the dispute. 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 system.

Unfortunately, these changes did not solve many problems and even created new ones. During the last years, the method of conflict resolution under the GATT was criticized sharply because:

(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 than 60 percent;
(5) the system of sanctioning a country in the case of non-compliance

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The Newer and Improved Model, 27 INT'L LAW. 603, 605 n. 10 (1993).

74 See Lowenfeld, supra note 29, 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. at 477.


76 "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." Montañà i Mora, supra note 67, at 124 n.93 (citations omitted).

with the panel report did not work; the panel report did not work; 
(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 "panel shop" to obtain a desired result rather than an impartial and 
neutral panel decision.79

Some deficiencies were corrected by the 1989 "Improvements Deci-
sion,"80 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.

Improvements to the dispute mechanism were mainly left to the Uruguay 
Round. During the negotiations, the EU favored a pragmatic approach: a 
regime based more on negotiations and compromise. At the same time, the 
U.S. wanted a more legalistic, rule-based system.81 It is noteworthy that

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78 The system of sanctions applied only once a trade sanction was formally approved. See 
Netherlands Measures of Suspension of Obligation to the United States, Nov. 8, 1952, GATT 

79 See Davey, supra note 61, at 81-89; Kendall W. Stiles, The New WTO Regime: The 
Victory of Pragmatism, 4 J. INT'L L. & PRAC. 3, 7-9 (1995); Ivo Van Bael, The GATT 
Dispute Settlement Procedure, J. WORLD TRADE, Aug. 1988, at 67, 71-73; John H. Weeks, 
Procedures for Dispute Settlement under the World Trade Organization—GATT 1994 and 
under Chapter 19 of the North American Free Trade Agreement, 18 HAMLINE L. REV. 343 

80 See Decision on Improvements to the GATT Dispute Settlement Rules and Procedures, 
April 12, 1989, GATT B.I.S.D. (36th Supp.) at 61 (1990). For more information, see 
generally Erwin P. Eichmann, Procedural Aspects of GATT Dispute Settlement: Moving 
towards Legalism, 8 INT'L TAX & BUS. LAW. 38 (1990); Ernst-Ulrich Petersmann, The Mid-
Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT 

81 See Philip A. Akakwam, The Standard of Review in the 1994 Antidumping Code, 5 
MINN. J. GLOBAL TRADE, 277, 284-85 (1996); Montañà i Mora, supra note 67, at 128-36.

For the pro-legalists view, see Davey, supra note 9, at 75-77; JOHN H. JACKSON & 
WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 2, 282 
(Supp. 1986); ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITU-
TIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 221-44 (1991); Harold H. Koh, The 

For the pro-pragmatists view, see LONG, supra note 75, at 88; David K. Tarullo, Logic, 
Myth and International Economic Order, 26 HARV. INT'L L.J. 533 (1985); Philip R. Trimble,
even after the Uruguay Round the GATT 1947 Articles XXII and XXIII still remain the legal basis for dispute settlement in the WTO.\textsuperscript{82} They are, however, "silent as to which approach, adjudication or negotiation, might be appropriate."\textsuperscript{83} In effect, the U.S. was successful and the new Dispute Settlement Understanding is much more adjudicatory than the GATT 1947 system.\textsuperscript{84}

\section*{B. Innovations by the WTO Treaty}

The Dispute Settlement Understanding modifies the dispute settlement regime of GATT by changing both the structure of the dispute settlement bodies and the procedure through which disputes are settled.

\subsection*{1. The Structure of the New Dispute Settlement Mechanism}

The new Dispute Settlement Understanding [DSU] which is part of the basic framework of the WTO, sets up an elaborate regime of provisions built upon the GATT Articles XXII and XXIII.\textsuperscript{85} This mechanism "is a central element in providing security and predictability to the multilateral trading system."\textsuperscript{86} Its aim is to reestablish credibility of the member states into the WTO conflict resolution process.\textsuperscript{87}

\subsubsection*{a. A Single Procedure}

One major improvement in the DSU is that member states have to follow only one settlement procedure once a conflict arises with regard to the covered agreements.\textsuperscript{88} The exclusivity of the system leads to more


\textsuperscript{82} See Understanding on Rules & Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 112 (1994) [hereinafter DSU], art. 3(1). The GATT 1994 Articles XXII and XXIII still are the same as in GATT 1947.

\textsuperscript{83} Thomas J. Dillon, Jr., \textit{The World Trade Organization: A New Legal Order for World Trade?}, 16 MICH. J. INT'L L. 349, 395 (1995); see also Davey, \textit{supra} note 9, at 75-76.

\textsuperscript{84} Young, \textit{supra} note 66, at 390-91.

\textsuperscript{85} See DSU, \textit{supra} note 82, at art. 3(1). GATT Articles XXII and XXIII can be found \textit{supra} notes 62 & 63.

\textsuperscript{86} DSU, \textit{supra} note 82, at art. 3(2).

\textsuperscript{87} See Jackson, \textit{supra} note 29, at 15.

\textsuperscript{88} The DSU covers the multi- and plurilateral agreements listed in its Appendix 1. DSU, art. 1(1).
coherence because “panel shopping” is abolished. In addition, 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 DSU encourages parties to resort to binding arbitration as an “alternative means of dispute settlement.”

Unilateral sanctions, on the other hand, are strongly discouraged. It has been observed that “[u]nilateral action undermines the multilateral basis of the WTO [because] it challenges the WTO’s credibility and encourages other countries to act unilaterally as well.” Therefore, the DSU 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.

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89 See Pescatore, supra note 61, at 30; Backes, supra note 61, at 917.

A list of the provisions derogating from the general rules is found in Appendix 2 to the DSU. Art. 64 of the TRIPS Agreement and Art. 7(3) of the Textiles Agreement are missing from that list. Id. at 138 n.33 & 139 n.34.
92 See id. at 139.
93 DSU, supra note 82, at art. 25.
95 See DSU, supra note 82, at art. 23. Authors have noted that the DSU Article 23 is especially directed against Section 301, which might be the United States’ most effective unilateral trade sanction. See Backes, supra note 61, at 11-12; Lowenfeld, supra note 29, at 481. Section 301 of the Trade Act of 1974 enables the U.S. President to take unilateral or retaliatory action against unfair trade practices of a foreign government. See 19 U.S.C. §§ 2411-2419 (1994).

For the relation between Section 301 and the DSU, see Abels, supra note 94, at 483-526; William J. Aceves, Lost Sovereignty? The Implications of the Uruguay Round Agreements, 19 Fordham Int’l L.J. 427, 439 (1995); Richard O. Cunningham & Clint N. Smith, Section 301 and Dispute Settlement in the World Trade Organization, in the World Trade Organization, supra note 9, at 581-612; Susana Hernandez Puente, Section 301 and the New WTO Dispute Settlement Understanding, 2 ILSA J. Int’l & Comp. L. 213 (1995); Jared R. Silverman, Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of
b. The Dispute Settlement Body

The drafters of the DSU agreed to establish a Dispute Settlement Body (DSB) to be responsible for administering the rules and procedures of the DSU, establishing panels, adopting panel and Appellate Body reports, surveying the implementation of rulings and recommendations, and allowing disciplinary action in the case of non-complying member states.96 The General Council meets also as the DSB, but the DSB has its own chairman and rules of procedures.97 Therefore, an "integrated system"98 is created. The Understanding has the same legal authority as the WTO Agreement itself, while the whole dispute resolution process is woven into the organic structure of the WTO.99

c. The "Negative" Consensus

Another improvement involves an attempt to speed up the settlement procedure through the principle of "negative consensus."100 All decisions in the WTO are still taken by consensus, but "the idea of consensus applies to the DSB in a vastly different manner."101 A decision is deemed to be adopted by the DSB unless its members decide by consensus not to adopt the decision.102 This "most radical innovation"103 has already been hailed as

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96 See DSU, supra note 82, at art. 2(1).
97 See WTO Agreement, supra note 9, at art. IV(3).
98 See Cocuzza & Forabosco, supra note 77, at 167.
99 See Pescatore, supra note 61, at 29.
100 See Jackson, supra note 29, at 14. It is also called "reverse" or "inverse consensus."
101 See Dillon, supra note 83, at 373. One author even refers to it as the "consensus to overrule."
103 Reitz, supra note 64, at 585. The introduction of the majority vote would have politicized the complete dispute settlement process. Jeffrey M. Waincymer, Revitalizing GATT Article XXIII-Issues in the Context of the Uruguay Round, WORLD COMPETITION, Sept. 1988, at 42-43.
104 See DSU, supra note 82, at 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. 1 SWACKER ET AL., supra note 4, at 373-74.
105 See Cocuzza & Forabosco, supra note 77, at 168.
an “ingenious solution”104 and “perhaps the most important advantage”105 to prevent a party from blocking the decision making process.

d. The Appellate Body

Finally, “perhaps the most definitive move in the direction of legalism”106 is the creation of a standing Appellate Body—a “unique and unprecedented institution in international trade.”108 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.”109 The members are appointed for a four year term,110 and, unlike the panel phase, the disputing parties cannot choose who is sitting on a case. Based on rotation, three of the seven members will hear a case.111 The working procedures that are to be drawn up by the Appellate Body in consultation with the chairman of the DSB and the Director-General contain the schedule determining who will serve.112 Inspired by common law systems,113 the Appellate Body may

104 See Reitz, supra note 64, at 585.
105 See Dillon, supra note 83, at 378.
106 Young, supra note 66, at 403. The establishment of the Appellate Body is even seen as a “significant step toward the creation of an international legal tribunal on trade.” Dillon, supra note 83, at 379.
107 See DSU, supra note 82, at art. 17.
109 DSU, supra note 82, at art. 17 (3). Professor 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 29, at 485. By the same token, Professor Nichols predicted that “the Appellate Body will become a focal point for scrutiny of the World Trade Organization.” Nichols, supra note 14, at 453 (citations omitted). See also Reitz, supra note 64, at 602 (discussing difficulties the Appellate Body may encounter).
110 See DSU, supra note 82, at art. 17(2).
111 See id. at art. 17(1).
112 See id. at art. 17(1) & (9).
reexamine the case with regard only to "issues of law . . . and legal interpretations"\textsuperscript{114}, and not to issues of fact.\textsuperscript{115}

As the panel decisions are now adopted "quasi-automatically,"\textsuperscript{116} it became necessary to provide for a review mechanism.\textsuperscript{117} 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{118}

It is very likely that the quality of the panel reports will improve.\textsuperscript{119} One has to bear in mind the stability of the Appellate Body and the limits of its competence on legal issues. The Appellate Body must build up a corpus of decisions thereby assuring consistency in WTO jurisdiction and guiding the panels.\textsuperscript{120}

2. The New Dispute Settlement Procedure

Besides 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.\textsuperscript{121}

\textit{a. Consultations}

When a member state alleges that the operation of any covered agreement is affected by another member's measures, it requests consultations and

\begin{footnotesize}
\begin{enumerate}
\item See Montañà i Mora, supra note 67, at 150.
\item DSU, supra note 82, at art. 17(4) & (6).
\item The distinction between questions of law and questions of fact is not always obvious. See Croley & Jackson, supra note 27, at 195; Lowenfeld, supra note 29, at 483-84.
\item Weeks, supra note 79, at 344. See also Jackson, supra note 29, at 14.
\item See Horlick & DeBusk, supra note 21, at 40 (assuming that panelists will prepare better reports when they know of the possibility of appealing the decision).
\item See Reitz, supra note 64, at 584; Vermulst & Driessen, supra note 91, at 145.
\item Aceves, supra note 95, at 439.
\end{enumerate}
\end{footnotesize}
notifies the DSB. The language employed by the DSU makes it clear that consultations are to be taken seriously and "[do] not simply exist as a formality before the establishment of a panel." 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." By the same token, the DSU provides for the end of the conflict at any time during the procedure whenever the parties agree on a solution.

The DSU 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. However, if a member does not reply to a consultation request within ten 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. In urgent cases, such as in those involving perishable goods, the time frame is

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122 See DSU, supra note 82, at arts. 4(2) & (4). In order to limit misuse, the DSU provides that "before bringing a case, a [m]ember 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, supra note 82, at art. 3(7).

123 Dillon, supra note 83, at 381 (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 procedures. . . . [A]lso e]ach [m]ember undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another [m]ember" in view of any measure that could affect the operation of any covered agreement. DSU, supra note 82, at arts. 4(1) & (2). 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>.

124 DSU, supra note 82, at art. 3(7). See also DSU, supra note 82, at art. 12(7).

125 Id. at art. 3(6) (emphasis added). The panels are directed to "give [the parties] adequate opportunity to develop a mutually satisfactory solution." Id. at art. 11.

126 Id. at 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 Subjects] 55-56 (W. Mauke Söhne publ., Hamburg 1994).

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, supra note 61, at 39.

127 See DSU, supra note 82, at arts. 4(3) & (7).
shorter.\footnote{128}

\textit{b. Panel Phase}

When the Dispute Settlement Body is asked by the complaining party to establish a panel, it will decide the issue by “negative” consensus, i.e., a panel will be formed unless it is the consensus of the DSB not to do so.\footnote{129} As a result of this voting mode, the complaining party practically obtains a right to a panel.\footnote{130} The DSU stipulates that the panel is to be established at the DSB meeting following the one in which the request was made.\footnote{131} The Secretariat holds a list of “well-qualified governmental and/or non-governmental individuals” from which to choose.\footnote{132} Parties can oppose the nominations for the panel for compelling reasons only.\footnote{133} The qualification requirement aims at increasing the quality as well as the authority of panel reports.\footnote{134} As under GATT a panel is usually made up of three persons, unless the parties to the dispute agree to have five panelists.\footnote{135} If the

\footnote{128} In urgent cases a request for consultations must be answered within 10 days, and disputes must be settled within 20 days. \textit{See id.} at art. 4(8).

\footnote{129} \textit{See id.} at art. 6.

\footnote{130} \textit{See Backes, supra note 61, at 917.}

\footnote{131} \textit{See DSU, supra note 82, at art. 6.}

\footnote{132} \textit{Id.} at arts. 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 or 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.” \textit{Id.} at art. 8(1).

The panelists are supposed to be selected “with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.” \textit{Id.} at art. 8(2). Consequently, panelists who are not citizens of the disputing nations are clearly preferred. \textit{See DSU, supra note 82, at art. 8(3)}.

If one of the parties is a developing country and it so requests, one of the panelists must also be a citizen of a developing country. \textit{See id.} at art. 8(10).

\footnote{133} \textit{See id.} at art. 8(6).

\footnote{134} \textit{See Khansari, supra note 90, at 192.} The panel process is laid out in DSU, \textit{supra} note 82, at art. 12.

\footnote{135} \textit{See DSU, supra note 82, at art. 8(5).} The request for a five-member panel has to be made “within 10 days from the establishment of the panel.” \textit{Id.} “Experience has shown 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.” 1 SWACKER ET AL., \textit{supra} note 4, at 380.
parties cannot agree within 20 days on whom to appoint, either party may request the Director-General to choose the panelists.\textsuperscript{136} The Director General would then be required to do so.\textsuperscript{137} 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{138} In attempting to “eliminate drawn-out disputes over the terms of reference,”\textsuperscript{139} the DSU provides for compulsory Terms of Reference in case the parties do not agree on special terms.\textsuperscript{140} 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{141} The DSU requires the complete panel phase to be completed within six months.\textsuperscript{142} This time frame is limited to three months in cases of urgency, and it may exceptionally be extended up to nine months.\textsuperscript{143}

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{144} A panel is not allowed to interpret any of the provisions of the covered agreements.\textsuperscript{145} During its examination of the case, the panel follows detailed “Working Procedures.”\textsuperscript{146} After fixing the time table, the panelists receive the parties’ submissions, hear their arguments, and, if necessary,

\begin{footnotes}
\textsuperscript{136} See DSU, supra note 82, at art. 8(7).
\textsuperscript{137} See id. at art. 8(7).
\textsuperscript{138} See id. at art. 9(1).
\textsuperscript{139} Young, supra note 66, at 402.
\textsuperscript{140} See DSU, supra note 82, at art. 7.
\textsuperscript{141} See Khansari, supra note 90, at 192.
\textsuperscript{142} See DSU, supra note 82, at art. 12(8).
\textsuperscript{143} See id. at arts. 12(8) & (9). The DSB must be informed by the panel about the reasons for the delay. See id. at art. 12(9).
\textsuperscript{144} See id. at art. 11.
\textsuperscript{145} See WTO Agreement, supra note 9, at art. IX(2). “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations” of the covered agreements. Id.
\textsuperscript{146} Appendix 3 to the Understanding contains model Working Procedures that have to be followed if the panel does not decide otherwise. See DSU, supra note 82, at art. 12(1). These Working Procedures also contain a proposed time table for panel work. See id. at app. 3(12).
\end{footnotes}
request additional information. 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. Also, the DSU instructs the panel to hear the arguments of any member who is substantially interested in the matter. Nevertheless, the panel deliberates confidentially and drafts the report in absence of the parties.

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. If not misused to interfere with the panel’s internal working, the interim review stage “surely will constitute an incentive to more responsible reasoning and a guarantee against unpredictable arguments,” because the parties get another, final chance to argue before the panel. The quality of the panel and its acceptance should be enhanced.

The interim report becomes final and is circulated to each member provided that no party requests a (third) meeting with the panel. After

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147 See DSU, supra note 82, at arts. 8(1), 12(3)-(6). 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. See id. at art. 12(6) app. 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.” 1 SWACKER ET AL., supra note 4, at 393.

148 See DSU, supra note 82, at art. 13(2). For a description of the use of experts in the proceedings, see Vermulst & Driessen, supra note 91, at 131-34.

149 See DSU, supra note 82, at art. 10.

150 See id. at art. 14. For information regarding the confidentiality of information given by an expert review group, see id. at app. 4(5).

151 See DSU, supra note 82, at art. 15(1) & (2).


154 See Abbott, supra note 152, at 135.

155 See DSU, supra note 82, at art. 15(2).
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. The DSB is not empowered to change the report’s contents in any way. It may only accept or refuse the entire report.

c. Appeal

An appeal can only be filed by a party to the dispute, and third party members do not have the right to appeal. However, third party statements are considered by the Appellate Body. There is a strict time limit with regard to the proceedings. Normally, the period is 60 days, but in no case is it more than 90 days. Like panel proceedings, the Appellate Body’s proceedings are confidential, and the report is drafted without the presence of the parties. Even if it has been feared that including minority opinions weakens the “authoritative force of the reports,” the Appellate Body members may express their own appreciation of the case by an individual opinion—a tradition found in common law countries. However, these opinions are anonymous 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. The
Appellate Body, in contrast to the DSB, has the power to “uphold, modify or reverse the legal findings and conclusions of the panel,” but it may not remand the case. 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.

d. 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 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

supra note 83, at 386.

166 DSU, supra note 82, at art. 17(13).
167 The exclusion of remanding a case is a unique limitation that probably does not exist in any other “multitiered system of legal decision making.” Lowenfeld, supra note 29, at 484.
168 See DSU, supra note 82, at art. 17(14).
169 See Cocuzza & Forabosco, supra note 77, at 181 (citing DSU, art. 3). In case of a rejection, unilateral retaliatory actions of the member states are foreclosed. See DSU, supra note 82, at art. 23.
170 See DSU, supra note 82, at 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.” See id. at art. 26.
172 The problem of implementation and sanctions is treated by the DSU, supra note 82, at art. 21-23.
of the final decision by the DSB.\textsuperscript{173} Under the old system practically no institution observed whether the members complied with the recommendations and rulings.\textsuperscript{174} Therefore, the DSB will review the implementation after a six month period and continuously thereafter until the issue is completely resolved.\textsuperscript{175}

The DSU favors the withdrawal of the inconsistent measure as the best solution.\textsuperscript{176} It emphasizes that the effectiveness of the dispute settlement system depends on the "[p]rompt compliance with recommendations or rulings of the DSB."\textsuperscript{177} 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{178} 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{179} If it is unclear whether the measures undertaken to comply with the report are satisfactory, a second procedure under the DSU shall be initiated, preferably with the original panel.\textsuperscript{180}

The DSU 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{181} However, if the country does not comply with the report within the given time, a graded scheme of sanctions will apply.\textsuperscript{182} As a

\textsuperscript{173} See id. at art. 21(6).
\textsuperscript{174} Andreas F. Lowenfeld, Preface to HANDBOOK OF GATT/WTO DISPUTE SETTLEMENT, supra note 9, at viii; Young, supra note 66, at 404.
\textsuperscript{175} DSU, supra note 82, at art. 21(6).
\textsuperscript{176} Id. at art. 3(7).
\textsuperscript{177} Id. at art. 21(1).
\textsuperscript{178} Id. at art. 21(3).
\textsuperscript{179} Id. at art. 21(3). The 15 months period may be extended subject to an agreement between the disputing parties. Id.
\textsuperscript{180} Id. at art. 21(5).
\textsuperscript{181} See id. at art. 22(1).
\textsuperscript{182} See id. at art. 22.

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.

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
first possibility the disputing parties may agree on the payment of compensation. The DSU states that compensation is voluntary, meaning that a country cannot be forced to pay it. Almost nothing is said about the nature or measure of compensation. 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. The DSB has 30 days to decide the issue by negative consensus which means that retaliatory measures are introduced almost automatically. The suspension should first be sought in the same sector in which the inconsistency was found. If this seems unpractical or ineffective, suspension with regard to other sectors should be considered. If the complainant believes this to be insufficient and the circumstances are sufficiently serious, concessions or other obligations under another covered agreement can be suspended. Of course, the level of suspension must be equivalent to the level of the original nullification or

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 INT’L LAW. 1095, 1103 (1994). Also noteworthy is the outcome of the only GATT panel decision that allowed retaliation. 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. 1 SWACKER ET AL., supra note 4, at 377-78.

183 See DSU, supra note 82, at art. 22(1).
184 See Reitz, supra note 64, at 590.
185 See DSU, supra note 82, at art. 22(2).
186 See id. at art. 22(6).
187 See id. at art. 22(3)(a).
188 See id. at art. 22(3)(b).
189 See id. at 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.”
190 See id. at art. 22(3)(d).

The suspension of concessions or other obligations in other sectors is known as “cross-retaliation”. Pescatore, supra note 61, at 34.
impeachment. Whenever a dispute arises in terms of the level or scope of suspension, an arbitrator shall examine the question within 60 days after the date at which a reasonable period of time has expired. Retaliatory measures are considered only temporary until the inconsistent measure has been removed or a "mutually satisfactory solution is reached."

C. 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 expressed their discontent with some stipulations and have suggested ways to improve the dispute settlement system. The major ones will be discussed below.

One criticism is that the process is too secret and should be more open. The confidentiality of the proceedings is not favored by "many groups whose interests are immediately and directly affected by ... decisions" of the DSB, particularly regarding decisions involving environmental matters.

A second major criticism targets the lack of DSU provisions prescribing qualifications for appeals to the Appellate Body. Without a mechanism in place to discourage frivolous appeals, the Appellate Body would be overloaded thus delaying the adoption of the reports. Therefore, a minimum threshold for appeals to the Appellate Body should be estab-

191 See DSU, supra note 82, at art. 22(4).
192 See id. at art. 22(6). The arbitrators are either the original panel or an individual or group appointed by the Director-General. Id.
193 See id. at art. 22(8).
194 See Jackson, supra note 29, at 14-16; Dillon, supra note 83, at 399-402; Khansari, supra note 90, at 195-197; Montañà i Mora, supra note 67, at 176-180; Reitz, supra note 64, at 598-600; Young, supra note 66, 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 THE WORLD TRADE ORGANIZATION, supra note 9, at 695, 701-10.
195 See Jackson, supra note 29, at 14.
196 See Young, supra note 66, 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." 1 SWACKER ET AL., supra note 4, at 394.
197 See Montañà i Mora, supra note 67, at 151. Dillon, supra note 83, at 385.
lished.\textsuperscript{198}

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{199} Termination of infringing measures is, of course, more desirable than retaliation.\textsuperscript{200} Furthermore, the retaliatory measures only work effectively when member states of similar economic power are involved.\textsuperscript{201} 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{202}

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 for the contracting parties to reach an agreement on the substantive rules."\textsuperscript{203} 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{204}

\section*{III. THE NORTH AMERICAN FREE TRADE AGREEMENT}

As a point of comparison for the WTO, the North American Free Trade Agreement will be discussed. The North American Free Trade Agreement is "preeminently" a trade agreement.\textsuperscript{205} Its main purpose is the establishment of a free trade zone between Canada, Mexico and the United States.\textsuperscript{206} The agreement enumerates its objectives as the elimination of

\textsuperscript{198} See id.; Cocuzza & Forabosco, supra note 77, at 179. It is even feared that the overload of work would paralyze 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 J. WORLD TRADE 173, 178 (1995).

\textsuperscript{199} Young, supra note 66, at 407-08.

\textsuperscript{200} Lowenfeld, supra note 29, at 487.

\textsuperscript{201} Cocuzza & Forabosco, supra note 77, at 185; Khansari, supra note 90, at 196.

\textsuperscript{202} Dillon, supra note 83, at 400.

\textsuperscript{203} See Montañà i Mora, supra note 67, at 177.

\textsuperscript{204} 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. 1259, 1260.

\textsuperscript{205} See Saunders, supra note 23, at 278.

\textsuperscript{206} See NAFTA, supra note 20, at art. 101.
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.\textsuperscript{207}

A. NAFTA Institutions

The principal institution of NAFTA, the Free Trade Commission (FTC), consists of trade ministers or their designees.\textsuperscript{208} It meets at least once a year.\textsuperscript{209} Among its functions are the supervision of NAFTA's implementation, its further elaboration, and the resolution of disputes concerning interpretation or application.\textsuperscript{210} The Commission also establishes committees or working groups and supervises them.\textsuperscript{211} Decisions of the Commission are taken by consensus.\textsuperscript{212} 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.\textsuperscript{213} The Secretariat is composed of national sections, for which each member nation is responsible.\textsuperscript{214}

Outside the main agreement, the parties agreed to establish a North American Trade Secretariat in charge of coordinating the work of the NAFTA Secretariat's national sections by, for example, translating and

\textsuperscript{207} See id. at art. 102(1). This illustrates that NAFTA covers "non-classical" areas such as investment, telecommunications and intellectual property as well as the "classical" areas of most trade agreements that are related to the trade in goods.


\textsuperscript{209} See NAFTA, supra note 20, at art. 2001(5).

\textsuperscript{210} See id. at art. 2001(1). Furthermore, the Commission "considers any other matter that may affect the operation of [the] Agreement." Id. NAFTA dispute resolution panels are bound by the FTC's interpretations of the NAFTA provisions. See Appleton, supra note 20, at 146.

\textsuperscript{211} See NAFTA, supra note 20, at art. 2001(3) (Committees and working groups that are established under different provisions of the NAFTA are listed in Annex 2001.2.)

\textsuperscript{212} See id. at art. 2001(4).

\textsuperscript{213} See id. at art. 2002(1) & (3). The Secretariat also supports the work of committees and working groups established under NAFTA. Id. at art. 2002(3).

\textsuperscript{214} See id. at art. 2002(2).
archiving documents.\textsuperscript{215}

\subsection*{B. The Side Agreements}\textsuperscript{216}

After signing NAFTA, the parties concluded two Side Agreements on Environmental Cooperation and Labor Cooperation. The negotiation of these agreements became necessary when concerns were raised in the U.S. that NAFTA "would spur excessive environmental degradation and job loss."\textsuperscript{217} Environmentalists feared that Mexico would serve as a "pollution haven."\textsuperscript{218} Workers were concerned that the elimination of tariff and non-tariff barriers, the liberalization of investment rules, 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.\textsuperscript{219} Therefore, the Environmental and Labor Side Agreements "were instrumental in securing passage of the

\textsuperscript{215} See Grijalve & Brewer, supra note 208, at 2, 4-5, noting that the North American Trade Secretariat was created at the first meeting of the FTC on January 4, 1994.

\textsuperscript{216} The body of this article will only briefly address NAFTA’s Side Agreements. For more information on these agreements see Annex A.


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.

Neither Side Agreement contains labor or environmental norms but rather is a legal process. One of their aims is to make the countries enforce their own labor or environmental laws.

C. The Dispute Settlement Regimes

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

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221 See Saunders, supra note 23, at 303.
223 See NAAEC, supra note 24, at art. 3, 5 & 6; NAALC, supra note 25, at 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. See NAAEC, supra note 24, at art. 2 & 3; NAALC, supra note 25, at art. 1 & 2. The agreements also provide for the exchange of information and cooperation between the parties. NAAEC, supra note 24, at art. 1 & 10; NAALC, supra note 25, at art. 1, 10 & 11.
226 “[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 (2d ed., 1985).

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.

For a very detailed and critical analysis of U.S. and WTO AD and CVD provisions, see BHALA, supra note 36, at 601-842.
19).\(^{227}\) for which particular provisions are in place.\(^{228}\) Both the Environmental and the Labor Side Agreements also set up separate dispute resolution mechanisms, but they are very similar to the Chapter 20 system.\(^{229}\)

1. Experiences Under CFTA

Generally stated, the scattered conflict settlement procedures of NAFTA reflect the system that has already been in existence under CFTA.\(^{230}\) CFTA provided a general framework for settling disputes in Chapter 18, excepting financial services\(^{231}\) and AD/CVD cases,\(^{232}\) for which a special arrangement existed.

Chapter 18 created the Canada-U.S. Trade Commission, which was bilaterally composed of cabinet-level representatives.\(^{233}\) The Commission facilitated consultations and negotiations between parties when a dispute arose.\(^{234}\) If these efforts remained unsuccessful, the Commission would establish a panel of experts.\(^{235}\) Three types of panel proceedings were

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\(^{227}\) NAFTA, supra note 20, at art. 2004.

\(^{228}\) For investment disputes, see NAFTA, supra note 20, at art. 1101-39 & Annexes; for AD/CVD cases, see id. at art. 1901-11 & Annexes. Chapter 11 will not be discussed because it deals with disputes between a private investor and the country of investment. See id. at art. 1115 & 1116.

\(^{229}\) NAAEC, supra note 24, at art. 22-36; NAALC, supra note 25, at art. 27-41.


\(^{231}\) The agreement stipulates clearly that "[n]o other provision . . . confers rights or imposes obligations on the [p]arties with respect to financial services." CFTA, supra note 21, at art. 1701(1).

\(^{232}\) Chapter 19 contains the dispute settlement system for AD/CVD cases.

\(^{233}\) See CFTA, supra note 21, at ch. 18, art. 1802.

\(^{234}\) See id. at ch. 18, art. 1802(1), 1805.

\(^{235}\) See id. at ch. 18, art. 1807(2). The panels established under Chapter 18 and 19 consisted of five persons. See id. at ch. 18, art. 1807(3) & Annex 1901.2(2).
possible: the first was binding arbitration in safeguard cases\textsuperscript{236} and in cases when the governments mutually agreed,\textsuperscript{237} and the second was panel recommendations.\textsuperscript{238} In the third case, the Commission would try to find an agreement in order to achieve a final resolution of the dispute.\textsuperscript{239} If the disagreement continued, the party whose rights were being infringed upon was entitled to retaliation until a resolution was found.\textsuperscript{240}

The system installed by Chapter 19 in connection with AD/CVD cases was unusual.\textsuperscript{241} CFTA did not contain any stipulation in terms of harmonizing AD and CVD laws; instead, every country continued to apply its own national law.\textsuperscript{242} A party could request 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{243} In the latter case, the panel had to apply the standard of review and general legal principles of the importing country.\textsuperscript{244} The panel

\textsuperscript{236} See id. at ch. 11, art. 1103.
\textsuperscript{237} See id. at ch. 18, art. 1806(1). No panels came together under articles 1103 or 1806, so they did not play any role in practice. See Harry B. Endsley, \textit{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).
\textsuperscript{238} See CFTA, supra note 21, at ch. 18, art. 1807.
\textsuperscript{239} See id. at ch. 18, art. 1807(8).
\textsuperscript{240} See id. at ch. 18, art. 1807(9).
\textsuperscript{241} See William J. Davey, \textit{Dispute Settlement under the Canada-U.S. Free Trade Agreement, in TRADE-OFFS ON FREE TRADE}, supra note 21, at 173, 177.
\textsuperscript{242} See CFTA, supra note 21, at ch. 19, art. 1902(1). The U.S. and Canada were not able to agree on harmonizing their AD/CVD laws “despite, for example, their common intention at the start of the negotiations to develop a new body of rules regulating government subsidization.” BELLO ET AL., supra note 230, at 494. Therefore they established a working group to take care of the matter. See CFTA, supra note 21, at ch. 19, art. 1907. The fate of this Working Group remains an open question because “[i]t has been very little activity by [it].” PAUL, HASTINGS, JANOFSKY & WALKER, NORTH AMERICAN FREE TRADE AGREEMENT: SUMMARY AND ANALYSIS 108 (1993). For the negotiating history of the CFTA, see BELLO ET AL., supra note 230, at 493-95; WINHAM, supra note 21, at 23-42.
\textsuperscript{243} See CFTA, supra note 21, at ch. 19, art. 1903, 1904.
\textsuperscript{244} See id. at ch. 19, 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. See Andreas F. Lowenfeld, \textit{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 their expectations because its application was limited to five years (CFTA, supra note 21, at
decisions were binding on the parties. An appeal was not possible, but the agreement provided for an "Extraordinary Challenge Procedure" designed for "issues of impropriety which bring the entire system of panel review into question."

Generally, CFTA dispute settlement system worked "extraordinarily well," with the Chapter 19 process being more successful than the Chapter 18 process. 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 CFTA, and not dividing along national lines. Most of the panel decisions seem to be well accepted. Also, compliance

ch. 19, art. 1906), but at the end of those five years, the NAFTA was signed. See NAFTA, supra note 20.

245 See CFTA, supra note 21, at ch. 19, art. 1904(9).
246 See id. at ch. 19, art. 1904(13) & Annex 1904(13).
247 Appleton, supra note 20, 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, supra note 21, at ch. 19, art. 1904(13) & Annex 1904(13)(1). In the only two challenges filed, the Committee unanimously upheld the original panels' decisions. See Huntington, supra note 153, at 437.
248 See Lowenfeld, supra note 244, at 334.
One scholar noted that "the 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 244, at 334.
For criticism and reform proposals see Bello et al., supra note 230, at 515-16; John Moss, Summary of Proceedings of the Seminar on Dispute Resolution under the Canada-United
with the decision did not constitute a problem.  

A sign that even politicians appreciated the panel’s work is that CFTA rules for the general procedure and the AD/CVD procedure were carried over into NAFTA with only minor changes.

2. The General Dispute Settlement Mechanism

NAFTA opens up an interesting option for a complaining party: when a dispute arises under both the provisions of NAFTA and GATT, the complaining party may select either forum for settlement. Once the procedures have started under one forum, generally the other one is excluded. On the other hand, a party can enforce NAFTA provisions against another party only by the means described in NAFTA itself, not in domestic courts.

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

*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, 857, 859-60, 863 (1992).*


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 224, at 19; Rosa, *supra* note 224, at 260-83.

253 See NAFTA, *supra* note 20, at 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. See NAFTA, *supra* note 20, at art. 2005(3) & (4).

254 See NAFTA, *supra* note 20, at art. 2005(6); see also id. at art. 2005(2) (regarding the involvement of a third party).

months.256

a. Consultations

The resolution of a conflict under Chapter 20, i.e. with regard to NAFTA except AD/CVD and investment cases, begins with consultations.257 The Agreement requests that the parties "make every attempt to arrive at a mutually satisfactory resolution . . . through consultations,"258 thus "clearly emphasis[ing] the prevention of disputes in the first instance or their cooperative resolution through consultations."259 Thus, it can be said that "the underlying principle of Chapter 20 is that of amicable agreement."260 A third party that believes it has a substantial interest in the matter can participate in the consultations.261

256 Id.
257 See NAFTA, supra note 20, at art. 2006(1). A party can initiate the Chapter 20 mechanism in three situations: when a dispute exists 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. See id. at 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 NAFTA. See Rojas, supra note 224, at 21.
258 See NAFTA, supra note 20, at art. 2006(5). The CFTA, however, did not contain a similar provision. See Rojas, supra note 224, at 20. It has been noted that this "new provision constitut[es] an international obligation of the three parties." Id.
259 Endsley, supra note 237, at 663. See also Winham, supra note 252, at 266. But is not clear whether many disputes will be settled by consultations. "As of December 1996, only eight disputes formally entered the Chapter 20 consultations phase." David Lopez, Dispute Resolution Under NAFTA: Lessons from Early Experience, 32 TEX. INT'L L.J. 163, 168 (1997). "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." Id. at 170-71.
260 See Siqueiros, supra note 224, at 387. It is noteworthy that NAFTA eliminated binding arbitration which CFTA required in certain instances. See Siqueiros, supra note 224, at 385. "Although this elimination seems a bold stroke, the change is not of great practical importance . . . [because] neither arbitration process has been used at all under [CFTA], and there is no reason to believe there would be a great demand for them under NAFTA." Rosa, supra note 224, at 285.
261 See NAFTA, supra note 20, at art. 2006(3).
b. Special Commission Meeting

If the parties are not able to reach an accord within 45 days any party may ask the Free Trade Commission for a meeting, which is required to take place within the following ten days. In order to assist the parties in finding a solution, the Commission can employ good offices, conciliation and other similar mechanisms, call on technical experts, establish working groups, and make recommendations.

c. Panel Phase

If the parties still disagree, either can request to set up a panel 30 days after the Commission’s meeting. A third party that has a substantial interest in the matter is entitled to join as a complaining party. The Agreement stipulates that “the Commission shall establish an arbitral panel.” Despite consensus being required for decision making, “the mandatory nature of the language suggests that the representatives of the three parties are legally bound to approve the establishment of the panel.” This means that the requesting party has, in fact, a right to a panel.

A panel consists of five persons, usually chosen from a pre-established roster of “individuals who are willing and able to serve as

262 See id. at 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.

263 See id. at art. 2007(4).

264 See NAFTA, supra note 20, at 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, supra note 20, at 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. See Huntington, supra note 153, at 418.

265 See NAFTA, supra note 20, at art. 2008(1).

266 See id. at art. 2008(3).

267 See id. at art. 2008(2).

268 See id. at art. 2001(4).

269 See Huntington, supra note 153, at 419.

In case of a two-party dispute, the parties have 15 days to agree on the chair of the panel; otherwise one of the disputing parties selected by lot nominates the chair. The chair must not be a citizen of that party. Within the next 15 days each party chooses two citizens of the other party as panelists—a so-called "reverse selection process" which ensures impartiality. If no panelist is chosen before the deadline, the selection will be done by lot. For a three-party dispute, the Agreement slightly modifies the method of selection. It has been observed that the possibility for a party to block the selection process is very

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271 See NAFTA, supra note 20, at art. 2009(1), 2011(1). The individuals listed in the roster have to meet 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 party; and
(c) comply with a code of conduct to be established by the Commission."
Id. at art. 2009(2), 2010(1).

A non-roster individual may be nominated as a panelist as well, but he or she is subject to a peremptory challenge from another disputing party. See id. at art. 2011(3).

272 See NAFTA, supra note 20, at art. 2011(1)(b). Even if the system works well theoretically, some obstacles occurred during its practical application. The experience of 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 a fifth panelist, the chairperson. Canada and the United States finally agreed on a chairman . . . in January 1996." Lopez, supra note 259, at 172 (citations omitted). It seems that in this case neither the deadlines were respected nor was the stipulated procedure (selection by lot) followed.

273 See NAFTA, supra note 20, at art. 2011(1)(c).
274 See JOHNSON, supra note 20, at 523; see also Holbein & Carpentier, supra note 252, at 562.
275 See Endsley, supra note 237, at 682.
276 See NAFTA, supra note 20, at art. 2011(1)(d).
277 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 [party or [parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such [party . . . [T]he [party complained against shall select two panelists, one of whom is a citizen of a complaining [party, and the other of whom is a citizen of another complaining [party. The complaining [parties shall select two panelists who are citizens of the [party complained against." Id. at art. 2011(2)(b) & (c).
limited—a situation which promotes the integrity of the settlement system.\textsuperscript{278}

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 Agreement.\textsuperscript{279} Pursuant to the latter ones, the panel has to examine the factual and legal aspects of the case.\textsuperscript{280} With respect to information or technical advice, the panel may question any person or body deemed appropriate if the disputing parties so agree.\textsuperscript{281} Furthermore, the Agreement provides for a written report by a scientific review board for any scientific matter if so requested by a party or initiated by the panel (unless a party objects).\textsuperscript{282}

Third parties are authorized to participate in the hearings and make submissions to the panel.\textsuperscript{283} Nevertheless, the entire panel proceedings except the final report must be confidential.\textsuperscript{284}

\textsuperscript{278} See Bialos & Siegel, \textit{supra} note 73, at 617.

\textsuperscript{279} See NAFTA, \textit{supra} note 20, at art. 2012(1)-(3). 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;" and confidentiality during most of the procedure. \textit{See id.} at art. 2012(1). The Model Rules of Procedures are a new concept that has not existed under the CFTA. \textit{See Siqueiros, supra} note 224, at 386.

\textsuperscript{280} See NAFTA, \textit{supra} note 20, at art. 2012(3), 2016(2).

\textsuperscript{281} \textit{See id.} at art. 2014.

\textsuperscript{282} \textit{See id.} at art. 2015(1). It is stipulated that the board consists of "highly qualified, independent experts" selected by the panel. \textit{See id.} at 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 the lobby." Winham, \textit{supra} note 252, at 258 (citation omitted).

\textsuperscript{283} See NAFTA, \textit{supra} note 20, at art. 2013.

\textsuperscript{284} \textit{See id.} at art. 2012(1)(b).
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 established.\textsuperscript{285} Separate opinions may be drafted on matters to which there has been no unanimous agreement, but the identity of their authors remains undiscovered.\textsuperscript{286} Thus protests with respect to a possible national bias are avoided, and the integrity of the process is ensured.\textsuperscript{287}

Within 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.\textsuperscript{288} Thirty days after presenting the initial report, the panel must issue its final report including anonymous separate opinions and reports of scientific review boards.\textsuperscript{289} “Panels will only issue determinations and recommendations, and not arbitral awards.”\textsuperscript{290}

d. Implementation and Enforcement of Panel Reports

Once the final report has been issued, it is up to the parties to find a resolution to the dispute, “which normally shall conform with the determinations and recommendations of the panel,”\textsuperscript{291} although conformity is not a requirement.\textsuperscript{292} Nevertheless, even a non-binding panel report has a certain

\textsuperscript{285} See id. at 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. 85 & n.152-54. For the experience made with regard to the deadlines, see infra note 289.

\textsuperscript{286} See NAFTA, supra note 20, at art. 2016(3), 2017(2).

\textsuperscript{287} See Bialos & Siegel, supra note 73, at 617-18.

\textsuperscript{288} See NAFTA, supra note 20, at art. 2016(4) & (5).

\textsuperscript{289} See id. at art. 2017(1)-(3). The final report shall be transmitted to the Commission. See id. at 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 no 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 259, at 172-73 (citations omitted).

\textsuperscript{290} Siqueiros, supra note 224, at 386.

\textsuperscript{291} NAFTA, supra note 20, at art. 2018(1).

\textsuperscript{292} 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”. See Huntington, supra note 153, at 426.
influence on the disputing parties. \textsuperscript{293} 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{294}

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{295} The use of retaliatory measures can be regarded as an "automatic right" because no further authorization is needed. \textsuperscript{296} 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{297} The suspension must first be sought in the sector or sectors affected. \textsuperscript{298} If the complaining party believes this to be impracticable or ineffective, it can suspend benefits in other sectors. \textsuperscript{299} The application of sanctions has to be discontinued when a mutually agreed upon solution to the dispute is found. \textsuperscript{300}

In addition, the parties' actions during the implementation phase are not monitored by any NAFTA institution. \textsuperscript{301} But should any party believe that

\textsuperscript{293} See 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 this 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." \textit{Id.} at 2180-82 (citation omitted).

\textsuperscript{294} See NAFTA, supra note 20, at 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. See CFTA, supra note 21, at art. 1807(8).

\textsuperscript{295} See NAFTA, supra note 20, at art. 2019(1). With respect to the economic effect of sanctions, see supra note 182.

\textsuperscript{296} See Huntington, supra note 153, at 425.

\textsuperscript{297} See Johnson, supra note 293, at 2181.

\textsuperscript{298} See NAFTA, supra note 20, at art. 2019(2)(a).

\textsuperscript{299} See \textit{id.} at art. 2019(2)(b).

\textsuperscript{300} See \textit{id.} at art. 2019(1).

the "level of benefits suspended by a [p]arty . . . is manifestly excessive," the Commission establishes a panel to investigate the issue.\textsuperscript{302} The effectiveness of this provision has been questioned because the reviewing panel only makes recommendations, whereas any action has to be taken by the disputing parties or the FTC, and "[s]ince the [p]arty 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."\textsuperscript{303}

3. Antidumping and Countervailing Duty Cases

The parties that negotiated NAFTA were unable to agree on harmonized rules and standards regulating the investigation and imposition of antidumping and countervailing duties.\textsuperscript{304} Therefore, as was the rule under CFTA, every country keeps its own AD and CVD laws.\textsuperscript{305} NAFTA also provides a formal mechanism for resolving disputes involving the review of statutory amendments to the parties' laws\textsuperscript{306} and for the review of final AD and CVD duty determinations made by the relevant national authorities.\textsuperscript{307} "[P]roblems that may arise with respect to the implementation or operation

\textsuperscript{302} See NAFTA, supra note 20, at art. 2019(3), (4).

\textsuperscript{303} See Rosa, supra note 224, at 286.

\textsuperscript{304} See JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER NAFTA CHAPTER 19 169-70 (1994); Debra P. Steger, Dispute Settlement, in TRADE-OFFS ON FREE TRADE, supra note 21, 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, HASTINGS, JANOFSKY & WALKER, supra note 242, at 107. For an overview of the parties' different aims during the negotiations, see CANNON, supra, at 167-68, and Oelstrom, supra note 224, at 793-96, 804-05.

\textsuperscript{305} See NAFTA, supra note 20, at art. 1902(1). Consequently, one author has called this principle the "cornerstone of dispute resolution under Chapter 19." CANNON, supra note 304, at 7. Unlike CFTA, NAFTA "has no sunset provision limiting the continuation of the Chapter 19 binational process, and it drops the working party established in [C]FTA to develop different rules for subsidies and antidumping procedures." Winham, supra note 252, 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, HASTINGS, JANOFSKY & WALKER, supra note 242, at 108. One author has criticized NAFTA because it does not contain any provision dealing with the harmonization of AD and CVD laws. See Huntington, supra note 153, at 441.

\textsuperscript{306} See NAFTA, supra note 20, at art. 1903.

\textsuperscript{307} See id. at art. 1904.
of . . . Chapter [19]" are to be solved by annual consultations. Furthermore, Chapter 19 requires the parties to adapt their laws to the NAFTA provisions according to a schedule. It also obliges any party to notify the others if it amends its AD or CVD laws.

a. 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 that these amendments violate the WTO Antidumping Agreement or the object and purpose of NAFTA, irrespective of the amendment having the "function and effect of overturning a prior [panel] decision" regarding AD and CVD duties.

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308 See id. at art. 1907(1).
309 See id. at 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. See CANNON, supra note 304, at 88, 95-100.
310 See NAFTA, supra note 20, at art. 1902(2). Consultations prior to the enactment of the amendment can be requested. See id. at art. 1902(2)(c).

It became a necessity to include a special chapter that contains "more elaborate procedures for dispute resolution of matters 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 the 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 304, at 4, 5.

311 See NAFTA, supra note 20, at art. 1903(1). The panel analyzes whether (a) the amendment does not conform to the provisions of Article 1902(2)(d)(i) or (ii); or (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.

Article 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
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.\textsuperscript{312} The qualification requirements for the panelists have been questioned, because, while the condition that they be experts in trade law is laudable, "their expertise does not necessarily imbue them with judicial qualities."\textsuperscript{313} Consulting with the other party involved, each disputing party has 30 days to nominate two candidates.\textsuperscript{314} 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.\textsuperscript{315} The selection process is designed to encourage the selection of fair panelists.\textsuperscript{316} If one of the deadlines is not met the missing candidate is chosen by lot.\textsuperscript{317} The parties are required to agree on a fifth panelist within 55 days of the request for a panel.\textsuperscript{318} If no agreement can be reached, the drawing of lots
will determine which party is to select the fifth panelist.\textsuperscript{319} Like the appointment of the chairman, the panel takes all decisions by majority vote.\textsuperscript{320}

To conduct the review of statutory amendments, the panel establishes rules of procedure.\textsuperscript{321} The panel conducts its deliberations in confidentiality.\textsuperscript{322} 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.\textsuperscript{323} The panel may recommend appropriate modifications to the amendments if it has found a violation of the said provisions.\textsuperscript{324}

A time limit of 14 days is set for the parties to object to the initial report; otherwise it becomes final.\textsuperscript{325} In case of an objection, the panel has 30 days to reconsider its initial report and to re-examine the issue.\textsuperscript{326} The panel must present its "final opinion" which might, like the initial report, include dissenting and concurring opinions.\textsuperscript{327}

The panel's report is not binding on the parties but just declaratory.\textsuperscript{328} 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{329} The complaining party may resort to self-help if within nine months following the end of the consultations, no modifications to the amendment have been made and no other agreement has

\textsuperscript{319} Id.
\textsuperscript{320} See id. at Annex 1901.2(5). The five panelists select a chairman "from among the lawyers on the panel by majority vote [; otherwise] by lot . . ." Id. at Annex 1901.2(4).
\textsuperscript{321} See id. at 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 id. at Annex 1903.2(1), (2), (5) & (6), for instance.

According to the Agreement "[t]he procedure shall ensure a right to at least one hearing before the panel, as well as the opportunity to provide written submissions and rebuttal arguments." Id. at Annex 1903.2(1).

\textsuperscript{322} See id. at Annex 1903.2(1).
\textsuperscript{323} See id. at Annex 1903.2(1) & (2).
\textsuperscript{324} See id. at Annex 1903.2(3).
\textsuperscript{325} See id. at Annex 1903.2(3) & (4).
\textsuperscript{326} See id. at Annex 1903.2(4).
\textsuperscript{327} See id. at 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{328} See id. at art. 1903(1); Annex 1903.2(4).
\textsuperscript{329} See id. at art. 1903(3)(a).
been reached.\textsuperscript{330} Self-help consists of either the enactment of "comparable legislative or equivalent executive action" or the termination of the Agreement regarding the violating party.\textsuperscript{331}

\textit{b. 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{332} Such panels are considered to be less biased than the national courts.\textsuperscript{333} Moreover, the panels use simpler procedures\textsuperscript{334} and act more expeditiously than national courts.\textsuperscript{335}

\textit{i. Panel Phase}

Once a final determination concerning the application of an AD or CVD duty for goods of a 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.\textsuperscript{336} The selection of the panelists and the establishment of the panel is carried out exactly the same way as for the panels

\textsuperscript{330} See id. at art. 1903(3)(b).
\textsuperscript{331} Id.
\textsuperscript{332} See id. at art. 1904(1). Once a party has chosen the panel procedure, a national judicial review is excluded. See id. at art. 1904(11).
\textsuperscript{333} See Johnson, supra note 293, at 2185. See also Deyling, supra note 313, 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 250, at 829.
\textsuperscript{335} See CANNON, supra note 304, at 35, 44; Horlick & DeBusk, supra note 21, at 30.
\textsuperscript{336} See NAFTA, supra note 20, at 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. See id. at art. 1901(4). 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 & SCHACHTER, supra note 21, at 525-31.
to review amendments to AD and CVD laws.\textsuperscript{337}

The panel carries out its investigation pursuant to the rules of procedure established by the parties.\textsuperscript{338} The rules include a tight time schedule because the goal is to have a final decision within 315 days of the request for the panel.\textsuperscript{339} The panel inspects the record of the national authority that imposed the duty, receives briefs and reply briefs of the parties, and hears their oral arguments.\textsuperscript{340} These proceedings are limited to 195 to 210 days.\textsuperscript{341} Because this timetable is the same as under CFTA, NAFTA AD/CVD panels are likewise expected to “issue prompt decisions.”\textsuperscript{342} The panel determines whether the imposition of the duty was correct under the national law of the importing party.\textsuperscript{343} It has to “apply the standard of review ... and the legal principles that a court of the importing [p]arty otherwise would apply.”\textsuperscript{344} 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

\begin{itemize}
\item \textsuperscript{337} See NAFTA, supra note 20, at art. 1901(2) (requiring that panels be established in accordance with Annex 1901.2). See also id. at Annex 1901.2 (providing procedures for establishment and selection of panel).
\item \textsuperscript{338} See id. at 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.
\item \textsuperscript{339} See id. at art. 1904(14).
\item \textsuperscript{340} Id. 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.” See id. at art. 1904(7).
\item \textsuperscript{341} See NAFTA, supra note 20, at art. 1904(14). “[T]he rules [of procedure] ... shall allow: ... 
  (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 argument ....” Id. at art. 1904(14).
\item \textsuperscript{342} Horlick & DeBusk, supra note 21, at 29. The authors consider that “[t]he many interim deadlines prevent the panels from falling behind schedule.” Id.
\item \textsuperscript{343} See NAFTA, supra note 20, at art. 1904(1) & (2).
\item \textsuperscript{344} Id. at 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 304, at 61-75; JOHNSON, supra note 20, at 532-33.
\end{itemize}
they "may have little expertise in the art of judging." Others have feared that interpretations of the standard of review might develop differently between the panels and the courts. Interestingly, the same arguments have been brought forth against CFTA panels, which, however, worked well and did not exceed their competence. Likewise, there are no indications why the system should not work well under NAFTA.

The panel is given 90 days to write and issue its report. Only the panelists take part in the confidential deliberations. The panel's deci-

345 See Deyling, supra note 313, at 364-67. On the other hand, "[t]o such panelists issues that may be arcane to lawyers or judges not specialized in the complex field 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 249, at 714.

346 See Burke & Walsh, supra note 334, at 541-44 (discussing Canadian and Mexican standards of review); see also Cannon, supra note 304, at 35, 50.

347 See supra p. 97-98. "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 temptation to develop a distinctive jurisprudence." Huntington, supra note 153, 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. Even if not based on the structure of the legal system there are also differences between Canadian and U.S. law. But, as experience under CFTA shows, "Canadian panelists have adeptly grasped U.S. trade law issues and shown no hesitancy in quizzing counsel on their position [, and the questions of U.S. panelists have reflected their 'informed experience']." Horlick & DeBusk, supra note 21, at 33 (citation omitted). 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 237, at 695. See also Moyer, supra note 249, at 714 (stating that panels involving Mexico will have to overcome legal and cultural barriers.). One has to bear in mind first that the AD and CVD laws are written codes in the U.S. and Canada as well as in Mexico, and, second, that it is just a question of becoming familiar with each other's system. See Andreas W. Lowenfeld, Binational Dispute Resolution Procedures Under the Canada-United States Free Trade Agreement, Panel Discussion, (April 23, 1991), supra note 249, at 430-31. See also Johnson, supra note 20, at 541. However, it has been asked if it is "realistically possible" to require the panelists to have the same competence as a judge, in part because these panels are created on an ad hoc basis. See Burke & Walsh, supra note 334, at 544.

348 See NAFTA, supra note 20, at art. 1904(14).

sions are made according to majority rule, but the report may also contain concurring and dissenting opinions. The panel has two choices: either to confirm the determination of the national authority, or to remand it, i.e., the panel is not authorized to change the amount of the duty imposed or otherwise alter the determination. The parties are bound by whatever the panel decides. In case of a remand, the panel is asked to “establish as brief a time as is reasonable for compliance with [it].” It may become 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.”

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,

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350 See NAFTA, supra note 20, at Annex 1901.2(5).
351 See id. at art. 1904(8).
352 See id. at art. 1904(9). National law cannot install a domestic procedure for appeals from a panel decision. See id. at art. 1904(11). Although panels decision 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 one hand, these decisions are considerably more ‘binding’ than 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 [p]arties with respect to the particular matter between the [p]arties that is before the panel, . . . [i.e., these decisions] will be accorded no precedential value.” Huntington, supra note 153, at 434-35 (citations omitted).
353 See NAFTA, supra note 20, at art. 1904(8). When calculating a reasonable 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.
354 Id. at art. 1904(8).
355 See id. at art. 1905. The Safeguard Mechanism will be discussed 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;
the second by the Extraordinary Challenge Procedure.\textsuperscript{356}

\textit{ii. 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.\textsuperscript{357} In such a case the complaining party can ask for consultations, which are to start within 15 days following the request.\textsuperscript{358} 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.\textsuperscript{359}

The three special committee members are selected from the same roster and in the same way as the Extraordinary Challenge Committee members.\textsuperscript{360} 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.\textsuperscript{361} A final report including separate, anonymous opinions is to be issued 30 days thereafter.\textsuperscript{362}

If the committee holds that the party complained against is responsible for non-compliance with the panel report or otherwise impairing the panel

\begin{itemize}
  \item[(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
  \item[(d)] has resulted in a failure to provide opportunity for review of a final determination by a[n independent] panel or court . . .”
\end{itemize}

\textit{Id.} at art. 1905(1). CFTA did not contain similar “safeguarding” provisions. \textit{See} Winham, \textit{supra} note 252, at 268.

\textsuperscript{356} See NAFTA, \textit{supra} note 20, at art. 1904(13) & Annex 1904.13.

\textsuperscript{357} See NAFTA, \textit{supra} note 20, at 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. \textit{Id.} at art. 1905(1).

\textsuperscript{358} See id. at art. 1905(1).

\textsuperscript{359} See id. at art. 1905(2) & (3).

\textsuperscript{360} See id. at art. 1905(4) & (5); Annex 1904.13.

\textsuperscript{361} See id. at art. 1905(6), Annex 1905.6. \textit{See also} CANNON, \textit{supra} note 304, at 105. For the special committee’s rules of procedure, see NAFTA, \textit{supra} note 20, at Annex 1905.6. A schedule for the Safeguard Procedure is found in CANNON, \textit{supra} note 304, at 105.

\textsuperscript{362} See NAFTA, \textit{supra} note 20, at art. 1905(6), Annex 1905.6.
process, the parties are invited to start consultations.\textsuperscript{363} 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{364} 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{365} If a 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{366} The effectiveness of the Safeguard Mechanism has been doubted because its use would indicate a failure of the entire Chapter 19 process.\textsuperscript{367}

\textbf{iii. The Extraordinary Challenge Procedure}

A party may attack a panel’s final decision only under the very restricted conditions of the Extraordinary Challenge Procedure. 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

\begin{itemize}
  \item Weid. id. at art. 1905(7).
  \item See id. at art. 1905(8).
  \item See id. at art. 1905(9).
  \item See id. at art. 1905(10).
  \item See id. at art. 1905(11).
\end{itemize}

\textsuperscript{367} See Winham, supra note 252, 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.” \textit{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 153, at 438. See also CANNON, supra note 304, at 107.

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 153, 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 220, at 366.
But of course, one could ask if only speed should matter in light of the complex nature of the cases. The Extraordinary Challenge Procedure must not be considered as a regular appeal; it is in fact far from that.

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. Secondly, it is necessary that "any of [these] actions . . . has materially affected the panel's decision and threatens the integrity of the binational panel review process."

Thus, in contrast to the Chapter 19 panels which work within the limits of the existing domestic law, "challenge committees construing and applying
[the Article 1904(3)] are fashioning a new jurisprudence.\textsuperscript{373} The functioning of the panel process will "undoubtedly" be affected by the newly created case law.\textsuperscript{374} Therefore, it has been predicted that "the arbitral model of nonreviewable dispute resolution will remain intact" if the decisions issued by the Extraordinary Challenge Committee (ECC) "continue to limit recourse to extraordinary challenges to truly extraordinary abuses of the Chapter 19 panel process."\textsuperscript{375}

Once a complaint has been filed, the parties are given 15 days to set up a three-person ECC.\textsuperscript{376} The committee members are "judges or former judges" listed in a pre-established roster.\textsuperscript{377} Every party nominates one committee member, and the drawing of lots decides which party is to select the third member.\textsuperscript{378} "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."\textsuperscript{379}

Rules of procedure that have to be established by the parties "shall provide for a decision . . . within 90 days."\textsuperscript{380} The ECC 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.\textsuperscript{381} If it is not, the committee will deny the challenge, thereby

\textsuperscript{373} See Moyer, supra note 249, at 724.
\textsuperscript{374} Id.
\textsuperscript{375} Id.
\textsuperscript{376} See NAFTA, supra note 20, at Annex 1904.13(1).
\textsuperscript{377} Id. Compared to 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 them to be or have been judges. Just the same, one author has criticized that, in contrast to Chapter 19 panelists, the ECC 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 250, at 353-54.
\textsuperscript{378} See NAFTA, supra note 20, at Annex 1904.13(1).
\textsuperscript{379} Bessko, supra note 250, at 354.
\textsuperscript{380} See NAFTA, supra note 20, at Annex 1904.13(2).
\textsuperscript{381} See id. at art. 1904(13) & Annex 1904.13(3). "By expanding the period of review [which was 30 days under CFTA] and requiring ECCs to look at the panel's underlying legal and factual analysis [which was not contained in 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, reprinted in
upholding the original panel's decision. But if the ECC 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. Criticism and Reform Proposals of NAFTA

Numerous suggestions for reform have been proposed, some of which have already been made for 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 NAFTA. However, NAFTA negotiators considered such an institution undesirable or politically damaging. After the conclusion of NAFTA, the Joint Working Group nevertheless reissued the proposal for a permanent tribunal responsible for interpretation.

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. Such an appellate tribunal was considered to "facilitate uniformity and coherence in the interpretation of regional norms."


NAFTA, supra note 20, at Annex 1904.13(3).

Id.

Id.

See Joint ABA/CBA/BM Working Group on Dispute Settlement, supra note 250, at 863.


See CANNON, supra note 304, at 224; Burke & Walsh, supra note 334, at 562; Deyling, supra note 313, at 370; Fitzpatrick, supra note 16, at 91-93.

See Fitzpatrick, supra note 16, at 92. See also CANNON, supra note 304, at 174.
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." A permanent tribunal would "develop a consistent jurisprudence" more easily than ad hoc panels. But the creation of a permanent tribunal might also cause problems. Given the fact that the arbitration procedures under CFTA has been used only five times, it is hard to believe that a permanent institution "would have enough work to justify its existence." 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.

Another point of criticism concerns the secrecy of the proceedings. It was proposed to open them more so that the public can have access not only to the final panel report but also to other documents like party submissions.

Furthermore, the effectiveness of sanctions in the form of retaliatory measures has been questioned. "[B]ecause of the size difference and relative trade dependence of Mexico and Canada on the United States, [a] retaliatory suspension of benefits of 'equivalent effect' would hurt Mexico and Canada proportionately more than the United States."

IV. COMPARATIVE ANALYSIS

In order to evaluate the different settlement regimes, this chapter will compare the World Trade Organization Dispute Settlement Understanding and NAFTA settlement procedures. 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

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390 See Rosa, supra note 224, at 301-02. See also Castel, supra note 230, at 126; Johnson, supra note 293, at 2185-86.
391 See Johnson, supra note 293, at 2185.
392 See id. at 2186. See also Garvey, supra note 222, at 452.
393 See Johnson, supra note 293, at 2186. See also Oelstrom, supra note 224, at 790 n.68.
394 See Oelstrom, supra note 224, at 790.
395 See Bialos & Siegel, supra note 73, at 620.
396 See Hage, supra note 230, at 375-76; Rosa, supra note 224, at 298. Of course, the same arguments can be used to oppose the present system of sanctions under the WTO.
397 Rosa, supra note 224, at 298-99. See also Barber, supra note 301, at 1016.
initial process, whereas in the other cases it is the first proceeding. Chapter 19 differs in most aspects from the other agreements which have, very basically, the same structure.

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, whereas NAFTA Chapter 19, Chapter 20 and the Side Agreements set up their own systems and institutions. However, common to the DSU, NAFTA Chapter 20, and the Side Agreements is the establishment of permanent institutions that are distinguishable from the contracting parties, even if composed thereof. 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. It should be noted here that the voting modus in the bodies differs: the DSB decides by "negative" consensus, the FTC and both Side Agreement Councils basically by consensus.

A. Consultations

Another 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. The exception is Chapter 19, which does not require consultations.

398 See DSU, supra note 82, at art. 1(1).
399 See NAFTA, supra note 20, at art. 1901(2), 1903, 1904, 2001, 2006-19; NAAEC, supra note 24, at art. 8, 22-36; NAALC, supra note 25, at art. 8, 20-41.
400 See DSU, supra note 82, at art. 2(1); NAFTA, supra note 20, at art. 2001(1); NAAEC, supra note 24, at art. 8(1); NAALC, supra note 25, at art. 8(1). An exception is NAFTA Chapter 19 which does not create a permanent body. See NAFTA, supra note 20, at arts. 1901-11.
401 See DSU, supra note 82, at art. 6(1); NAFTA, supra note 20, at art. 2008(2); NAAEC, supra note 24, at art. 24(1); NAALC, supra note 25, at art. 25(1). It is unique that the DSB, in this regard the most powerful institution, adopts the panel reports. See DSU, supra note 82, at art. 16(1) & (4). Under the other agreements, with the exception of Chapter 19, NAFTA, supra note 20, at art. 1904(9), adoption of panel reports is left to the parties. See NAFTA, supra note 20, at art. 2018(1); NAAEC, supra note 24, at art. 33; NAALC, supra note 25, at art. 38(1).
402 See DSU, supra note 82, at art. 6(1), 16(4), 17(14), 22(6).
403 See NAFTA, supra note 20, at art. 2001(4); NAAEC, supra note 24, at art. 9(6); NAALC, supra note 25, at art. 9(6).
404 See DSU, supra note 82, at art. 4(2); NAFTA, supra note 20, at art. 2006(1); NAAEC, supra note 24, at art. 22(1); NAALC, supra note 25, at art. 27(1).
B. Establishment of a Review Panel

Between the consultation and the panel phase the agreements work differently. Provided that consultations have failed, under the WTO, the parties ask the DSB to establish a panel. In the NAFTA regime, under Chapter 20, the parties have to ask for an FTC meeting, and only in case of their failure to reach a solution can a request for a panel be made. The wording of Chapter 20 and especially Chapter 19 suggests that the parties have a right to a panel. The same is basically true for the DSU because the DSB decides the establishment of a panel by “negative” consensus. All systems except Chapter 19 propose additional means of resolving disputes such as good offices, conciliation, and other similar mechanisms—the DSU during the consultation phase, and Chapter 20 during the Commission meeting. Thus, the drafters of both regimes encourage the parties 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 panel, whereas Chapter 19 and Chapter 20 entitle both parties to do so.

All agreements provide for the establishment of a roster from which the panelists are usually selected. They all require the panelists to meet certain conditions and under all agreements the parties choose the panelists. However, the method of selection differs. Chapter 20 employs 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. Under Chapter 19 each party selects two panelists, both parties have to agree

405 See DSU, supra note 82, at art. 5(4).
406 See NAFTA, supra note 20, at art. 2007(1).
407 See id. at art. 2008(1); NAAEC, supra note 24, at art. 24(1); NAALC, supra note 25, at art. 29(1).
408 See NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(2), art. 2008(2).
409 See DSU, supra note 82, at art. 6(1).
410 See id. at art. 5.
411 See NAFTA, supra note 20, at art. 2007(5)(b).
412 See DSU, supra note 82, at art. 5(4), 6(1).
413 See NAFTA, supra note 20, at art. 1904(2), (5), 2008(1).
414 See DSU, supra note 82, at art. 8(4); NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(1) & (2), art. 2009 (1) & (3).
415 See DSU, supra note 82, at art. 8(1) & (2); NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(1) & (2), art. 2009(2), 2010(1).
416 See NAFTA, supra note 20, at art. 2011(1)(b) & (c).
on a fifth, and the chairman is appointed by majority vote of the panelists.\footnote{See id. at art. 1901(2), Annex 1901.2(2).} The DSU stipulates that the disputing parties find an accord with respect to the panelists which are proposed by the WTO Secretariat.\footnote{See DSU, supra note 82, at art. 8(6) & (7).} Not all agreements provide for panels of five persons:\footnote{See NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(2) & (3), art. 2011(1)(a).} the DSU prefers three persons, and a five-member panel is considered exceptional.\footnote{See DSU, supra note 82, at art. 8(5).} In case the parties are unable to agree on the panelists, each agreement contains a safety mechanism in order to prevent a blockage of the process.\footnote{See id. at art. 8(7); NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(2)-(4), art. 2011(1)(b) & (d).}

C. Panel Proceedings

The panel proceedings are also very similar. Under all agreements the parties are accorded the right to present their arguments in written form and orally\footnote{See DSU, supra note 82, at art. 12(1), Appendix 3(4) & (5); NAFTA: Rules of Procedure for Article 1904, Rules 55-69, supra note 349, at 8694-97; NAFTA, supra note 20, at art. 2012(1)(a).} in order to ensure a fair process. Nearly all of the proceedings are confidential,\footnote{See DSU, supra note 82, at art. 14, Appendix 3(2) & (3); NAFTA: Rules of Procedure for Article 1904, Rule 18, supra note 349, at 8690; NAFTA, supra note 20, at 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. See NAAEC, supra note 24, at art. 28; NAALC, supra note 25, at art. 33.} 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,\footnote{See id. at art. 8(7); NAFTA, supra note 20, at art. 1901(2), Annex 1901.2(2)-(4), art. 2011(1)(b) & (d).} 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.\footnote{See DSU, supra note 82, at art. 12(1), Appendix 3(4) & (5); NAFTA: Rules of Procedure for Article 1904, Rules 55-69, supra note 349, at 8694-97; NAFTA, supra note 20, at art. 2012(1)(a).} 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. The question is whether national law has been enforced and not if it has been applied correctly. Moreover, the
determination of AD and CVD duties and the standards of review are highly complex and complicated, thus demanding a very thorough knowledge of the national law in question.

In cases brought under the DSU and Chapter 20, the panel issues an initial and a final report. Only Chapter 19 instructs the panelists to write a single report, probably to speed up the procedure. With the exception of the DSU the agreements allow separate opinions to be drafted. The common law tradition of dissenting opinions did not find a place within the confines of the WTO on the panel level.

The force granted to panel reports varies from agreement to agreement, and 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. Furthermore, the only way to attack such a report is through the very restrictive Extraordinary Challenge Procedure. 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. Therefore, politicians can exercise the largest influence in these cases because 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. Thus, the losing party has only a very limited possibility to block the adoption of the report.

D. Appeals Procedures

Chapter 19 and the DSU present two unique features, the Extraordinary Challenge Committee and the Appellate Body. While these two

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426 See DSU, supra note 82, at art. 15(2); NAFTA, supra note 20, at art. 2016, 2017.
427 See NAFTA, supra note 20, at art. 1904(8).
428 See NAFTA: Rules of Procedure for Article 1904, supra note 349, Rule 72 at 8697; NAFTA, supra note 20, at art. 2016(3), 2017(1) & (2).
429 See NAFTA, supra note 20, at art. 1904(9).
430 See id. at art. 1904(13), Annex 1904.13.
431 See id.
432 See DSU, supra note 82, at art. 16(4).
434 See DSU, supra note 82, at art. 17.
bodies differ very much concerning their composition, their function and their power, Chapter 20 does not contain a similar procedure for judicial review of a panel decision. One reason might be that Chapter 20 still enables 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.

E. Sanctions

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 is similar among the agreements. In the end, all agreements provide for the suspension of benefits, i.e., self-help.\footnote{435 See id. at art. 22; NAFTA, supra note 20, at art. 19, 20.} The DSU and Chapter 20 offer voluntary compensation as an alternative solution to the suspension of benefits.\footnote{436 See DSU, supra note 82, at art. 22(1); NAFTA, supra note 20, at art. 2018(2).} All agreements also entitle the parties to ask for checking the amount of the suspended benefits.\footnote{437 See DSU, supra note 82, at art. 22(6); NAFTA, supra note 20, at art. 1905(10), art. 2019(3).} 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.\footnote{438 See NAFTA, supra note 20, at art. 1905(1)(d) & (2), 2018(1), 2019(1).} Thus, it is an exception that the Dispute Settlement Body exercises this function for disputes arising under the WTO agreements.\footnote{439 See DSU, supra note 82, at art. 21.}

F. Time Frames

The maximum time frames from the initiation of a dispute settlement procedure until the delivery of the final report are very different. Chapter 20 establishes the shortest time limits. It aims at having the panel issue its report after not more than 255 days.\footnote{440 See NAFTA, supra note 20, at 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.} After another 30 days, the winning party is allowed to suspend benefits.\footnote{441 See NAFTA, supra note 20, at art. 2019(1).} Chapter 19 requires the panel to issue its report after 315 days at the latest.\footnote{442 See id. at art. 1904(14).} It takes another 210 days for
the winning party to suspend benefits.\textsuperscript{443} 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 nine months\textsuperscript{444} (plus, at the most, another 60 days for the adoption of the report\textsuperscript{445}). If an appeal is filed, the entire procedure will last 15 months at the very most\textsuperscript{446} (plus not more than 30 days for the adoption of the Appellate Body report\textsuperscript{447}). With up to nearly 16 months, the period until sanctions can be applied is comparatively long.

\textbf{G. Amendments to Procedure}

Another question in this context is whether 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. In 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{448} The parties have somewhat more freedom under the DSU because they may determine the panel’s Terms of Reference,\textsuperscript{449} 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{450} Consequently, the possibility for the parties to take deviations from the course described in the agreements because of political considerations varies a lot.\textsuperscript{451}

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\textsuperscript{443} See id. at art. 1905(2), (3), (6), (7), (8), Annex 1905.6.
\textsuperscript{444} See DSU, supra note 82, at art. 12(9).
\textsuperscript{445} See id. at art. 16(4).
\textsuperscript{446} See id. at art. 12(9), 17(5).
\textsuperscript{447} See id. at art. 17(14).
\textsuperscript{448} See NAFTA, supra note 20, at art. 1904. However, the Safeguard Mechanism allows the parties to make individual agreements. See id. at art. 1905(2) & (3).
\textsuperscript{449} See DSU, supra note 82, at art. 7(1).
\textsuperscript{450} See NAFTA, supra note 20, at art. 2007(1)(d), 2008(1)(c), 4(b), 2012(2), 2016(1) & (2), 2017(1).
\textsuperscript{451} 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
Moreover, Chapter 19 also differs from the other agreements’ panel proceedings. In a comparative study, the DSU panel proceedings and the Chapter 20 system should be considered together whereas the Chapter 19 panel and the DSU appeal process should be considered separately. Chapter 19 and the Appellate Body review an initial process, while the DSU panel proceedings and the Chapter 20 system are the initial process. Thus, Chapter 19 differs in most respects from the other agreements.

H. Political Influence

The amount of political influence varies throughout the different agreements. 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 political interventions are possible at every moment, therefore the degree of political control varies a lot between the different proceedings.

In sum, an effective dispute resolution mechanism must provide for a timely investigation with binding and enforceable conclusions, prevent multiple jeopardy and eliminate tactical advantages and the possibility of retaliatory trade legislation. The Chapter 19 dispute settlement procedure meets these requirements, but the DSU and Chapter 20 only come close.

V. CONCLUSION

The analysis conducted in this article 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.” The degrees, of course, vary

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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 tremendous sensitivity to the domestic electoral pressures faced by their fellow trading partners.

Lopez, supra note 259, at 206.

452 See Gastle, supra note 31, at 736.

453 See TREBILCOCK & HOWSE, supra note 26, at 406.
significantly. There has, however, been 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-based because the negotiation-based system failed and was no longer able to resolve disputes effectively. The same cannot be said for NAFTA, of course, but NAFTA has two important features distinctive from either the WTO or the GATT. First, NAFTA itself is more adjudicatory than the GATT ever was (even if it is less adjudicatory than the WTO mechanism). There were three possibilities under CFTA for going through the general dispute settlement mechanism, and under NAFTA there is only one. Insofar as it is possible to speak of straightening the procedure of dispute settlement procedure, NAFTA has taken a step in this direction.

The second feature that distinguishes NAFTA and the WTO is the number of signature states. The WTO currently counts 130 members, NAFTA "only" three. For a system that relies heavily on negotiations, it is easier to reach an agreement among three rather than among 130 states. The need for a strict rule-based system is not as urgent for NAFTA as it was for the WTO.

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

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454 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 2, at 63. See also Huntington, supra note 153, at 443.

455 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 224, at 788-89; Straight, supra note 271, at 229. One might also remember that, in the first years, with fewer members and less complex matters, the GATT 1947 system worked well.

456 See Huntington, supra note 153, at 443.
provisions. The suspension of benefits is the usual sanction; this, however, does not work effectively. Another much stricter possibility is simply to cancel the membership of that country. 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.

Another issue presented is whether the pragmatic approach or the legalistic approach is preferable. Without a doubt, adjudication is the more effective process. On the other hand, it always results in a "winner and loser" situation, which can generate friction. 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 important that a dispute resolution system function well in order to avoid creating frustration with the entire agreement. In this respect, the WTO seems well equipped to accept more member states and to govern more agreements, while still providing an effective mechanism for conflict resolution. In the event that significantly more countries become parties to 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.

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457 See Cocuzza & Forabosco, supra note 77, at 188.
458 See Bello & Holmer, supra note 182, at 1103; Gastle, supra note 31, at 811.
459 See Cocuzza & Forabosco, supra note 77, at 188.
460 None of the analyzed treaties contains a provision that allows other member states to exclude a recalcitrant party.
ANNEX A

I. THE SIDE AGREEMENTS

A. The Environmental Side Agreement

The NAAEC stipulates the establishment of a Commission for Environmental Cooperation (CEC) made up of a Council, a Secretariat, and a Joint Public Advisory Committee. The Council, the governing body of the CEC, consists of “cabinet-level or equivalent representatives”. 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.” The Council arrives at its decisions by consensus. Assistance to the Council is provided by the Secretariat and advice is provided by the Joint Public Advisory Committee, which is composed of 15 members appointed in equal numbers by the parties.

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. The Commission is governed by the Council, a body consisting of the labor ministers which convenes at least once a year. As is true under the Environmental Side Agreement, one of the Council’s responsibilities is to address disputes

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2 See NAAEC, supra note 1, at art. 9(1), 10(1).

3 See id. 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. Id. at art. 10(1)(b) & (f), 10(3).

4 See id. at art. 9(6).

5 See id. at art. 11(5).

6 See id. at art. 16(1) & (4).


8 See id. at art. 9(1) & (3).
concerning the Agreement's interpretation and application. Decision-making is subject to consensus. The Secretariat supports the Council in "exercising its functions." The Commission is assisted by National Administrative Offices (NAO), which each party is directed to establish at the federal level.

II. 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 matters"). 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.

The way both Side Agreements deal with the first category of conflicts is "far more intricate." 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.

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9 See NAALC, supra note 7, at art. 10(g). For the Council's functions, see id. at art. 10, 11.
10 See id. at art. 9(6).
11 See id. at art. 13(1).
12 See id. at 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, [and] . . . the Secretariat." See id. at art. 16(1).
13 See NAAEC, supra note 1, at art. 20(1) & 22(1); NAALC, supra note 7, at 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 or case." NAAEC, supra note 1, at art. 45; NAALC, supra note 7, at art. 49. One author has noted correctly that it still remains unclear what exactly constitutes a "persistent pattern of failure." See RAJ BHALA, INTERNATIONAL TRADE LAW 1349 (1996).
15 See NAAEC, supra note 1, at art. 20(1); NAALC, supra note 7, at art. 20.
16 See Lopez, supra note 14, at 185.
A. The Pre-Stage under the Labor Side Agreement

Under the Labor Side Agreement, a NAO may ask for consultations with another NAO concerning "the other [party]'s labor law, its administration, or labor market conditions." Also, a meeting at the ministerial level may be requested "regarding any matter within the scope of [the] Agreement." 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). The ECE's analysis is limited to "patterns of practice by each [party] 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

17 NAALC, supra note 7, at 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 14, at 195.
18 See NAALC, supra note 7, at art. 22(1).
19 See id. at art. 23(1). An ECE can only be established if the matter is either "trade-related" or "covered by mutually recognized labor laws." Id. at 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. See BHALA, supra note 13, at 1353.
20 "As of December 1996, no ECE had been convened to review any labor dispute between the NAFTA countries." Lopez, supra note 14, at 195.
21 See NAALC, supra note 7, at art. 23(2).
22 See id. at 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 International Labor Organization (ILO), and, "where possible, other members shall be selected from a roster developed by the [parties]." Id. But no stipulation prescribes exactly the method of how to choose the other ECE members. Compare NAALC, supra note 7, at art. 24(1)(c), and North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 & 32 I.L.M. 605 at art. 2011 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. 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] be independent of, and not affiliated with or take instructions from, any [party or the Secretariat]." See NAALC, supra note 7, at art. 24(1)(c).
22 See NAALC, supra note 7, at art. 24(1)(d)-(f), 25(1).
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."25

B. 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.26 Both Agreements require the parties to

23 See id. at art. 25(1).
24 See id. at art. 25(2), 26(1).
25 See id. at art. 26(3) & (4).
26 See NAAEC, supra note 1, at art. 22(1); NAALC, supra note 7, at 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]." See NAAEC, supra note 1, at art.
22(1), 45(1); NAALC, supra note 7, at art. 27(1), 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." See Steve Charnovitz, The NAFTA Environmental Side Agreement: Implications
for Environmental Cooperation, Trade Policy, and American Treatymaking, 8 TEMP. INT'L

The Labor Side Accord only allows consultations with respect to "occupational safety and
health, child labor or minimum wage." See NAALC, supra note 7, at art. 27(1). Hence the
issue is further limited in comparison to what the ECE is allowed to analyze. 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." See Christopher Thomas & Gregory A.
Tereposky, The NAFTA and the Side Agreement on Environmental Co-operation, 27 J.
WORLD TRADE 5, 27 (1993). Nevertheless, one author criticized this procedure because "the
wording of Article 27(1) is confusing, and the result is anomalous." See BHALA, supra note
13, 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." See
Lopez, supra note 14, at 188 (citation omitted). No dispute under the NAALC has reached
the stage of party consultation. See Lopez, supra note 14, 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. See Michael
"make every attempt to arrive at a mutually satisfactory resolution," thus emphasizing the role of consultations in order to obtain a solution at a very early stage of the dispute.

C. 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. The Councils are to "resolve the dispute promptly" by using the advice of experts, by employing alternative ways of dispute resolution, or by making the appropriate recommendations.

D. Panel Phase

If the parties are not able to reach a mutually satisfactory resolution within 60 days after the Councils' meetings, the Council establishes an arbitral panel upon request and by a two-thirds vote. 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 NAFTA, a "panel cannot be formed absent a majority vote


27 NAAEC, *supra* note 1, at art. 22(4); NAALC, *supra* note 7, at art. 27(4).

28 See NAAEC, *supra* note 1, at art. 23(1) & (3); NAALC, *supra* note 7, at art. 28(1) & (3). The Councils are the Council for Environmental Cooperation and the Council for Labor Cooperation, respectively.

29 See NAAEC, *supra* note 1, at art. 23(3); NAALC, *supra* note 7, at art. 28(3).

30 See NAAEC, *supra* note 1, at art. 24(1); NAALC, *supra* note 7, at 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." See NAAEC, *supra* note 1, at 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." See NAALC, *supra* note 7, at art. 29(1).
of the Council." The panelists who have to meet certain qualifications will be chosen from a roster. The provisions for the selection process and the possibility for a third party to join as complainant are the same as 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 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 may be furnished on matters not unanimously agreed upon. A time limit of 30 days is set for the parties to make comments on the initial report. The panels may reexamine the case and reconsider the draft taking such comments into account and may also ask for the view of another party.

31 See Lopez, supra note 14, at 187.
32 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 from any [p]arty, the [relevant] Secretariat," or, for disputes on environmental issues only, the Joint Public Advisory Committee. See NAAEC, supra note 1, at art. 25(2), 26(1); NAALC, supra note 7, at art. 30(2), 31(1).
33 See NAAEC, supra note 1, at art. 24(2), 27; NAALC, supra note 7, at art. 29(2), 32.
34 See NAAEC, supra note 1, at art. 28; NAALC, supra note 7, at art. 33.
35 See NAAEC, supra note 1, at art. 29, 30; NAALC, supra note 7, at art. 34, 35; NAFTA, supra note 21, at art. 2015. In contrast to the NAFTA the Side Agreements do not provide for the establishment of scientific review boards.
36 See NAAEC, supra note 1, at art. 31(1) & (2); NAALC, supra note 7, at 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." See Charnovitz, supra note 26, at 268 (citation omitted).
37 See NAAEC, supra note 1, at art. 31(2); NAALC, supra note 7, at art. 36(2).
38 See NAAEC, supra note 1, at art. 31(3); NAALC, supra note 7, at art. 36(3).
39 See NAAEC, supra note 1, at art. 31(4); NAALC, supra note 7, at art. 36(4).
before issuing a final report within 60 days after the presentation of the draft.\textsuperscript{40}

E. 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 initially.\textsuperscript{41} Three articles and three annexes in each agreement lay down a very meticulous scheme concerning implementation and sanctioning of such a plan.\textsuperscript{42} The detailed stipulations try to cover every imaginable situation. A variety of possibilities, including time frames ranging from not more than 60 days to at least 180 days, is described in a scrupulous but also "bewildering" manner.\textsuperscript{43}

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.\textsuperscript{44} In this case, the reconvened panel analyzes whether the plan is sufficient.\textsuperscript{45} If it is not, the panel develops its own action plan.\textsuperscript{46} Additionally, it has the power but not the duty to impose a monetary enforcement assessment.\textsuperscript{47} Secondly, the panel may be reassembled when the full implementation of an action plan is in doubt, no

\textsuperscript{40} See NAAEC, supra note 1, at art. 31(5), 32; NAALC, supra note 7, at art. 36(5), 37.
\textsuperscript{41} See NAAEC, supra note 1, at art. 33; NAALC, supra note 7, at art. 38.
\textsuperscript{42} See NAAEC, supra note 1, at art. 34-36 & Annexes 34-36B; NAALC, supra note 7, at art. 39-41 & Annexes 39-41B.
\textsuperscript{43} See Michael Reisman & Mark Wiedman, Contextual Imperatives of Dispute Resolution Mechanisms, J. WORLD TRADE, June 1995, at 5, 32. In order to make the confusing treaty provisions easier to understand, the provisions 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, at 36-38.
\textsuperscript{44} See NAAEC, supra note 1, at art. 34(1)(a) & (2); NAALC, supra note 7, at art. 39(1)(a) & (2).
\textsuperscript{45} See NAAEC, supra note 1, at art. 34(4)(a) & (6); NAALC, supra note 7, at art. 39(4)(a) & (6).
\textsuperscript{46} See NAAEC, supra note 1, at art. 34(4)(a) & (6); NAALC, supra note 7, at art. 39(4)(a) & (6).
\textsuperscript{47} See NAAEC, supra note 1, at art. 34(4)(b) & Annex 34; NAALC, supra note 7, at art. 39(4)(b) & Annex 39.
matter if it is an agreed-upon or a panel-developed plan. If the panel determines that the implementation is insufficient, it is required to impose a monetary enforcement assessment.

All assessments are limited with respect to their amount. If a party does not pay, the complaining party is entitled to suspend NAFTA trade benefits "in an amount no greater than that sufficient" to collect the assessment through tariffs. 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." Should the recalcitrant party suspect that the suspension of benefits is "manifestly excessive," the panel may be reconvened on request.

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48 See NAAEC, supra note 1, at art. 34(1)(b) & (3); NAALC, supra note 7, at art. 39(1)(b) & (3).

49 See NAAEC, supra note 1, at art. 34(5), (6), 35 & Annex 34; NAALC, supra note 7, at 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. See NAAEC, supra note 1, at Annex 34(3); NAALC, supra note 7, at Annex 39(3).

50 For the first year after the agreements have 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." See NAAEC, supra note 1, at Annex 34; NAALC, supra note 7, at 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 14, at 187 n.255 (citation omitted).

51 See NAAEC, supra note 1, at art. 36(1)-(3), Annexes 36 A & 36 B; NAALC, supra note 7, at art. 41(1)-(3), Annexes 41 A & 41 B.

52 See NAAEC, supra note 1, at art. 36(4); NAALC, supra note 7, at art. 41(4).

53 See NAAEC, supra note 1, at art. 36(5); NAALC, supra note 7, at 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 26, at 88 n.119.

Questioning the purpose of the monetary penalty, one author predicted that "[p]ublicity and transparency will prove to be more effective enforcement tools 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." See Thomas J. Schoenbaum, The North American Free Trade Agreement (NAFTA): Good for Jobs, for the Environment, and for America, 23 GA. J. INT'L & COMP. L. 461, 483 (1993).
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 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.54

III. CRITICISMS OF THE SIDE AGREEMENTS

The Side Agreements have been criticized for establishing too lengthy and too cumbersome a procedure before finally arriving at a solution.55 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

54 See Jack I. Garvey, Trade Law and Quality of Life—Dispute Resolution under the NAFTA Side Accords on Labor and the Environment, 89 Am. J. Int'l L. 439, 444 (1995). 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 against the United States and Mexico 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." See Daniel B. Magraw, Jr., Trade Agreements, C990 ALI-ABA 193, 204 (1995).

until the imposition of a sanction.\textsuperscript{56} Due to the time it takes to bring a complaint under the Side Agreements, "the abuses can continue unchecked."\textsuperscript{57}

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.\textsuperscript{58} However, one author who observed that "[t]he remedy of retaliation through the suspension of benefits has never proven effective" welcomed the "unique damages remedy."\textsuperscript{59} It has also been noted that "[p]ublicity and transparency will prove to be more effective enforcement tools than the symbolic . . . fine[s]."\textsuperscript{60}

Another object for criticism is the possibility for politicians to intervene at practically every stage of the settlement process.\textsuperscript{61} 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.\textsuperscript{62} The parties were very cautious in choosing a "soft law" approach where they retain considerable control on the whole procedure.\textsuperscript{63} Also, the scope of the

\textsuperscript{56} See Reisman & Wiedman, supra note 43, 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 trade sanctions 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 26, at 270 (citations omitted).

\textsuperscript{57} See Champion, supra note 55, at 229.

\textsuperscript{58} See Charnovitz, supra note 26, at 269 (citing an Administration official who said that the value of the penalties "would be primarily symbolic"); Reisman & Wiedman, supra note 43, at 32-33. See also Kevin W. Patton, Dispute Resolution under the North American Commission on Environmental Cooperation, 5 DUKE J. COMP. & INT'L L. 87, 109-11 (1994); J. Owen Saunders, NAFTA and the North American Agreement on Environmental Cooperation: A New Model for International Collaboration on Trade and Environment, 5 COLO. J. INT'L ENVTL. L. & POL'Y 273, 303 (1994).


\textsuperscript{60} See Schoenbaum, supra note 53, at 483.

\textsuperscript{61} See Kelly, supra note 26, at 96 (speaking of "political trapdoors"); Samios, supra note 55, at 75. See also Garvey, supra note 54, at 452.

\textsuperscript{62} See Garvey, supra note 54, at 452; Reisman & Wiedman, supra note 43, at 33.

\textsuperscript{63} See Reisman & Wiedman, supra note 43, at 33.
agreements is very limited. In such “new” fields, the parties obviously did not want to give up their power. Therefore, politicians prefer a system based on cooperation over one based on adjudication.64

64 See Saunders, supra note 58, at 303-04.