NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison

Marceau, Gabrielle Zoe

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Gabrielle MARCEAU*

I. INTRODUCTION

Systems for trade dispute settlement are rarely conceived in purely abstract terms. Indeed, like most legal regimes, they often arise and evolve through a combination of borrowing from successful efforts of the past, together with innovations to meet the perceived need for the future. This process can be recognized in the dispute settlement process of the 1989 Free Trade Agreement between Canada and the United States[1] (FTA) and the 1994 North American Free Trade Agreement (NAFTA).[2] The similarities between the dispute settlement rules of the FTA and those used under the General Agreement on Tariffs and Trade (GATT)[3] were impressive. It was not unreasonable to expect that the United States and Canada, when they set up the FTA, borrowed from practices developed in the GATT forum where they had always been active users of the dispute settlement mechanism. William Davey, in his *Pine and Swine* critique of the FTA case-law, goes further and claims that:

> "[The FTA] dispute settlement provisions were, by and large, the same as the WTO/GATT procedures as they emerged from the Uruguay Round. Indeed some of the Uruguay Round innovations in the GATT/WTO procedures were first implemented in the Canada–U.S. FTA."[4]

This article will try to develop Davey's affirmation and assess whether this GATT/FTA interaction process has continued between the dispute settlement rules of the

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[1] The FTA was negotiated from 1985 to 1987, signed on 2 January 1988 and came into effect on 1 January 1989.

[2] The NAFTA was negotiated from 1992 to 1994, signed on 17 December 1992 and entered into force on 1 January 1994.

[3] GATT was negotiated between 1946 and 1947, signed on 30 October 1947 and entered into force provisionally on 1 January 1948.

[4] W. Davey, *Pine and Swine; Canada–United States Trade Dispute Settlement: The FTA Experience and NAFTA Prospects*, 1996, Centre for Trade Law and Policy, Ottawa, p. 27. For a criticism of the Montreal Mid-Term Review proposal see, amongst others, W. Davey, *GATT Dispute Settlement: 1988 Montreal Reforms*, in *Living with Free-Trade*, 1989, p. 167. Note that the 1989 Decision on "Improvements to the GATT Dispute Settlement Rules and Procedures" (BISD 36S/64) did not include any interim review process (which was in the FTA), or any provision for the automatic adoption of Panel and Appellate Body Reports.

World Trade Organization (WTO)—which incorporated and replaced GATT[5] rules—and the NAFTA—which more or less incorporated and replaced the FTA.[6] Indeed, when NAFTA was negotiated, GATT contracting parties had already reached consensus on the "Improvements to the GATT Dispute Settlement Rules and Procedures"[7] which served as a basis for the new dispute settlement rules of the WTO. Moreover, a large part of what was going to become the Dispute Settlement Understanding—with some important exceptions such as the automatic adoption of panel findings—was completed at the Brussels meeting of the Uruguay Round in December 1990, while NAFTA was under negotiation. However, although some of the NAFTA and WTO dispute settlement procedures are fairly similar, they also differ importantly in their nature and their reach. In fact the new dispute settlement system of the WTO, contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) goes much further than that of NAFTA.

This study will look first at the basic purposes of the NAFTA and WTO Agreements, since the nature of such Agreements may have an impact upon the administration of their respective dispute settlement systems. Second, it will describe briefly the various dispute settlement mechanisms of NAFTA which, unlike those of the WTO, are not integrated into a single mechanism. The focus in the third part will be on some systemic features of the dispute resolution mechanism of Chapter 20 of NAFTA and a comparison with those of the parallel provisions of the DSU of the WTO. Fourth, the procedural steps of dispute resolution, the adoption of panel reports and their implementation pursuant to NAFTA are addressed and compared thematically with the corresponding procedures of the WTO. A last section concerns the conflicts of laws and the choice of forum for disputes which can be raised either in NAFTA or in WTO. Throughout this discussion, the exclusive characteristics of the special dispute resolution process of Chapter 19 of NAFTA for anti-dumping and antisubsidy measures—although completely different in nature from that of Chapter 20[8]—will occasionally be referred to in an effort to ensure the most comprehensive description of the dispute settlement mechanisms of NAFTA.

Similarities and differences between NAFTA and WTO dispute settlement mechanisms will be drawn. This should facilitate a better understanding of both systems,

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[5] GATT still exists as an integral part of the WTO treaty as included in GATT 1994. GATT 1994 is defined to include the text of the original GATT Agreement, called GATT 1947, together with amendments, etc. and adopted decisions of GATT CONTRACTING PARTIES and other components listed in paragraph 1 of the language incorporating GATT 1994 into Annex 1A and often described as GATT Acquis. Note also that the provisions of Article 3.1 of the DSU integrates into the DSU the provisions of Articles XXII and XXIII of GATT: "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

[6] In the present article, in order to avoid repetition, reference will be made only to NAFTA provisions, although when relevant, improvements of NAFTA over the FTA provisions will be noted. Moreover, when NAFTA came into force in 1994, the FTA was suspended, having been subsumed into NAFTA. This suspension was contained in some exchanges of letters between the United States and Canada and confirmed in the U.S. implementing legislation and the Canadian Statement on Implementation.

[7] Decision taken at Montreal Ministerial Meeting in December 1988 and adopted by the CONTRACTING PARTIES on 12 April 1989, BISD 36S/61.

[8] There is extensive literature on the dispute settlement process and case-law of Chapter 19 of the FTA and NAFTA. A very brief description of this original international adjudication process is referred to below.

and should also demonstrate that, together with borrowing from other international practices and experiences, both systems could improve their processes by importing further aspects from each other.

II. The Purposes of the GATT/WTO and FTA/NAFTA Agreements

The nature of trade or commercial agreements between States may have a direct impact on the administration of the dispute resolution mechanisms included in such agreements, since the purpose of any dispute settlement mechanism is to guarantee respect for the agreements, in responding to violations and legitimate expectations under such agreements.

A. GATT/WTO

Any understanding of GATT requires an awareness of its limited beginning.[9] From its inception, GATT was only an Agreement containing the results of multilateral tariff negotiations undertaken at the initiative of the United States and the United Kingdom after the Second World War. The GATT negotiations took place in parallel to the negotiations, under the aegis of the United Nations, for an ambitious International Trade Organization (ITO) which was originally intended to be the third pillar of the Bretton Woods system together with the World Bank and the IMF. It was then thought that the results of GATT would be introduced under the umbrella of the proposed ITO whose text contained disciplines on the economic behaviour of States and firms. GATT contained a few commercial disciplines, the purpose of which was to ensure that governments would effectively respect multilateral tariff reductions and maintain the overall economic balance of the tariff concessions. These disciplines have included a most-favoured-nation (MFN) clause, national treatment, prohibition of import and export quotas, transparency, safeguard provisions, general and security exceptions together with rules allowing for protection against distorted competition such as anti-dumping and antisubsidy provisions. The purpose of the initially limited GATT dispute settlement rules was always to maintain the balance of reciprocal rights and obligations relating to the conclusions of market access, namely tariffs and non-tariff measures. The ultimate sanction for non-voluntary compliance with a panel recommendation was a unilateral readjustment of concessions.[10] The GATT was put into force on a provisional basis on 1 January 1948, pending the completion of the ITO. The ITO was, however, never ratified and the law of GATT (defined to include the original treaty plus additional Agreements negotiated during subsequent

[9] For a detailed history of the negotiations of GATT and ITO, see J. Jackson, *World Trade and the Law of GATT*, Bobbs Merrill, Indianapolis, 1969.

[10] In fifty years of GATT, there has been only one dispute which led the CONTRACTING PARTIES to authorize sanctions, but parties finally settled: see *Netherlands—Measures of suspension of obligations to the United States*, determination of 8 November 1952, BISD IS/32.

negotiating Rounds) remained the only set of multilateral trade disciplines until the WTO Agreement was concluded.

It can be argued that the main principles of GATT law are still applicable to the WTO Agreement, at least as far as trade in goods is concerned, as the old GATT is the basic component of what is now called GATT 1994. For the new sectors covered by the Trade-Related Intellectual Property Agreement (TRIPs) and the General Agreement on Trade in Services (GATS), The assessment is more complex. TRIPs and GATS contain rules on transparency, national treatment, MFN treatment, rules for safeguards, and against distorted competition. The special nature of the TRIPs Agreement, which brought under the scope of the WTO a series of norms and standards from other intellectual property international conventions (most of which provide rights and obligations to persons holding intellectual property rights such as copyrights, patents etc.), can be considered as containing additional provisions against undistorted competition. These intellectual property rights and obligations are directly related to and complement the effectiveness of market-access rules for goods and services. The GATS deals, by its very nature, with issues other than border or tariff measures. Still, one can argue that GATS, as is GATT for goods, is about guaranteeing transparency, predictability and competitive opportunities of import and export markets ensured through MFN, national treatment, market access, prohibition of distorted competition and similar disciplines.WTO, like GATT, is about market-access guarantees.

The purpose of the dispute settlement mechanism of the WTO is still, therefore, to guarantee to WTO Members the full respect of their expected commercial and competitive opportunities, both in terms of export and imports of goods and services together with their related intellectual property rights. However, the traditional view is that the only remedy that can be recommended by a WTO panel is to bring the measure into conformity with the WTO Agreement, i.e. the cessation of the illegal act.[11] If the losing Member does not bring its measure into conformity with the WTO Agreement and the panel and Appellate Body recommendations, then a satisfactory compensation may be agreed upon; compensation must be consistent with the Covered Agreements, is temporary, and cannot be preferred to full implementation.[12] This appears to be saying that two Members could not settle their dispute in tolerating each other's illegal measure. The enforcement of this prohibition, however, remains difficult since a WTO Member not directly concerned by the dispute may not be interested in initiating the dispute settlement mechanism; indeed, such a Member may not have the legal standing to do so.[13] Pursuant to Article 21.6 of the DSU, "The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time

[11] Article 19 of the DSU also envisages the possibility of additional suggestions which could be used by the losing party to comply with the recommendations of the panel. It can be argued that if the losing party complies with any of the panel's suggestions, there is an irrefutable presumption of compliance with the panel (or Appellate Body report) in favour of that losing party.

[12] Article 22.1 of the DSU.

[13] The issue of the legal standing of any WTO Member to trigger the dispute settlement process was discussed in the Interim Report in the *Banana III*. The Panel concluded that there is no legal interest requirement under the DSU. It remains to be seen whether the Appellate Body will confirm this conclusion.

following their adoption." It remains to be seen whether the rights of a WTO Member not party to a specific dispute could have the legal interest to act as watch-dog of the system and trigger a formal dispute settlement process.

If no compensation is agreed between the parties to the dispute, the Dispute Settlement Body (DSB) composed of all WTO Members must, if so requested, authorize the winning Member to retaliate. Therefore, as it was the case with GATT, in the absence of any agreement between the parties, the ultimate sanction for non-compliance is that the winning Member will suspend a concession or other obligation[14] against the losing party. Against this argument it should be said that suspension of a concession and other obligations are to be temporary measures but "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation..."[15] Literally, it could be argued that the term "other obligations" could cover any non-tariff obligation. For instance, a WTO Member might want to retaliate against another Member by refusing to respect its obligations under the Technical Barriers to Trade (TBT) Agreement with regard to that other Member. However, Article 22.4 of the DSU seems to oppose this interpretation because it would be almost impossible to evaluate the appropriate level of suspension of the said obligation:

> "The *level* of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the *level* of nullification or impairment." (emphasis added).

How can the level of suspension of application of the TBT obligations equal to any specific nullification of benefits be evaluated? How can this provision be applied to a situation where an uncompensated Member decides that its retaliation will consist of the non-respect of the TBT Agreement with the losing Member? This difficulty indicates some weakness in the practicability of cross-retaliation possibilities mentioned in Article 22.3 of the DSU, as further discussed in Section VII below. Strictly and legally, however, but to the extent that it is possible and practicable, cross-retaliation could include a wide range of measures.

The retaliation possibilities under the WTO may also appear to be inadequate considering that smaller countries are not economically able to retaliate effectively against stronger countries. In addition, the WTO Agreement has introduced many new obligations, the nullification of which cannot be easily evaluated. But, this was an old handicap of the GATT dispute settlement mechanism which, arguably, has not been completely overcome. As long ago as 1966, the Brazilian and Uruguayan delegations proposed to the Committee on Trade and Development[16] that less-developed countries be authorized to use additional remedies, including financial indemnities, to be

[14] Article 22.6 of the DSU.
[15] Ibid., Article 22.1.
[16] Report adopted on 5 April 1966, BISD 14S/129, 139–141.

compensated for the damage caused by the violation of the GATT.[17] However, no consensus was reached on this proposal and instead a decision was adopted reducing the duration of the panel process at the request of a complainant, but only when the complainant is a developing country;[18] this decision is still referred to in Article 3.12 of the DSU.

Under the WTO Agreement, as it was under GATT, the losing party does not risk any fine or any sanction affecting its membership status in the case of non-compliance with a panel recommendation, or a condemnation by the entire membership.[19] In this sense some argue that "illegalities" are not "central" to the WTO dispute settlement system.[20] This is not to say that the WTO Agreement does not contain rules to be respected or that the dispute settlement system of the WTO is not a rule-based system. On the contrary, the WTO, as did GATT, contains a set of binding rules, but their non-respect leads only to the re-establishment of the balance of economic concessions between the parties.

B. THE FTA/NAFTA

Like the WTO Agreement, NAFTA is a multilateral trade liberalization agreement. NAFTA, as did the FTA, contains a series of market-access commitments and related disciplines between its parties. NAFTA includes disciplines on the MFN clause, national treatment, prohibition of import and export quotas, transparency, safeguard provisions, general and security exceptions together with rules allowing for protection against distorted competition such as anti-dumping and antisubsidy duties. In this context,[21] WTO Members are authorized to deviate from the MFN obligation in favour of other

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[17] "...(A) In the event that the measures complained of have been applied by a developed contracting party and it is established that they are adversely affecting the trade and the economic prospects of the less-developed contracting party or parties concerned, the panel may recommend, where it is not possible to eliminate the measure complained of or to obtain an adequate commercial remedy, that the damage caused should be compensated by means of an indemnity of a financial character on mutually acceptable terms. (B) In cases where the import capacity of a less-developed contracting party has been, or is being impaired by the maintenance of measures by a developed contracting party or parties which are inconsistent with the provisions of the General Agreement, the Director-General shall, with or without the assistance of a panel of experts as may be considered necessary, forthwith proceed to determine in particular the following elements: (a) the damage incurred through the incidence of the measures complained of upon the exports earnings and economic effort of the less-developed contracting party; (b) the compensatory or remedial measures which the contracting party whose measure are complained of would be prepared to take to make good the damage inflicted by their application; (c) the effects of such measures as the injured contracting party would be prepared to take in relation to the contracting party whose measures have nullified or impaired the benefits deriving from the General Agreement which the former contracting party is entitled to expect."

[18] Decision of 5 April 1966, BISD 14S/18.

[19] Note however that in the case of an accepted amendment to the WTO, a Member who refuses the amendment is said to be free to withdraw or to remain a Member with the consent of the Ministerial Conference: Article X:3 of the WTO Agreement.

[20] See Judith Bello, *The WTO DSU: Less is More*, Editorial Comment in the A.J.I.L., July 1996, Vol. 90, No. 3, p. 416. For a contrary view see J.H. Jackson, *The WTO DSU*, A.J.I.L., January 1997, Vol. 91, No. 1, p. 60.

[21] Free-trade areas are authorized by the WTO in Article XXIV of GATT 1994 and Article V of the GATS since they are viewed as potentially creating further trade within and outside the free-trade areas. Within a WTO-compatible free-trade area, the process of trade liberalization should be intensified on substantially all the trade in services and goods between the parties, the internal tariffs should be brought to zero and the regulations restricting commerce should be phased out.

parties to the regional Agreement. As for the dispute settlement mechanism of the WTO, the general NAFTA dispute settlement process of Chapter 20 aims at protecting market-access commitments. In case of a declared violation of a provision of NAFTA, if no mutual resolution is agreed, the winning party may suspend the application of "benefits of equivalent effect until such time as they have reached an agreement on a resolution of the dispute", a concept clearly imported from GATT and the DSU.[22] As in the WTO, no party can be forced to withdraw from NAFTA.[23] In a regional agreement such as NAFTA where internal tariffs should be brought to zero, most of the disciplines and rules will be concerned with non-tariff measures. The limitations of retaliation possibilities exist in NAFTA but there is no precision as to the nature of compensation, and the only requirement in case of retaliation is that the level of suspension of benefits not be "manifestly excessive".

Thus, NAFTA and WTO Agreements are both trade liberalization agreements guaranteeing to their Members predictable competitive market opportunities. The purposes of NAFTA and WTO dispute settlement mechanisms are also similar, i.e. to ensure the respect of these market-access commitments in an effort to maintain at least the overall balance of the market-access commitments which have led to States to adhere to these Agreements. In both Agreements, the ultimate sanction may argue to be limited in practice to changes to tariff or quota concessions. However, the dispute settlement mechanisms of NAFTA and WTO differ importantly in their nature and means for achieving respect of their Agreement. For instance the third-party adjudication process of the DSU, the integrated nature of all dispute settlement processes under the DSU, its quasi-automaticity, the WTO Appellate process and the participation of lawyers and other representation in NAFTA hearings, maintain distinctions between the two adjudication systems. Although both processes share a similar procedural process, the DSU is far more ambitious than any of the dispute settlement mechanisms of NAFTA.

III. THE VARIOUS NAFTA DISPUTE SETTLEMENT MECHANISMS

A. THE ABSENCE OF AN INTEGRATED DISPUTE SETTLEMENT MECHANISM IN NAFTA

The NAFTA does not have an integrated dispute settlement mechanism, as does the WTO with the DSU. NAFTA contains various rules for the avoidance, conciliation and settlement of disputes according to the subject-matter at issue. The five main dispute settlement mechanisms of NAFTA are:

- the general government-to-government dispute settlement mechanism under Chapter 20;

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[22] Article 2019:1 of NAFTA.

[23] In case of non-compliance with a recommendation of the Special Challenge Committee pursuant to a complaint under Chapter 19 of NAFTA (dealing with contestants of subsidies and dumping determinations), the other party may suspend the application of the entire Chapter 19 with regard to the faulty party.

- the binational panels for anti-dumping and countervailing measures under Chapter 19;
- various sector-specific provisions for arbitration and/or dispute resolution, including more specific consultation processes;
- the reference to national systems, as for intellectual property and government procurement disputes; and
- the dispute resolution system for environmental and labour disputes.

On the other hand, the WTO Agreement has established with the DSU an integrated system for the settlement of all WTO disputes whereby WTO Members can base their claims on any multilateral trade agreement (the Covered Agreements) contained in the Annexes 1, 2 and 3 of the WTO.[24] This remedied the fragmentation of the old GATT and the forum-shopping possibilities which were open to certain contracting parties which were also signatories of any of the various Codes of the Tokyo Round containing their own dispute settlement rules. The WTO Agreement is said to be one single undertaking for which there is one single dispute settlement mechanism.[25] The introduction of an integrated dispute settlement system within the WTO is perhaps one of the best success stories of the Uruguay Round negotiations and one of the important distinctions between the NAFTA dispute settlement process and that of the DSU. So far, during the first two years, WTO Members have made great use of this new integrated system: in all but four of the sixty-four requests for consultations, violations of at least two different Agreements have been claimed for each dispute. In fifteen disputes, claims have been raised under more than three WTO Agreements and some disputes involved the application of more than six multilateral trade agreements.

Notwithstanding the multiple NAFTA dispute settlement mechanisms, disputes have only been raised under Chapters 19 and 20 (or Chapter 18 of the FTA). Under the FTA, fifty-two disputes concerned the application of Chapter 19, out of which three concerned the extraordinary challenge procedures, and five concerned the application of Chapter 18. Under NAFTA, twenty-three cases have so far taken place under Chapter 19 and one under Chapter 20. The other dispute settlement provisions of NAFTA have not yet reached the panel process.

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[24] Annex 1 on goods, services and TRIPs, Annex 2 on the DSU and Annex 3 on the Trade Policy Review Mechanism (TPRM), called the Multilateral Trade Agreements, are integral parts of the WTO Agreement, and are binding on all Members. The Agreements and associated legal instruments included in Annex 4 (Agreement on Government Procurement, Agreement on Trade in Civil Aircraft, International Dairy Agreement and the International Meat Agreement), called the Plurilateral Trade Agreements, are also part of the WTO Agreement for those Members that have accepted them, and are binding on those Members only. The Plurilateral Agreements can become subject to the DSU by a decision of the concerned WTO Members.

[25] In addition to the general rules of the DSU, some special and additional rules are still contained in covered agreements and prevail over the general provisions of the DSU, according to Article 1.2 of the DSU. These "special and additional rules" are listed in Annex 2 to the DSU and are generally concerned with specific provisions dealing with experts and time-limits.

B. THE GENERAL DISPUTE SETTLEMENT MECHANISM OF NAFTA—CHAPTER 20

Generally, the dispute settlement process envisaged in FTA Chapter 18 was said to be a replica of the GATT dispute settlement system.[26] William Davey's statement that the procedures of Chapter 18 were "by and large the same"[27] as the WTO procedures deserves some qualification. Legally the DSU goes much further than GATT, the FTA and NAFTA dispute settlement processes. It is clear, however, that the basic concepts, structure and process of the dispute settlement mechanism of NAFTA (as with the FTA) have been borrowed extensively from GATT/WTO dispute settlement rules. The reverse is also true but to a much lesser degree.

Chapter 20 of NAFTA comprises three main stages. First, in the event that any matter might affect the operation of the NAFTA, Article 2006 provides that any party may request consultations with the other party concerned. The language emphasizes the importance of a full exchange of views at the consultation stage and obliges the parties to seek to avoid any resolution that would adversely affect the interests of any other party. In several Chapters, as a means of avoiding disputes, NAFTA provides for consultations with experts before a panel can be established. For instance, consultations held under Chapter 5 on Rules of Origin, Chapter 7 on Sanitary and Phytosanitary Measures and Chapter 9 on Standard-Related Measures replace the consultations required under Chapter 20 prior to requesting the establishment of a panel.

Second, if the parties fail to resolve the dispute, the Commission, composed of cabinet-level representatives of the parties or their designees[28] is convened.[29] The Commission is directed to endeavour to resolve the dispute promptly, including through the use of good offices, mediation, conciliation or any other means of dispute settlement resolution.

Third, if the Commission is not successful, any party has the right to request the establishment of a panel. After having selected panelists from a common Roster, the parties will exchange at least one set of submissions and will meet the panel at least once. The panel may also pose questions to the parties and request advice from outside experts. The panel will issue a preliminary report commented by the parties and a final report, which, if not implemented voluntarily, will provide the winning party with the right to suspend benefits equivalent to those affected by the violation.[30] In case of a "manifestly excessive" retaliation by the winning party, the losing party may request arbitration.

C. BINATIONAL PANELS FOR ANTIDUMPING AND COUNTERVAILING DISPUTES—CHAPTER 19

The dispute settlement provisions concerning dumping and subsidy determinations

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[26] G. Horlick, *The U.S.–Canada FTA and GATT Dispute Settlement Procedures*, 26 J.W.T. 2, 1992, p. 9.
[27] Davey, *Pine and Swine*, *supra*, footnote 4, p.27.
[28] Article 2001 of NAFTA.
[29] Article 2007.1 of NAFTA.
[30] Article 2019 of NAFTA.

between Canada and the United States were the object of long negotiations both under the FTA and NAFTA. At the beginning of the FTA negotiations, Canada wanted to do away with FTA internal trade measures. It is indeed arguable that Article XXIV:8(b) of the GATT—which prescribes that restrictions on commerce be eliminated on substantially all trade amongst parties to a free-trade area—would require that anti-dumping (and antisubsidy) measures be phased out between parties to a free-trade area.[31] The purpose and object of Chapter 19 of the FTA was to ensure that the application of trade remedies amongst FTA Members did not worsen. This arrangement was to last only seven years, during which a working group would examine alternative avenues for trade remedies and the possibility of phasing out the use of trade remedies within the FTA. With the conclusion of NAFTA, Chapter 19 was made permanent and a new Working Group, established pursuant to the new Chapter 15 on Competition, is now responsible for examining and reporting on the relationship between competition laws and policies and trade in the free-trade area before 1 January 1999.[32]

Under Chapter 19 each party reserves the right to apply its anti-dumping and countervailing duty laws to goods imported from the territory of any other party.[33] However, two types of recourse are possible: 1. following an amendment to an existing antidumping law; and 2. to review an anti-dumping or countervailing measure assessment by a national authority.

1. *Following an Amendment to an Existing Anti-Dumping Law*

Each party reserves the right to modify its anti-dumping law or countervailing duty law, provided that:

- such amendment applies to goods from another party only if the amending statute specifies that it applies to goods from that party;
- the amending party notifies in writing the parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such stature;
- following notification, the amending party, on request of any party to which the amendment applies, consults with that party prior to the enactment of the amending statute; and
- such amendment, as applicable to that other party, is not consistent with GATT/WTO law and the object and purpose of NAFTA which is to establish "fair and predictable conditions for the progressive liberalization of trade between the parties while maintaining effective and fair disciplines on unfair trade practices."[34]

Article 1903 provides that a party to which an amendment of another party's anti-

[31] For further discussions on this issue, see G. Marceau, *Antidumping and Antitrust Issues in Free-Trade Areas*, Oxford University Press, Oxford, 1994.
[32] Article 1504 of NAFTA.
[33] Article 1902 of NAFTA.
[34] Id.

dumping or countervailing duty statute applies, may request that such an amendment be referred to a binational panel for a declaratory opinion as to whether the amendment is consistent with GATT/WTO law or with the object and purpose of NAFTA.

2. *To Review an Anti-Dumping or Countervailing Measure Assessment by a National Authority*

As under the FTA, where it was negotiated on a temporary basis, each party has to provide for judicial review of final anti-dumping and countervailing duty determinations by a NAFTA binational panel instead of the existing national review process, at the option of the complaining party. Therefore, a party may request that a binational panel review a final anti-dumping or countervailing duty determination of a competent investigating authority of an importing party to decide whether such determination was made in accordance with the anti-dumping or countervailing duty law of the importing party. The NAFTA binational panel is said to apply the standard of review and the general legal principles that a court of the importing party would otherwise apply to review a determination of the competent investigating authority. A party, on its own initiative, may request such review of a final determination, and must, if requested by a person who would otherwise be entitled under its domestic law to commence domestic procedures for judicial review of that final determination, request such review. The binational panel may uphold or remand a final determination.[35]

The peculiar nature of Chapter 19 is that the role of these *ad hoc* binational panels is limited to reviewing whether the determination by the national authority of the importing country (party to NAFTA) was made in accordance with that country's own laws, norms and standards.[36] Since these binational panels apply the national law of the importing country, there is no issue of the "applicability" of the panel report into domestic law; the binational panel process is part of the domestic law, and as such binational panel reports become binding into the domestic law of the importing country. There is nothing close to NAFTA Chapter 19 process in the WTO/DSU. Under the WTO, the anti-dumping and countervailing determinations can be challenged pursuant to the general and integrated dispute settlement process of the DSU and the applicable law will be the WTO anti-dumping or countervailing provisions.

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[35] Article 1904 of NAFTA also provides for an Extraordinary Challenge, if, within a reasonable time after the panel decision is issued, a party alleges that: (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct; (ii) the panel seriously departed from a fundamental rule of procedure; or (iii) the panel manifestly exceeded its powers, authority or jurisdiction; and the actions have materially affected the panel's decision and threaten the integrity of the binational panel review process. Finally, a party may also claim that the domestic law of one of the parties is such as to block the effective process of binational panels. A new procedure has been put into place to safeguard the Panel Review System; its conclusions may lead a party to suspend the operation of the process of a binational panel under Article 1904 of NAFTA.

[36] Article 1904:2.

D. VARIOUS SECTOR-SPECIFIC PROVISIONS FOR ARBITRATION OR DISPUTE RESOLUTION

1. *Emergency Actions (NAFTA Chapter 8)*

In Article 804 NAFTA provides that no party may request the establishment of an arbitral panel regarding any proposed emergency action. The trade-off for this loss of a dispute settlement mechanism which existed under the FTA,[37] is a fuller consultation process and arguably more transparency leading to further avoidance of disputes. Emergency safeguard actions are possible only during the transition period[38] and are subject to compensation.[39] In addition, a party must immediately deliver to any party that may be affected by such an emergency action, a written notice of the institution of a proceeding that may result in emergency action against a good originating in the territory of that party. Parties retain their WTO rights such as to impose global emergency actions,[40] except those regarding compensation or retaliation and exclusion from a NAFTA emergency action.[41] No party may impose restrictions on a good without delivery of prior written notice to the Commission, and without adequate opportunity for consultation with the party against whose good the action is proposed, as far in advance of taking the action as is practicable.[42]

For both bilateral and global emergency actions, NAFTA obliges parties to maintain "equitable, timely, transparent and effective" domestic procedures.[43] Indeed, on instituting an emergency action proceeding, the competent investigating authority must publish a detailed notice of the institution of the proceeding and hold a public hearing to allow all interested parties to be heard on the questions of serious injury, or threat thereof, and the appropriate remedy.[44] Finally, a competent independent investigating authority must also publish a report setting out its findings and reasoned conclusions on all pertinent issues of law and fact.

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[37] Chapter 11 of the FTA did provide for the possibility of non-binding arbitration for safeguard measures.

[38] In addition, no action may be taken by a party against any particular good originating in the territory of another party more than once during the transition period; and on the termination of the action, the rate of duty shall be the rate that would have been in effect one year after the initiation of the action. After the expiration of the transition period, a party may take a bilateral emergency action only with the consent of the party against whose good the action would be taken (Article 801(2) and (3)). See Article 805 for a definition of the transition period.

[39] A party taking an action under Article 802 of NAFTA shall provide to the party against whose good the action is taken mutually agreed trade liberalizing compensation in the form of concessions having substantially equivalent trade effects or equivalent to the value of the additional duties expected to result from the action. If the parties concerned are unable to agree on compensation, the party against whose good the action is taken may take action having trade effects substantially equivalent to the action taken under this Article but only for the minimum period necessary to achieve the substantially equivalent effects (Article 802(6)). Although outside the scope of the present article, note the striking resemblance with the new WTO Safeguard Agreement.

[40] Article 802 of NAFTA.

[41] According to Article 802 of NAFTA, any party taking an emergency action under the WTO must exclude imports of a good from each other party from the action unless imports from a party, considered individually, account for a substantial share of total imports; and imports from a party, considered individually, or in exceptional circumstances imports from parties considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

[42] Article 802:5 of NAFTA.

[43] Article 803:3 of NAFTA.

[44] The investigation must demonstrate the existence of a clear causal link between increased imports and serious injury to domestic like products.

2. *Investment (Chapter 11)*

Chapter 11 on investment[45] provides for binding arbitration in favour of private investors against a party under the International Centre for the Settlement of Investment Disputes (ICSID) Convention of the World Bank or the UNCITRAL[46] Arbitration rules. These arbitration rules will govern the arbitration except to the extent that they are modified by NAFTA. Various forms of remedies are possible. A tribunal may award, separately or in combination, monetary damages and any applicable interest or restitution of property, in which case the award shall provide that the party may pay monetary damages and any applicable interest in lieu of restitution.[47] A tribunal may also award costs in accordance with the applicable arbitration rules but may not order a party to pay punitive damages. Such an award is binding on the country-parties. In the case of a final award made under the ICSID Convention, a party may request revision or annulment of the award within one hundred and twenty days from the date the award was rendered. In the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules, a country-party may commence a proceeding to revise, set aside or annul the award within three months from the date the award was rendered.[48]

If a country-party fails to comply with a final award, the Commission, on delivery of a request by a country-party whose inventor was a party to the arbitration, will establish an arbitral panel under Chapter 20. The requesting party may seek a determination that the failure to comply with the final award is inconsistent with the relevant NAFTA obligations and a recommendation that the losing party comply with the final award. An investor may seek enforcement of an arbitration award under the ICSID Convention,[49] the New York Convention[50] or the Inter-American Convention[51] regardless of whether Chapter 20 proceedings have been requested.

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[45] For further discussions on this issue, please refer amongst others to R. Dearden, *Arbitration of Expropriation Disputes between an Investor and the State under NAFTA*, 29 J.W.T. 1, February 1995, p. 113; Malcolm R. Wilkey, *Introduction to Dispute Settlement in International Trade and Foreign Direct Investment*, in L. & P. in Int'l Trade, Vol. 26, No. 3, 1995; and G. Horlick and A. Marti, *NAFTA Chapter 11B: A Private Right of Action to Enforce Market Access through Investments*, presented at the Geneva Global Arbitration Forum, held on 19 September 1996, and printed in 14 J. Int. Arb 1, March 1997, p. 43.

[46] Arbitration rules of the United Nations Commission on International Trade Law, approved by the UN General Assembly on 15 December 1976.

[47] An award of restitution of property shall provide that restitution be made to the enterprise; an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law: NAFTA, Article 1135:2.

[48] The reason why there are three options is because the United States, Canada and Mexico were parties to different conventions.

[49] Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, 18 March 1965.

[50] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York, 10 June 1958.

[51] Inter-American Convention on International Commercial Arbitration, done in Panama, 30 January 1975.

3. *Financial Services (Chapter 14)*

Chapter 14 of NAFTA on financial services (contrary to Chapter 17 of the FTA in which it is otherwise subject to the general dispute settlement rules of Chapter 20) provides for its own roster of fifteen expert panelists. By exception, Article 1414:5 limits the possibility of cross-retaliation. In any dispute where a panel finds a measure to be inconsistent with NAFTA and the measure affects only the financial services sector, the complaining party may suspend benefits only in the financial services sector; if the measure affects the financial services sector and any other sector, the complaining party may suspend benefits in the financial services sector that have an effect equivalent to the effect of the measure in the party's financial services sector; finally, if the measure affects only a sector other than the financial services sector, the complaining party may not suspend benefits in the financial services sector.

Article 1415 of NAFTA provides for rules of conflict in the case of an investment dispute in financial services. Where an investor of another party submits a claim to arbitration under Chapter 11 on Investment against a party who invokes one of the exceptions specific to Chapter 14 on Financial Services, the tribunal, on request of that party, must refer the matter in writing to the Financial Services Committee[52] for a decision. The Committee decides the issue of whether and to what extent the alleged exceptions are a valid defence to the claim of the investor. The Committee then transmits a copy of its binding decision to the tribunal and to the Commission. Where the Committee has not decided the issue within sixty days of the receipt of the referral, the party or the country of the investor may request the establishment of an arbitral panel under Chapter 20. That arbitral panel must also transmit its binding final report to the Committee and to the tribunal. Where no request for the establishment of an arbitral panel has been made within ten days of the expiration of the sixty-day period, the tribunal itself may proceed to decide the matter.

E. THE EXPLICIT RECOURSE TO DOMESTIC DISPUTE SETTLEMENT PROCESSES THROUGH INCREASED PROCEDURAL RIGHTS IN FAVOUR OF COMMERCIAL ACTORS OF THE OTHER PARTY

NAFTA also contains some provisions whereby the parties are required to maintain domestic procedures in favour of nationals of the parties.

1. *Customs Procedures (Chapter 5)*

Pursuant to Chapter 5, traders are not granted a right of review and appeal of advance rulings on customs determinations, determinations of origin, and country of origin determinations. These extended transparency rules provide for detailed expert

[52] Article 1412 of NAFTA.

analysis of the issues before they are brought to a panel; this expert process should also reduce the number of disputes that reach the panel stage.

2. *Government Procurement (Chapter 10)*

Chapter 10 on government procurement provides that each party must accord to goods of another party, to the suppliers of such goods and to service suppliers of another party, treatment no less favourable than the most favourable treatment that the party accords to its own goods and suppliers or to goods and suppliers of another party. In addition, no party may treat a locally established supplier less favourably than another locally established supplier on the basis of degree of foreign affiliation or ownership; nor may any party discriminate against a locally established supplier on the ground that the goods or services offered by that supplier for the particular procurement are goods or services of another party. Therefore suppliers from all parties can bid and challenge the results of a bid procedure before a national independent reviewing authority of the other party.

3. *Intellectual Property (Chapter 17)*[53]

The mechanism envisaged in the sector of intellectual property is fairly similar to that concerning government procurement. Each party must accord to nationals of the other parties treatment no less favourable than the treatment it offers to its own nationals. Article 1714 (and following) obliges all parties to ensure that enforcement procedures are available under their domestic laws so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by NAFTA, including expeditious remedies to prevent infringements and remedies to deter further infringements. Each party must ensure that its procedures for the enforcement of intellectual property rights are fair and equitable, are not unnecessarily complicated or costly, and do not entail unreasonable time-limits or unwarranted delays.

F. THE DISPUTE SETTLEMENT PROCESSES FOR ENVIRONMENTAL AND LABOUR ISSUES[54]

The dispute settlement provisions of the North American Agreement on Environmental Co-operation (Environmental Side Agreement) and the North American Agreement on Labour Co-operation (Labour Side Agreement)[55] are fairly similar, very detailed and complex. The Environmental Side Agreement contains rules which provide for consultations between the parties where one party believes that

[53] Chapter 17 is a replica of the Trade-Related Intellectual Property Agreement (TRIPs) of the WTO.

[54] For further discussions on the environment issue please refer, amongst others, to A. Baker Fox, *Environment and Trade: The NAFTA Case*, in Political Science Quarterly, Vol. 110, No. 1, 1995, p. 49.

[55] Entered into force on 1 January 1994, immediately after NAFTA. Article 47 of the Environmental Side Agreement and Article 51 of the Labour Side Agreement.

another party is engaging in a "persistent pattern of failing to enforce effectively its environmental law".[56] If these consultations at Council level are unsuccessful and if there is allegation of a persistent pattern of failure to enforce environmental laws on a product which is exported, the Council must convene an arbitral panel at the request of any consulting party.[57] The Labour Side Agreement envisages first a preliminary process of co-operative consultations and evaluation by an Evaluation Committee of Experts (ECE). Following such an ECE report, formal consultations can be requested by a party with regard to "persistent patterns of failing to enforce effectively its occupational safety and health, child labour or minimum wage technical labour standard"[58] addressed in the ECE report.

Both Side Agreements contain detailed procedural rules on the panel selection and process which follow the pattern of Chapter 20 of NAFTA and the DSU. After meeting the parties, the panel will first issue an initial report, in respect of which parties are invited to make comments. Subsequently, the panel will issue its final report that may recommend remedies from amongst a wide range of options, including, in the case of the Environmental Side Agreement, penalties which can go up to US$ 20 million, the imposition of an action plan to correct the pattern violations, and in the case of Mexico and the United States, the imposition of trade sanctions. Both Side Agreements contain detailed rules on the implementation of panel recommendations and provide for a process of review of the implementation which includes the possibility that the initial panel be reconvened. In case of consistent non-compliance, including monetary enforcement, a party may suspend equivalent benefits against the other party.[59]

IV. Some Features of the Dispute Resolution Mechanism of NAFTA and the WTO

A. Government-to-government process

The GATT and the WTO Agreement were concluded amongst States and their disciplines are addressed to States only;[60] the GATT/WTO forum and the GATT/WTO dispute settlement process are open exclusively to WTO Members.

The same holds true for the general dispute settlement mechanism of Chapter 20 of NAFTA as is made explicit in Article 2021:

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[56] Environmental Side Agreement, Article 22.

[57] Ibid., Article 24.

[58] Article 27 of the Labour Side Agreement.

[59] The Environmental Side Agreement also provides for the ability of a private party to initiate a factual investigation which could thereafter be published: Articles 14 and 15.

[60] However, since the Semi-Conductor Panel Report (*Japan—Trade in Semi-conductors*, adopted on 4 May 1988, BISD 35S/116) government measures regulated by GATT disciplines have been interpreted to include non-mandatory measures followed by private firms when the government has put into place a system of sufficient incentives or disincentives related to the non-mandatory measures.

> "No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement."

This same principle is reiterated in Article 38 of the Environmental Side Agreement and Article 42 of the Labour Side Agreement.

However, as mentioned, disputes under Chapter 19 of NAFTA are not government-to-government disputes since most often the binational review process is triggered by private parties (the exporters, although governmental authorities may be co-complainants) which challenge the application of the domestic law by the national authorities of the importing country. The Chapter 19 process is therefore rather a State-private enterprise process which bears some resemblance to the ICSID Convention and the process envisaged in Chapter 14 of NAFTA on Investment involving disputes between a private party and a State.

B. INSTITUTIONAL ASPECTS

NAFTA has put in place a Commission comprising cabinet-level representatives of the parties or their designees. The Commission's functions are to supervise the implementation of NAFTA; oversee its further elaboration; resolve disputes that may arise regarding its interpretation or application; supervise the work of all committees and working groups established under NAFTA; and consider any other matter that may affect the operation of the NAFTA Agreement. The Commission may also establish, and delegate responsibilities to *ad hoc* or standing committees, working groups or expert groups; seek the advice of non-governmental persons or groups; and take such other action in the exercise of its functions as the Parties may agree.[61]

All decisions of the Commission are taken by consensus,[62] except as the Commission may otherwise agree. The Commission convenes at least once a year in regular session chaired successively by each Party. NAFTA is not an independent international organization, as is the WTO, but the NAFTA Commission has a Secretariat comprising "national Sections". In this context, each country party to NAFTA had to establish a permanent office of its Section, be responsible for the operation and costs of its Section, and the remuneration and payment of expenses of panelists and members of committees and scientific review boards established under NAFTA, and designate an individual to serve as Secretary for its Section, who is responsible for its administration and management. Although the wording of Article 2001 seems very broad, in practice the role of the NAFTA Secretariat (through its national branches) is almost exclusively administrative and operational. Its structure, composition and activities are very much more limited than those of the WTO Secretariat.

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[61] Article 2001 of NAFTA.
[62] Article 2001:4 of NAFTA.

The WTO, on the other hand, is a formal international organization with legal personality.[63] However, the WTO Agreement has not provided the Ministerial Conference, the General Council, the DSB or the Trade Policy Review Mechanism (TPRM) Council with any power or authority to investigate situations or initiate disputes, unlike the Commission of the European Communities, for instance. In fact, in the WTO, it is the full WTO membership that monitors collectively the compliance with the WTO Agreements as well as the implementation of the panel and Appellate Body reports. The WTO Agreement has created a new body for dispute settlement, the Dispute Settlement Body, composed of the same membership as the General Council, i.e. all the WTO membership, which is responsible for the administration and application of the DSU.[64] The DSB establishes panels, adopts panel and Appellate Body reports, maintains surveillance of implementation and compensation and authorizes, if requested, retaliations. In NAFTA, after consultations, only the parties to the disputes ultimately control its process. The institutional organization of the WTO and the DSB, and the continuous participation of all WTO Members in the various stages of the dispute resolution process[65] (even if most WTO Members not party to the dispute only have the right to ask questions and comment) make the WTO dispute settlement system a truly multilateral system where non-parties to a dispute have surveillance rights and obligations. This confirms the systemic interest of the entire WTO membership for the WTO law, institutions and disputes.

C. AUTOMATICITY AND DURATION OF THE DISPUTE RESOLUTION PROCESS

Both NAFTA and the WTO dispute settlement systems are rule-based systems as opposed to negotiation-conciliation-mediation types of dispute resolution mechanisms. Both systems envisage procedural steps which can be triggered by any party unsatisfied with the other party's application and interpretation of the Agreement, in order for the unsatisfied party to obtain a formal interpretation by an independent body through an adjudicative process of the relevant rights and obligations under the relevant Agreements.

Under NAFTA, the legal steps of the dispute settlement process are quasi-automatic, although parties can, and do, agree otherwise. In theory, the process under Chapter 20

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[63] Article VIII:1 of the WTO Agreement. The GATT was not an international organization although it had a Secretariat and the contracting parties acting collectively (CONTRACTING PARTIES) took decisions having effects similar to those taken by an international organization. Legally, however, GATT was nothing but a contract between States (indeed we refer to the GATT "contracting parties") while the ITO, which was to be a formal international organization, used the expression "Members"). Through the evolution of GATT, pragmatic needs forced States to put in place an executive body, the Council (1959 Decision of the CONTRACTING PARTIES, BISD 7S/7) and additional committees have been formed over the years to respond to specific organizational and administrative needs.

[64] It can be argued that the DSB is legally distinct from the General Council with a different chairperson, different rules of procedures, different voting rules and different rights for observers.

[65] For instance any WTO Member may intervene in the establishment of terms of reference other than standard: Article 7.3 of the DSU; for mutually agreed solution: Article 3.6 of the DSU; or in the surveillance process; Articles 21.6 and 22.8 of the DSU.

should last less than one hundred and twenty days after the panelists have been selected[66] (and all panelists should be selected within thirty days from the day of the request for a panel). Therefore, a complaining party is provided with the legal tools to force the development of the panel process to a final decision within one hundred and twenty days. However, under Chapter 20, the recommendations of the panels are not strictly binding. After the panel submits its recommendations, the panel report is transmitted to the Commission, and parties are again invited to agree on the implementation of the panel's recommendations. If the recommendations of the panel are not voluntarily implemented within thirty days, the winning party can retaliate, as the winning party has the right to suspend equivalent concessions. Binding arbitration is available under Article 2019 to determine whether one country's retaliation, in response to another country's failure to implement and comply with a panel report, is "manifestly excessive".[67] Arguably, this binding arbitration acts as a guarantee against unilateral measures not authorized by NAFTA itself to the extent that the unilateral retaliatory measure is manifestly excessive. It can be said that NAFTA provides for an automatic process and imposes parameters such as binding arbitration to avoid excessive retaliation.

The principle of automaticity of the legal steps of the dispute resolution mechanism has evolved from the early days of GATT. Except for the very early years where contracting parties voted,[68] decisions of the CONTRACTING PARTIES have been taking place when no country formally objected to it; this has been the practice of consensus.[69] The right of a party to force the establishment of a panel without the need to obtain consensus of the entire membership, including from the country whose measure was challenged, was first recognized in the Anti-Dumping and Subsidy/Countervailing Duty Codes of the Tokyo Round.[70] Under the Montreal Mid-Term Review decision to improve the dispute settlement process,[71] changes were made to secure greater automaticity in the establishment, terms of reference and composition of panels, so that decisions would no longer depend on the consent of the parties to a dispute. The DSU strengthened further the existing system by extending the automaticity principle to the adoption of panel and Appellate Body reports and to the retaliation process. The DSU now provides for a series of legal events which take place automatically, unless the Members agree otherwise by consensus. This is the reverse, or negative, consensus in

[66] There must be less than ninety days between the issuance of the initial report and the selection of panelists, (Article 2016:2) and an additional thirty days between the initial and final report (Article 2017:1). In practice, however, most of the FTA and NAFTA panels have functioned wholly outside the time frames by agreement of the parties.

[67] Article 2019:3 of NAFTA.

[68] See for instance the *United Exports Restrictions* case against Czechoslovakia, 8 June 1949, II BISD/28 where a vote of two-thirds of the CONTRACTING PARTIES led to a decision rejecting the claim of Czechoslovakia.

[69] Consensus is probably the oldest practice of GATT and reflects its political roots. Consensus is also the normal voting procedure of the NAFTA Commission. Due to the limited membership, consensus may be more easily obtained than in the WTO forum.

[70] Article 15.5 of the Tokyo Round Anti-Dumping Code and Articles 13.3 and 18.1 of the Tokyo Round Subsidies Code.

[71] Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures, BISD 36S/64.

that consensus is needed to reverse or stop the automaticity of the legal steps of the dispute settlement process.[72]

The proposed duration of the DSU dispute settlement process is nine months from the establishment of the panel[73] or six months from its constitution[74] (i.e. after panelists have been selected and terms of reference have been agreed upon) until the issuance of the final report to the parties. If this six-month limit cannot be respected, the chairman of the panel must notify the DSB of the reasons for the delay and the expected date of issuance of the report.[75] After the constitution of a panel, the parties agree on precise dates for their submissions and acts based on the suggested timetable of Appendix 3 of the DSU. Nothing is said in case of non-respect of the time-period for the panel process.[76] Some time-limits are more stringent, such as the Appellate Review process[77] or the period within which the "reasonable period of time for implementation" is to be determined,[78] or the duration of the dispute proceedings in case of disagreement on the proposed implementation,[79] or in case of arbitration in the context of retaliation.[80]

The dispute settlement process of the DSU seems therefore more automatic than that of NAFTA. In both forums, however, the process can be stopped or slowed down upon the agreement of the parties; WTO Members maintain a few independent rights.

D. JURISDICTION OF THE PANEL

1. *Claims*

Traditionally, GATT has always recognized the right of its contracting parties to complain about the violation of a provision of GATT by another contracting party. Article XXIII:1(b) and (c) envisages also the possibility that a contracting party's action (or arguably its absence of action) or another situation may still impair or nullify the benefits of another contracting party.[81] The concepts of violation and non-violation claims have been imported into the FTA/NAFTA, with some modifications.

(a) *Violation complaints*

Under NAFTA, consultations[82] can be requested regarding any actual or proposed

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[72] A decision will be deemed to have been taken by consensus if no Member, present when the decision is taken, formally objects to the proposed decision: Article 2.4 of the DSU.

[73] Article 20 of the DSU.

[74] Article 12.8 of the DSU.

[75] Article 12.9 of the DSU.

[76] So far none of the WTO panels has been able to respect the six month time-limit for the panel process.

[77] Maximum ninety days: Article 17.5 of the DSU.

[78] Maximum eighteen months: Article 21.4 of the DSU.

[79] Article 21.5 of the DSU.

[80] Article 22.6 and 22.7 of the DSU.

[81] Some parallels can be drawn between this concept of "non-violation complaints" and that of "legitimate expectations" argued in the context of State responsibility in public international law.

[82] Article 2006: 1 of the NAFTA and Article 4 of the DSU.

measure or any other matter that a party considers might affect the operation of NAFTA. The language of GATT Article XXII:1, reiterated in Article 4.2 of the DSU, does not include such proposed measures. Article 4.2 of the DSU reads as follows:

> "...afford adequate opportunity for consultation regarding any representations made by another Member concerning *measures affecting the operation of any Covered Agreement* taken within the territory of the former." (emphasis added).

All depends on what "measure" or "proposed measure" mean. The GATT case-law has always been that only mandatory measures can be considered a measure subject to challenge.[83] A proposed measure, by definition, would not be binding, and arguably would not be challenged under GATT unless a WTO Member alleges that the very proposition and its announcement constitute a violation or a non-violation of GATT/WTO. The scope of a measure to be adjudicated upon seems wider under NAFTA than under the GATT/DSU.[84]

(b) *Non-violation complaints*[85]

As discussed in Section II above, the purpose of the GATT/WTO dispute settlement mechanism is to ensure the respect of rights and obligations of the parties affecting their market-access commitments and market-competitive opportunities, including tariff concessions and related disciplines. In this context, Article XXIII:1(b) of GATT allows a party to challenge any measure that, although not in breach of GATT, has the effect of undermining the value of the balance inherent in GATT.[86] Under GATT, thirteen non-violation claims have been addressed by panels, but only four panel reports containing

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[83] See GATT Analytical Index, 1995, pp. 133 and 638; see also *United States—Taxes on petroleum and certain imported substances*, adopted on 17 June 1987, BISD 34S/136; *EEC—Regulation on imports of parts and components*, adopted on 16 May 1990, BISD 37S/132; *Thailand—Restrictions on importation of and internal taxes on cigarettes*, adopted on 7 November 1990, BISD 37S/200; and *United States—Measures affecting alcoholic and malt beverages*, adopted on 19 June 1990, BISD 39S/206.

[84] The scope of application of the DSU—to all WTO Agreements in an integrated dispute settlement process—is wider than under NAFTA.

[85] For further discussion on the concept of non-violation see Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, as well as that of Thomas Cottier and Krista Nadakavukaren Schefer, *Non-Violation Complaints in WTO/GATT Dispute Settlement: Past, Present and Future* in Petersmann (ed.), bionote, *supra*. See also on the non-violation procedure of the GATT and on the dispute settlement procedure in general, A. von Bogdandy, *The Non-Violation Procedure of Article XXIII:2*, 26 J.W.T. 4, August 1992, p. 97; E.-U. Petersmann, *Violation-Complaints and Non-Violation Complaints in Public International Trade Law, German Yearbook of International Law*, 1991, p. 175; M. Bronckers, *Non-Judicial and Judicial Remedies in International Trade Disputes*, 24 J.W.T. 6, December 1990, p. 121; J. Waincymer; *Revitalizing GATT Article XXIII—Issues in the Context of the Uruguay Round*, 12 W. Comp. 1, September 1988, p. 5; L. Sohn, *Preparation of a New Treaty for the Settlement of International Duties*, and R. Ostrihansky, *The Future of Dispute Settlement Within GATT: Conciliation v. Adjudication?* in *The United Nations Decade of International Law*; M. Brus, S. Muller and S. Wiemers (eds.), Leiden Journal of International Law, 1991, pp. 51 and 125.

[86] Article XXIII:1 of GATT: "If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, *whether or not it conflicts with the provisions of this Agreement*, or (c) the existence of any other situation." (emphasis added).

conclusions on non-violation claims have been adopted.[87] Under GATT, this concept of non-violation has been mainly used when an otherwise GATT-compatible subsidy was provided in an unexpected manner in favour of domestic goods for which tariffs had been negotiated. The complaining party had to prove that the measure could not have been reasonably expected when tariff concessions on the relevant products were negotiated and that such subsidy nullified benefits accruing to it under GATT, namely tariff concessions.[88]

The FTA has also imported the concept of non-violation complaints from GATT; a party may claim nullification or impairment of its benefits under NAFTA even in situations where there is no violation of any provision of NAFTA. Article 2004 states, in part, that:

> "...the dispute settlement provisions of this Chapter shall apply with respect to...an actual or proposed measure of another party [that a party considers] is or would be inconsistent with the obligations of this Agreement or *cause nullification or impairment in the sense of Annex 2004*." (emphasis added).

Annex 2004 provides the scope of these non-violation nullification and impairment claims applicable to trade in goods, as is the case in GATT. Non-violation claims are also possible for services and intellectual property obligations, except where a country is acting pursuant to a general exception under Article 2101. However, no claim of non-violation may be made respecting investment, cultural industries or for dumping and subsidy determinations.[89]

Under Article 26 of the DSU, non-violation claims have been further regulated than they were under GATT or the Tokyo Round Understanding on Dispute Settlement. Article 26 of the DSU is said to apply when the provisions of Article XXIII:1(b) of GATT 1994 are applicable to a Covered Agreement. In other words, unless explicitly excluded, non-violation claims are possible for any measures under any of the Agreements of Annex 1A of the WTO Agreement. Article 64 of TRIPS cross-refers to non-violation claims under GATT 1994, but Article 64.3 of TRIPS provides that no

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[87] *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1959, BISD II/188; *Treatment by Germany of Imports of Sardines*, adopted on 31 October 1952, BISD 1S/53; *EEC—Payments and subsidies paid to processors and producers of oilseeds and related animal feed proteins*, adopted on 25 January 1990, BISD 37S/86; and the *United States—Restrictions on the importation of sugar and sugar-containing products applied under the 1955 Waiver* (the so-called *Headnote* case), adopted on 7 November 1990, BISD 37S/228.

[88] There is still a debate as to whether the only benefits under GATT are those tariff concessions or whether benefits may include non-tariff measures. The *EC—Tariff treatment of citrus products from certain Mediterranean countries*, 7 February 1985, never adopted (L/5776) and the *Headnote* case, *supra*, footnote 87, seem to accept that all benefits, not only those under Article II (such as unbound tariffs) may lead to non-violation claims. Difficulties in the evaluation and assessment of the nullification and impairment of benefits would take place, as further discussed below.

[89] Annex 2004 provides that: "1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of: (a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment, (b) Part Three (Technical Barriers to Trade), (c) Chapter Twelve (Cross-Border Trade in Services), or (d) Part Six (Intellectual Property), is being nullified or impaired as a result of the application of any measure *that is not inconsistent with this Agreement*, the Party may have recourse to dispute settlement under this Chapter. 2. A Party may *not invoke* (a) paragraph 1(a) and (b), to the extent that the benefit arises from any cross-border trade in services provision of Part Two, or (b) paragraph 1(c) or (d), with respect to any measure subject to an exception under Article 2101 (General Exceptions)." (emphasis added).

non-violation claims pursuant to Article XXXIII:1(b) or (c) can be brought before the DSB, and that the Council for TRIPS is to decide within five years whether non-violation claims are to be possible in the area of intellectual property. The provisions of Article 26 of the DSU are not applicable to non-violation claims under GATS, but Article XXIII of GATS also envisages the possibility of non-violation claims:

> "If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure. In the event an agreement cannot be reached between the Members concerned, Article 22 of the DSU shall apply."

The provisions of GATS on non-violation complaints are therefore similar with two exceptions. First, the remedies under the DSU and GATS differ. Under Article 26.1(b) of the DSU, the standard remedy for non-violation claims is compensation, since panels cannot recommend that the losing party withdraw its measure or bring its law into conformity with the WTO as the measure is already WTO-compatible. Roessler reports that the CONTRACTING PARTIES decided in 1952 that a finding of impairment of benefits accruing under GATT did not entail the obligation to remove the impairing measure in referring to BISD II/195 and that this decision was taken over in Article 26.1(b) and (c) of the DSU.[90] Article XXIII of GATS provides that the Member is entitled to a "mutually satisfactory adjustment" which "...*may* include the modification or withdrawal of the measure" (emphasis added). One could argue that the only reasonable interpretation of this provision is that a WTO Member, losing a GATS non-violation case, could offer in the context of a mutually agreed compensation, to modify or withdraw a GATS-compatible measure.

(c) *Situation complaints*

GATT Article XXIII:1(c) and Article 26.2 of the DSU provide for the so-called "situation complaints" which have never been interpreted by a panel.[91] It has been argued that these situation complaints could be used for actions by the private sector of a Member State which could not be imputed directly to the government; others believe that situation complaints can be used to avoid the argument that the situation could not have been reasonably expected. However, there is no provision for situation complaints under GATS or under NAFTA.

The cause of action is therefore somewhat different between NAFTA and the WTO. Under NAFTA, violation complaints include actual and proposed measures; so far GATT has only covered actually binding measures. On the other hand, under the WTO non-violation claims can be raised under all Covered Agreements where NAFTA contains a

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[90] See Roessler, *supra*, footnote 85, at p. 8.

[91] The only case was the *Japan—Nullification or impairment of the benefits accruing to the EEC under the GATT and impediment to the attainment of GATT objectives*, the so-called *Way of Life* case initiated by the EC. Japan opposed the establishment of the Panel and the EC did not pursue the matter further.

series of sector-exceptions. On the other hand, NAFTA admits allegations of non-violation claims in areas of intellectual property rights; TRIPs does not. For non-violation claims (as for violation claims) NAFTA recommends and favours the removal of the measure[92] where the DSU makes it voluntary for non-violation claims.

2. *Terms of Reference*

Under Chapter 20 of NAFTA, unless the parties otherwise agree within twenty days from the date of the delivery of the request for the establishment of a panel, the terms of reference are the following:

> "To examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations [requested by the parties]."

NAFTA panels may hear any matter related to a NAFTA dispute since Article 2016(2)(b) provides that the panel report must contain, in addition to its recommendations on violation or non-violation claims, "any other determination requested in the terms of reference". For instance, Article 2012.5 explicitly refers to the possibility that parties request the Panel to make findings as to the "degree of adverse effects of any measure" found to nullify or impair benefits under NAFTA. Where one party is requesting such an assessment of the degree of adverse trade effects (as well as in the case of non-violation claims), the terms of reference must so indicate.

Under the DSU, the principle is the same as under Chapter 20 of NAFTA: Panels usually have standard terms of reference, unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel. The practice of the WTO, so far, has been to refer, in the standard terms of reference, to the document in which the complaining party requested the establishment of the panel, and to leave it to the panel to decide on any jurisdictional issue, the applicable law and whether adequate consultations have taken place before the establishment of a panel.[93] If other than standard terms of reference are agreed upon, any Member may raise in the DSB any point relating thereto; this possibility does not exist in favour of the NAFTA party not involved in the dispute. This is another indication of the multilateral aspects of the WTO dispute process. Article 7 of the DSU on standard terms of reference refers to claims under the Covered Agreements, which would mean that only WTO Agreements can be enforced through the DSU process. This is not to say that other Agreements can be used to interpret the WTO Agreement.[94] The mandate of a DSU panel seems more restricted than that of a NAFTA panel, as the former is limited in its examination to findings of

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[92] Article 2018 of NAFTA. In general NAFTA panels have much wider latitude as to their recommendations and the appropriate remedies compared with DSU panels; see Sections IV:5 and V:2.

[93] The standard terms of reference therefore read as follows: "To examine, in the light of the relevant provisions cited by [the parties to the dispute] in document [request(s) for establishment of the panel] the matter referred to the DSB by [the parties to the dispute] in that [those] document(s) and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that [those] agreement(s)."

[94] Article 3.2 of the DSU.

violations or non-violation and recommendations that the measure be brought into compliance with the WTO. In NAFTA, parties appear to be able to agree on any mandate for their panel.

Unlike NAFTA,[95] there is no explicit requirement under the DSU that the terms of reference contain non-violation allegations. However, this requirement is implicit since the terms of reference simply refer to the content of the document requesting the establishment of a panel which must identify "the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[96] The terms of reference of a non-violation claim would therefore refer to its legal basis, specific and different to that of a violation claim. In addition, under GATT practice, a matter cannot be brought to a panel unless it has been the object of consultations prior to the request for a panel. Thus, for a WTO panel to address non-violation claims, both the request for consultations and the request for the establishment of a panel should refer explicitly to the facts and legal arguments in support of any non-violation allegation.

E. CONCLUSIONS OF PANELS, AND REMEDIES

The first recommended remedy pursuant to a panel's violation conclusion is the same for both NAFTA and WTO systems: the removal of the measure in violation cases. In cases of non-violation claims, the DSU provides for compensation, unless otherwise agreed by the parties, but NAFTA does not make any distinction: wherever possible the measure should be removed; if not, compensation should be agreed upon.[97] Panelists in NAFTA generally seem to have much more latitude as to which remedy they can recommend. Article 2016 provides that the initial report to be given to the parties should include findings of fact, including the level of adverse effect of any alleged violation or non-violation measure, its determination on violation or non-violation claims as well as any determination requested in the terms of reference.[98] NAFTA panelists can therefore quantify the economic impact of any violation or non-violation, a practice which does not exist under GATT/WTO: panels have never made any assessment of the economic or trade effects of any violation. In addition to its recommendations, the DSU panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. But these suggestions are only alternative ways in

[95] Article 2012:4 of NAFTA.

[96] Article 6.2 of the DSU.

[97] Article 2018 of NAFTA provides: "On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute...Wherever possible, the resolution shall be *non-implementation or removal of a measure not conforming with this Agreement* or causing nullification or impairment in the sense of Annex 2004 *or*, failing such a resolution, *compensation*." (emphasis added).

[98] For investment disputes in financial services, it shall be for Panels to decide whether and to what extent Article 1410 is a valid defence to the claim of the investor: Article 1415:2 of the NAFTA.

which a Member "could" decide to implement.[99] It is, however, possible for parties to a WTO dispute to agree on any form of compensation.

NAFTA provisions on remedies are therefore much wider than the prescriptions of Article 19 of the DSU which appear to limit the authority of the panel to recommending that the measure be brought into conformity with the WTO Agreement unless the prescription of the first sentence of Article 19 of the DSU contains a minimum requirement to which any Appellate Body recommendations could be added.

F. STANDARD OF REVIEW

Chapter 20 of NAFTA does not make any reference to an appropriate standard of review to be applied by panels when assessing the compatibility of national measures with NAFTA. Under Chapter 18 of the FTA, panels have not hesitated to scrutinize the effective impact of national measures to assess whether they respect the obligations of the FTA. It can even be argued that FTA panels have gone so far as assessing the proportionality of national measures, such as in the *Salmon/Herring* case[100] where the Panel stated: "...the central issue was whether the conservation benefits of the landing requirement would have been *large enough to justify* imposing the commercial inconvenience in question." (emphasis added).[101] Such a panel statement implies that it was re-balancing that country's alleged conservation benefits against NAFTA trade inconveniences.[102] So far GATT panels have never been so intrusive and have guarded themselves from challenging the authentic choice of policy or the objective of the measure.[103] The DSU does not contain any provision on standards of review. Article 11 of the DSU is, however, relevant of the function of panels:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the Covered Agreements. Accordingly, a panel should make an *objective assessment* of the matter before it, *including* an *objective assessment of the facts* of the case *and* the *applicability of and conformity with the relevant Covered Agreements*, and made such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the Covered Agreements. Panels should consult regularly with the parties to the dispute

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[99] The Panel Report on *U.S.—Restrictions on imports of cotton and man-made fibre underwear*, WT/DS24/R, contain a suggested remedy for the immediate removal of the measure.

[100] *Canada's Landing Requirement for Pacific Coast Salmon and Herring* (*Salmon/Herring* case), Case No. CDA-89-1807-01, Final Report of the Panel, 16 October 1989.

[101] Paragraph 7.10 of the Salmon/Herring FTA Panel Report.

[102] In Chapter 19 of NAFTA, Article 1904:3 provides explicitly that binational panels are to apply the standard of review that would otherwise be applicable in the domestic system of the importing country. It is interesting therefore to note that these binational panels apply different standards of review depending on the nationality of the complaining party. For a comparison on the standard of review, see D. Steger, and J. Robichaud, *Chapter 19 of the FTA: The First Five Years*, presented to the Symposium on International Trade, Universidad Nacional Autónoma de México, 1993. On standard of review, see also S. Croley and J. Jackson, *WTO Dispute Panel Deference to National Government Decisions: The Misplaced Analogy to the U.S. Chevron Standard-of-Review Doctrine*, in Petersmann (ed.), bio note, *supra*.

[103] This was confirmed by the first WTO Panel on Gasoline, between Venezuela and Brazil against the United States, where the Panel concluded that WTO Members are free to determine the level and the type of ecological standards they want, but must do so with measures compatible with the WTO Agreement. This was also confirmed by the Appellate Body, WT/DS2/R, adopted together with the Appellate Body Report on 20 May 1996.

and give them adequate opportunity to develop a mutually satisfactory solution." (emphasis added).

This is to say that DSU panels have to examine the facts sufficiently so as to be able to conclude objectively whether the measure of the WTO Member is compatible with WTO rules. If a violation is proven, the nullification and impairment of benefits is presumed (Article 3.8 of the DSU). If a Member invokes an exception, panels have so far limited their assessment as to whether the violation was necessary and that the measure chosen was the least trade-restrictive and not a disguised restriction to trade. Arguably, the WTO case-law may develop criteria for panels to perform some form of balancing when assessing the compatibility of a measure with the *chapeau* of Article XX of GATT. New WTO Agreements, such as the Technical Barriers to Trade and the Sanitary and Phytosanitary Agreements, may call for a more expanded review process by DSU panels. The Anti-Dumping Agreement[104] contains a standard of review provision in Article 17.6(ii):

> "The panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

An additional Ministerial decision[105] could be argued to provide that the same standard of review applies to subsidies cases, and a second decision[106] invites Members to consider whether the same standard of review could be made applicable to all WTO Agreements.[107] In the Panel Reports *U.S.—Restrictions on imports of cotton and man-made fibre underwear*[108] and *U.S.—Measure affecting the imports of woven wool shirts and blouses*,[109] all parties agreed that the provisions of Article 17.6 of the WTO Anti-Dumping Agreement were not applicable under the Agreement on Textiles and Clothing.

There is no standard of review for the Appellate Body decisions. Article 17.6 of the DSU simply states that "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." The Rules of Procedure of the Appellate Body have not brought any further light on the criteria to be used by the Appellate Body to distinguish questions of fact from questions of law.

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[104] Agreement on Implementation of Article VI of GATT 1994 of the WTO Agreement.

[105] Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994: "*Ministers decide* as follows: The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."

[106] Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures: "*Ministers recognize*, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

[107] The debates surrounding the expression "permissible interpretations" is argued by Croley and Jackson, *supra*, footnote 102.

[108] *Supra*, footnote 99.

[109] WT/DS33/R.

G. ALTERNATIVE DISPUTE RESOLUTION

In an improvement from the FTA, NAFTA favours the amicable settlement of disputes and the use of alternative dispute settlement mechanisms. Article 2003 imposes an obligation on the parties to seek agreed interpretations, and to "make every attempt" to reach agreed solutions. Following consultations, the NAFTA Commission can recommend various dispute resolution means. The Commission may[110] call on such technical advisers or create working groups or expert groups as it deems necessary, have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or make recommendations, to assist the parties to reach a mutually satisfactory resolution of the dispute. Article 2022 also encourages parties to use arbitration and other means of dispute resolution for private parties. NAFTA Parties must therefore guarantee national arbitration procedures including the recognition and enforcement of arbitral awards.[111] In addition, a trilateral Advisory Committee on Private Commercial Disputes was established to examine the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes in NAFTA.

In the area of alternative dispute resolution, the WTO seems to go further than NAFTA and this may be easily explained with the background of GATT. Article XXIII gave to the entire GATT membership the jurisdiction to decide on disputes between contracting parties. The GATT dispute settlement process has evolved towards today's rule-based system from when it was initially an essentially conciliatory process. Contracting parties' working groups were slowly replaced with panels. Article 5 of the DSU provides that good offices, conciliation or mediation may be requested at any time by any party to a dispute. If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds. For this reason, there is an explicit provision on the confidentiality of any particular position taken by the parties during these good offices, conciliation or mediation.[112] Another conciliation or mediation process exists with the new process of the Textiles Monitoring Body (TMB) which may precede any related panel process. This type of conciliatory process of the TMB may be what contracting parties had in mind when they drafted the provisions of Article XXII:2 of GATT on multilateral consultations. In addition, Article 25 of the DSU provides for arbitration as an alternative means of dispute resolution.[113] Such arbitration procedure must be mutually agreed between the parties and notified to the DSB; arbitration awards must also be notified to the DSB.

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[110] Article 2007 of NAFTA.

[111] Article 2022:2 provides that a Party is deemed to be in compliance with this requirement if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

[112] The Director–General may, acting in an *ex officio* capacity, offer good offices, conciliation or mediation with the view to assisting Members to settle a dispute.

[113] This type of arbitration is to be distinguished from the arbitration that may take place in the context of the surveillance, implementation and retaliation process under the DSU.

V. The Dispute Resolution Process

A. Consultations

Under NAFTA (as is the case with the DSU), the dispute settlement process is initiated with a written request sent to the other party and notified to the Secretariat. "The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement."[114] During consultations, parties must therefore "provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation of this Agreement."Consultations are mandatory for at least thirty days, or forty-five days if a third party has joined in, or fifteen days for matters regarding perishable agricultural goods, or any other agreed period. Then, any party may request in writing a meeting of the Commission. The Commission will convene within ten days. The Commission is asked to make all attempts to assist the parties to reach a mutually satisfactory resolution of the dispute during an additional thirty days.[115] The Commission may therefore "call on such technical advisers or create such working groups or expert groups as it deems necessary, have recourse to good offices, conciliation, mediation or such other dispute resolution procedures, or make recommendations."[116] It is only after this completion of additional process with the Commission that a party may request the establishment of a panel.

Under the DSU, there is also a mandatory confidential consultation period, generally of sixty days, or thirty days in case of urgency or for consultations concerning perishable goods. If the defending party does not respond to the request for consultations within ten days of the receipt of the request or if consultations are not held within thirty days of the receipt of the request, the complaining party may request the DSB to establish a panel. There is no additional formal period of discussion in the DSB, as within the NAFTA Commission. In practice, if WTO Members do not resolve their dispute during the sixty-day period for consultations, the complaining party may forward to the DSB (through the WTO Secretariat) a request for the establishment of a panel; if requested, a panel should be established at the latest the second time it appears on the agenda of the DSB. The process of the WTO is, however, not much faster than that of NAFTA. With the new DSU, WTO Members can request a DSB meeting with a ten to fifteen days notice.[117] After the first meeting of the DSB, if the defending party does not agree to the establishment of the panel, then the dispute will appear again on

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[114] Note that if parties hold consultations under Article 513 (Working Group on Rules of Origin), Article 723 (Sanitary and Phytosanitary Measures—Technical Consultations) or Article 914 (Standards-Related Measures—Technical Consultations), they can also trigger the dispute settlement process of Article 20 and request a meeting of the Commission.

[115] Or any other agreed period; remember that decisions of the Commission are taken by consensus: Article 2001:4.

[116] Article 2007:5 of NAFTA.

[117] Article 6, footnote 5 of the DSU.

the agenda of the next meeting of the DSB which will take place at the earliest eleven days after the first DSB meeting, or at the earliest the twenty-third day after the expiry of the consultation period. However, since there are always logistic impediments of room-availability to host the DSB with its full WTO membership, it is rare that two meetings of the DSB can be squeezed within thirty days, if they were not already pre-arranged. Overall, the consultation process is therefore fairly similar under both NAFTA and the DSU.

Right of Third Parties in the Consultation Process

Article 2006:3 of NAFTA authorizes any "third party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other parties and to its Section of the Secretariat." This language resembles that of Article 4.11 of the DSU.[118] The conditions of application are, however, different under NAFTA and the DSU. Under the DSU, the third party requesting to join consultations must have a substantial trade interest.[119] Moreover, the participation of such a third party at the stage of consultations is possible only if consultations were requested pursuant to Article XXII of GATT 1994 and are always subject to the acceptance by the defending party. Under NAFTA, the participation of such a third party with only substantial interest is automatic, and is therefore closer to the right given to third parties to participate in the panel process under the DSU.[120] This difference can be explained: in NAFTA there is always only one possible third party which is always more directly concerned with any result of any dispute. In the WTO, all Members have systemic interests, so it is not unreasonable to limit their participation to confidential consultations only to those having a substantial trade interest, since parties to a WTO dispute may not want to have any WTO Member participating in their negotiations—especially if these third parties have no authentic trade interest.

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[118] Article 4.11 took over the content of a 1958 Decision of the CONTRACTING PARTIES providing third parties with a right to request to join in consultations. Note the language of Article 4.11 of the DSU: "Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to paragraph 1 of Article XXII of GATT 1994, paragraph 1 of Article XXII of GATS, or the corresponding provisions in other Covered Agreements, such Member may notify the consulting Members and the DSB, within ten days after the date of the circulation of the request for consultations under the said Article, of its desire to be joined in the consultations. Such Member shall be joined in the consultations, provided that the Member to which the request for consultations was addressed agrees that the claim of substantial interest is well-founded. In that event they shall so inform the DSB. If the request to be joined in the consultations is not accepted, the applicant Member shall be free to request consultations under paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATT 1994, paragraph 1 of Article XXII or paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other Covered Agreements." This provision seems to replace the 1958 Decision of the CONTRACTING PARTIES "Procedures under Article XXII on Questions Affecting the Interests of a Number of Contracting Parties" adopted on 10 November 1958 (BISD 7S/24) which provides any other contracting party with a substantial trade interest with the right to request to join in the consultation within forty-five days of the initial request for consultations if agreed upon by the defending parties. Note that at that time consultations lasted for much more than sixty days.

[119] There is no provision for the adjudication of whether a Member has any "substantial trade interest" in the dispute.

[120] Once a DSU panel is established, any Member with a systemic interest can participate in part of the panel process, as further discussed below.

B. Panel establishment

In NAFTA, within thirty days of the Commission being convened following consultations, any consulting party may request in writing the establishment of an arbitral panel; on delivery of the request, the Commission must establish the panel. The establishment of the panel is therefore automatic.[121] The request for a panel must state the measure or other matter complained of and indicate the NAFTA provisions that it considers relevant. There is no provision as to when this panel is to be established but the Chairman of a Chapter 20 panel must be selected within fifteen days of the delivery of the panel establishment request.[122]

Under the DSU, the establishment of a panel is also automatic "at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel."[123] Article 9 of the DSU encourages that multiple complaints related to the same matter be examined by a single panel "whenever feasible". Such a single panel is to organize its examination and present its findings to the DSB in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired.[124] With regard to multiple complaints, the provisions of the DSU are more detailed, due in part to the more extensive membership of the WTO.

C. Selection of panelists

The selection process of panelists under NAFTA reveals an important distinction with that of the DSU. In the DSU, the selection of non-party panelists together with the independent Appellate Body reflect the third-party adjudication process of the WTO, as opposed to the party-orientated process of NAFTA.

Under NAFTA, except for the chair of the panel, panelists are always citizens of the parties to the dispute. This differs from the FTA where parties could, and always did,[125] choose their own citizens. Instead of separate national rosters as under the FTA,[126] Article 2009 of NAFTA calls for a consensus roster. Contrary to the FTA, panelists not on the

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[121] Under Chapter 19, the procedure for contesting a determination is slightly different. A written request for a panel is to be made to the other involved party within thirty days following the date of publication or notification of the final determination in question. The failure to request a panel within thirty days precludes a review by a binational panel. The first two panelists must be selected within thirty days of the request for a Chapter 19 panel.

[122] The Commission may consolidate two or more proceedings regarding other matters before it that it determines are appropriate to be considered jointly: Article 2007:6 of NAFTA.

[123] Article 6.1 of the Dsu.

[124] If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned. If more than one panel is established to examine the complaints related to the same matter, "to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized."

[125] Davey, *Pine and Swine*, *supra*, footnote 4, p. 25.

[126] Under the FTA, Article 1807:3, the parties select two panelists each and the Commission selects the chair within fifteen days of the establishment of the panel. If the Commission (i.e. the two parties' representatives) could not agree, the four panelists were given thirty days to agree on the fifth panelist. If agreement was not possible, the chair was then selected by lot.

Roster may be selected, but are subject to peremptory challenge within fifteen days after the individual has been proposed.[127] Under NAFTA, the procedure is the following:[128] the panel shall comprise five members; where there are two parties, the parties must agree on the chair of the panel within fifteen days of the delivery of the request for the establishment of the panel. If the parties are unable to agree within this period, a party chosen by lot selects within five days as chair an individual who is not a citizen of that party. Within fifteen days of selection of the chair, each party selects, normally from the Roster, two panelists who are citizens of the other party. If a party fails to select its panelists within such period, such panelists are selected by lot from among the Roster members who are citizens of the other party. Where there are more than two parties, and when parties are unable to agree on the chair within this period, the party chosen by lot selects a chair, within ten days, who is not a citizen of such party. Within fifteen days of selecting the chair, the party complained against selects two panelists, one of whom is a citizen of a complaining party, and the other is a citizen of another complaining party.[129] The complaining parties select two panelists who are citizens of the party complained against and the same selection rule should apply if any party fails to select a panelist within such period.

Under the DSU, the selection process of panelists is different from that of Chapter 20 of NAFTA. There is never any attribution by lot. Moreover, contrary to NAFTA, citizens of WTO Members whose governments[130] are parties or third parties to the dispute cannot, unless the parties to the dispute agree otherwise, serve as panelist for that dispute. WTO panels are composed of three panelists (unless parties agree to a panel composed of five panelists). The process is initiated by the WTO Secretariat which suggests names of possible panelists. Until the DSU, there was only one roster of non-governmental individuals, which had not often been used. To ensure a selection of experts and to facilitate the selection of panelists, the Members have established an indicative list containing the names of governmental and non-governmental potential

[127] Under Chapter 19, the selection of panelists is different. Parties have established a specific roster of individuals to serve as Chapter 19 panelists. Within thirty days of a request for a panel, each involved party appoints two panelists, in consultation with the other involved party. Normally panelists should be selected out of the roster. If a panelist is not selected from the roster, the panelist should have the qualifications expected from the other panelists. Within forty-five days of the establishment of the panel, each party has the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other party. Peremptory challenges and the selection of alternative panelists occur within forty-five days of the request for the panel. Within fifty-five days of the request for a panel, the parties must agree on the selection of a fifth panelist. If the parties are unable to agree, they shall decide by lot which of them shall select, by the sixty-first day, the fifth panelist from the roster, excluding candidates eliminated by peremptory challenges. On appointment of the fifth panelist, the panelists appoint a chairman from among the lawyers on the panel by majority vote of the panelists. If there is not majority vote, the chairman is appointed by lot from among the lawyers on the panel. The same rules apply to a panelist selected for the hearing of the Special Committee pursuant to a claim under the new "Safeguard Panel Review Process" of Article 1905 of NAFTA discussed further below.

[128] Article 2011 of NAFTA.

[129] This seems to imply that there could not be two defending parties but only two complaining parties.

[130] In the case where customs unions or common markets are parties to a dispute, this provision applies to citizens of all Member countries of the customs unions or common markets.

panelists recommended by WTO Members.[131] Panelists do not have to be selected from that list, but the new list has broadened the source of reference of expert-panelists for all of the new specialized Agreements.[132] Article 8.6 of the DSU states that the parties to the dispute cannot oppose nominations except for compelling reasons. If there is no agreement between the parties on the selection of panelists within twenty days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Councils or Committees, may determine the composition of the panel within ten days of the request. Under Article 12.11 of the DSU, in the case of a panel involving a developing country, such developing country may request a panelist from a developing country. In practice, in the GATT/WTO panels, most panelists have been national delegates to GATT/WTO.

Finally, under NAFTA, the qualities expected of panelists are fairly similar to those mentioned in the DSU: independence, objectivity, and relevant expertise. In the case of NAFTA, panelists are also requested to respect the Code of Conduct.[133] On 3 December 1997, the DSB adopted the new Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[134] which provides for similar obligations for panelists. There are therefore no differences between NAFTA and the DSU.

Although the DSU system may appear fairer because nationals do not participate in the panel process, it is very frequent that the same countries (less involved in disputes)

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[131] The Indicative List of governmental and non-governmental individuals possessing the qualifications of independence, impartiality, etc. "shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the Covered Agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject-matter of the Covered Agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject-matter of the Covered Agreements.": Article 8.4 of the DSU.

[132] The Decision on Certain Dispute Settlement Procedures for the GATS provides that "Panels should be composed of well-qualified governmental and/or non-governmental individuals who have experience in issues related to GATS and/or in services, including associated regulatory matters...Panels for disputes regarding sectorial matters shall have the necessary expertise relevant to the specific services sectors which the dispute concerns."

[133] Article 2009:2 of NAFTA states that individuals on the NAFTA Roster shall have expertise or experience in law, international trade, other matters covered by NAFTA or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment; they shall also be independent of, and not be affiliated with or take instructions from, any party and comply with a code of conduct to be established by the Commission. Under Chapter 19 of NAFTA, the qualities expected from the panelists are the same: good character, high standing and repute, objective, reliable, with sound judgment and general familiarity with international trade law. Panelists cannot be affiliated with a party, or take instructions from a party. Interestingly under Chapter 19 panels, a majority of the panelists on each panel shall be lawyers in good standing. Article 8.1, 8.2 and 8.9 of the DSU states that panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member 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 Member. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience. Panelists shall serve in their individual capacities and not as government representatives, or as representatives of any organization. Members shall therefore not give them instructions or seek to influence them as individuals with regard to matters before a panel.

[134] WT/DSB/RC/1.

provide most of the panelists: Hong Kong, Australia, New Zealand and Switzerland have, since the WTO entry into force, provided the largest number of panelists. With the serious increase in the number of panels and the procedural encouragement to "joint" similar disputes[135] and for Members to participate as third parties, many competent panelists find themselves disqualified because of their nationality. This appears to be one of the most important difference between NAFTA and the DSU: not the selection process as such, but rather the persons selected under the DSU who are, as a general rule, not citizens of any of the countries involved in the dispute.

D. RULES OF CONDUCT

As mentioned in the previous section, NAFTA requires that individuals on the Roster comply with the Code of Conduct.[136] The NAFTA Code of Conduct contains a series of rules which aim at ensuring the continuous independence and impartiality of panelists as well as allowing a party to challenge panelists. The main obligations imposed on panelists by the NAFTA Code of Conduct are:

- to disclose any interest, relationship or matter that is likely to affect the candidate's independence or impartiality or that might reasonably create an appearance of impropriety or an appearance of bias in the proceeding. Such obligation to disclose is a continuing duty after a member has been appointed on a panel;
- to perform their duties thoroughly and expeditiously;
- to carry out all duties fairly and diligently;
- to comply with the relevant provisions of NAFTA;
- not to engage in *ex parte* communications;
- to remain independent and impartial and avoid creating an appearance of impropriety or apprehension of bias including:
  - not to be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a party or fear of criticism;
  - not to accept any benefit or incur any obligation which may appear to interfere with his obligations; and
  - not to use his position to advance any personal or private interests; or
  - not to allow past, existing or potential financial business, professional, family or social relationship or responsibilities influence his conduct or judgment;
- not to advise or represent any participant with regard to anti-dumping or countervailing duty matters, or in a domestic court proceeding or another proceeding involving the same goods for a period of one year after the completion of a binational panel; and

[135] Article 9 of the DSU.

[136] Article 2009:2(c) NAFTA. Since the adoption of the Rules of Conduct for the DSU on 3 December 1996, panelists in WTO disputes also have to respect the Rules of Conduct. See Section v:D *infra*.

– to maintain confidentiality of the deliberations, of any non-public information, of the conclusions of any decisions until they are made public.

A panelist may be challenged by any party, for any alleged non-respect of these Rules of Conduct. Under Chapter 19, if a party believes that a panelist is in violation of the Code of Conduct, the parties shall consult and if they agree, the panelist is disqualified and a new panelist shall be selected in accordance with the same initial procedure. If a panelist becomes unable to fulfil panel duties or is disqualified, proceedings of the panel are suspended pending the selection of a substitute panelist. One of the parties may also initiate an extraordinary challenge as was done in the *Lumber* case.[137]

The NAFTA Code of Conduct served as the basis for the U.S. proposal submitted to the GATT contracting parties on 9 November 1994, during the work of the Preparatory Committee for the WTO. The DSU did contain provisions referring to behavioural obligations of panelists such as the obligation to maintain confidentiality of the proceedings and deliberations, in Articles 14.1, 17.10 and 18.2 of the DSU; the necessity for panels to make objective assessments which pre-suppose some independence and impartiality of panelists, in Article 11 of the DSU, and also mentioned in Article 8.2 and 8.9. However, the DSU does not contain any disclosure obligation or any challenge procedure to allow parties to challenge a rebel panelist.

The new DSU Rules of Conduct[138] cover four groups:

– panelists (experts, arbitrators);
– the Appellate Body members (and its support staff);
– Secretariat staff; and
– Textiles Monitoring Body members.

The three first groups are subject to the general obligations: to be independent and impartial, to avoid direct or indirect conflicts of interest and to maintain confidentiality; these obligations are already contained in the DSU. To ensure the respect of these obligations, each covered person must:

– respect the provisions of the DSU;
– disclose anything which may cause a party to question that person's independence or impartiality;
– avoid conflict of interest.

The fourth group, members of the TMB, are not considered as covered persons, but yet are required to discharge their function on an *ad personam* basis so as to preserve the integrity and the impartiality of the proceedings of the TMB. There is also an explicit reference to the current text of the rules of procedures of the TMB.

All covered persons must disclose any information that could reasonably be

[137] *Certain Softwood Lumber Products from Canada* (*Lumber* case), Case No. ECC.94.1904.01 USA, Opinion of the Committee, 3 August 1994. See on this issue C. Castel and J.-G. Castel, *Should the NAFTA Dispute Settlement Mechanism in Antidumping and Countervailing Duty be Reformed in the Light of Softwood Lumber III*, in L.P. in Int'l Bus., Vol. 26, p. 823; and Davey, *Pine and Swine, supra*, footnote 4, Chapter 11.

[138] Document WT/DSB/RC/1, adopted by the DSB on 3 December 1996.

expected to be known to them at the time which is likely to affect or give rise to justifiable doubts as to their independence or impartiality; and an illustrative list of matters to be disclosed is provided in Annex 2. The disclosure process is different for each covered person:

- panelists make their disclosures to the Chair of the DSB for consideration by the parties;
- members of the Appellate Body and its support staff make their disclosures to the Appellate Body for its consideration;
- the Secretariat (including the Chairman of the TMB and its staff) make their disclosures to the Director-General for consideration by the Director-General. Note that the members of the TMB are not subject to the disclosure obligation.

Section VIII refers to the procedure for disqualification of a covered person who has committed a material violation of the obligations contained in the Rules; the disqualification is to take place within fifteen working days from the initiation of the process:

- *For panelists, arbitrators and experts*: if the challenged person is a panelist, an arbitrator or an expert, the party shall provide the evidence to the Chair of the DSB. If, after having consulted with the person concerned the matter is not resolved, the Chair of the DSB shall forthwith provide all the evidence, and any additional information from the person concerned, to the parties to the dispute. In all cases, the Chair of the DSB, in consultation with the Director-General and a sufficient number of Chairs of the relevant Council or Councils to provide an odd number, and after having provided a reasonable opportunity for the views of the person concerned and the parties to the dispute to be heard, will decide whether there was a material violation of the Rules of Conduct. Contrary to NAFTA, parties cannot simply "agree" to disqualify a covered person. Some systemic interests have been protected:

  > "Where the parties agree that a material violation of these Rules has occurred, it would be expected that, consistent with maintaining the integrity of the dispute settlement mechanism, the disqualification of the person concerned would be confirmed."[139]

- *For the Appellate Body and its support staff*: the principle is that the seven members would decide amongst themselves on the best solution to any allegation of violation and would then simply report to the Chair of the DSB.[140]

- *The members of the WTO Secretariat assisting panels* are treated differently than those under the NAFTA Code of Conduct, which imposes on panelists the obligation

[139] Section VIII:8 of the DSU Rules of Conduct.

[140] "It shall be for the Standing Appellate Body to take any appropriate action after having provided a reasonable opportunity for the views of the concerned person and the parties to the dispute to be heard. The Standing Appellate Body shall inform the parties to the dispute and the Chair of the DSB of its decision, together with relevant supporting information."

> to "take all reasonable steps to ensure that the member's assistant and staff comply with [the rules] of this Code of Conduct"; panelists' assistants and staff have to respect confidentiality and disclosure obligations as well as those of avoiding impropriety and appearance of impropriety in observing high standards of conduct. Under the DSU Rules of Conduct, members of the WTO Secretariat who participate in a panel are fully covered by the Rules of Conduct. There are, however, two important distinctions: staff members cannot be challenged as such by parties: parties may only complain to the Director-General, who would then decide whether to enforce disciplinary action through staff rules; and staff members of the Secretariat do not have to disclose any professional assistance, information or other advice provided to WTO Members in the context of their WTO function.

Although the qualities and expected behaviour of panelists are fairly similar under NAFTA and the DSU, the rules in place to ensure their respect and allow parties to challenge partial or bias panelists differ importantly. The systemic interests are further protected under the DSU Rules of Conduct, the possibilities of abuse of the system are much reduced considering that the entire challenge process cannot last more than fifteen working days, and that disqualifications are possible only if any such alleged material violation of the Rules of Conduct also impairs the integrity, impartiality or confidentiality of the dispute settlement mechanism—a fairly heavy burden on the shoulders of any party who wants to trigger the challenge process. This can be viewed as an example of a sector where the experience developed in NAFTA was exported to the WTO and where it was not only adapted to an authentic world dispute settlement system but also improved from its weakness as revealed by the NAFTA experience.

E. RULES OF PROCEDURES OF PANELS

Generally, the rules of procedures of NAFTA panels are more detailed than those of WTO panels. Under Chapter 20, panels must follow the standard rules of procedure and the panel process is to last one hundred and twenty days. Usually, parties will exchange a first set of written submissions in a sequential manner: the complaining party, ten days after the panelists have been selected, and the defending party, twenty days after the receipt of the complaining party's submission. There should be only one hearing which takes place in the capital of the defending party, unless at the request of the party the Chair of the panel conveys an additional panel meeting. Advisers of a party, including private lawyers, may attend hearings providing they do not address the panel and provided they do not have any financial or personal interest in the proceeding. During the hearing the complaining party presents its arguments, followed by the defending party and the third party; then the complaining party may reply followed by the counter-reply of the defending party. The panel may direct questions to the parties,

orally or in writing but, contrary to GATT practice, the parties do not ask each other questions. Within ten days after the date of the hearing, each party may file written rebuttals responding to any matter that arose during the first hearing of the panel. Then the panel, within ninety days after the last panelist is selected, will present to the parties an initial report containing: findings of fact; its determination on the violation or non-violation allegation or any other determination requested in the terms of reference; and its recommendations, if any, for resolution of the dispute. Parties can comment on the initial report within fourteen days of its issuance.[141] Within thirty days of presentation of the initial report, unless otherwise agreed, the final report is issued.[142]

The provisions of the DSU on the dispute process, together with the DSU rules of procedure contained in Appendix 3 to the DSU, are less detailed than those of NAFTA and seem to have borrowed from the latter certain aspects such as stricter time-limits, the possibility for the panel to refer to an expert review group,[143] the Rules of Conduct,[144] an effective indicative list,[145] the interim review stage, and the non-working-day practice.[146] Under the DSU, each panel must adopt its rules of procedure, but the DSU sets out maximum, minimum and standard time-limits within which various legal steps must be performed. A panel report should be issued within six months after its composition (selection of panelists and terms of reference) or nine months from the establishment of the panel.[147] At the first organizational meeting the parties will determine the calendar of procedural steps within the time parameters suggested by Appendix 3 of the DSU.

Generally, under the DSU, panel parties will exchange sequentially, within two months from the composition of the panel, a first set of written submissions. Within two weeks thereafter, the panel will hold its first meeting with the parties during which the latter will present their case and be invited to respond to questions from the panel and

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[141] Article 2016 of NAFTA.

[142] The procedures under Chapter 19 are different from those applicable to Chapter 20. Panels established to review dumping or subsidies determinations must follow the standard rules of procedure, while panels reviewing statutory amendments establish their own rules of procedures. For panels on review of dumping and subsidies determinations, final decisions should be issued within three hundred and fifteen days of the date on which a request for a panel is made. There are, thereafter, two exchanges of written submissions and a hearing of the panel; there is no issuance of an interim type of panel report before the binding report. Within ninety days after its chairman is appointed, the panel is supposed to present to the two parties an initial written declaratory opinion containing findings of fact and its determination. If the findings of the panel are affirmative, the panel may include in its report its recommendations as to the means by which the amending statute could be brought into conformity with NAFTA. The initial opinion of the panel shall become the final declaratory opinion, unless a party to the dispute requests a reconsideration of the initial opinion. Within fourteen days of the issuance of the initial declaratory opinion, a party disagreeing in whole or in part with the opinion may present a written statement of its objections and the reasons for those objections to the panel. In such event, the panel must request the views of both parties and reconsider its initial opinion. The panel may conduct and hold an additional meeting, and must issue a final written opinion, together with dissenting or concurring views of individual panelists, within thirty days of the request for reconsideration. Unless the parties to the dispute otherwise agree, the final declaratory opinion of the panel will be made public, along with any separate opinions of individual panelists and any written views that either party may wish to be published: Annex 1903:2.

[143] Article 13 of the DSU.

[144] WT/DSB/R.C/1, adopted by the DSB on 3 December 1996.

[145] Article 8.4 of the DSU.

[146] See WT/DSB/W/6.

[147] See the different language of Articles 12.8 and 20 of the DSU.

from the other parties, in order to clarify all the legal and factual issues. During this first meeting, a session for the third parties will be held where they will be invited to submit their arguments to the panel.[148] Within the four weeks thereafter, parties will exchange written rebuttals followed by a second substantive meeting with the panel. Then, following a procedure borrowed from NAFTA, the panel will issue the draft descriptive part of its panel report to which parties are invited to make comments within two weeks. Three weeks after this, the panel will issue its interim report containing the revised descriptive part and the proposed findings. Parties are again invited to make comments and may request another meeting of the panel to further argue specific comments about the interim report. The final report must contain a reference to all the arguments raised by the parties during the interim stage. Finally, the panel will issue its final report to the parties within two weeks thereafter[149] and the panel report will be circulated to all members within three weeks after its issuance to the parties.[150] An important difference is that the GATT/WTO practice does not allow WTO Members to be represented by a lawyer or legal adviser before a panel. This may explain why most, if not all, steps and stages of the panel process are coupled with written documents, such as written statements before the panel and written questions and answers.

Although the DSU panel offers more hearings with the parties, the procedures under NAFTA appear to be more detailed and perhaps more efficient, or at least more transparent. The absence of lawyer representatives has been maintained in the GATT/WTO forum as a testimony of the diplomatic roots of the system. The pressures of some countries to be represented by lawyers may change this policy. However this may not favour smaller developing countries which risk becoming victims of this commerialization of legal information. The DSU process may gain in adding further to its procedural rules.

F. GROUP OF EXPERTS

Under Chapter 20 of NAFTA, any party, or the panel on its own initiative unless the parties disapprove, may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a party in a proceeding, subject to such terms and conditions as such parties may agree. The board members are selected by the panel after consultations with the parties and relevant scientific bodies. The Rules of Procedure adopted for Chapter 20 disputes provide for very detailed rules for the request for and submissions by these boards and other aspects of this scientific review board, and the actions and behaviour of experts. Parties are given an opportunity to provide comments to the panel on the proposed factual issues to be referred to the board; and they are also given a copy of the board's

[148] Third parties also get copies of the first written submissions only; they do not get any rebuttals or any other communication after the first substantive meeting of the parties: Article 10 of the DSU.

[149] Appendix 3, paragraph 12(j).

[150] Appendix 3, paragraph 12(k).

report and an opportunity to provide comments to the panel. The panel must take into account the board's report and any comments by the parties on the report in the preparation of its report.

It is thought that this idea of a "group of experts" process was introduced into the DSU in November 1993 in response to U.S. environmentalists' concerns and the procedure was borrowed from NAFTA. Article 13.2 and Appendix 4 of the DSU provide that each panel has the right to seek information and technical advice from any individual or body which it deems appropriate. Article 13.2 provides that panels also:

> "...may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group. Rules for the establishment of such a group and its procedures are set forth in Appendix 4."

The wording of Appendix 4 of the DSU has borrowed extensively from NAFTA, yet is much less detailed. As in NAFTA, WTO Members are invited to comment on the report of the group of experts and may also be asked by any other WTO Member for a non-confidential summary.

G. RIGHTS OF THIRD PARTIES IN THE PANEL PROCESS

Under NAFTA, Article 2008:3 states that a "third party that considers it has a substantial interest in the matter shall be entitled to join as a complaining party on delivery of written notice of its intention to participate to the parties." That third party shall thereafter be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the parties. Moreover, such a third party who joins in becomes a complainant party, and if a third party does not join in accordance with Article 2008:3, it is considered to have foregone its right to initiate or continue a dispute settlement procedure under NAFTA, or, even, a dispute settlement proceeding in the WTO on ground that are substantially equivalent to those available to that party under NAFTA, regarding the same matter in the absence of a significant change in economic or commercial circumstances.

Under the DSU, third parties have less rights than under NAFTA. For instance, Article 10.4 of the DSU[151] provides that:

> "If a third party considers that a measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it under any Covered Agreement, that Member may have recourse to normal dispute settlement procedures under [the DSU]. Such a dispute shall be referred to the original panel wherever possible."

Under the DSU, third parties which have a substantial interest[152] in a matter before

[151] This provision is completely different from Article 2008:3 of NAFTA.

[152] Note the distinction between the "substantial trade interest" required for a third party to join in consultations under Article 4.11 of the DSU and the "substantial interest" needed to participate as third party once a panel is established.

a panel and which have notified their interest to the DSB,[153] are given an opportunity to participate in the first meeting of the panel;[154] they receive the first submissions of the parties and they can make written and oral submissions to the panel. Panels have, however, the right to adopt any additional or modified rules of procedure in favour of third parties, and they have done so in certain cases.[155]

Third parties which have notified the DSB of their substantial interest in the matter and which conform to the rules of procedure of the Appellate Body, may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.[156] In practice, third parties attend the entire meeting of the Appellate Body together with the parties. They are therefore fully informed of all claims and arguments of the main parties. Therefore, before the Appellate Body, and contrary to the panel stage, third parties have full rights of participation similar to those of the parties to the dispute.

It would be wrong to conclude that third parties in NAFTA have more rights than third parties under the WTO/DSU. In NAFTA, a third party joining the process is made a complainant, and its trade and systemic interests are presumed. Under the DSU a third party with systemic interest is given limited rights in any dispute, but at the same time, such third party may simply initiate its own dispute settlement process and be heard, as much as possible, by the same original panel. The case-law will determine whether a WTO Member with only systemic interests (no trade interest) can initiate the dispute settlement mechanism of the DSU, or whether it should only participate as a third party. If nothing is mentioned in the DSU, one may wonder how the ultimate retaliation process could take place, since there would not be any effective nullification of actual trade benefits to be compensated against. On the other hand, a Member may have interests, other than immediate trade interests, and may want only a declaration by a panel or the Appellate Body.

VI. ADOPTION OF AND RECOURSE AGAINST PANEL REPORTS

A. ADOPTION OF PANEL REPORTS

Under Chapter 20 of NAFTA, the panel presents its final report, which may include a dissenting opinion, within thirty days of presentation of the initial report, unless the parties otherwise agree. Then the parties transmit to the Commission the final report, including any report of a scientific review board established under Article 2015, as well as any "written views" that they may want to be appended, on a confidential basis,

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[153] In practice this is done at the DSB meeting when the panel is established; however, pursuant to GATT practice, third-party rights can be registered by sending a written notice within ten days following the day of the establishment of the panel: see minutes of the GATT Council, 12 July 1994, C/M/273, p. 15.

[154] During the first meeting of the panel, a session of the meeting is reserved for the third parties, who can then present their written submissions to the panel which are to be reflected in the panel report (but the conclusions of the report are not addressed to third parties): see Article 10.2 and 10.3 of the DSU.

[155] For further discussions on the right of third parties in GATT/WTO panels see M. Footer, *The Role of Third Parties in GATT/WTO Dispute Settlement Proceedings*, in Petersmann (ed.), bio note, *supra*.

[156] Rules 24 and 27(3) of the Working Rules of Procedure of the Appellate Body, adopted on 15 February 1996, document WT/AB/WP/1.

within a reasonable period of time after the final report is presented to them. Unless the Commission decides otherwise, the final report is published fifteen days after it is transmitted to the Commission. Under NAFTA, as indeed under WTO, after the adoption of a panel report, parties are again encouraged to negotiate the settlement of their dispute.[157] Agreed solutions, which should conform to the panel recommendations, are to be notified to the NAFTA Secretariat.[158] Strictly speaking, the panel report is not binding, but indirectly it is. However, if there is no voluntary implementation and no agreement is reached between the parties, the winning party may unilaterally suspend equivalent benefits. In case of manifestly excessive retaliation by the winning party, the losing party may request an arbitral panel.[159] There is no appeal, revision or any further re-assessment of the panel recommendations under Chapter 20.[160]

Under the DSU, Article 16 provides that the panel report, if not appealed within the following sixty days of its circulation to WTO Members, must be adopted, unless Members, by consensus, decide not to do so.[161] Note that a panel report cannot be considered for adoption during the first twenty days after its circulation, and that Members having objections to a panel report must give written reasons to explain their objections for circulation at least ten days prior to the DSB meeting at which the panel report will be considered. The automatic adoption of DSU panel reports is a revolution in international trade. The counterpart for this binding character of panel reports was the introduction of a new Appellate process to review any legal issue arising out of the panel report.

B. THE DSU APPEAL PROCESS

WTO panel reports may be appealed by any party[162] to the dispute before they are adopted by the DSB.[163] The Appellate Body was established at the first meeting of the DSB, on 10 February 1995. It is composed of seven persons, three of whom serve on any one case, in rotation.[164] On 29 November 1995, the DSB nominated its first seven

[157] Article 2018 of NAFTA favours the remedy of the non-implementation or removal of a measure not conforming with NAFTA or causing nullification or impairment; if this is not possible, then compensation is envisaged as a second alternative.

[158] Article 2018:1 of NAFTA.

[159] Article 2019 of NAFTA.

[160] The decision of a panel under Chapter 19 of NAFTA is binding on the involved parties with respect to the particular matter between the parties that is before the panel. No party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts. There are, however, possibilities of extraordinary challenge as well as claim under the new Safeguard Panel Review process mechanism.

[161] The sixty-day period does not seem to be an appeal time-limit but rather a maximum time-limit within which a report is to be adopted. Indeed this reference to the sixty days is included in Article 16 of the DSU, entitled Adoption of Panel Reports, and not in Article 17, entitled Appellate Review.

[162] Article 17.4: "Only parties to the dispute, not third parties, may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body."

[163] Pursuant to Article 16.4 of the DSU, panel reports must be adopted within sixty days of their circulation: Article 16.4.

[164] Article 17 of the DSU.

Appellate Body members:[165] Mr James Bacchus (United States), Mr Christopher Beeby (New Zealand), Professor Claus-Dieter Ehlermann (Germany), Dr Said El-Naggar (Egypt), Justice Florentino Feliciano (Philippines), Mr Julio Lacarte-Muro (Uruguay) and Professor Mitsuo Matsushita (Japan). Article 17.2 of the DSU provides that these members are to serve on the Appellate Body for a four-year term, and that each person may be reappointed once. However, the terms of appointment of three of the seven persons appointed immediately after the entry into force of the WTO Agreement are to expire at the end of two years.[166]

As a general rule, the appeal proceedings are not to exceed sixty days from the date a party to the dispute formally notifies its decision to appeal and, in any case, must not exceed ninety days. An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel, and the Appellate Body is required to address each of the issues raised in the request for appeal. Only parties may initiate an appeal although third parties which registered their right before the panel can submit arguments before it. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel. An Appellate Body report must be adopted by the DSB, and unconditionally accepted by the parties to the dispute, unless the DSB decides by consensus not to adopt it within thirty days following its circulation to the Members.[167] This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report. In practice in the two first cases which were taken to the Appellate Body, the panel reports were adopted as modified by the Appellate Body reports.[168] It remains to be seen whether preliminary exceptions, and other panel decisions and acts taken during the panel process and the surveillance process, will be considered as appealable to the Appellate Body.

As mentioned, there is no appeal process or any other review process against decisions rendered under Chapter 20 or any other Chapters of NAFTA. However, under Chapter 19, it is possible for a party to the dispute to ask for an Extraordinary Challenge within a reasonable time after the panel decision is issued. Any such party may complain that a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, or that the panel seriously departed from a fundamental rule of procedure, or that the panel manifestly exceeded its powers, authority or jurisdiction, for example by failing to

[165] Article 17.3 states: "The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject-matter of the Covered Agreements generally. They shall be unaffiliated with any government. The Appellate Body membership shall be broadly representative of membership in the WTO. All persons serving on the Appellate Body shall be available at all times and on short notice, and shall stay abreast of dispute settlement activities and other relevant activities of the WTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interests."

[166] We still do not know which, or if any, of the first seven members will serve for only two years, since they may be renewed for another two-year term.

[167] If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

[168] Report on *United States—Standards for reformulated and conventional gasoline*: Panel Report circulated on 29 January 1996, Appellate Body Report circulated on 20 May 1996; both Reports were adopted by the DSB on 6 June 1996. Report on *Japan—Taxes on alcoholic beverages*: Panel Report circulated on 11 July 1996, Appellate Body Report circulated on 4 October 1996: both Reports were adopted by the DSB on 29 October 1996.

apply the appropriate standard of review, and that such action has materially affected the panel's decision and threatens the integrity of the binational panel review process and to initiate the Extraordinary Challenge procedure. An Extraordinary Challenge Committee, composed of three members, is then established within fifteen days of such a request. Each party has named five persons to this Roster. The selection of the members is made as for the panel. The Extraordinary Challenge Committee must render its decision within ninety days of its establishment. Committee decisions are binding on the parties with respect to the particular matter between the parties that was before the panel. The Committee:

> "...shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the Committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established..."[169]

Also under Chapter 19 of NAFTA, a party, pursuant to the new procedure for the "safeguard of the panel review system", may also claim that the application of another party's domestic law has:

- prevented the establishment of a panel; or
- prevented a panel from rendering a final decision; or
- prevented the implementation of a panel decision or denied it binding force and effect with respect to the particular matter that was before the panel; or
- resulted in a failure to provide opportunity for review of a final determination by a panel or court of competent jurisdiction that is independent of the competent investigating authorities.

After consultations, the complaining party may request the establishment of a Special Committee, comprising three members selected in accordance with the procedures set out for the Extraordinary Challenge. The rules of procedures of the Special Committee hearings are similar to those of the Extraordinary Challenge Committees. Where the Special Committee makes an affirmative finding, the parties must begin consultations within ten days thereafter and shall seek to achieve a mutually satisfactory solution within sixty days of the issuance of the Committee's report. In certain circumstances, the complaining party may suspend the operation of the binational review process of Article 1904 with respect to the party complained against, or the application to the party complained against of such benefits under NAFTA, as may be appropriate under the circumstances.

Another interesting feature of NAFTA Chapter 19 is that the competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. At some point during the preparatory negotiations of the WTO Agreement, some people invoked the possibility that the panel itself be authorized to make representations before the Appellate Body to support the panel report under appeal. It was finally decided not to use the

[169] Annex 1904.13 of the NAFTA.

"advocate-general" type of approach. However, it can be argued that the DSB, to which the Appellate Body reports, could always request the Director-General of the WTO to present any submission, including possibly one related to the panel's decision.

VII. Implementation of Panel Reports and Retaliation

Under NAFTA, if parties[170] cannot agree on a mutually satisfactory resolution within thirty days of receiving the final report, the complaining party may suspend the application to the party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute. Suspension is therefore, by definition, temporary. NAFTA, contrary to the FTA, envisages cross-retaliation. Article 2019:2 of NAFTA provides what benefits to suspend first:

> "(a) a complaining party should first seek to suspend benefits in the *same sector or sectors* as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment in the sense of Annex 2004; and
>
> (b) a complaining party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in *other sectors.*" (emphasis added).

This retaliation is unilateral and does not require any prior notification, intervention or authorization of the Commission. However, if requested, the NAFTA Commission must establish a panel to determine whether the level of benefits unilaterally suspended by a party is "manifestly excessive". That retaliation panel is to be conducted as any other panel under Chapter 20, but it must submit its report within sixty days after the last panelist is selected or such other period as the parties may agree. Although NAFTA panel reports are not strictly binding, the winning party is allowed to retaliate unilaterally as long as the retaliation is not manifestly excessive. Therefore, under NAFTA, the ultimate standard for retaliation is a "level of suspension of benefits not manifestly excessive to that of the level of nullification and impairment."[171] Strictly, if retaliation is not manifestly excessive (e.g. if the retaliation is simply excessive), the matter would not be arbitrable. Maybe this criteria of "manifestly excessive" was chosen to avoid excessive and useless arbitration on the evaluation of the level of nullification and impairment, especially so that retaliation and arbitration become necessary because the losing party did not comply voluntarily with the panel conclusions.

In the WTO, as with NAFTA, there is no independent policing-body responsible for enforcing the panel and Appellate Body recommendations. The DSB, composed of all the WTO Members, supervises the implementation of panel and Appellate Body reports. The surveillance and implementation procedures are the following: thirty days after the adoption of the report, the losing party must state its intentions in respect of

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[170] This is a new provision in favour of parties to the dispute. Article 1807:8 of the FTA used to say: "Upon receipt of the final report of the panel, the *Commission shall agree on the resolution of the dispute*, which normally shall conform with the recommendation of the panel..." (emphasis added).

[171] Article 2019:3 of NAFTA.

implementation of the recommendations adopted.[172] If it is impracticable to comply immediately, the party will be granted a "reasonable period of time", to be agreed by the parties within forty-five days after the adoption of the report,[173] or the period proposed by the Member concerned with the approval of the DSB,[174] or by arbitration within ninety days after the adoption of the report.[175]

If the WTO Member concerned fails to bring the illegal measure into compliance therewith within the reasonable period of time, the parties may enter into negotiations with a view to agreeing on mutually acceptable compensation. Compensation is said to be temporary, cannot be preferred to full implementation and must be consistent with the Covered Agreements. As mentioned before, this appears to prohibit WTO Members from agreeing on compensation which would consist of illegal measures. The enforcement of this prohibition depends on the legal interest or legal standing required for any Member to conduct the dispute settlement process. Pursuant to Article 21.5 of the DSU, WTO Members not parties to the specific dispute may only raise the issue of implementation before the DSB. Could any WTO Member not directly affected by an agreed compensation challenge its compatibility with the WTO Covered Agreements? Further panel or Appellate decisions will bring light on this issue.

If such negotiations do not succeed within twenty days, the winning party may request authorization from the DSB to suspend the application to the other party concerned of concessions or other obligations.[176] Contrary to NAFTA, retaliation is possible only after a prior authorization by the DSB. However, after the expiration of the reasonable period, unless a party requested a referral to the initial panel or to arbitration to assess whether the new measure or its withdrawal complies with the WTO Agreement,[177] the DSB, upon request, is obliged to authorize retaliatory sanctions. During the Uruguay Round negotiations, the issue of compensation and retaliation, including cross-retaliation, came in early 1990 in parallel with the discussions for an integrated dispute settlement mechanism.[178] Cross-retaliation appeared to be the logical consequence of the integration of the numerous Multinational Trade Negotiations (MTN) Codes and Agreements into a single dispute settlement mechanism. In the Dunkel draft of 1991, the retaliation process was not yet automatic and there were no procedures or criteria to govern cross-retaliation. This cross-retaliation by stages was negotiated late in the Round and functions, in theory, in the following manner. In principle, the concessions should be suspended in the same sector as that involved in the case considered by the panel.[179] If this is not practicable or effective, the suspension may

[172] Article 21.3 of the DSU.
[173] Ibid., Article 21.3(b).
[174] Ibid., Article 21.3(a).
[175] Ibid., Article 21.3(c).
[176] Ibid., Article 22.2.
[177] Ibid., Article 21.5.
[178] T. Stewart and C. Callahan, *Dispute Settlement Mechanisms*, in T. Stewart (ed.), *The GATT/Uruguay Round*, Kluwer, Deventer, 1993, p. 2665.
[179] Article 22.3(a) of the DSU.

be in a different sector under the same Agreement.[180] If, yet again, this is not practicable or effective and if the circumstances are serious enough, there may be cross-retaliation, i.e. concessions maybe suspended under another Agreement:

> "In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:
>
> (a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the *same sector(s)* as that in which the panel or Appellate Body has found a violation or other nullification or impairment;
>
> (b) if that party considers that it is not *practicable or effective* to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in *other sectors* under the same Agreement;
>
> (c) if that party considers that it is not *practicable or effective* to suspend concessions or other obligations with respect to other sectors under the same Agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under *another Covered Agreement*;" (emphasis added).[181]

Cross-retaliation may not be practicable. For instance, as discussed earlier, it may not be possible or practicable for a winning Member to suspend the application of the TBT Agreement *vis-à-vis* a losing Member, or to suspend the application of some provisions of the TRIPs Agreement to retaliate against an illegal quota, for instance. It may not be practicable because it may be very difficult to evaluate the level of suspension of the TBT obligations. Indeed, Article 22.4 provides that the "level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification and impairment." In case of disagreement regarding either the level of nullification or the level of retaliation, arbitration may be requested.[182] Yet, in principle, retaliation across the WTO Agreement is possible, although it may be revealed to be very difficult to do. This further emphasizes the crucial role of the arbitrator, pursuant to Article 22.6 and 22.7 of the DSU, who will have the final say on the winning party's proposed type of retaliation. Contrary to NAFTA, the losing WTO Member does not have to be victim of manifestly excessive retaliation before requesting arbitration. Also, contrary to NAFTA, the winning party cannot go ahead unilaterally; if the losing party requests arbitration on the proposed suspension of concessions or obligations, under Article 22.6 of the DSU the retaliation process is suspended. This arbitrator can become one of the most powerful agents of the dispute settlement mechanism. Indeed, since arbitral decisions are not appealable, and taking into account that at the retaliation stage only arbitral reviews have been

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[180] Ibid., Article 22.3(b).

[181] Ibid., Article 22.3(c).

[182] Ibid., Article 22.4: "The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment."

envisaged,[183] the retaliatory potential of the dispute settlement mechanism may become subject to very important pressures.

The similarity of the cross-retaliation mechanism of Article 22.3 of the DSU with that of Article 2019:2 of NAFTA is to be noted. There were no provisions on cross-retaliation in the FTA, and the history of the negotiations of the DSU after the Dunkel draft makes one believes that this is another sector where the DSU concepts have been exported to NAFTA.

Until there is full satisfaction of the winning Member and the issue is resolved, the matter remains on the DSB agenda and the losing Member is requested to submit a written report of the state of implementation.[184] This is more evidence of the multilateral character of the WTO dispute settlement mechanism. Here again, the DSU goes further than the NAFTA.

VIII. RELATIONSHIP BETWEEN NAFTA AND WTO DISPUTE SETTLEMENT PROCESSES

A. CONFLICTS OF LAWS: HIERARCHY OF NORMS

An important interpretation difficulty arises when there is a conflict between norms and rules contained in NAFTA and those of the WTO. GATT provisions are referred to more than fifty times in NAFTA[185] (and were referred to some one hundred and fifty times in the FTA). Article 103 of NAFTA[186] provides that:

> "1. The Parties affirm their existing rights and obligations with respect to each other under the General Agreement on Tariffs and Trade and other Agreements to which such Parties are party.
>
> 2. In the event of any inconsistency between [NAFTA] and such other Agreements, [NAFTA] shall prevail to the extent of the inconsistency, except as otherwise provided in [NAFTA]."

In the *Dairy/Poultry* dispute between Canada and the United States concerning tariffs to be applied on dairy and poultry products, a problem arose from the fact that Annex 702:1(1) of NAFTA incorporates Article 710 of the FTA which provided:

> "Unless otherwise specifically provided in this Chapter, the Parties retain their rights and obligations with respect to agricultural, food, beverage and certain related goods under the General Agreement on Tariffs and Trade (GATT) and Agreements negotiated under the GATT, including their rights and obligations under GATT Article XI."

Canada took the position that this latter provision takes precedence over the

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[183] At the implementation stage, Article 21.5 of the DSU envisages a referral to the initial panel or any panel to determine whether the implementation is compatible with the WTO Agreement and the Panel or Appellate Body recommendation. Arguably this Article 21.5 panel decision would be appealable.

[184] Articles 21.6 and 22.6 of the DSU.

[185] For instance, NAFTA Chapter 3 refers to Articles III and XI of GATT, Chapter 7 borrows from the SPS Agreement, the Chapters relating to government procurement and on intellectual property also make reference to their related WTO Agreements.

[186] Article 1801:2 and 1801:3 of the FTA envisaged that disputes could be settled before the FTA or GATT but that once a choice of forum had been made, the parties had to limit themselves to this forum.

prohibition contained in Article 302 of NAFTA to "increase" or "adopt" any custom duty, and imposed tariffs as high as authorized by the WTO Agriculture Agreement. Canada argued that its more recent commitments during the Uruguay Round prevailed over the previous NAFTA tariff reduction commitments. The United States argued that NAFTA was a more specific agreement than the WTO and that the wording of Article 302 was clear. A NAFTA panel was established, which issued its final report on 2 December 1996. The Panel concluded that based on public international law principles of interpretation of treaties, the wording of the NAFTA treaty was to be interpreted as to mean that the results of the Uruguay Round were incorporated into the FTA and NAFTA; and the explicit reference to GATT contained in Article 710 of the FTA was a reference to GATT "an evolving system of law".

That NAFTA Panel gave priority to WTO provisions over those of NAFTA, contrary to the provisions of Article 302:2 of NAFTA. Thus, there is no absolute or even general hierarchy of norms between those of the WTO and NAFTA other than what is stated in Article 103 of NAFTA, which itself refers the reader to a case-by-case analysis.

B. CONFLICTS OF LAWS: CHOICE OF DISPUTE FORUM

NAFTA contains provisions for resolving conflicts over the choice of forum in case of disputes which can be brought both before GATT and NAFTA panels. Article 1801 of the FTA envisaged that disputes arising under both FTA and GATT (including the Tokyo Round Codes) could be settled in either forum at the discretion of the complaining party but that once a matter is brought before either forum, the procedure initiated shall be used to the exclusion of any other. Article 2005 of NAFTA maintained the same principle but imposed additional pre-notification obligations on the third party. If a third party wishes to have recourse to NAFTA dispute settlement procedures on the same matter, it must inform the notifying party promptly. Those parties should then consult with a view to agreeing on a single forum. If NAFTA parties cannot agree, Article 2005 provides that "the dispute normally shall be settled under this Agreement". From this wording, it can be argued that primacy is given to NAFTA dispute settlement over that of the GATT/WTO.

Paragraph 3 of Article 2005 provides that where the responding party claims that its action is subject to Article 104 of the Environmental and Conservation Agreements (inconsistency with certain environmental and conservation agreements), sanitary and phytosanitary measures, or standards-related measures adopted or maintained by a party to protect its human, animal or plant life or health, or its environment, and that raises factual or scientific issues on these aspects "the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures *solely under [NAFTA].*" (emphasis added). According to Article 2005.5, if the complaining party has already initiated GATT procedures on the matter, NAFTA provides that the "complaining Party shall promptly withdraw from participation in those proceedings and may initiate

dispute settlement procedures under Article 2007."[187] This explicit reference to GATT 1947 raises an interesting question: do the same rules apply to the DSU ("GATT as an evolving system of law")? If so, it is arguable that the provisions of Article 23.2(a) of the DSU clash with those of Article 2005 of NAFTA. Article 23.2(a) of the DSU reads as follows:

> "...Members shall:
>
> (a) *not make a determination to the effect that a violation has occurred*, that benefits have been nullified or impaired or that the attainment of any objective of the *Covered Agreements* has been impeded, *except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;" (emphasis added).

This means that a WTO violation can be addressed only according to the WTO/DSU rules. How can this provision be reconciled with the exclusive priority given to the NAFTA dispute settlement process (contained in Article 2005 of NAFTA) concerning obligations which are similar in NAFTA and in WTO? For instance, Article 301 of NAFTA refers explicitly to Article III of GATT. In the hypothetical case of a NAFTA country's domestic regulation which would violate Article III of GATT, therefore impairing the benefits of any of the two other NAFTA countries, the defending party may have a valid defence under NAFTA, but the complaining party may prefer to have the matter addressed in the WTO. The situation may also be reversed. The defending party may have some procedural or political advantage to have its case debated in the WTO. Have NAFTA countries forgone their parallel WTO/DSU rights between themselves in certain circumstances?

If a dispute is initiated under the DSU, it is extremely doubtful that a DSU panel would give any consideration to a party's request to halt the procedures because similar or related procedures are taking place under a regional arrangement, such as NAFTA. A WTO panel would certainly not examine any allegation of a NAFTA violation[188] but it could be asked to examine an alleged WTO violation similar to a NAFTA violation, under any Covered Agreement of the WTO. It would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure inconsistent with the WTO, because the complaining or defending Member may have a more specific or even more appropriate defence or remedy in another forum, concerning the same legal facts.[189] On the other hand, in initiating a parallel WTO dispute, a NAFTA party may be in violation of its obligation under NAFTA, but this again is outside the scope of the WTO.

Does Article 23 of the DSU go as far as denying WTO Members the right to waive their WTO dispute settlement rights for legal situations which can be addressed both in

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[187] Article 2005:7 concludes that for purposes of Article 2005, dispute settlement proceedings under the GATT are deemed to be initiated by a party's request for a panel, such as under Article XXIII:2 of GATT 1947.

[188] *Margin of Preferences* Panel Report, adopted on 9 August 1949, BISD II/11.

[189] Under the WTO, there does not seem to be any requirement of exhaustion of national or regional remedies. On the issue of exhaustion of local remedies, see R. Martha, *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, in 30 J.W.T. 4, August 1996, p. 107.

regional and WTO forums? Have NAFTA countries forgone their parallel WTO/DSU rights between themselves in certain circumstances? Could it be argued that the dispute settlement mechanism of NAFTA is compatible and ancillary to the provisions of Article XXIV of GATT 1994 and Article V of GATS which envisage the right for WTO Members to form regional agreements where preferential treatment on goods and services are given to parties to these regional arrangements?

C. THE TWO-FORUM DISPUTES[190]

Disputes between Canada and the United States have been brought both before the FTA and the GATT on, apparently, the same subject-matters. Four products have been the object of disputes in GATT and FTA forums: beer, lumber, pork and salmon/herring.[191] The disputes concerning beer, lumber and pork arose from the application of the special procedure of Chapter 19 of the FTA dealing with anti-dumping and antisubsidy measures where the national law of the importing country is applied at the request of a private or public entity. On the face of these FTA disputes, no legal parallel can be drawn with the government-to-government disputes which took place before GATT panels concerning these products. The salmon/herring disputes are more interesting.

1. *The Beer Disputes*

There were three GATT disputes between Canada and the United States concerning beer. One dispute involved certain sales practices of the State-trading operations of the Canadian provincial liquor boards.[192] The second dispute addressed the question of whether imported beers from Canada were taxed and regulated by the U.S. State authorities in a less favourable manner than beers produced in the United States.[193] The third dispute, brought under the Tokyo Round Anti-Dumping Code, concerned the definition of "regional market" in a dumping determination; however, no panel report was ever circulated in that case.

There are also several Chapter 19 binational panels on beer: two of them were lodged by U.S. producers against Revenue Canada[194] and the Canadian International Trade Tribunal (CITT)[195] for their respective dumping and injury determinations, and a

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[190] The following discussion is very brief and does not analyse the panel reports. The reader could consult Davey's *Pine and Swine*, *supra*, footnote 4, where all the disputes and panel reports under the FTA are thoroughly examined and analysed. The main purpose of Section VIII:3 of this article is simply to demonstrate that no legally similar disputes have been raised either in the FTA/NAFTA or the GATT/WTO.

[191] No such two-forum dispute has taken place since the entry into force of the WTO and NAFTA.

[192] *Canada—Import, distribution and sale of alcoholic drinks by provincial marketing agencies*, adopted on 18 February 1992, BISD 39S/27.

[193] *United States—Measures affecting alcoholic and malt beverages*, adopted on 19 June 1992, BISD 39S/206.

[194] *Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company, Inc., Pabst Brewing Company and the Stroh Brewery Company for Use or Consumption in the Province of British Columbia*, CDA-91-1904-01.

[195] Ibid., CDA-91-1904-02.

third one was requested by Canadian producers against the CITT order rescinding the injury finding.[196]

These GATT and FTA disputes, although related to the same products, did not involve the same parties, dealt with completely different legal and factual matters[197] and, more importantly, the applicable law was totally different. Before the binational panels, the applicable law was the U.S. domestic law; before the GATT panel, the applicable law was GATT law.

2. *The Lumber Disputes*

None of the many disputes on lumber in the FTA[198] have had any parallel in GATT. The first two lumber cases were before the Tokyo Round Subsidies and Countervailing Committee. These two Panels were concerned with the countervailing duties imposed by the U.S. authorities against Canadian imports of lumber.[199] The first Panel was requested in August 1986 and the dispute was settled with a Memorandum of Understanding (MOU) in May 1987 in which Canada agreed to collect an export tax. In 1991, Canada announced that it would no longer collect the lumber export tax. In October 1992, the United States imposed interim countervailing duties following an alleged violation of the MOU by Canada. A second Panel[200] concluded that there was evidence of a subsidy sufficient to justify the initiation of a countervailing duty investigation but that the alleged violation of the MOU did not justify provisional countervailing duties.[201]

Under Chapter 19 of the FTA, a number of appeals were lodged to binational panels following the imposition of countervailing duties by the U.S. authorities on imports of Canadian lumber in 1986.[202] An appeal was filed against the U.S. Commerce Department determination by the Canadian and some provincial governments, several Canadian trade associations, a Canadian exporter and the U.S. industry association.

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[196] *Certain Malt Beverages from the United States of America*, CDA-95-1904-01.

[197] An interesting argument which would need to be substantiated with evidence difficult to collect may be that following the first two GATT disputes, imports have increased and the domestic industry used the protection of the anti-dumping laws to slow down such imports. Both GATT panels have indeed declared the U.S. and Canadian domestic regulations affecting imports of beers to be inconsistent with GATT; consequently domestic regulations had to be amended, which probably led to increased imports of beers. However, panels on national treatment issues and those on anti-dumping determinations review very different legal issues.

[198] Davey wrote that the U.S. countervailing action against Canadian lumber has been the most controversial issue in Canada–U.S. trade relations in the last dozen or so years: Davey, *Pine and Swine*, *supra*, footnote 4, p. 173.

[199] The U.S. authorities considered that the "stumpage" practice of the Canadian government (where standing timber is sold to private users at artificially low prices) was equivalent to a subsidy.

[200] *United States—Measures affecting imports of softwood lumber*, adopted on 27 October 1993, BISD 40S/358.

[201] The panel recommended that the United States reimburse any cash deposits and release any bonds in connection with this affair.

[202] *Certain Softwood Lumber Products from Canada*, Federal Register, Vol. 51, No. 204, 22 October 1986, p. 37453.

There were two binational Panels with remands[203] and an extraordinary challenge[204] on the subsidy determination by the U.S. Commerce Department.[205] The injury determinations by the International Trade Commission (ITC) were also remanded twice by binational panels.[206] After the third binational Panel Report, which again remanded the case to the ITC, the two governments signed an Agreement on 2 April 1996 whereby Canada agreed to tax (in one way or other) softwood exports to the United States.[207]

Legally the GATT and FTA lumber disputes were not similar. In both cases, disputes were triggered by U.S. countervailing measures imposed against imports of Canadian lumber. However, the parties to the disputes and the laws applicable were different. For the Chapter 19 binational panels, the applicable law was the U.S. domestic law on countervailing measures while before the Tokyo Round Code Panels, the applicable law was the Tokyo Round Agreement on Implementation of Article VI. Evidently the matters before the respective panels were very different and the parties also differed.

3. *The Pork Dispute*

The dispute between Canada and the United States on alleged Canadian subsidies given to pork also led to a GATT panel and a series of binational panels under Chapter 19 of the FTA, including an Extraordinary Challenge. In the FTA, following the U.S. Commerce Department determination in 1989 that an illegal subsidy had been provided

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[203] *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-01, 6 May 1993; and *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-01, Decision of the Panel on Remand, 17 December 1993.

[204] *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-01, Extraordinary Challenge Committee.

[205] The first Panel Report remanded the U.S. Commerce Department decision which had concluded that there was a "specific subsidy". The binational Panel asked the U.S. Commerce to re-examine whether the "stumpage practice" was effectively a subsidy (whether it had an effect on price). After the remand, U.S. Commerce redid its analysis and concluded again that there was a specific subsidy and that the countervailing duty imposed on the end-product was valid. This decision was again appealed to a binational panel. This binational Panel decision on the remand decision concluded that the U.S. Commerce Department failed to demonstrate, as U.S. courts would have usually done, that the stumpage practice was a specific subsidy. The United States then referred the matter to the Extraordinary Challenge Committee which confirmed the binational conclusion that the U.S. Commerce Department had made a mistake and therefore the stumpage practice was not countervailable.

[206] *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-02, Decision of the Panel Reviewing the Final Determination of the ITC, 26 July 1993; *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-02, Decision of the Panel on Review of the Remand Determination of the ITC, 28 January 1994; and *FTA Decision on Softwood Lumber Products from Canada*, Case No. USA-92-1904-02, Decision of the Panel on Review of the Second Remand Determination of the ITC, 6 July 1994. The ITC had concluded that the U.S. industry had been injured and this decision was appealed to the binational Panel. The binational Panel concluded that some price-related aspects of the injury analysis were flawed and remanded the matter to the ITC. On remand, the ITC redid its price analysis and concluded again that Canadian exports were responsible for U.S. price suppression. The ITC's second decision (remand) on injury was appealed again to a binational Panel which, again, found a number of deficiencies in the injury analysis. The decision was sent back to the ITC which, for the third time, concluded that Canadian exports were responsible for the declining state of the U.S. industry. This decision was appealed a third time and sent to a binational Panel which remanded the decision for the third time to the ITC with comments on the causation determination made by the ITC.

[207] Although many have argued that this deal is possibly inconsistent with WTO law prohibiting voluntary export restraints, the Canadian position was that it was better to keep the export tax revenue in Canada, rather than have it collected as U.S. import duties and sent to the U.S. treasury, or given to lawyers as fees.

to the pork industry, a first binational Panel[208] was requested by Canadian producers, the Canadian government and three Canadian provinces. The binational Panel remanded the decision to the U.S. Commerce Department. The U.S. Commerce Department decision (on remand) was then appealed again to the binational Panel[209] which remanded it a second time. The binational Panel on the second remand decision by the U.S. Commerce Department confirmed the determination.

With respect to the injury determination, the International Trade Commission concluded that such imports of pork were causing a threat of injury to the U.S. industry. This ITC determination was appealed to a binational Panel[210] which remanded the determination back to the ITC. The ITC decision on remand was appealed again to a binational Panel,[211] which again ordered a remand back to the ITC. The decision of the ITC on the second remand indicated that the ITC Commissioners would not follow any recommendation by a binational panel in the future. The United States then triggered an Extraordinary Challenge[212] against the binational Panel decision which was rejected by the Extraordinary Challenge Committee.[213] Without a valid injury determination, the U.S. countervailing duties determination was therefore withdrawn.

The pork dispute in GATT was initiated in September 1989 and the Panel Report was adopted on 11 July 1991.[214] The GATT Panel addressed a much more specific and limited aspect of the dispute between the United States and Canada regarding the Canadian subsidy alleged to have been given to pork. The GATT Panel concluded that upstream subsidies (subsidies to live swine, which allegedly affected the production of fresh or frozen pork), although legally countervailable under the Tokyo Round Code, could not be considered, in this specific case, to have benefitted fresh and frozen pork.[215]

While the pork Panels in FTA and GATT appear to have been linked, the GATT Panel was a government-to-government dispute which addressed only the very specific upstream subsidy issue, while the FTA binational Panels were initiated by many parties including Canadian producers, and concerned various aspects of several subsidy

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[208] *FTA Fresh, Chilled and Frozen Pork*, Case No. USA-89-1904-06 on the Memorandum Opinion and Order, 28 September 1990.

[209] *FTA Fresh, Chilled and Frozen Pork*, Case No. USA-89-1904-06 on the Memorandum Opinion and Order on Commerce Determination on Remand, 8 March 1991.

[210] *FTA Fresh, Chilled and Frozen Pork*, Case No. USA-89-1904-11 on the Memorandum Opinion and Remand Order to the ITC, 24 August 1990.

[211] *FTA Fresh, Chilled and Frozen Pork*, Case No. USA-89-1904-11 on the Memorandum Opinion concerning ITC Determination on Remand, 22 January 1991.

[212] Amongst other arguments, the United States argued that the various binational panels were not using the appropriate standard of review, that the binational Panel had applied a due process principle that does not exist under U.S. Law, and there were problems with the evidence used by the binational Panel. For a detailed analysis of the Extraordinary Challenge in the Pork Case, See Davey, *Pine and Swine*, *supra*, footnote 4, pp. 227–232.

[213] *FTA Fresh, Chilled and Frozen Pork*, Case No. EEC-91-1904-01 USA on the Memorandum Opinion concerning ITC Determination on Second Remand, 12 February 1991.

[214] *United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, adopted on 11 July 1991, BISD 38S/30.

[215] The GATT Panel on pork is interesting from two aspects. First, it was brought under Article VI of GATT and not before the Subsidies and Countervailing Committee. Arguably for strategic reasons, Canadians used their forum-shopping option and refused to bring their complaints before the limited audience of the Tokyo Round Committee. Maybe the dispute was brought by Canada before the GATT because the issue of upstream subsidy is of general concern. Second, the Panel concluded that the countervailing measures were illegal and should be reimbursed, a remedy highly contested in the GATT forum.

programmes, applied in different ways in Canadian provinces. More importantly, before the binational Panels the applicable law was the U.S. domestic law; before GATT, the applicable law was GATT.

4. *The Salmon/Herring Dispute*

The *salmon/herring* cases are the only disputes which can be argued to have genuinely addressed similar issues in the GATT and FTA forums, although the two Panels examined two consecutive Canadian regulations. In 1986, a first GATT dispute settlement process was initiated by the United States against Canada concerning the Canadian prohibition to export unprocessed salmon. The United States claimed that the Canadian prohibition was in effect a violation of Article XI of GATT which prohibits export restrictions. Canada argued that the export prohibition was necessary for the conservation of a natural resource, and therefore was justified under the general exception of Article XX(g) as a "measure related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption." The Panel concluded that the Canadian regulation violated GATT Article XI and was not "primarily aimed at the conservation of natural resources and in conjunction with domestic measures primarily aimed at rendering effective these restrictions"; therefore it could not qualify for the purposes of Article XX of GATT. This GATT Panel Report was adopted on 22 March 1988.[216]

In 1989, Canada (implementing the recommendations of the 1988 GATT Panel Report) changed its legislation and modified its export prohibition of unprocessed salmon and herring in favour of a requirement that all salmon and herring caught in Canadian waters be landed on Canadian ports for control purposes before exportation. The United States argued that, in practice, this landing requirement obliged fishermen to have their fish processed in Canada, since salmon and herring are rapidly perishable. The United States requested the establishment of a panel under Chapter 18 of the FTA and claimed that this new Canadian regulation was a violation of Articles XI and XX of GATT which applied under the terms of the FTA.[217] The FTA Panel concluded that this Canadian landing requirement violated the provisions of Article XI of GATT, as incorporated into the FTA, in that it "...had the effect of imposing a materially greater commercial burden on exports than on domestic sales" (paragraph 6.09). As for the general exception for measures "relating to the conservation of exhaustible natural resources" which Canada claimed was applicable, Davey argued that the FTA Panel felt they had to "elaborate the GATT 'primarily aimed at' test".[218] According to the GATT Panel Report, for a measure to benefit from the application of this Article xx exception, the violation "must be primarily aimed at the conservation of natural resources". The FTA Panel accepted the GATT "primarily aimed at" test for Article XX(g). The FTA Panel

[216] *Canada—Measures affecting exports of unprocessed herring and salmon*, BISD 35S/98.
[217] Articles 407 and 1202 of the FTA.
[218] Davey, *Pine and Swine*, *supra*, footnote 4, p. 36.

Report went further and seemed to have added some form of balancing between the advantages, the inconveniences and some proportionality requirement when it stated that:

> "...the central issue was whether the conservation benefits of the landing requirement would have been large enough to justify imposing the commercial inconvenience in question."[219]

The FTA Panel concluded that this was not the case in that there were less trade-restrictive ways of collecting data on salmon than that chosen by Canada, which forced fishermen to land 100 percent of the fish caught before export.

On this salmon/herring issue, the FTA and GATT dispute resolution processes did not duplicate each other. They were not concomitant: the FTA Panel took place four years after that under GATT; and the two dispute settlement processes addressed two different measures. It can be said, however, that this is a genuine example of cross-fertilization where the FTA panel process continued the work initiated by a GATT panel.

The fact that disputes in FTA and in GATT concerned similar products should not lead to the mistaken conclusion that the two parallel regional and world dispute settlement mechanisms have been used to duplicate disputes.

IX. CONCLUSION

It is evident that parties to the FTA and NAFTA have borrowed extensively from their GATT experience and from what was to become the dispute settlement rules of the WTO, i.e. the DSU.[220] The concepts of "nullification and impairment" of benefits, including the possibility of non-violation claims, the preliminary binding consultation process, the establishment of an *ad hoc* panel, the panel process itself, the recommendation nature of the conclusions of panel reports, the implementation of panel recommendations as well as the retaliation possibilities, have all been imported from the GATT/DSU process. In exchange, Canada and the United States may have exported to the WTO some procedural and adjudicatory rules such as the indicative list of panelists from the milieu, the reference to groups of experts, and the Rules of Conduct. It can be hoped that this borrowing process of further procedural guarantees from the NAFTA experience will enrich the WTO dispute mechanism. In this context, it can be argued that the new Working Rules of Procedure of the Appellate Body reflect a concern of this nature.

On the other hand, substantial differences remain between the two systems. The WTO is now a single undertaking with an integrated dispute settlement process. NAFTA contains various dispute settlement mechanisms. The institutional framework of NAFTA

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[219] Paragraph 7.10 of the *Canada–U.S. FTA Salmon/Herring* Panel Report.

[220] Free from the pressures from other GATT contracting parties, some have argued that Canada and the United States have been testing different norms within their free-trade area—such as the intellectual property chapter of NAFTA, which is similar to the TRIPS of the WTO, before agreeing to their application on a multilateral basis.

is weaker than that of the WTO, an independent international organization, which now has a Dispute Settlement Body composed of the full WTO membership that supervises the implementation of panel and Appellate Body recommendations. In this context, the WTO dispute settlement mechanism is an authentic third-party adjudication process where non-parties have general rights of supervision over any dispute. In addition, the WTO has now a standing and autonomous Appellate Body which should ensure the respect of WTO law by all WTO Members. The NAFTA dispute settlement mechanism is, on the contrary, handled by panellists who are citizens of the parties, under the supervision of a Commission composed of ministerial representatives of each party. The WTO dispute process is more legalistic, neutral, rule-oriented and under the scrutiny of WTO Members, than that of NAFTA. But NAFTA, due to its small membership, is able to go further than the World Trade Organization with its one hundred and twenty-six Members, in some areas such as the possibility of non-violation claims in the sector of trade-related intellectual property rights.

The existence of parallel FTA/NAFTA and GATT/WTO dispute settlement systems does not appear to have been used to duplicate legal issues. Some disputes concerning similar products have been raised under Chapter 19 of the FTA and under GATT, but they evidently addressed very different legal matters.

Most interesting, is the way the two parallel systems will evolve and continue to influence positively their respective evolutions. The WTO dispute settlement mechanism seems to be more legally ambitious than NAFTA, but additional procedural requirements in the WTO panel process may provide further guarantee of "due process" for all parties involved, as well as further transparency of this formal adjudicatory process. The DSU will be reviewed at the WTO Ministerial Conference in 1998. It would be most enriching if some positive experiences from the NAFTA dispute resolution process, as well as from other forums, were introduced into the most ambitious world dispute settlement mechanism of the WTO ever reached.