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A COMPARISON OF DISPUTE RESOLUTION SYSTEMS IN THE GENERAL AGREEMENT ON TARIFFS AND TRADE, THE CANADA-UNITED STATES FREE TRADE AGREEMENT, AND THE NORTH AMERICAN FREE TRADE AGREEMENT

BY

JOHN STUART LITTLE 

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of **MASTER OF LAWS**

IN THE

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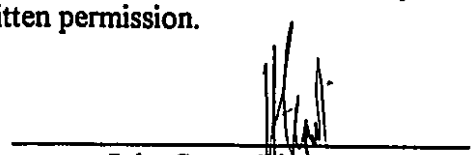

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled A COMPARISION OF DISPUTE RESOLUTION SYSTEMS IN THE GENERAL AGREEMENT ON TARIFFS AND TRADE, THE CANADA-UNITED STATES FREE TRADE AGREEMENT, AND THE NORTH AMERICAN FREE TRADE AGREEMENT submitted by JOHN STUART LITTLE in partial fulfillments of the requirements for the degree of MASTER OF LAWS in INTERNATIONAL LAW.

Professor Philip Raworth

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ABSTRACT

This thesis examines the dispute resolution systems of three international trade agreements to which Canada is a party: the General Agreement on Tariffs and Trade ("GATT"), the Canada United-States Free Trade Agreement ("FTA"), and the North American Free Trade Agreement ("NAFTA").

The examination of each of the agreements takes the form of a brief introduction of its history to establish the context in which the agreement was negotiated, followed by an explanation of the mechanics of its dispute resolution system. From that point, the examination branches into different directions for each of the agreements.

In the case of the GATT, criticisms of the operation of the dispute settlement system are analyzed to establish the background against which the Uruguay Round changes to the system evolved. GATT panel cases involving Canada and the United States are then reviewed in order to better understand the history of trade disputes between the two countries which helped to shape the development of the dispute settlement regime in the FTA.

In the case of the FTA, again the cases decided under the general dispute resolution provisions are reviewed to demonstrate the operation of the system and to establish the background against which the NAFTA dispute settlement system was negotiated.

The NAFTA, of course, has not yet offered up cases for review to see how its mechanism works in practice, but this section of the thesis compares features of the NAFTA mechanism to those of the GATT and FTA in an attempt to show how it builds on the earlier agreements and to predict how successful it might be.

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A COMPARISON OF DISPUTE RESOLUTION SYSTEMS IN THE GENERAL AGREEMENT ON TARIFFS AND TRADE, THE CANADA-UNITED STATES FREE TRADE AGREEMENT, AND THE NORTH AMERICAN FREE TRADE AGREEMENT

CHAPTER 1

INTRODUCTION

Canada is currently a party to three major international trade agreements. The General Agreement on Tariffs and Trade[1] ("GATT") is a multilateral treaty established in 1947 which came into force January 1, 1948 as an agreement among twenty-three states[2] in a move towards liberalizing trade in goods[3] following World War II. The Canada-United States Free Trade Agreement ("FTA"), on the other hand, is a bilateral trade agreement covering trade in goods, services and investment, between only Canada and the United States. Implemented on January 1, 1988, it was billed as the "biggest trade agreement ever concluded between two countries",[4] incorporating existing bilateral agreements and customs together with certain GATT commitments.

Canada is now also a party, with the United States and Mexico,[5] to a third major trade treaty, the North American Free Trade Agreement ("NAFTA") which came into force January 1, 1994[6] and creates a trading bloc of over 360 million

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[1] Opened for signature October 30, 1947, 55 U.N.T.S. 187.

[2] As at December, 1993 the GATT membership had expanded to 117 states.

[3] The GATT has been expanded to cover services as well under the new agreements concluded in December, 1993 at the end of the Uruguay Round of negotiations and adopted by the GATT membership in the spring of 1994. See *infra* note 64.

[4] See The Canada-U.S. Free Trade Agreement (Ottawa: The Department of External Affairs, 1987) Official Text, Copy 10-12-87, Overview.

[5] The North American Free Trade Agreement in Article 2204 provides for accession to the Agreement by additional nations.

[6] For the enabling legislation in Canada, see the North American Free Trade Implementation Act, S.C. 1993, c. 44, proclaimed into force 1 January 1994, SI/94-1, C. Gaz. Much of this Act simply adapts existing federal legislation. Its provisions become effective only as ordered by Cabinet which will not so order until it is satisfied that the other parties have taken satisfactory steps to make the Agreement effective. NAFTA Article 2203 also provides that the Agreement is to become effective January 1, 1994 on an exchange of letters among the Parties. For a series of articles discussing the constitutionality of its implementation, see "Constitutional Implications of NAFTA: Perspectives from

people. Negotiations among the three countries originally concluded on August 21, 1992, though negotiations continued on "side agreements" dealing with environmental and labour concerns.[7] Each of these agreements employs a different system for dispute resolution, though they appear to be evolving toward a common model. The dispute resolution system in the GATT, largely due to its political nature, began as a relatively loose, custom-based structure that is now moving toward a more legalistic model. The FTA established a system closer to that found in private law agreements: a more formal procedure that can culminate in a binding decision. The system adopted for the NAFTA follows that in the FTA with several important distinctions and refinements.

This paper will examine each of these systems from the perspective of a common law lawyer. To do so, a brief examination will first be made of the distinctions between the dispute resolution methods employed in private agreements and those found public international agreements, which distinctions are necessitated by the political elements in public international law and form little or no part of agreements under a private law system. This largely theoretical examination will be made in the context of the GATT dispute resolution system which, due to the number

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Canada, the United States, and Mexico" in Constitutional Forum, Vol. 5, Nos. 3 and 4. See also B. Appleton, *Navigating NAFTA* (Scarborough: Carswell, 1994) at 12.

[7] See *North American Agreement on Environmental Cooperation and North American Agreement on Labour Cooperation* (Ottawa: External Affairs and International Trade Canada, 1993). These side agreements address environmental and labour concerns, namely the lower environmental enforcement standards in Mexico and perceived lower labour standards in Canada and the United States as industries are forced to compete with their Mexican counterparts. For a number of essays on the environmental issues, see T. Anderson, ed., *NAFTA and the Environment* (San Francisco: Pacific Inst. for Public Policy, 1993). For an analysis of the impact of the GATT environmental provisions on negotiation of environmental side agreements in NAFTA, see Michael S. Feeby and Elizabeth Knier, "Environmental Considerations of the Emerging U.S.-Mexico Free Trade Agreement" (1992) 25 Duke J. of Comp. and Int'l. Law 259; David J. Ross, "Making GATT Dolphin-Safe: Trade and the Environment" (1992) 25 Duke J. of Comp. and Int'l. Law 345. Canada under the Liberal government elected in October, 1993 also sought to re-open the energy provisions of the NAFTA, but the United States stated that those provisions were not subject to renegotiation. Canada instead issued its own declaration on energy to the effect that Canada's interpretation of the relevant NAFTA provisions is that they do not require Canada to export any given level or proportion of its energy resources to another country (see *Inside U.S. Trade*, Vol. 11, No. 48, December 3, 1993).

and diversity of parties to the GATT, and because of its history, provides the most obvious sample for such an examination. We shall see from this examination that there is a reform movement in the GATT, evidenced by the agreements reached in the Uruguay Round, toward the more legalistic approach to dispute resolution found in private law agreements. While one must be careful in analyzing GATT cases due to the fact that they have no formal precedential value[8], we will also briefly examine a number of cases involving disputes between Canada and the United States to see how the GATT system has served the two countries and to establish part of the background against which the FTA dispute settlement provisions evolved. We will also examine the three disputes between Canada and the U.S. that have proceeded through the GATT system since implementation of the FTA to see why one party may favour the GATT provisions over those of the FTA.

The FTA dispute resolution system will then be examined. This system, because it is part of a two party agreement, more closely approximates the systems typically found in private law agreements. Yet it clearly has its foundations in the GATT, mandating communication and cooperation between the parties before more legalistic procedures are employed. After a description of the general dispute mechanism, the disputes decided under the FTA to date will be examined to determine if the mechanism appears to be meeting the objectives of the parties.

Lastly, the NAFTA dispute resolution system will be analyzed and compared to that of the GATT and the FTA to examine to what extent the GATT and FTA influenced its development. Because cases will not begin to be decided under NAFTA until some time after its implementation on January 1, 1994, we can do no more than speculate about how the mechanism will work in practice, but we can make certain predictions about its effectiveness based on the GATT and FTA experiences.

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[8] See Jan Klabbers, "Jurisprudence in International Trade Law: Article XX of GATT" (1992) 26 J.W.T. 2, 163. Klabbers argues, however, that in practice panel reports are bound to serve as precedents to a limited extent.

It should be noted that the dispute resolution mechanisms examined in each of the three agreements are those designed to handle general disputes and that each of the agreements contains different mechanisms for the resolution of disputes relating to particular goods or services or specific complaints. These mechanisms will be referred to only peripherally.

CHAPTER 2

DISPUTE RESOLUTION IN THE GATT

I. Introduction

The dispute settlement system in the GATT[9] provides a unique case study for students of international dispute resolution. It is an oddly optimistic mix of legalistic and pragmatic approaches, and its lack of a formal institutional infrastructure demonstrates how successful an uninstitutionalized dispute settlement system can be despite frequent criticisms of its operation.

Since the adoption of the General Agreement over forty years ago, scholars of international politics, economics, and law have proposed various agendas for reform of its dispute resolution system. Certain reforms have been implemented over the course of its lifetime, and still others are now before the GATT membership as a result of the Uruguay Round[10]. This chapter will set out the present structure, introduce the theories surrounding suggested reforms to that structure, and evaluate how successful the most recent Uruguay Round amendments are in meeting those suggested reforms.

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[9] The term "GATT" as used in this paper refers, as the context requires, to the written agreement and to the organization and institutions which have developed from it. The term "General Agreement" refers to the written agreement only. For ease of reference, official citations to certain GATT documents are followed by references to P. Pescatore, W. Davey, and A. Lowenfeld, eds., *Handbook of GATT Dispute Settlement* (New York: Transnat'l. Juris Pub., 1991) (the "*Handbook*"). References to the "General Agreement" are to the original 1947 agreement, while references to the General Agreement as amended in the Uruguay Round are to the "GATT 1994".

[10] The Uruguay Round was launched in September, 1986 in Punta del Este, Uruguay and concluded on December 15, 1993.

II. Background

In order to understand the legal framework for GATT dispute resolution and the deficiencies in that framework, it is first necessary to examine how the GATT was conceived and eventually born.[11]

The general economic disorder following World War I and the worldwide economic depression of the 1930's found countries in the 1940's questioning the basis for their xenophobic trade policies of the previous decade,[12] which policies were seen as a major cause of World War II. The major post-war economic powers saw currency stability, free movement of capital, and free trade as essential to avoid repeating the economic disorder of the inter-war years. They saw that internally focussed trade policies and high tariffs on imported goods were outmoded and hurtful, recognizing that a more international outlook was required. At the instigation primarily of the United States and the United Kingdom in 1947, the United Nations organized a Preparatory Committee to examine a proposal for the creation of an International Trade Organisation ("ITO") as the third arm[13] of a tripartite structure for international economic cooperation on a broad front. The ITO, as proposed, was to be a comprehensive program of international rules governing trade, investments, business practices, commodity arrangements, and labour standards, with a secretariat as its institutional component.[14] While still negotiating the ITO constitution in 1947,

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[11] For more detail, the interested reader is referred to R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* (2d)(Salem: Butterworths, 1990) chapters 1 to 6.

[12] *Trade Policies for a Better Future: The Leutwiler Report, the GATT and the Uruguay Round* (Dordrecht: Martinus Nijhoff, 1987) (the "*Leutwiler Report* ") at 157. Not everyone shares this view of the contribution of protectionist policies in creating the depression; see S. Strange, "Protectionism and World Politics" in K. Stiles and T. Akaha, eds., *International Political Economy - A Reader* (New York: Harper Collins, 1991) 133 at 140.

[13] The other two arms, the International Monetary Fund and the International Bank for Reconstruction and Development, were actually established.

[14] The *Leutwiler Report*, *supra* note 12 at 159.

the Preparatory Committee commenced multilateral trade negotiations, with twenty three parties signing the General Agreement in 1947. At this time the General Agreement was still considered an interim measure dealing with international trade in goods which was to be incorporated into the ITO. For reasons which are unimportant for this analysis, talks on the ITO broke down,[15] while the General Agreement remained. In addition, further negotiations have been held since the first negotiations in 1947. These negotiations, or Rounds, deal with a variety of concerns of the contracting parties.[16] Of these, the Tokyo Round (1973-1979) and the Uruguay Round, begun in 1986 in Punta del Este, Uruguay and concluded in 1993, had and continue to have significant implications for dispute resolution in the GATT and are examined below.

What is important for our purposes is simply that the GATT was left as an institutional agreement without an infrastructure. An informal infrastructure has necessarily evolved[17] including a Director General as the senior executive and a governing body called the General Council comprised of representatives from any contracting parties which care to belong. The Contracting Parties have delegated much of their decision-making powers to the General Council but, until the Uruguay Round proposals, including the proposal for a World Trade Organization as a replacement for the stillborn ITO, were ratified, there existed no formal institution having constitutional jurisdiction. As Hudec points out, however, it can be argued that the lack of a formal institutional framework allowed the GATT the kind of institutional flexibility that its originators had attempted to build into the ITO. Indeed, one reason

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[15] *Ibid.* at 160. See also K. Kock, *International Trade Policy and the GATT 1947-1967* (Stockholm: Almqvist & Wiksell, 1969) at 53.

[16] In keeping with convention, the term "contracting parties" when used in this paper denotes the individual membership. The term "Contracting Parties" denotes the GATT membership acting as a collective.

[17] See the *Handbook*, *supra* note 9 at 11-16.

for the lack of a formal structure may be that the informal structure became increasingly effective "while everyone was waiting for something else."[18]

III. The Mechanism

Aside from the difference that the General Agreement does not provide for an ultimate dispute resolution institution analogous to a court of law, the development of dispute settlement methods in the GATT is not unlike the development of our common law system: it is a set of substantive general principles supplemented by a series of customs and procedures which have been codified as the need arises better to implement the substantive principles.

The general principles for GATT dispute resolution are contained in Articles XXII and XXIII of the General Agreement.[19] Article XXII:1 provides for consultation between a complaining party and the offending party or parties with respect to any matter affecting the operation of the GATT in an effort to reach a mutually satisfactory resolution. It is essentially a "good faith negotiation" clause which requires that one party "give sympathetic consideration" to the representations of another respecting matters of concern under the General Agreement. Article XXII:2 allows a contracting party to request that the Contracting Parties step in to consult on matters for which the disputing parties have been unable to reach a satisfactory solution.

Article XXIII repeats the "sympathetic consideration" requirement to a more formal degree, allowing one party to make written representations to another if it considers that a benefit to which it is entitled is being "nullified or impaired" or that its attainment of an objective of the General Agreement is being impaired by the actions

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[18] Hudec, *supra* note 11 at 67.

[19] See Appendix 1 for the complete text of Articles XXII and XXIII.

of another party. As does Article XXII:1, Article XXIII:1 requires that the party to whom the representations are made give "sympathetic consideration" to them. The differences between the two Articles are that Article XXIII:1 requires written representations and expands on the reasons that allow for such representations from "matters affecting" the General Agreement to another's breach of its obligations, its application of any measure, or "the existence of any other situation".

If the parties cannot reach a satisfactory solution, the matter may be referred under Article XXIII:2 to the Contracting Parties who are then required to "promptly investigate" the matter and make recommendations or give a ruling on the matter. If they consider the situation serious enough to justify the suspension of benefits, the Contracting Parties may authorize a party to do so. The party against which the application of benefits is suspended and which does not wish to comply with the Contracting Parties' decision is then free to withdraw from the GATT on notice to the Contracting Parties.

It is noteworthy that Article XXIII does not contain the formal rules but merely sets out the principles for dispute resolution. The parties recognized early that actually having the Contracting Parties as a group hear complaints would make the process unwieldy. Thus the Contracting Parties initially delegated this function to "working parties" consisting of representatives of the parties to the dispute and several other parties which may or may not have been neutral. This smaller group had the "advantage of limited numbers, enough time to look at things in depth, and informal face-to-face bargaining where delegates can explore possibilities without formally coming to a position."[20] The practice of having the principals to the dispute as part of the working party is evidence that the purpose of the working party was more to allow the parties to negotiate a settlement than to have them arrive at an adjudication on the merits of the case.

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[20] Hudec, *supra* note 11 at 78.

The working party process appeared to work successfully for the first few disputes early in the GATT's history, but it then became obvious that the process lacked the "legal" elements necessary to deal with disputes as they became more frequent and complex. The first hint of the need for change came with the Australian Subsidy case in 1950 in which the working party was unable to reach a consensus since Australia, one of the participants, objected to the conclusions of the majority. In 1952, facing seven requests for dispute resolution, the Chairman of the Contracting Parties proposed a panel to hear the various complaints, such panel omitting delegates from any of the disputants and from any of the more powerful nations. The panel then established new procedures which saw formal presentation of the case by the parties and interested parties, private deliberations of the panel, presentation and discussion of an initial report, and presentation of a formal report to the Contracting Parties.

This evolution from the working party to the panel was sudden but subtle.[21] There had been no formal debate about changes to the working party model, merely a suggestion by the Chairman as to the establishment of a panel which did not include the parties to the dispute.

Since then, refinements to the procedures have developed by custom and are codified in a number of resolutions adopted formally or *de facto* by the Contracting Parties:[22]

a) The 1979 Understanding[23] essentially codifies the customs which had evolved up to the time of the Tokyo Round. It establishes that the Director General proposes the composition of a neutral panel from a list of qualified government and non-government trade experts nominated by all contracting parties and suggests time

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[21] *Ibid.* at 87.

[22] For a more comprehensive review of the history of changes to the GATT dispute settlement procedure, see J. Bello and A. Holmer, "U.S. Trade Law and Policy Series #16: Settling Disputes in the GATT: The Past, Present and Future" (1990) 24 Int'l. Lawyer 19.

[23] 1979 Understanding on Dispute Settlement, BISD 26S/210, *Handbook* at D4/1.

limits for reaching agreement on the composition of panels and implementation of their decisions.

b) The 1982 Ministerial Declaration[24] acknowledges that no major changes are required to the 1979 Understanding but clarifies the operation and interpretation of certain of its provisions.

c) The 1984 Action[25] recognizes that time limits are rarely met and thus provides for appointment of a panel by the Director General if agreement on panelists is not reached within a reasonable time. It also provides for further refinements to the panel appointment process.

d) Finally, the 1989 Improvements,[26] which were being applied provisionally until ratification of the Uruguay Round proposals, establish again that the existing procedures will be followed by the contracting parties, set standard terms of reference, recommend further time limits, and authorize consensual arbitration as an alternative dispute settlement procedure.

The result of these provisions is that either party to a disagreement or alleged violation of a provision of the General Agreement may request that a panel be established to hear the dispute and make recommendations for its resolution. While the Contracting Parties, acting through the General Council, have discretion whether or not to establish such a panel, they have never refused to do so.[27] A panel of three to five trade experts is agreed to by the parties to the dispute, and failing agreement is appointed by the General Council, in consultation with the disputants. The panel then hears the dispute, prepares a draft report for review by the disputants, and failing agreement at this stage, prepares a final report for the Contracting Parties. While the Contracting Parties customarily, although often after some considerable time, adopt

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[24] 1982 Ministerial Declaration on Dispute Settlement, BISD 29S/13, *Handbook* at D5/1.
[25] 1984 Action on Dispute Settlement, BISD 31S/9, *Handbook* at D6/1.
[26] 1989 Dispute Settlement Procedures Improvements, BISD 36S/61, *Handbook* at D7/1.
[27] *Leutwiler Report*, *supra* note 12 at 122.

the panel's recommendations,[28] they must do so by consensus, including the support of the parties to the dispute. If the panel's recommendations, once adopted, are not implemented within a reasonable time, the Contracting Parties may authorize sanctions by the complainant against the violator.[29]

Special regimes exist with respect to particular situations or agreements such as when one party to a dispute is a developing country or in the case of a number of Codes adopted for trade in particular products. While these regimes differ primarily in minor procedural ways, not in their substantive provisions, it means that a number of sets of procedural rules are available to the participants.

Thus, what is most evident to a common law practitioner is that the GATT dispute resolution structure is based throughout on the expectation that the parties themselves will reach agreement and that, even if they do not, they will abide by the recommendations of a panel that has no definitive authority and the recommendations of which cannot be adopted if even one contracting party, including a party to the dispute, withholds its support. In common law parlance, this would be labelled as an "agreement to agree" and thus potentially unenforceable, for the common law system recognizes that a dispute resolution system, whether non-consensual such as our court system or consensual such as any number of variants of the arbitration system, must have the capacity to bind the parties. Nowhere does the GATT structure grant that authority to any institution.[30] Nor are there, in the GATT system, formal consequences for missing deadlines, which consequences are an integral part of any common law judicial or quasi-judicial dispute resolution system.

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[28] Of 52 panel reports prepared under Article XXIII between 1948 and 1986, all but two were eventually adopted.

[29] Such sanctions were authorized only once, by the Netherlands against the U.S., although the Netherlands never actually carried out the sanctions. The sanction authorized was a quota against U.S. wheat, but because the price of such wheat was so competitive, it would not have served the interests of the Netherlands to enforce it. See Robert P. Parker, "Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement" (1989) 23 J.W.T. 3, 83.

[30] There was a proposal early on in the GATT negotiations that disputes be submitted to the International Court of Justice, but the proposal was rejected. See Hudec, *supra* note 11 at 52.

Based upon the foregoing, potential problems with the GATT dispute settlement system may be summarized as follows[31]:

1. Initiation of the procedure may be made only by a contracting party with a direct and substantial interest in the disputed matter. If the parties directly concerned are prepared to live with the violation (perhaps because they have some other agenda) it will go uncontested, even though such violation may impair the integrity of the GATT system.

2. Authorized retaliation, the ultimate and only sanction, may be impractical. A small country facing a large trading power may not initiate the procedure because retaliation, if authorized as the final resolution, may not be a meaningful penalty to the larger party and in fact may hurt the smaller party by restricting its already limited imports.[32]

3. Panels are typically composed of officials who work at delegations in Geneva. This is partially a matter of convenience and partially a matter of economics - there is not a lot of money in the GATT budget to bring people in from elsewhere. But it means that panels may be composed of non-experts in the subject matter of the dispute and that panel members as career diplomats may be more interested in conciliating or finding diplomatic solutions than in interpreting the legal issues in dispute. There is also the additional concern that, even if the panelists are not nationals of any of the parties to the dispute, it is difficult for them to ignore their government's views on the issues. In fairness, though, while this may have been the case with early working party decisions written

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[31] Ivo Van Bael, "*The GATT Dispute Settlement Procedures*" (1988) 22 J.W.T. 4, 67.
[32] *Supra* note 29.

primarily by career diplomats, recent panel decisions of trade and trade law experts are well-written and reasoned without political overtones.

4. Delay is inherent in the process. While to a certain extent this is a problem even in systems with legislated time limits, the lack of formal time limits in the GATT system aggravates the problem. And as has been referred to above, there are no penalties provided in the GATT system which can seriously prejudice a "defendant's" case, thereby discouraging delay.

5. Information tends to be leaked from files of the parties, although it may be argued that these are carefully selected leaks by parties seeking to advance their positions in the diplomatic circles outside of the formal dispute settlement process.

6. Consensus is necessary. The implications of this problem have been discussed above and can be easily understood by imagining a "losing" party to a dispute having to agree to the final decision. To this extent, it can be argued that the system has not addressed the fundamental flaw of working parties where consensus could not be reached because the disputants were part of the process. But again, the significance of this problem may be overstated since the GATT record shows that panel reports are virtually always adopted by consensus, though implementation of the panel's recommendations may be slow or non-existent.

But noting these omissions pre-supposes that the common law systems to which we are more accustomed are ideal systems or on the path to being ideal systems. It does not account for the unique nature of the General Agreement as a contract among over one hundred sovereign states from widely divergent legal, social, political, and economic regimes. If the GATT system, by common law standards,

contains so many real or perceived flaws, how has it lasted so long? Perhaps our common law precepts do not apply.

IV. International Law as Law

The above discussion begs the question of the legal character of what we think of as international law. From a common law perspective, we view law not just as a set of norms of behaviour but as a set of norms of behaviour that can ultimately be enforced by a legal institution established for that purpose, namely a court.[33] One of the primary differences between public international law and private law is that nations cannot be bound to rules that they find unacceptable, while individuals can be bound to unacceptable rules if they are imposed by a legislature. Therefore, a popular misconception among those just introduced to international law concepts is that "in the absence of a supranational system of sanctions capable of being enforced against the lawbreaker"[34] international law cannot really be law. But this belief ignores the common sense reality that there must exist some set of norms among nations given that they must increasingly deal with one another in a myriad of economic, social, and political situations. The fact that there exists no supranational institution to enforce violations of international law is irrelevant so long as nations recognize that there are certain rules established by custom or treaty that govern their behaviour.

As Akehurst points out,[35] states "obey" international law more often than most people believe for reasons similar to those which explain why individuals obey the law

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[33] For an excellent primer on the arguments for and against the use of an international court in the settlement of disputes, see R. Bilder, *International Dispute Settlement and the Role of Adjudication* (Madison: Institute for Legal Studies, 1986), a working paper commissioned by the American Society of International Law as part of the debate over the jurisdiction of the International Court of Justice to hear and decide Nicaragua's complaint against the U.S. resulting from the latter's use of force against the Nicaraguan government.

[34] M. Akehurst, *A Modern Introduction to International Law* (5th) (London: George Allen & Unwin, 1984) at 1.

[35] *Ibid.* at 8.

more often than not: they recognize the mutual advantages that arise from such compliance. States like individuals are to a greater or lesser extent dependent upon each other and realize that adherence to agreed upon rules or norms, particularly in commercial matters, is more advantageous than solving every problem by a contest of strength.

And as will be seen below, diplomacy plays an important part in the interaction of nations just as it does in the interaction of individuals, though in international law diplomacy may be the only solution in the absence of institutions such as our courts,[36] which stand as the final arbiters of individuals' disputes when diplomacy fails. It is fair to say that formal alternative dispute resolution mechanisms are more prevalent in international than in domestic law, and most of these methods, such as the use of conciliation, good offices, and mediation, are derivatives of diplomacy.

V. Addressing Criticisms of a Rule-Based System

Waincymer[37] defines a number of issues which must be addressed to determine whether a rule-based system such as that found in domestic law systems is appropriate in international law.

He cites as the first criticism of a rule-based system the view, generally held by politicians, that international relations fall into the realm of policy, not law; that governments must maintain their sovereignty and develop policy (by which is usually meant protectionist policy) in response to changing circumstances. Conceding that policy has a substantive role, Waincymer nonetheless argues that a minimum set of rules is necessary simply to keep arbitrary policies in check so that governments are

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[36] There are, of course, international law forums such as the International Court of Justice and the International Centre for the Settlement of Investment Disputes, but they depend upon attornment by the parties and play no role in the GATT system.

[37] J. Waincymer, "GATT Dispute Settlement: An Agenda for Evaluation and Reform" (1989) 14 N.C.J. Int'l. Law and Commercial Reg. 81.

constrained from always seeking short term benefits for pressure groups over long term gains for their entire constituency. Having a set of rules in place allows governments to justify stepping back from a situation on the basis that rules exist which legitimately restrict their authority.[38]

But deLacharriere also makes the seemingly contradictory argument that policy is necessary as a tool to establish the substantive principles parties will use to govern trade relations:[39]

> . . . no mistake must be made about the relations between the procedures for dispute settlement and the GATT rules over which disputes arise. It is agreement on these rules which conditions agreement on the procedures for settlement and not the opposite. A stronger consensus on precise substantive rules makes it possible to strengthen the machinery for supervision of their interpretation and application. But if there is no such consensus, a strengthening of the dispute-settlement procedures will provide no remedy. On the contrary, because the supervision procedures are applied to contested rules, the stricter they are, the more firmly they will be rejected.

The tension between the roles of policy and law in international relations leads to the next criticism of international law analyzed by Waincymer, namely that international law is not law at all.[40] Certainly, as has been alluded to above, it contains elements that are not law as we think of it in a domestic sense, but even international law has a normative effect, potentially making one course of action less beneficial than another because of consequences that may flow from that course of action. For that reason a rule-based system of some sort is required in international law.

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[38] See J. Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal" (1980) 12 Law and Policy in Int'l. Bus. 21 at 26.

[39] G. de Lacharriere, "The Settlement of Disputes Between Contracting Parties to the General Agreement" in the *Leutwiler Report*, *supra* note 12 at 130. See also R. Hudec, *supra* note 11 at 203.

[40] This criticism is not limited to international law. See K. Donovan, "Family Law and Legal Theory" in M. Twining, *Legal Theory and Common Law* (1986).

A related criticism is that, assuming that a rule-based system is necessary in the GATT, the present system is based on an inappropriate model. While the existing system lacks formal institutions and constitutional validity, its evolution has been along the lines of an adversarial system "designed on the model of Western democratic legal systems [which] unduly upsets those members whose philosphy is to avoid labelling a culprit in a litigious environment."[41] Yet as Waincymer points out, with the diversity of legal systems now represented in the GATT, the parties must examine each other's legal systems to find common ground or something of an "international legal order" towards which the dispute resolution system should move. It is simplistic to state that the "Western model" predominates the GATT dispute resolution system when the system itself bears little resemblance to what common law lawyers consider their system. In fact it can be argued that the GATT system even as it evolved from working parties to panels bears little resemblance to what we consider the Western adversarial legal system.

VI. Legalism in the GATT Dispute Resolution System

It should be evident from an examination of these criticisms that no one would seriously suggest that legal rules have no place in international trade and relations. The philosphical debate relating to the GATT dispute resolution system comes down to just how legalistic it should be. On the one hand, the closer it moves toward what we traditionally consider to be a rigid and binding system, the more certain its interpretation will become. A reliance on conventional burdens of proof, rules of evidence, and the doctrine of *stare decisis* would perhaps allow parties better to gauge in advance reactions to their taking or failing to take action in any particular trade matter. On the other hand, burdens of proof are imprecise standards, adhering to strict

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[41] Waincymer, *supra* note 37 at 96.

rules of evidence may make any kind of proof impossible when dealing with macreoeconomic issues, and the doctrine of *stare decisis* is only as valuable as the first decision, is subject to arbitrary interpretation, and is likely to be of limited use in the GATT context where situations are often very dissimilar.[42] From a purely interpretational analysis, the text of Articles XXII and XXIII of the GATT itself is generally so vague and precatory that saddling it with a rigid dispute resolution structure would be akin to building the proverbial castle on a foundation of sand. Yet as Davey[43] correctly points out, the fact that Article XXIII allows the parties to determine whether there has been a "breach" and whether it should be sanctioned suggests that the drafters intended a judicial model. And there can be little doubt that "[o]ver the years, the GATT dispute settlement procedure has developed in the direction of increased legal control."[44]

Long[45], in analyzing the role law plays or should play in GATT, discusses the issue in terms of finding the proper balance between using a pragmatic approach to deal effectively and realistically with policy issues, and supporting that approach with legal mechanisms strong enough to control undue pragmatism, yet flexible enough to adapt to evolving conditions. The GATT dispute resolution system typifies this philosophy by encouraging, and in fact requiring, substantial negotiation and mediation before invoking the formal settlement procedure. The formalized negotiation system procedure in Articles XXII and XXIII, however, requires disputants to work toward settlement, a legal requirement that mandates pragmatism. This reliance on negotiation may prove to be fruitless if neither party is willing to move from its

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[42] The doctrine of *stare decisis* is not an accepted doctrine in international law, though it appears to be influential in GATT panel decisions. See J. Jackson, *Restructuring the GATT System* (New York: Foreign Relations Press, 1990) at 12.

[43] W. Davey, "An Overview of the General Agreement on Tariffs and Trade" in the *Handbook*, *supra* note 9 at 71.

[44] Ivo Van Bael, *supra* note 31.

[45] O. Long, *Law and Its Limitations in the GATT Multilateral Trade System* (Dordrecht: Martinus Nijhoff, 1985). Long is a former Director General of GATT.

position, but in that case resort is then to be had to the formal dispute resolution procedures. In our domestic legal system, this "pre-litigation" procedure is not formalized, so that often litigants reach the formal procedure without a clear understanding of the range of issues the litigation must address and no understanding of counter-arguments likely to be raised.[46]

Jackson[47] presents this same theme as a conflict between settlement by negotiations dependent upon the relative strengths of the parties, as opposed to settlement by negotiations dependent upon reference to an agreed upon set of rules. In that context, Jackson advocates a rule-based system as the better of the two alternatives, recognizing, though, that there must still be a balance between the two approaches.

But how do we know where the balance should be? Waincymer[48] discusses extensively the tension between the legalistic and the pragmatic approaches to GATT dispute resolution. He argues that in order to evaluate any such system, we must first understand its objectives and then select processes which promote those objects.

Applying that theory, we can observe that the preamble to the General Agreement states its overall objectives as including conducting trade relations with a view to improving living standards, employment, and real income. Articles XXII:2 and XXIII:1 provide for "sympathetic consideration" of other parties' positions, and Article XXIII:1 speaks specifically of reaching a "satisfactory adjustment". While the preamble to the General Agreement is something of a lofty ideal as is often contained in the recitals to both domestic and international commercial agreements, the stated

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[46] But see J. Waincymer, "Revitalising GATT Article XXIII-Issues in the Context of the Uruguay Round" (1989) Australian Bus. Law J. 3 . He argues (at 7) that the pre-trial process in common law dispute settlement system provides more extensive disclosure of the parties' interests than that contained in GATT. In our domestic system, however, the formal procedure is commenced by pleadings which are often over-broad, and parties need not have had negotiations before issuing pleadings.

[47] J. Jackson, "Governmental Disputes in Int'l Trade Relations: A Proposal in the Context of GATT" (1979) 13 J.W.T.L. 1 at 3.

[48] *Supra* note 46. See also W. Davey, *supra* note 43.

objectives of its dispute resolution are considerably softer than those found in other domestic and international agreements which typically are replete with terms such as "binding" and "enforceable". Thus is is clear that the objectives of the GATT dispute resolution system are different from those contained in more traditional commercial agreements where such systems are designed to coerce compliance, penalize non-compliance, or compensate the aggrieved party for a breach by another. The approach of the GATT, on the other hand, is said to be to "restore, with the minimum interference with trade, the balance of concessions and advantage between the parties in dispute."[49] Even the allowance for subsequent trade-related retaliation in Article XXIII is based upon the philosophy of restoring the balance between the parties in the future as opposed to restoring them to their pre-existing situations through an award of damages[50], though retaliation may amount to a penalty.[51]

In many ways, this philosophy simplifies the task of developing a dispute resolution system since the objective is narrow. In a domestic system, the range of outcomes of litigation is broader. The parties may be compelled to use arbitration which is then subject to review. They may go directly to litigation, with claims and counterclaims, applications for injunctions, and motions for summary or default judgment. Thus the range of procedures needed to facilitate making these outcomes available must be broader. In the GATT system, there is no need for such elaborate procedures since the range of possible outcomes is effectively limited to one: a panel can only make recommendations for compliance.

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[49] Long, *supra* note 45 at 76.
[50] Although as will be seen later, compensation may be awarded under the GATT 1994.
[51] Jackson, *supra* note 38 at 61.

VII. Suggested Reforms

What are some alternative processes or refinements to existing processes which will promote the objectives of the GATT system? There is no shortage of suggested reforms to the system, but there is limited consensus[52] on the more important of these reforms, including better panel selection procedures, better enforcement of decisions, unification of the system, and the opportunity for third party intervention.

1. Panels

De Lacharriere[53] recommends that the dispute settlement procedures be reinforced by replacing panels with the International Court of Justice ("ICJ") or a permanent tribunal established within GATT. There are jurisdictional issues involved in having the ICJ hear a GATT dispute since the mechanism for such a reference does not exist,[54] though with agreement in principle, there is no reason why such a mechanism could not be developed. Further philosphical difficulties are that this may formalize the process to a degree undesirable to some members and that it may simply put the dispute into the hands and minds of people with excellent legal training but no experience in international trade law. A common complaint among lawyers in our common law system, and a compelling reason instead to choose a consensual resolution system such as arbitration, is that the courts are peopled by judges who may have no particular expertise in certain areas of law being litigated before them.

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[52] For an excellent analysis of how various of the GATT communities view these reforms, see M. Hilf, "Settlement of Disputes in International Economic Organizations: Comparative Analysis and Proposals for Strengthening the GATT Dispute Settlement Procedures" in E. Petersmann and M.Hilf, eds., *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems* (Deventer: Klewer Law and Taxation Pub., 1988) at 290.

[53] *Leutwiler Report*, *supra* note 12 at 133.

[54] See M. Hilf, *supra* note 52 at 306 for a discussion of the difficulties in using established tribunals.

The more reasonable alternative would be a permanent tribunal within GATT. This could then be filled by experts in international trade law and policy who could develop further expertise in the area. These experts could be chosen from outside of government to "de-governmentalise"[55] the process or from a mix of government and non-government experts from countries other than those involved in the dispute so that the panel could achieve an appropriate balance between those who are neutral and those who have some stake in the viability of the system.

Waincymer[56] goes further. He advocates the use of experts not just to sit on panels but to assist the parties in negotiating and conciliating and as a method of testing the evidence of the respective sides in order to assist in evaluation of the relative merits of the dispute.

2. Enforcement of Decisions

One of the key defects in the existing system is the ability of one party to block the consensus needed to adopt the panel's decision which at worst thwarts the entire process and at best contributes to delay in the process. If something less than consensus is required, the question then becomes what majority is needed. Two obvious alternatives can be presented. One is that a majority of whatever magnitude be required with both parties to the dispute allowed to vote. Another is that consensus be required but that the parties to the dispute not be entitled to vote. The difficulty that might arise in the latter case is that parties to a dispute would lobby amongst the membership and could thus block consensus. As will be seen later, a not so obvious alternative is that a report be adopted unless by consensus the Contracting Parties agree not to adopt it. This alternative would place the onus squarely on the "loser" to

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[55] De Lacharriere in the *Leutwiler Report*, *supra* note 12 at 134.
[56] *Supra* note 37 at 113.

persuade all other members of the GATT as to the correctness of its position instead of allowing such a party by itself to block adoption of the panel recommendation.

In the same vein, strengthening of the enforcement mechanism is required. The existing system allows retaliation, but in the case of a weak trading partner versus a strong trading partner, retaliation may have little effect and may hurt the "winner" more than the "loser". The most obvious means of buttressing the enforcement mechanism would be to allow, or even require, other parties or all parties to take action against an offender if it fails to implement the recommendations of a panel.

3. Unification

Jackson[57] argues that the various procedures available for resolution of particular types of disputes or Code problems be integrated into whatever procedure is ultimately adopted for the GATT generally in order to avoid complexity, fragmentation, and "forum shopping" by complainants who wish to choose the most favourable procedure or panel to hear their complaint. While the variety of procedures now available for "specialized" disputes may add somewhat to the complexity of the system, it is difficult to oppose specialized procedures if it can be argued that they are tailored to the nature of problems which for whatever reason may not be dealt with effectively in the regular system.

4. Third Party Intervention

A dispute between two parties to the GATT is likely to have repercussions for other members, and improper actions against a party which may be tolerated by it may disrupt the working of the whole system. For these reasons, one suggested reform is to allow third parties not directly party to or affected by an action to invoke the

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[57] *Supra* note 47 at 10.

dispute resolution mechanism.[58] They may now make representations to the panel but cannot initiate the process and must rely on the process being initiated by an aggrieved party. Again, if this is a weak country, it may choose not to invoke the process, and the grievance will go unredressed.

De Lacharriere takes this approach one step further. He suggests that a sort of "Attorney-General" be appointed to prosecute "violations" of the General Agreement so that aggrieved parties can distance themselves from the prosecution. This may encourage weaker parties to use the dispute settlement system where they now feel that indirect retaliation may result from being seen as a complainer. This approach is used within the European Community.[59] There, the Commission, as well as other Member States, may bring a Member State before the European Court of Justice. Further, if the Court finds that a Member State has failed to fulfill an obligation, it can order that measures be taken to fulfill that obligation, and if the Member State does not do so, the Commission may bring the matter back before the Court which then has jurisdiction to impose a penalty.

Whether this approach is feasible for the GATT is questionable. It is likely that no agency by itself could possibly monitor the system to check for violations but would have to rely largely on complaints received. An agency may also, if complaints do not require that a party take active steps itself, find itself so overwhelmed with complaints as to have to disallow some even when they are genuine, although enforcement agencies everywhere have to decide which cases are worthy of prosecution when personnel is in short supply.

A further reform involving third parties involves allowing individuals to bring complaints. At present, only member states have status to invoke Articles XXII and XXIII, though there can be no doubt that businesses lobby their respective

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[58] J. Waincymer, *supra* note 37 at 112.

[59] Provisions Amending the Treaty Establishing the European Economic Community with a View to Establishing the European Community, Articles 115 and 171.

governments to have perceived trade problems dealt with. Hilf[60] argues that allowing individuals (by which he also presumably means corporate bodies) into the process would improve existing procedures. He cites as precedent the success of a like procedure used by the International Centre for the Settlement of Investment Disputes. This reform, however, would seem merely to add a further complication to the GATT dispute settlement procedures. There is already a perception that large firms, particularly multinationals, exert too much influence in international law and politics. It can be argued that at least by requiring that such firms bring their complaints first to their national government, a filter is in place to see that their influence is first exerted nationally. Additionally, allowing individuals to bring complaints may tax the dispute resolution machinery beyond its capacity.

5. Time Limits

A perennial problem with the existing system is the ability of one party inordinately to delay the process. This is a common complaint in most domestic systems as well, although most of these systems have built-in "default" time limits which either establish that the complaint is deemed to have succeeded if time limits are not honoured or allow the instigator to apply to the court to have time limits placed on the proceedings. The GATT record shows that delay, while still not an insignificant problem, is less problematic in recent years than it was in the past, with most panels rendering decisions within a year of the decision to establish the panel.[61]

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[60] M. Hilf, *supra* note 52 at 318.
[61] *The Handbook*, *supra* note 9 at 73.

VIII. Uruguay Round Amendments

We can now examine how some of these and other concerns have been addressed in the Uruguay Round.

On December 20, 1991, the General Council tabled a *Draft Final Act Embodying the Resolutions of the Uruguay Round of Multilateral Trade Negotiations* [62] (the "Draft Act"). As its name implies, this Draft Act set out a number of resolutions proposed during the Uruguay Round. Chapter S of the Draft Act contained an "Understanding on Rules and Procedures Governing the Settlement of Disputes Under Article XXII and XXIII of the GATT" (the "1991 Understanding").

On December 15, 1993, the GATT membership through its Trade Negotiations Committee, adopted an Agreement Establishing the Multilateral Trade Organization and the Ministerial Declarations and Decisions embodying the results of the Uruguay Round Multilateral Trade Negotiations. The Agreement consists of a series of agreements and instruments comprising the Final Act[63], but for ease of reference and in keeping with the terminology used in the Agreement itself[64] it will be referred to here collectively as the GATT 1994. The GATT 1994 includes an Understanding on Rules and Procedures Governing the Settlement of Disputes, referred to here as the WTO Understanding[65] which, with minor differences, incorporates the terms of the 1991 Understanding.[66]

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[62] MTN.TNC/W/FA.

[63] Signed April 15, 1994. While Canada, like the other members of GATT, has signed the Final Act, it must be approved by each of the national governments. Subject to such approval, it is expected that the provisions of the Final Act will become effective January 1, 1995. See Government of Canada Press Release, April 15, 1994.

[64] Agreement Establishing the MTO, Article II:4.

[65] See Appendix II for the complete text.

[66] a.) There is in the WTO Understanding no reference to panelists being from Geneva as was contained in s. 15.8 of the 1991 Understanding, presumably because the parties wish to be able to choose panelists without being unduly restricted.

One important preliminary note is to briefly explain an additional institutional component in the GATT 1994. Under Part II of the Final Act in the Agreement Establishing the Multilateral Trade Organization (which has been renamed the World Trade Organization or WTO), the GATT finally has the institutional equivalent of the International Trade Organization originally proposed in 1947. The WTO is to be the structure through which the General Council, still composed of representatives of the contracting parties (now referred to as Members) administers the GATT, including the WTO Understanding.[67] The General Council will still maintain jurisdiction over dispute resolution, including the establishment and supervision of panels, but it will only do so when it convenes as a Dispute Settlement Body ("DSB"). The DSB may have its own chairman and is to establish such rules of procedure as are necessary to fulfill its duties.[68]

In the writer's view, the WTO Understanding, particularly the sections discussed below, shows how the GATT dispute settlement system is continuing its evolution toward a more legalistic framework, albeit still with heavy pragmatic influence.

Pursuant to Section 1 of the WTO Understanding, its provisions apply to disputes under enumerated agreements, most notably the agreements on trade in goods and services and intellectual property. Its provisions also apply to disputes under other agreements such as those dealing with anti-dumping, subsidies, and financial services to the extent to which they do not have their own rules and procedures.

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b.) The reference in s. 12.2 of the 1991 Understanding to "secret" panel deliberations has been changed to "confidential" in s. 14.1 of the WTO Understanding, presumably to avoid any unpleasant connotations of the word "secret".

c.) Potential panelists on the roster can be listed by areas of expertise under s. 8.4 of the WTO Understanding, a move to enhance the informed selection of panelists to ensure expertise in the area in dispute.

[67] Like so much of the GATT, the GATT 1994 is drafted such that reference must be made to a number of agreements in order to understand the whole.

[68] Agreement Establishing the MTO, Article IV:3.

Section 2 grants jurisdiction to the DSB to administer the rules, establish panels, adopt panel reports, and authorize suspension of concessions. While this appears to be a delegation of authority, as referred to above the DSB is really the entire membership. Thus it is really the entire membership "delegating" these responsibilities to itself while it is acting in the capacity of arbiter.

Section 3 of the WTO Understanding introduces its general provisions and sets the tone for interpretation of its subsequent text. Section 3.3 refers to "maintenance of a proper balance", an objective discussed earlier in this paper. Section 3.7 even more clearly establishes the aim of the parties as being to reach "positive" and "mutually acceptable" solutions and to use retaliation as a "last resort". Section 3.7 allows for temporary, voluntary compensation if withdrawal of the offensive measure is impractical. The wish is also expressed in section 3.10 that parties act in good faith and that claims not be associated with counterclaims.

All of the foregoing suggests that what is proposed in the WTO Understanding is not a radical reform of the system but instead a continuation of the same philosophy of cooperative resolution. The terms referred to above are not commonly associated with a legalistic scheme designed to sort out the winner from the loser and to penalize the loser. Such systems are typically unconcerned with the intent of the parties so long as there is a legal, as opposed to an equitable, remedy being sought. Nor are legalistic systems averse to counterclaims, since most contain elaborate provisions on how counterclaims are to be pleaded and argued.

Section 4 begins by re-stating the parties' obligations to accord "sympathetic consideration" to complaints and to seek "satisfactory adjustments". Section 4.3, however, goes on to address the criticism that the process could be unilaterally delayed by an unwilling participant. It establishes a ten day deadline to respond to a complaint and a thirty day period thereafter to attempt a satisfactory solution. If a party fails to respond to a complaint or to consult within the deadline, or if

consultations are not fruitful within sixty[69] days of the request for their commencement, the complainant may request the establishment of a panel without further attempts at negotiation.

The text is now beginning to read more like those found in collective agreements and commercial contracts where responses are required to allegations of a breach within fixed time periods and the formal dispute resolution is mandated if agreement is not reached or if one party fails to respond.

Section 4.11 continues the practice of allowing interested third parties to join the consultation process (section 10 extends this to participation in submissions to a panel), addressing the concern expressed by Waincymer that in some cases a country which is not a party to a dispute nevertheless is concerned with its outcome and wishes to make arguments in the proceedings. While intervenor status may appear to be a concept borrowed from domestic legal systems, it is better viewed as a pragmatic component of a domestic system than a legal component of a pragmatic system - it is not necessary to resolve the dispute at hand but recognizes that allowing all interested parties to argue their positions may provide for better coverage of the issues and add an element of legitimacy to a decision. It may also avoid duplicitous litigation if interested parties participate in the existing dispute before deciding whether to commence their own proceedings.

Section 5 encourages the use of good offices, conciliation, and mediation[70] as intermediary steps in the process which can extend the sixty-day consultative period and may run parallel to the panel process. This can include using the Director-General as an ex-officio conciliator or mediator, one of the reforms suggested by Jackson.[71] This may again be seen as a pragmatic reform, though it is notable that a similar

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[69] This is abridged to twenty days for disputes involving perishables.
[70] See L. Reif, "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes" (1990) 14 Fordham Int'l. Law Journal 578 for a comprehensive discussion of these alternatives to traditional dispute resolution. See also R. Bilder, *supra* note 33.
[71] *Supra* note 38 at 75.

practice is used in common law systems which require pre-trial conferences or mini-trials in which a judge is called upon either to assist the parties in settling or to tell the parties which side is likely to "win" the dispute. Settlement at this stage can avert further costs and potential embarrassment but still leaves the parties with the impression that their grievance has been heard by someone with authority and competence.

Section 6.1 imposes a deadline for striking a panel, again responding to the criticism that justice delayed is justice denied. The request for a panel is to be written and is to set out the history of the dispute together with any special terms of reference (dealt with also in s. 7). This process essentially requires that the complainant draft pleadings, though we should not too quickly conclude that this adds a legal element which did not exist before since it is questionable whether the existing system would handle a verbal request without written memoranda of some sort. Section 6 appears to be more an attempt to ensure that the issues are clearly defined in one document so that a knowledgeable panel can be found with a clearer picture at the start of what the dispute is about.

Section 8 deals with the composition of panels, ordinarily three members. In keeping with existing practice, a list of qualified panel members is to be kept and, to maintain neutrality, panel members cannot sit on a case involving their country (which in the case of a member state of a customs union or common market means any of its member states). The Secretariat nominates panelists from the roster and the parties are not to oppose such nominations without "compelling" reasons. If agreement cannot be reached, the Director-General in concert with the Chairman of the DSB picks the panelists.

This reform does not go so far as to establish a permanent tribunal which could develop consistency, but it addresses the need to continue to ensure that panelists are available from a roster of well-qualified individuals.

Under Section 9, one panel may be established when two or more parties have made formal requests for the establishment of a panel on the same issue. Similarly, panels struck to deal with similar complaints are to be composed of the same nominees, allowing panelists a certain familiarity with the issues. This procedure was used in a U.S. complaint against Canada respecting beer exports - the panel was composed of the same nominees as heard a similar dispute against Canada brought earlier by the European Community.

To ensure that complaints are dealt with without undue delay, section 12 sets out firm procedural deadlines for panels. They are to issue their final reports within six months from the date the panelists and terms of reference are agreed to, and again this is to be abridged in the case of perishables to three months. If additional time is required, the panel must notify the DSB of the reasons for delay and, in any event, not more than nine months may elapse between the selection of panelists and agreement on the terms of reference.

Section 13 of the WTO Understanding adopts another of Waincymer's recommendations, namely allowing the panels to seek out information on their own and to consult experts of their own accord. This is a movement away from the adversarial toward the inquisatorial system which should assist new members and members from developing countries which may not have the experience and expertise necessary to fully present their cases. A more professional panel with the ability to call on experts for assistance should allow a panel to fill in gaps left by the parties in the evidence and argument before the panel.

There are additional references to the use of experts in section 27, which mandates that the Secretariat maintain its role of assisting panels. It also states that experts are to be made available to developing countries involved in the dispute settlement process.

Section 16 contains perhaps the most significant advance: panel reports are automatically adopted by the Contracting Parties unless by consensus they decide otherwise (or one of the parties formally notifies the DSB that it intends to appeal). Thus a party will no longer be able to unilaterally block the adoption of a panel report. As discussed above, this is one of the alternatives suggested by GATT reformers to prevent the "losing" party effectively having a veto over the adoption of a panel report, possibly the most serious of the defects in the GATT dispute resolution mechanism.

Section 17 outlines a reform that has not been discussed extensively in the literature: an appellate review procedure.[72] A standing appellate panel is to hear appeals on "issues of law covered in the panel report and legal interpretation developed by the panel" from direct parties to the dispute only (with third party intervenors involved in the panel process able to make representations). Membership in the seven person body is to be drawn from non-government trade law (not necessarily international trade law) experts who will serve four year terms subject to one renewal term. The report of the Appellate Body, like a panel report, is automatically adopted by the Contracting Parties unless they agree otherwise by consensus.

This is clearly a major step in the evolution of the system towards the more legalistic, yet it is unclear what purpose it serves. In conjunction with better qualified panels, which can seek counsel from their own experts and hear argument from third parties, one would think that the legal quality of panel decisions will be better and there should be no need to interpose another step between the panel report and its consideration by the Contracting Parties. Moreover, an appellate or review body is only truly required where the initial tribunal has the authority to bind the parties.

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[72] Pescatore discusses the concept of an appellate body briefly in the *Handbook*, *supra* note 9 at 74. His suggestion involves the use of a short roster of panelists to decide cases in the first instance with an appeal to the entire roster or its senior members.

In addition, one could argue that many of the reforms in the WTO Understanding are designed to keep the process moving along expeditiously, and an appellate body, even one limited to a sixty day limit to decide the appeal, adds an extra means for one party to delay implementation of the panel report.

The use of an appellate body may, however, be of psychological importance to countries, such as the United States, which place great stock in the value of having at least one level of appeal. Representatives of such countries can invoke the appellate procedure to convince their constituents that they are doing everything legally possible to challenge what they consider to be a bad decision. In a more positive vein, it may lead to a more consistent GATT jurisprudence[73] in the same way as appellate level decisions in domestic legal systems clarify inconsistent trial level decisions.

Sections 21 and 22 address the concerns raised about enforcement of a panel decision adopted by the DSB. Within thirty days of the adoption of a panel or Appellate Body report, the "violator" is to have informed the DSB of steps taken toward compliance or reasons why it is impracticable to comply immediately. Other provisions of section 22 set out how "violators" who do not comply with a panel report are to be dealt with, but there is no substantial change to the concept of suspending concessions in order to restore balance. Compensation can be negotiated but not compelled except to the extent that the threat of suspension of benefits may practically compel the "losing" party to agree to certain compensation rather than face uncertain retaliation.

Section 25 provides for arbitration as a voluntary alternative to the general dispute settlement procedure. Because parties that agree to arbitration need not allow other parties to participate, arbitration may be an attractive alternative when the countries involved believe that they can resolve the dispute satisfactorily but wish to leave open their options vis-a-vis other countries that may have the same complaint.

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[73] *Ibid.*

IX. Evaluation of the WTO Understanding

The reforms contained in the WTO Understanding, while "impressive"[74] in addressing many of the criticisms levelled against the existing system, are to a great extent part of the evolution of the GATT dispute settlement system from a pragmatic system within a quasi-legal framework to a legalistic system with pragmatic components. The largest step in this evolution is that, for all practical purposes, sections 16 and 19 of the WTO Understanding make the report of a panel or Appellate Body binding on the parties, and the rest of the document addresses procedural flaws in the existing system by "tightening up" the rules. Under the WTO Understanding, a party will no longer be able to evade the operation of Article XXIII and will eventually find itself the subject of a panel procedure with all of its consequences.

This movement is not only inevitable but welcome. Despite the (assumedly) well-meaning arguments of pragmatists who do not wish to see the GATT system burdened by complex rules, a "soft" system is far too open to abuses by the powerful and the weak alike. A more legalistic system, provided that the substance of what it regulates remains acceptable to the parties, is more likely to achieve the consistency required which "often cannot be achieved if complex international trade issues are settled on an *ad hoc* basis by traditional diplomatic procedures."[75]

Where to from here? The next reform that the writer would like to see is a strengthening of the remedies available upon adoption of a panel report. Significantly,

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[74] J. Bello and A. Holmer, "*U.S. Trade Law and Policy Series # 21: GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?* "(1992) 26 Int'l. Lawyer 789 at 796 (referring to the 1991 Understanding).

[75] E. Petersmann, "Strengthening the GATT Dispute Settlement System: On the Use of Arbitration in GATT", in *The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems*, *supra* note 52.

the remedies available under the WTO Understanding do not include the authorization of general retaliation or the imposition of financial penalties against an offending member, which would have been of assistance to weaker nations in disputes against their more powerful counterparts. The suspension of benefits by a small trading nation may have little effect on a larger offender, and the offender may already have reaped considerable financial benefit from its wrongdoing such that even the suspension of benefits does little to practically restore balance. As will be seen later in this paper, it is often a simple arithmetical calculation to determine the financial gains of an offending party. Allowing a panel to make that calculation and recommend direct compensation may prove to be an effective deterrent to offensive behaviour in the future. Specifying that compensation is voluntary, as is now the case under section 22 of the WTO Understanding, is unlikely to result in its frequent implementation.

X. Canada v. The United States in the GATT

Before beginning our examination of the dispute resolution system in the Canada-U.S. Free Trade Agreement, it will be useful to examine some of the background between the two parties under the GATT dispute resolution system. As will be seen, neither of the parties is a stranger to disputes under the GATT. The U.S. in particular is not shy about flexing its muscle in international trade disputes, often arguably as a means of influencing negotiations.[76]

Canada and the U.S. confronted each other under the general GATT dispute resolution system eight times[77] between 1980 and 1988 (pre-FTA) and three times

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[76] Ingrid Nordgren, "The GATT Panels During the Uruguay Round: A Joker in the Negotiating Game" (1991) 25 J.W.T. 4, 57. Of 19 panels established from 1986 through 1990, the U.S. requested 8 and was the target of 7.

[77] *GATT, Trade Policy Review - Canada 1992* (Geneva, 1992), *GATT, Trade Policy Review - U.S. 1992* (Geneva, 1992). Of the 8 pre-FTA disputes, 1, a complaint by Canada against the U.S. relating to sugar products, was deferred before the panel process was completed. Seven of the 10 complaints discussed in this paper were initiated by Canada.

since 1989 (post-FTA). This paper will examine these disputes with two aims; firstly, to establish the background against which the FTA dispute settlement provisions were negotiated and to get a glimpse of the trading relationship between the two parties, and, secondly, to explain why the parties might still choose the GATT dispute settlement system over that of the FTA. The first four cases examined deal with Article XX of the Agreement, which sets out certain exceptions to GATT free trade principles.

A. Pre-FTA Cases

1. United States - Prohibition of Imports of Tuna and Tuna Products from Canada[78]

In 1979, the U.S. prohibited tuna and tuna product imports from Canada. It did so under the auspices of its Fishery Conservation and Management Act which required such prohibitions when another country implemented its law in areas of jurisdiction not recognized by the U.S. Canada claimed that the prohibitions violated a number of GATT principles, while the U.S. argued that such prohibitions were justifiable under Article XX(g) of the General Agreement which allows exceptions to import restrictions on the basis of conservation of exhaustible natural resources. Article XX(g) allows such prohibitions if they are not "arbitrary or unjustifiably discriminatory" and as long as they are not "disguised restrictions" on trade.

The GATT panel constituted at Canada's request agreed with the U.S. position that the prohibition was not arbitrary or "unjustifiably" discriminatory since it applied to other countries as well as Canada. In other words, so long as a country enforces its general trade exceptions against all countries, they cannot be discriminatory. In

[78] BISD 29S/91, report adopted February 22, 1982.

addition, the panel agreed with the U.S. argument that the restrictions were not disguised measures since they had been publicly announced by the U.S. as trade measures. The panel agreed with this logical interpretation of Article XX which shows both the flaw in the article's wording and the failure of the panel to give it a meaningful interpretation.

Nevertheless, the panel agreed with Canada on the substantial issue that the measure was not justifiable as a conservation measure and that the U.S. was therefore in breach of its GATT obligations. We will see how the U.S. conveniently ignored this GATT ruling in a similar case against Canada under the FTA.

2. U.S. - Imports of Certain Automotive Spring Assemblies[79]

Article XX also contains an exception to otherwise objectionable trade measures that are necessary for the protection of patents. The U.S. in 1981 had excluded imports of certain spring assemblies. The U.S. Tariff Act declared unlawful the importation of products made under processes covered by unexpired U.S. patents by giving the same status to such products as the processes themselves. Canada argued that this constituted less favourable treatment of imports than similar products originating in the U.S. A complainant respecting such products would be limited to a civil action to protect its patent and could not rely on any internal trade restrictions on the allegedly offensive product.

There is considerable confusion in the panel report about whether the "measure" being examined was the Act itself or a directive given under the Act, with the panel eventually concluding that it was the directive that had to be examined, though without providing a foundation for that finding. And again, the panel found that the directive was not "unjustifiably discriminatory" since it applied to all countries. As in the *Tuna* case, the panel seems to have accepted the distinction between

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[79] BISD 30S/107, report adopted May 26, 1983.

discrimination and unequal treatment even when the unequal treatment is aimed at one party. The panel then ruled in favour of the U.S., holding that the directive was necessary for the U.S. to implement its patent laws due to the difficulty of enforcing its patent laws against alleged violators outside of the U.S. The panel neglected to consider that this alleged difficulty may be illusory given reciprocal treatment of judgments beween Canada and the U.S.

This was a GATT panel's first foray into an interpretation of Article XX(d), and admittedly the issue was complex. But the panel's reasoning is oblique at best and largely unsupportable by logic.[80] A different panel had occasion to re-examine Section 337 of the U.S. Tariff Act in 1989 upon a complaint brought by the European Community, and this time the panel ruled against the U.S. It found that the offensive measure, in order to be "necessary" under GATT Article XX(d), must be virtually the only means to accomplish the goals of the domestic legislation. If other means are available, the measure will not pass the GATT test.

3. Canada- Administration of the Foreign Investment Review Act[81]

In this case, it was the U.S. complaining about an action by Canada, namely Canada's practice of negotiating domestic purchasing arrangements with foreign investors as part of, though not required under, the approval process of the Foreign Investment Review Act ("FIRA"). Canada and the U.S. agreed that this practice constituted a "measure" under Article XX of the General Agreement but disagreed on whether the practice was contrary to the General Agreement and, if so, whether it was justified under Article XX(d).

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[80] Jan Klabbers, "Jurisprudence in International Trade Law: Article XX of GATT" (1992) 25 J.W.T. 2, 63.

[81] BISD 30S/140, report adopted February, 1984.

The panel concluded that the FIRA legitimately required examination of foreign investment to see whether it would be of net benefit to Canada but correctly concluded that the practice in question was not necessary to that approval process. The panel, for the first time, discussed the legal concept of burden of proof, holding, as it should have done in the *Spring Assemblies* case, that the party alleging that a party invoking an exception to the GATT principles must justify that exception. In the second *Spring Assemblies* case (referred to above) the panel approved this principle respecting the burden of proof, to a limited extent showing the precedential value of panel reports.

4. Canada- Measures Affecting Exports of Unprocessed Herring and Salmon[82]

Canada, under the auspices of the Canadian Fisheries Act, imposed regulations prohibiting the exportation of salmon and herring caught in Canadian waters unless and until they had been processed in Canada. Canada attempted to maintain that this was justified as a measure necessary to preserve an exhaustible natural resource and that, as the U.S. had successfully argued in the *Tuna* case, it was not a disguised trade restriction since it was publicly announced. Not surprinsingly, the U.S. reversed its position on this latter point, successfully arguing that the "disguise" referred to in Article XX means simply that calling something by a different name does not mean that it is not a trade restriction and does not mean literally that it is something which is hidden. Just as the U.S. measure on tuna failed the GATT Article XX(g) test, so did Canada's processing requirement. The panel found that GATT Article XX(g) must be construed narrowly to avoid countries arguing that any measure that even incidentally promotes conservation is a justifiable trade restriction. Article XX(g) does not open the door that wide.

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[82] BISD 35S/98, report adopted March 22, 1988.

5. United States Taxes on Petroleum Certain Imported Products[83]

The U.S. Superfund Amendments and Reauthorization Act (1986) ("Superfund Act") imposed taxes on imports of petroleum and certain petroleum products. The European Community, Mexico, and Canada all requested consultations with the U.S. but were unsuccessful in attaining a satisfactory resolution. Canada and the European Community requested a panel, while Mexico requested the use of good offices to conciliate the dispute. The General Council decided to have all three disputes heard by a panel appointed February 27, 1987.

The Superfund Act, among other things, imposed taxes on petroleum to create a fund to clean up toxic waste sites. The tax on petroleum was originally 0.79 cents per barrel for domestic and foreign crude oil. This was then increased to 8.2 cents for crude oil delivered for refining and 11.7 cents per barrel for refined petroleum products. The effect of this differential was that refined products entering the U.S. were taxed at a higher level than those originating in the U.S.

The U.S. did not dispute that its tax differentiated between national and imported petroleum, but argued that the difference was so insignificant that importers suffered no real injury. The GATT panel found that the national treatment principle articulated in GATT Article III presumed damage from a violation and therefore a complainant need not prove injury. Interestingly, the panel relied on a 1949 decision of a GATT panel in making this ruling, demonstrating again that GATT panel reports have some precedential value. The U.S. had argued in the alternative that even if the provisions of Article III had been technically violated, the party complained against could rebut the presumption of nullification or impairment by showing that no actual injury had been suffered, but again the panel ruled that the imposition of an illegal measure essentially created an irrebuttable presumption of nullification or impairment.

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[83] (1987) 2 T.S.T. 4205.

As to a proposed tax on petroleum products which was to come into effect some time in 1989, the U.S. successfully argued that a GATT panel had no jurisdiction to hear a complaint since there had been no nullification of impairment of benefits, ie. a panel could not render a decision on hypothetical matters.

This decision is important for two reasons. First, in holding that a complainant did not have to prove injury, the panel recognized the difficulties inherent in international trade in proving injury due to the complexity of economic factors which must be considered in calculating injury. It can be argued that in the *Petroleum* case the damage calculation from a tax differential of three cents per barrel is simply an arithmetical calculation, but there are numerous other situations in which an exporting country might be hard-pressed to show that the extra cost in and of itself resulted in a significant financial impact.

Secondly, in holding that a GATT panel could not deal with future measures, the case points out that the GATT does not have an adequate means of dealing with prospective measures. As will be seen from an examination of the FTA and NAFTA, this deficiency was addressed in those agreements, though arguably in a more concrete fashion in the FTA than in the NAFTA.

6. Customs User Fees (U.S.)[84]

Here, both Canada and the European Community complained about the amount of a customs user fee imposed by the U.S. on imports on the basis that it was inconsistent with GATT Articles II and VIII. Articles II and VIII prohibit all such fees unless they are limited to the approximate cost of services rendered and do not constitute an indirect protection of domestic products or a tax on imports.

The U.S. had imposed an *ad valorem* structure in an attempt to recoup the entire cost of its customs service including the cost of such items as its executive

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[84] (1987) 1 T.S.T. 4229

offices and legal counsel. The panel found this structure offensive to the GATT in that it had the effect of increasing what could be thought of as the direct costs of processing imports by including indirect costs of the customs service.

7. Ice Cream and Yoghurt[85]

In 1988, Canada amended its Import Control List to impose quotas on the importation of ice cream and yoghurt. The quotas on ice cream were based loosely on the levels of imports for the previous year, though the quotas on yoghurt were considerably lower than previous levels of imports. Such quotas are prohibited under Article XI:1 of the General Agreement but may be justified under Article XI:2(c)(i) which allows restrictions on agricultural products if there are similar restrictions imposed on quantities of "like domestic" products.

A panel was formed in December, 1988 at the request of the U.S. following unsuccessful consultations in the fall of that year. Agreement was not reached on the composition of the panel until April, 1989, and the panel reported in September, 1989.

While Canada attempted to justify the quotas on the basis that it regulated milk production using a supply management system, the panel found that that system regulated only the raw material, namely milk, and not products made from the raw material. Hence the panel found that the requirements of Article XI:2 had not been met. The quotas were inconsistent with Canada's GATT obligations, and the panel recommended that Canada terminate the restrictions or bring them into conformity with its GATT obligations.

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[85] (1989) 2 T.C.T. 7143.

B. Post-FTA

8. Alcoholic Drinks - Canada[86]

This case is the first of the so-called beer war cases between Canada and the U.S. The two countries held consultations respecting a number of Canadian provincial requirements on beer marketing that the U.S. claimed discriminated against U.S. beer. Consultations in 1990 were ineffective, and a panel was established in February, 1991. Not coincidentally, the panel was comprised of the same members as had sat in 1988 on a panel investigating complaints against Canada's beer marketing practices by the European Community.[87] In that case, the panel found provincial pricing practices contrary to GATT principles and recommended that Canada bring its provinces into conformity with Article XXIV:12 of the General Agreement, which states that members must take reasonable measures to ensure that regional governments observe the General Agreement. In the instant case, the panel in September, 1991 again found a number of provincial beer marketing and pricing practices to be contrary to the GATT national treatment principle. It further concluded that Canada had not seriously addressed a number of practices earlier found offensive in the EC challenge, such inaction constituting a *prima facie* case of nullification or impairment of benefits due to the U.S.

9. Measures Affecting Alcoholic and Malt Beverages - U.S.[88]

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[86] (1991)7 T.T.R. 53.
[87] See (1988) 1 T.S.T. 4044.
[88] (1992) 5 T.C.T. 8133. See also *GATT Activities 1992: An Annual Review of the Work of the GATT* (Geneva, 1993).

Canada was not the only offender with respect to import restrictions on beer. Canada had complained that U.S. federal excise taxes and a wide range of state measures resulted in discrimination against Canadian beer, wine and cider in violation of the national treatment principle enunciated in Article III of the General Agreement. Consultations held in 1991 were ineffective, with a panel being established in July, 1991. Canada claimed that the U.S. measures were detrimentally affecting its exports to the U.S. The U.S. countered by arguing that although Canadian imports were down, imports of beverages from other countries were up, so that the decrease in imports of Canadian beer was due to other factors. This argument is reminiscent of that raised by the U.S. in the *Petroleum* case where it admitted that the measures were offensive but argued that they had no financial impact on Canadian exports.

The GATT panel in its February, 1992[89] decision concluded that lower excise taxes and federal excise tax credits on U.S. domestic beer were inconsistent with Article III as were most of the state measures and recommended that the U.S. take appropriate action to remove the offensive measures. The U.S. claimed that it could not approve the report immediately without talking to its states, but in June 1992 it permitted adoption of the report.

The two cases summarized above are an example of why the parties might choose the GATT dispute resolution system over that contained in the FTA, notwithstanding that the FTA system was developed by the parties for the parties. Chapter 12 of the FTA contains certain exceptions to the free trade principles enunciated in the FTA. The exceptions include, in Article 1204, measures in place as of October 4, 1987 relating to the internal sale and distribution of beer and malt-

[89] It is noteworthy that while the GATT panel dealing with the U.S. complaint against Canada reported first, both panels were were examining similar issues for a period of some 3 months. Quare whether Section 9 of the WTO Understanding might now be invoked in a similar situation to have the complaints dealt with together.

containing products. Accordingly, any attack on a country's policies respecting these products must be made through the GATT system.

Chapter 12 of the FTA also incorporates the conservation exceptions of Article XX of the Agreement into the FTA, though as will be seen later in this paper, the incorporation of such provisions still requires that the Article XX test for those conservation exceptions must be met in a challenge under the FTA while the acceptance of existing measures relating to beer precludes their challenge under the FTA.

This use of the GATT system to challenge the practices of a particular industry excluded from the FTA raises an interesting question: should a country be allowed to use the general provisions of a global trade treaty to challenge trade practices which are acceptable under the terms of a bilateral trade agreement? The more reasonable interpretation surely is that if the two countries agree in a specific treaty to tolerate certain practices in an industry, they ought not to invoke the more general provisions of a multilateral treaty to challenge those practices. Even without a provision in the FTA dealing with inconsistencies with other agreements (Article 104), the statutory rule of interpretation that specific provisions prevail over general provisions should apply to suspend the application of the national treatment provisions of the GATT with respect to the beer industry practices in question. FTA Article 104 states that the FTA prevails over other agreements to the extent of any inconsistencies. In the case of beer pricing practices, while FTA Article 1204 recognizes the legitimacy of measures in force as of October 4, 1987, Article 1205 goes on to state that the parties "retain their rights and obligations under the GATT" with respect to matters exempt under Article 1204. The specific wording of Article 1204:3 refers to "existing measures", but unfortunately there is nothing in the cases to indicate that the measures being challenged had been put in place after October 4, 1987. In fact, it will be recalled that the EC in 1988 challenged many of the same measures that the U.S.

complained of in 1990. In short, it would have been enlightening for the GATT panels to have discussed the application of FTA Articles 104, 1204, and 1205.

Notwithstanding FTA Article 1205, it seems clear that Canada and the U.S. wished to exempt their respective beer industries from GATT principles at least to the extent that they recognized that certain existing measures offended GATT principles. Unfortunately, their resolve appears not to have held, and they resorted to invoking the dispute resolution provisions of the GATT to effectively render FTA Article 1204 meaningless.

10. Pork Countervail[90]

To understand the so-called "Pork Panel" case, some background is necessary. In 1986, the EC had had established in the GATT Subsidies Committee a panel to investigate Canada's countervailing duty on boneless beef from the EC. The duty had been established to protect the position of Canada's cattle producers, but the EC successfully argued that cattle producers were not a "domestic industry concerned" within the meaning of the Subsidies Code on the basis that producing cattle and producing boneless beef were two separate industries: one was engaged in production of a raw material and the other was engaged in the process of manufacturing that raw material.

It will be recalled that Canada lost the *Yoghurt* case for similar reasons, and it was therefore not an advocate of the EC position in the boneless beef case referred to above, but it used the same argument against the United States. Canada contended that the U.S. countervailing duty on processed pork from Canada was greater than Canada's subsidies to its swine producers and that the countervailing duties were therefore inconsistent with Article VI:3 of the General Agreement.

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[90] GATT Document DS7/R dated September 18, 1990.

The GATT panel established in December 1989 at the same General Council meeting that adopted the *Yoghurt* panel report, held in Canada's favour, finding that swine breeding and pork production were two separate industries and that subsidies to swine producers did not constitute indirect subsidies to pork processors so long as pork processors were not receiving their raw material at a lower cost as a result of the subsidies. In other words, if the subsidies remained with the producers and were not passed on to the processors, the U.S. was not entitled to levy a countervailing duty on the processors. The U.S., following adoption of the panel report, refunded close to $20,000,000.00 plus interest.[91]

C. Conclusions

As can be seen from this brief review of the cases, GATT panels are required to examine complex issues and to decide contested trade disputes based as much upon interpretation of domestic laws as the GATT rules. For that reason, the proposed changes contained in the WTO Understanding, to the extent that they improve the expertise and independence of panels, are welcome.

What is also noteworthy about all of the above cases is that neither Canada nor the U.S. is a stranger to the international trade dispute resolution system under the GATT and that, despite the criticisms and weaknesses of the system set out above, few of those criticisms and weaknesses show up in practice. None of the cases above was unduly delayed, and in none of them did the Contracting Parties fail to adopt the panel recommendations. The most obvious failure of the system, and a criticism which can be levelled at most adjudicatory systems, appears to be in the expertise of the panels themselves and the occasional lack of solid legal reasoning in their reports. Yet as can be concluded from the case summaries above, it is also clear that the quality of

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[91] *Trade Policy Review - Canada 1992* (Geneva, 1992).

panel reports is improving. Panels are developing consistent principles and beginning to follow previous interpretations, yet they are not hamstrung by precedent in the case of bad cases such as the first *Spring Assemblies* case.

The *Spring Assemblies* case is also support for the Appellate Body proposed under the 1991 Understanding and brought forward into the WTO Understanding. This case shows that a poor panel report can indeed be confirmed by the membership, and that until the quality and consistency of decisions improve, an appellate review is necessary. If the Appellate Body had been in place at the time of the first *Spring Assemblies* case, it is arguable that such a body would have seen the inadequacies in the panel's reasoning and reversed its ruling.

The Pork Countervail case, in which it will be remembered that the U.S. paid substantial compensation after being found to have breached its GATT obligations, provides support for mandatory compensation. As discussed above, this alternative is not now available, but the case shows how even voluntary compensation may be strongly urged upon a party in appropriate circumstances.

CHAPTER 3

THE CANADA- U.S. FREE TRADE AGREEMENT

I. Introduction

The Canada - United States Free Trade Agreement[92] ("FTA"), while often erroneously perceived to be the culmination of only three years of negotiation, is actually merely one agreement reached in a process of negotiating trade arrangements between these two nations, a process which began formally in 1854[93] and which can be seen continuing today in the broader context of the tripartite negotiations culminating in the implementation of the North American Free Trade Agreement. Nevertheless, the negotiations leading up to the FTA were far and away the most public trade negotiations between the parties[94] and resulted in the most comprehensive agreement to that time. While to a great extent the FTA has been superseded by the North American Free Trade Agreement ("NAFTA"), an examination of the FTA provides a solid foundation for an analysis of its successor.

During negotiations, one aspect of the FTA, namely its provisions relating to dispute resolution, received as much attention as its substantive provisions. While

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[92] 27 I.L.M. 288 (1988).

[93] For a comprehensive review of trade negotiations and treaties between Canada and the United States, see J. L. Granatstein, "Free Trade Between Canada and the United States: The Issue That Will Not Go Away", *The Politics of Canada's Economic Relationship with the United States* (1985). Granatstein refers at p. 1 to a reciprocity treaty in 1854, a campaign for reciprocity ending in 1891, a reciprocity treaty in 1911, trade agreements in 1935 and 1938, the Hyde Park Agreement of 1941, trade discussions from 1947 to 1948, and the Auto Pact. These arrangements, though, (with the exception of the Auto Pact) were relatively short-lived, and since 1948, the multilateral provisions of the GATT have, for the most part, served as the basis for trade arrangements between the two parties: see F. Stone, "Institutional Elements and Dispute Resolution in the Canada-U.S. Free Trade Agreement: Implications, Opportunites, and Challenges" in D. Nolle, ed., *The Canada-U.S. Free Trade Agreement* (New York: N.Y. University Press, 1990) at 68.

[94] M. Hart, "Dispute Settlement and the Canada-U.S. Free Trade Agreement" (1990) Occasional Papers in Int'l. Trade Law and Policy, Centre for Trade Policy and Law at 5.

much of the substantive agreement between the parties relates to complex issues such as tariffs, quotas, and other technical trade-related matters, the dispute resolution provisions are comparatively simple and thus understandable even to those without economic or trade backgrounds. Perhaps for that reason, the media were quick to pick up on the dispute resolution provisions during the negotiations and to disseminate to the public their encapsulated analyses.[95] The same holds true today. While few people may be able to recite the current levels of quotas and tariffs under the FTA and those aspects receive little media attention, the few disputes which have worked their way through the dispute resolution mechanism typically receive wide coverage.

Is this attention warranted? This chapter will explain how the general dispute resolution mechanism in the FTA actually works and outline some of the history behind it to see why this mechanism was chosen over other alternatives. It will then examine the decisions which have been reached to date and attempt to determine whether those decisions reflect favourably on the choice and operation of the dispute resolution system.

II. Relevant Provisions

The FTA actually contains a number of dispute resolution mechanisms. We will concentrate on the dispute resolution system in Chapter 18 which may be thought of as the general mechanism, but a brief review of the other provisions is in order.

Chapter 19 deals with disputes arising out of claims that one of the parties has been "dumping" goods in the territory of the other, that is selling them at lower prices than at home. It also deals with claims that the government of one party is unfairly subsidizing the production of certain goods, thus allowing them to be exported at prices lower than at home where they are not (or not so heavily) subsidized. The

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[95] *Ibid.*

forum set up to deal with these claims is the binational panel, a quasi-judicial body of five picked from a roster established for that purpose which reviews the decision of the domestic party's court that the other party has been dumping or subsidizing and thereby causing injury to the domestic party.[96] The decision of the panel is final and not subject to review by domestic courts.

Chapter 16[97], which governs investment, incorporates the dispute resolution mechanism from Chapter 18, modified slightly to ensure that panel members have experience in the area in dispute and to state that consideration shall be given to international rules of arbitration.

Chapter 20, a form of hotch pot clause dealing with miscellaneous matters, also allows a party which considers that a benefit has been nullified or impaired to invoke the Chapter 18 mechanism,[98] and Article 1103 mandates arbitration for proposed emergency actions.

Customs administration, import and export restrictions, matters respecting fresh fruits and vegetables, market access for certain agricultural products, energy matters, government procurement, and services, investment and temporary entry matters all have specialized procedures for consultation and resolution of disputes.[99]

III. History

Although established by a Liberal federal government in 1982, the Royal Commission on the Economic Union and Development Prospects for Canada (the

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[96] FTA 1904. A binational panel may also review the antidumping or countervail legislation of one of the parties and make recommendations for its amendment to conform with the FTA, failing which the aggrieved party may take comparable legislative or executive action or terminate the FTA.
[97] FTA 1608.
[98] FTA 2011.
[99] FTA 702(5), 1103, 406, 407, 705(4), 905, 1305, 1306, and 1404.

"Macdonald Commission") chaired by Donald Macdonald was in many ways the basis for Prime Minister Mulroney's decision to negotiate a free trade agreement with the United States. Recommendations from the report of the Macdonald Commission (the "Macdonald Report") are particularly apparent in the general dispute resolution mechanism employed in the FTA.

Creating effective institutions to manage bilateral trade between the two countries was widely discussed well before the Macdonald Report.[100] Donald Macdonald in 1979, while a cabinet minister, proposed the creation of a joint commission to manage trade. Maine Senator Mitchell in 1984 introduced a bill to provide for the establishment of a trade commission similar to that proposed by Donald Macdonald, namely a binational panel which would investigate and report without binding either side as a preliminary step toward other, presumably more formal, procedures. The Canadian and American Bar Associations also advocated more formal dispute resolution structures.

Yet some held the view that existing arrangements for bilateral dispute resolution were sufficient and that adding institutions to the process would unduly complicate matters:

> We need an improved consultative process but do not need to interpose some new institutional mechanism within the already complex bureaucracies of each country in order to achieve this.
>
> Brian Mulroney, May 1984 while Opposition Leader.[101]

The Macdonald Commission therefore had considerable background material from which to arrive at recommendations. As set out in the Macdonald Report,[102] the two fundamental design choices for a dispute settlement structure were:

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[100] F. Stone, *supra* note 91 at 69.

[101] Quoted in J. Quinn, *The International Legal Environment* (Toronto: University of Toronto Press, 1986) at 208.

> Will the key decisions taken under the proposed free-trade agreement be made by the two national executives? Or will they be made by a standing body comprised of appointed representatives, with long fixed terms and formal legal independence from their home governments?

In the end, the Macdonald Commission envisioned involving a committee of high level government officials in all "major decisions concerning the interpretation and implementation of a free-trade arrangement."[103] Its rationale was that effective implementation of such an arrangement would necessarily involve political decisions and that, therefore, politically accountable representatives have responsibility for enforcement. This political body would be supported by a "consultative council" to serve as a fact-finding and conciliation tribunal, and it would be comprised of private experts (including retired civil servants). From this consultative council could be formed smaller panels to investigate and conciliate disputes.

The Macdonald Report found no compelling need for a permanent independent body but stated that some form of standing arbitral committee would lend strength to the free trade agreement by eliminating what would otherwise be a power-based conflict resolution system which would place Canada at a distinct disadvantage. The Macdonald Report recommended the establishment of a five member standing arbitral body comprised of two representatives from each country and a neutral (from another country?) chairman, each having five year terms. The Macdonald Report suggested that in addition to sending a message to Canadian investors that the system was ultimately stable and neutral, such a panel would at the same time encourage pre-arbitration settlement to avoid the uncertainties associated with arbitration.

The Macdonald Report was prepared after lengthy and extensive consultation with a wide range of participants, so its recommendations may be seen to reflect the

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[102] Vol. 1, Part II at 320.
[103] *Ibid.*

reality that international agreements of any sort are political as well as legal creatures and that we "cannot have a system that will see differences resolved on the basis of raw power."[104] Yet nations are reluctant to yield sovereignty even to bilateral institutions and need room for political manoeuvering. If any trend in the area of dispute resolution generally can be said to be discernable, it is that parties are embracing notions of alternative dispute resolution which move away from our formalized, adversarial institutions. But parties are reluctant to embrace alternative dispute resolution systems if there is not, at the end, a body or procedure capable of binding both parties. It is as though a safety net of security is required before parties will try new moves.

What may be said by way of footnote is that it is surprising in some respects that the Macdonald Report, in a three volume 1800 page text, devoted just two pages to a discussion of dispute resolution in any proposed agreement, hardly what might be termed a comprehensive analysis of the alternatives available and their relative merits.

IV. The Mechanism

Article 1801: The first article of Chapter 18 sets out the scope of the chapter. It applies to the avoidance or settlement of disputes over the interpretation or application of the FTA with the exception of disputes arising out of matters relating to financial services and dumping/subsidies. Using language borrowed from Article XXIII of the General Agreement, it also applies to situations where either party considers an existing or potential measure of the other to be inconsistent with the FTA or capable of nullifying or impairing any benefit the complaining party may expect from the FTA.

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[104] T. Bradbrooke Smith, "Comments on Dispute Resolution Under a North American Free Trade Agreement" (1987) 12 Canada-U.S. Law Journal 337.

It is important to note that the structures established may be invoked notwithstanding that there is not an ongoing dispute. A "measure" of the other party may be a statute, regulation, or policy and need not be an ongoing action that we typically think of as giving rise to a dispute. We will see from the *UHT Milk* case discussed below that the phrase "nullification and impairment" has been given as broad an interpretation in the FTA as in the General Agreement and thus allows considerable latitude for disputes.

It is also important to note that the parties may agree to use a procedure other than one set out in Chapter 18. As an example, the parties could agree to engage a particular arbitrator or expert to decide a dispute if they are concerned that the procedures provided in Chapter 18 do not allow for a decision by a body with sufficient expertise to determine their dispute. Difficulty may arise, though, if one of the parties does not wish to follow the arbitrator's recommendations since there would only be the parties' agreement to fall back on as opposed to the binding provisions of the FTA. If the parties had agreed in advance to be bound by the results of the arbitration and one side then refused to honour the decision, the "winning" party may have to invoke its domestic law to enforce the arbitrator's decision.

Where the dispute is with respect to a matter covered both by the FTA and the GATT, either forum may be chosen at the option of the complainant, the only restriction being that once either forum is chosen, it has exclusive jurisdiction over the subject matter of the dispute. A party is not entitled to try one forum and then the other if the first does not arrive at a favourable decision. Johnson and Schachter[105] suggest that the FTA is likely to offer more timely redress, an opinion shared by others,[106] although the previously discussed reforms incorporated into the WTO

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[105] J. Johnson and J. Schachter, *The Free Trade Agreement: A Comprehensive Guide* (Aurora: Canada Law Book, 1988) at 160.

[106] J. Anderson and J. Fried, "The Canada-U.S. Free Trade Agreement in Operation" (1991) 17 Can.-U.S. L. J. 397.

Understanding which tighten up the time limits may narrow this advantage. But there may also be cases where a complainant feels that it cannot get an unbiased hearing under the FTA or wishes to bring additional pressure on the offender by raising the dispute in the GATT forum where other GATT signatories may share the grievance.[107]

On the other hand, an advantage to using the FTA rather than the GATT is that although the FTA was entered into to manage trade, it is part of a larger relationship between the two countries as opposed to the GATT which looks at trade largely in isolation.[108]

Article 1802: This article establishes the Canada-U.S. Trade Commission (the "Commission"). Its mandate is to supervise the implementation and operation of the FTA including the consideration of "any other matter that may affect its operation." As recommended in the Macdonald Report, the Commission is composed of an equal number of representatives from each party with the "principal representative" of each being its highest ranking political officer responsible for international trade. It is to meet at least once per year, may delegate to committees, and may seek advice from outside of government. No consultative council as such is established as was suggested by the Macdonald Commission, although the Commission retains consultants and hires staff to perform that function (and as discussed below the Commission has access to the Chapter 19 Secretariat).

No institutional framework is established for the Commission, presumably because both parties have sufficient bureaucratic structures in place to "loan" to the Commission. It is, in a sense, not a new idea since the parties had been meeting unofficially well before the FTA to discuss trade. In addition, Article 1909

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[107] J. Johnson and J. Schacter, *supra* note 105.
[108] J. Anderson and J. Fried, *supra* note 106.

states that the Secretariat established under Article 19 to deal with subsidies and dumping is to provide assistance to the Commission on request. This Secretariat was the body which the Macdonald Report saw as providing institutional support if the FTA were to deal with subsidies and dumping disputes.

Article 1803: One area where the FTA clearly improves upon GATT principles is in the area of keeping the other party informed. Article 1803 provides that each party is to give the other advance notice of and respond to inquiries respecting any proposed measure (again this may be a statute, regulation, or policy) which might "materially affect" the FTA. Thus the parties can consult one another in advance of the implementation rather than having simply to react to a measure which has already been taken. This step could go a long ways toward avoiding confrontation, for the simple reason that people tend to react more favourably even to unpleasant changes if they have had an opportunity to discuss them and perhaps adjust to them.

Article 1804: This provision again is analogous to Article XXIII of the General Agreement in providing that either party may request "consultations regarding any actual or proposed matter" which affects the operation of the Agreement. Upon such a request being made, the parties are to consult with a view to satisfactory resolution of the matter. It is essentially a "negotiate in good faith" clause which formalizes the parties' obligations to keep lines of communication open.

Article 1805: If no resolution is achieved through consultation under Article 1804 within thirty days of the request being made, either party may request that the Commission meet within ten days to hear the dispute. The Commission may seek the assistance of technical or other advisors or appoint a mediator to assist the parties.

In the context of trade disputes, the time limits set out in Article 1804 and 1805 are welcome. Only forty days need elapse between the time a party first requests consultation and the time when the Commission meets to hear the matter. While these time limits tend to be honoured more in the breach than otherwise and the parties agree to extensions rather than push for over-hasty consultations or hearings, the time limits at least attempt to provide a timely hearing and can be used to prevent one of the parties from delaying the process. As discussed earlier, a frequent criticism of the GATT dispute resolution mechanism has been its failure to move the process along in a timely fashion.

Articles 1806 and 1807: If a dispute referred to the Commission has not been resolved within thirty days of its referral, Article 1806 states that it may be sent to arbitration (and must be sent to arbitration if it involves an Emergency Action). The permissive language in Article 1806 leads to the question of what happens if the dispute is not referred to arbitration. This is dealt with in Article 1807(2) which allows either party to request that the matter be dealt with by a panel of experts. Five experts are chosen from a roster, two from each party and a third to be agreed upon or appointed by the Commission or drawn by lot if agreement cannot be reached. The time limits are now extended somewhat. While provision is made for prompt appointment of the panel, the panel then has three months to hear the dispute and prepare a preliminary report for the parties' review. The parties have an opportunity to take issue with any findings in the report, but a final report must be presented to the Commission within thirty days of presentation of the preliminary report.

The Commission then reviews the final report and attempts to agree to a resolution of the dispute which "normally shall conform"[109] to the recommendations of the panel. The Commission has thirty days in which to reach a satisfactory resolution,

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[109] Article 1807(8).

failing which the aggrieved party may retaliate by suspending the application to the other party of benefits having equally detrimental effect on the offending party.

Thus, a dispute begun under Chapter 18 may wind up in binding arbitration or in the hands of a panel of experts which essentially has authority only to make recommendations. The panel process is very similar to that used in the GATT dispute resolution system and for that reason the parties are familiar with it and may be expected to choose the panel process over arbitration in most cases.[110] On the other hand, a party with a strong case may prefer that the matter be dealt with by binding arbitration rather than a panel process which ultimately results in recommendations made to the Commission, the body which was unable to resolve the issue in the first instance. To date, all five disputes which have been dealt with through the Chapter 18 mechanism have used the panel process.

The FTA dispute resolution mechanism has been drafted to provide for a certain flexibility. While there are elaborate rules established in Article 1807 for the selection of experts (which rules are to be applied to the appointment of arbitrators as well), the panel of experts or arbitration panel has considerable freedom to establish its own procedures.[111] This recognizes that disputes over different matters may well require different approaches, different presentation of evidence, or different standards of proof, and further recognizes that the panelists or arbitrators chosen are assumed to be capable of developing processes which will see that natural justice in an administrative sense is achieved. No doubt some standard procedures will eventually develop as the process is refined, and in fact the Commission has already developed

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[110] T. McDorman, "The Dispute Settlement Regime of the Free Trade Agreement" (1988) 2 R.I.B.L. 303.

[111] For an interesting discussion on whether the power to develop rules extends to rules providing for interim relief, see S.A. Baker, "Resolving Disputes under the Canada-U.S. Free Trade Agreement: Comments on Chapter 18" in R. Dearden, M. Hart, and D. Steger, eds., *Living with Free Trade: Canada, the Free Trade Agreement and the GATT* (Ottawa: University of Ottawa, 1989).

Model Rules of Procedure for Chapter 18 panels. But the drafters of the FTA recognized that attempting to lay down an elaborate procedural scheme before the process had been tried may have hindered the settlement of disputes between two sovereign nations. Many familiar with the complex rules established in civil litigation regimes of common law legal systems will acknowledge that, in many cases, the rules become an end in themselves and that the system can ultimately lose sight of the objective of resolving the dispute. By building flexibility into the dispute resolution system, the architects of the FTA have allowed for evolution of the system to accommodate changing circumstances.[112]

This flexibility also recognizes the compromise reached between a purely adjudicative system and a purely diplomatic system. McDornan describes the traditional reluctance of Canada and the U.S. to allow dispute resolution to be dealt with by institutions and their preference for handling such disputes through negotiation and diplomacy.[113] He cites the relatively few disputes between the two countries before the FTA as evidence that the pre-existing system or lack thereof was largely satisfactory. Yet others argue that diplomacy is so cumbersome that hundreds of disputes concerning limited numbers of participants or dollars languish unresolved in perpetuity.[114] Ultimately, as McDornan states, Chapter 18 blends a variety of mechanisms so as to allow the parties to manage disputes as opposed to merely adjudicating them. But the ability of the parties to resort to adjudication is important, particularly for Canada, so that dispute resolution in the FTA does not come down to a contest of economic strength: "Canada, as a small country economically, is better served by a legalistic model that stresses adjudication and the rule of law."[115]

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[112] D. Nolle, *supra* note 93.

[113] *Supra* note 110 at 327.

[114] L. Sohn, "Dispute Resolution within a North American Free Trade Agreement" (1987) 12 Can.-U.S. L.J. 319.

[115] J.G. Castel, "Current Developments: The Settlement of Disputes under the 1988 Canada-United States Free Trade Agreement" [1989] Am. J. of Int'l. Law 119. Yet at a symposium on alternative dispute resolution held at the University of Maine law school in 1988, Prof. Trakman argued that

An interesting comparison can be made between the dispute resolution provisions of the FTA and those found in the U.S.-Israel Free Trade Agreement ("U.S.-Israel FTA").[116] The provisions in the U.S.-Israel FTA are a model of simplicity in comparison to those in the FTA. Essentially, the parties are required to enter into consultations as a preliminary step to resolving a dispute. Failing satisfactory resolution, either party may refer the dispute to a Joint Committee comprised of cabinet level representatives of each of the parties. If agreement still cannot be reached within sixty days, either party can refer the matter to a conciliation panel comprised of one member appointed by each of the parties and a third appointed by the two nominees. The conciliation panel, if unable to help the parties reach a satisfactory resolution, merely presents its non-binding report and recommendations to the parties, following which the affected party is entitled to take any appropriate measures it thinks necessary.

This simple procedure epitomizes the diplomatic model of dispute resolution, relying as it does on non-binding conciliation. It should be noted, however, that the United States and Israel have neither the volume of trade that the United States and Canada enjoy nor the volume of trade disputes. Given the history of trade disputes between Canada and the United States under the GATT, it is not surprising that they chose a far more rigid dispute resolution mechanism in anticipation of putting it to use more often than that contained in the U.S.-Israel FTA.

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international arbitration was "poorly received" in Canada, as evidenced by its tardy and reluctant adoption of the New York Arbitration Convention: (1988) 40 Me. L.R. 224 at 232. See also J. Brierly, "Canadian Acceptance of Arbitration" (1988) 40 Me. L.R. 287 at 300.

[116] 24 I.L.M. 653 (1985), signed April 22, 1985.

V. The Cases

Let us now look at the five cases which have been dealt with under the formal mechanism of Chapter 18.

1. Salmon and Herring

The first, which will be referred to as the *Salmon and Herring* case,[117] dealt with Canada's response to an unfavourable GATT ruling. After a GATT panel found Canada's regulations prohibiting the export of unprocessed salmon and herring to be contrary to the GATT,[118] Canada implemented new regulations which required that all salmon and herring caught in Canadian waters be landed in Canada to be weighed. The U.S. argued that these regulations were inconsistent with the FTA.

Consultations between the parties were unsuccessful, and Canada eventually advised the U.S. that the dispute could be resolved only by invoking the FTA or GATT dispute resolution provisions. The U.S chose to invoke the FTA provisions, and the terms of reference for a panel were established by an exchange of letters over the course of one week. The parties then agreed, through a further exchange of letters, on a schedule which would see a final report issued within three months of commencement of the formal panel process. While panel selection took a week longer than scheduled, the U.S. filed its initial brief on time, and Canada filed its response according to schedule as well. The hearing was held in Ottawa over a two day period, additional briefs were then filed, and the parties agreed on a one month extension. The

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[117] *Canada's Landing Requirement for Pacific Coast Salmon and Herring*(1989) 2 T.C.T. 7162.
[118] See Chapter 2.

final report, therefore, was issued just five months after the process was invoked (the extra delay of one month was largely attributable to the death of one of the panelists).

What is interesting about this dispute, in addition to its demonstrating that disputes can be dealt with expeditiously, is that it demonstrates how the FTA and GATT work together. Article 407 of the FTA confirms the parties' obligations under GATT with respect to export and import restrictions, subject to any stricter restrictions under the FTA, and Article 1201 of the FTA incorporates exceptions to the GATT restrictions. FTA Article 409 then requires that even export restrictions justified under the GATT provisions respecting preservation of resources are only acceptable if certain other conditions specified in Article 409 are met.

The panel first found that the regulations constituted an export restriction within the meaning of Article XI of the General Agreement, rejecting Canada's argument that the landing requirement did not prohibit exportation but only added a requirement respecting the sale of fish whether bound for export or Canadian consumption.

The next GATT test was whether such restrictions were justified under Article XX(g) of the General Agreement which, as discussed earlier, allows a party to impose export restrictions for the preservation of exhaustible natural resources. Canada argued that, in order effectively to regulate the fishing industry, it needed to know what was being caught and could only do so by examining one hundred per cent of the catch. Again, the panel rejected this argument on the basis that reliable data could be obtained by measuring something less than one hundred per cent and that accordingly the requirement was not "primarily aimed at" conservation as is necessary to rely on the GATT Article XX(g) exception. There was then no need to examine Article 409 of the FTA.

The panel's decision was unanimous with the exception that one panelist disagreed with the conclusion that the landing requirement was not "primarily aimed

at" conservation. Nevertheless, he agreed with the rest of the panel that some sample less than one hundred percent of the catch could satisfy the coservation aims of the measure.

2. Lobsters from Canada

The second case is referred to as the *Lobster* case.[119] The U.S. in 1989 enacted amendments to its fisheries conservation legislation, one of which such amendments prohibited the sale or transport in the U.S. of sub-sized lobsters. The amendment had the effect of prohibiting the import into the U.S. of sub-sized lobsters from Canada which were formerly allowed in on the ground that they were caught in Canadian waters and the legislation applied only to lobsters caught in U.S. waters. Canada notified the U.S. that it considered this an illegal import restriction under GATT rules.

Consultations failed to resolve the issue. Again, the parties established the terms of reference for a panel of experts through an exchange of letters, as being, firstly, whether the amendments were inconsistent with the GATT as incorporated into Article 407 of the FTA and secondly, whether, if they were inconsistent, they were saved by Article 1201 which incorporates into the FTA the "conservation of natural resources" exception in Article XX(g) of the General Agreement.

The parties further agreed on a schedule which would see the issuance of a final report approximately four months after determining the terms of reference.

As part of its findings of fact, the panel found that approximately ten per cent of lobsters caught in Canadian waters would be sub-sized lobsters by U.S. standards.

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[119] *Lobsters from Canada* (1991) 2 T.T.R. 72.

With total value to the Canadian industry of approximately $145 million Canadian for lobsters exported to the U.S., a loss of ten per cent would be significant.

The panel then reviewed the legislative history of the fishing conservation legislation and its amendments, determining that there was a danger to the American lobster industry if lobsters were harvested before their reproductive capacity and that the prior exception for Canadian lobsters was perceived as unfair by U.S. lobstermen and created enforcement difficulties for the fishing regulators.

While the panel was divided as to whether the amendment constituted an import restriction, the majority held that it did not and that the measure was more appropriately categorized as a General Agreement Article III measure which could only be found contrary to the General Agreement if it discriminated between domestic and imported production. Because the amendment applied equally to domestic and imported lobsters, it was not in violation of Article III of the General Agreement. There was therefore no need for the panel to consider Article XX(g) of the General Agreement.

The minority held that the amendment was an import restriction and that to hold otherwise would bring "seriously into question the value of the provision in the General Agreement and the FTA that prohibits the imposition of prohibitions or qualitative restrictions on international trade except in narrowly defined circumstances." Having made this determination, the minority went on to find that the amendment was not saved by Article XX(g) of the General Agreement since there was evidence that the amendment was enacted both for trade and conservation purposes; thus it was not "primarily aimed at" conservation.

Unlike the *Salmon and Herring* case where the minor disagreement by one of the panelists is dealt with in a footnote and when that panelist ultimately agreed with the conclusion of the majority, the *Lobster* case shows a clear division between a three panel majority and a two party minority. The minority prepared a separate decision on

virtually all aspects of the case, including findings of fact based on what it considered to be "unduly limited information".[120] The minority further concluded that, as in the *Salmon and Herring* case, while a size requirment was one of the means of ensuring proper harvest management, there were other equally viable means available such as closed seasons and that, where such other means exist, the party complained about has not satisfied its onus to justify the measure under Article XX. While the identity of the minority is not reported, it is common knowledge that it was comprised of the two Canadian members.

3. Interest

The third case, which will be referred to as the *Interest* case,[121] dealt with Chapter 3 of the FTA which sets out certain rules of origin for determining whether goods in fact originate in one of the countries or have been sufficiently changed in one of the countries or whether they are just imported from a third country and then exported without any value being added. FTA Article 304 sets out one of the rules for determining whether value has been added by establishing criteria to determine the direct cost of processing. The criteria include the cost of "mortgage interest . . . for real property used in the production of the goods". The U.S. Customs service had adopted a policy that excluded from the direct cost of processing the cost of interest on capital borrowed to purchase plant and equipment, a policy which had the effect of excluding certain auto parts from being considered to have originated in Canada. The policy was based on an interpretation of Article 304 that interest could only be factored in if it was mortgage interest on real property.

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[120] *Ibid.* at 157.

[121] *Article 304 and the Direct Cost of Processing* (1992) 5 T.C.T. 8118.

The dispute was not resolved through consultations, and Canada requested a panel of experts on January 6, 1992. A unanimous panel reached its decision June 9, 1992, concluding that on a plain reading of Article 304, the listed criteria were illustrative and not exhaustive. It concluded that all "bona fide interest incurred under a loan agreement intered into on arm's length terms in the ordinary course of business" should be considered a direct cost of processing and recommended that the U.S. implement new regulations and adopt a new customs policy.

4. Durum Wheat[122]

The fourth case, begun in May 1992 and decided in February, 1993, involved a dispute between the parties respecting Canada's exports of durum wheat to the United States. FTA Article 701.3 prohibits either party, or a public entity which it controls, from exporting agricultural products at prices lower than the acquisition price of the products plus handling and storage charges. It was conceded that Canada's exports of durum wheat had almost doubled since 1986, when it began exporting to the U.S., and that its exports to the U.S. accounted for 360,000 tonnnes to the U.S. at a price per tonne of $158.72. Thus the issue was of considerable financial interest to both parties.

Looking at Article 701 of the FTA in context, the panel found that neither domestic subsidies (ie. on all goods) nor export subsidies (ie. only on goods destined for export) are absolutely prohibited internationally, that export subsidies to the other party are generally prohibited under the FTA, and that the only export subsidy explicitly prohibited is a subsidy under the Western Grain Transportation Act on goods moving to the U.S through western ports. Before the FTA, Canada had maintained,

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[122] *The Interpretation of and Canada Compliance with Article 701.3 with Respect to Durum Wheat Sales* [1993] F.T.A.D. No. 2.

through the Canadian Wheat Board ("CWB"), a two tier price system for durum wheat with one price for domestic sales and one for export sales. This sytem was abandoned by Canada during negotiations leading to the FTA. At issue was generally whether the replacement system of the CWB constituted an export subsidy prohibited under section 701, and specifically whether the "acquisition price" of wheat by the CWB meant only its initial payments to producers or included interim and final payments.

The initial payment was fixed by legislation as 80% of the price the CWB expected the wheat to fetch on the market. That price could be supplemented by interim payments made during the year to producers who received the lowest initial payments. At the end of the year, the CWB distributed to all farmers the surplus, if any, from its operations. The U.S. argued that all three payments formed part of the acquisition price, while Canada argued that the interim and final payments were in the nature of a distribution of profit and were not part of the cost of acquisition which was the price paid at the time of export.

The panel looked first to dictionary and statutory definitions of "acquisition price". The Canadian Wheat Board Act referred to the interim and final payments as distributions of profit, as did a Federal Court of Canada case on point (*Lacey* v. *Canada* [1990] 1 F.C. 168 at 188). But in looking further, towards a purposive interpretation, the panel found some support for the U.S. position that the intent of Article 701 was to prohibit export subsidies regardless of what they were labelled domestically. While the CWB distributed "profit" to its members by way of payments made after the initial payment, the federal government made up any losses incurred by the CWB, and the U.S. argued that this amounted to a subsidy of its operations.

The panel ultimately held in Canada's favour. It found that the distribution of surplus only occurred if the CWB was profitable, and that if the Board was profitable it received no government subsidy. Reasoning that the inclusion of all three payments would make Article 701 operative even if the government was not required to

subsidize the CWB, the panel determined that Canada's position was consistent with the intent of the FTA, the drafters of which had not intended for Canada to potentially be in breach of the provisions of the FTA because the CWB estimated the market price for wheat almost a year and a half before it distributed profits to its members. And according to evidence reviewed by the panel, the CWB consistently set the initial payment at the U.S. market price for wheat of comparable quality and had not used the initial payment as a mechanism to sell Canadian wheat at below world prices.

Nor was the panel swayed by the argument of the U.S. that the CWB should have to take into account under the heading of handling charges the WGTA subsidies paid with respect to other grain crops. The panel found that if the CWB were required to do so, even though such subsidies were handled by another agency, it could never sell wheat to the U.S. at competitive prices.

The panel, under its terms of reference, went beyond adjudication of the dispute to try to assist the parties in arriving at an information-sharing scheme which would allow the U.S. to determine whether Canada was complying with Article 701 without having to bring the matter within Chapter 18. The panel recomended guidelines for this information sharing which would give comfort to the U.S. while protecting Canada's interest in the confidentiality of its decision-making process.

5. UHT Milk[123]

The UHT Milk dispute arose out of Puerto Rico's[124] prohibition of the import of UHT milk from Quebec after fourteen years of accepting the same. Canada

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[123] *Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec* [1993] F.T.A.D. No. 7.

[124] Puerto Rico is included in the definition of a "territory" of the United States within the meaning of Article 201 of the FTA.

requested the establishment of a panel in September, 1992, and the panel issued its final report in June, 1993.

Quebec had been the only exporter of UHT (produced under ultra-high temperature and packaged to preserve its shelf life) milk to Puerto Rico, and in fact the only source of that product, from 1977 to 1981. Beginning in 1986 when Puerto Rico began producing its own UHT milk, Quebec's share of the market gradually declined until its market share was only twenty-five percent in 1991. UHT milk from Quebec had been allowed to enter Puerto Rico during that time on the basis that it was produced and processed under sanitary standards "essentially equivalent" to regulations governing food processing in Puerto Rico. At the insistence of the Food and Drug Administration (FDA) of the U.S., Puerto Rico amended its regulations to adopt the standards for milk processing used by the FDA under the Pasteurized Milk Ordinance (PMO). Following Puerto Rico's adoption of the PMO in 1991, Puerto Rico revoked the import license of Quebec's Lactel Group, a UHT milk producer and exporter. The decision was ostensibly made not so much on the basis that the imported milk did not meet the new standards but on the basis that Quebec was not a member of the National Conference on Interstate Milk Shipments (NCIMS), a voluntary organization of which all fifty U.S. states, the District of Columbia, and Puerto Rico are members and which cooperates with the FDA on milk processing standards. Because Quebec was not a member, FDA inspectors would not inspect Quebec UHT milk to see whether it met the PMO standard adopted by Puerto Rico. While the PMO provided for an equivalency standard, the FDA maintained that equivalence could only be established through continuous testing which the FDA was not prepared to do so long as Quebec was not a member of the NCIMS.

Lengthy negotiations took place between Canada, the U.S and Puerto Rico both before and after the ban on Quebec imports. Much of the debate among the parties centered on Canada's unwillingness to become a member of NCIMS, arguing

that its standards were equally rigorous and that there was simply no need to adopt the American standards. The U.S. appeared equally unwilling to make exceptions to Canadian imports, particularly when only one producer was involved.

During the panel hearings, one of Canada's arguments was that the licensing system adopted by Puerto Rico under the PMO regulations constituted a quantitative limitation on imports contrary to Article XI of the General Agreement incorporated into the FTA under Articles 407 and 710. Such quantitative limitations completely restrict imports, are made effective through licenses, and require the importer to meet specific domestic requirements. The licensing requirement in question, it was submitted, amounted to a condition which could not be met in any objective or equivalent sense but only by membership in a foreign organization. Canada also submitted that the licensing requirement breached the national treatment principle set out in the General Agreement and incorporated into the FTA since although the licensing requirement technically applied only at the border to ban the imported product, it had the effect of treating an imported product less favourably than equivalent domestic product.

The U.S. countered that the PMO regulation was purely a domestic regulation that applied to both the domestic and imported product but that the Canadian product did not meet the standard which, for equivalence, meant an identical or stricter standard. Because Canada was not a member of the organization that would inspect the product or certify foreign inspectors, there was no way that the U.S. could determine the product's equivalency.

The panel noted that this was the first FTA dispute dealing with standards and that it must be careful not to rule on the legitimacy of such standards, which it conceded must be determined by the parties, but merely to rule on the interpretation and application of those standards in the context of a trade agreement based on

cooperation and mutual consideration. In short, the panel stated that its role was to determine the appropriate manner of determining equivalency.

The panel first determined that, because there was no separate licensing regime for UHT milk importers but rather one regime for all milk producers, importers, and exporters, the licensing system did not constitute a quantitative restriction. In reaching its conclusion on this issue, the panel referred to the panel decision in the *Lobster* case in which the majority found a size requirement to be purely a domestic matter.

The panel further determined that, while the fact that Puerto Rico had imported Quebec UHT milk for over fourteen years without incident was not of itself sufficient to conclude that its ban on such milk after adoption of the PMO standard was an unjustifiable restriction, it called for a full examination of the standard and the interpretation of the parties' obligation to work towards equivalency standards. In this respect, the panel stated that although the United States' handling of the matter was "far from exemplary,"[125] the establishment of equivalent standards is essentially a consensual matter and could not be imposed nor conducted unilaterally. The panel stated that the conduct of the United States did not constitute a violation of the obligation under FTA Article 708(2)(a) of the parties to "work toward" the elimination of technical standards that create arbitrary or unjustified restrictions on bilateral trade, presumably because the wording of the Article requires that a technical standard be found arbitrary or unjustified, and the panel did not make this finding.

The panel after considerable discussion determined that the U.S. had not violated any specific provisions of the FTA including provisions of the General Agreement incorporated into the FTA.[126] Where the panel at last accepted Canada's position was that the facts of the case taken together resulted in a nullification or impairment of the benefits to which Canada was entitled under the FTA. It will be

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[125] *Supra* note 121, para. 5.50.

[126] Articles 703, 708.1, and Schedule II to Annex 708.1. It declined to make a ruling on the alleged violation of GATT Articles III:1 and III:4.

remembered that this is one of the criteria for invoking the dispute mechanism under FTA Article 1801 which refers to FTA Article 2011 under which a party can bring a dispute before a panel notwithstanding that a measure complained about is not itself in contravention of the terms of the FTA. In this regard, the panel stated that the FTA should be interpreted liberally to take into account its economic purpose which is to facilitate trade. While the panel was careful again to acknowledge that the parties had to retain their sovereignty over health and safety standards, those standards had to be interpreted and applied fairly. Given the circumstances that the product under question was consumed in Canada, exported without complaint for a considerable period, consumed by the U.S. army in Puerto Rico after its ban from the rest of the country, and that the standards under which it was processed met the standard under which it was formerly judged, the panel found that Canada could reasonably expect to be permitted to continue its export of the product during negotiations over standards of equivalency. Accordingly the panel recommended that equivalency studies be conducted expeditiously and that if equivalence is found, UHT milk from Quebec should be allowed to be exported to Puerto Rico without delay.

VI. Analysis of the Cases

As was the case with the GATT cases discussed earlier, it is apparent from the *Salmon and Herring* and *Lobster* cases that both parties are quick to attempt to justify what would otherwise be offensive trade measures by arguing conservation grounds.

Can the two cases be reconciled? On the one hand, it appears that when Canada imposes a requirement on conservation grounds that simply adds (both for domestic and foreign fishermen) cost to the process but does not prohibit exportation of a product caught in Canadian waters, a panel finds it to be an unwarranted export

restriction. When the U.S. adopts a measure that assists domestic producers and also has the effect of absolutely prohibiting a product caught in Canadian waters that was formerly allowed, a panel finds the measure to be a legitimate internal restriction.

On the other hand, Canada's landing requirement for salmon and herring was imposed as a replacement for an illegal processing requirement that had no bearing on conservation,[127] while in the *Lobster* case, the legislative history of the amendment presented a better argument that it was part of a regulatory scheme designed to conserve fish stock.

Even if on an objective basis they appear to be decided in accordance the rule of law and the spirit of the FTA, the *Salmon and Herring* and *Lobster* cases may be perceived by the public as demonstrating only that, although there is a formal mechanism for dispute resolution that is tailored to resolving disputes in a legalistic manner, nothing of substance has changed and Canada will consistently lose to the larger trading partner. What we effectively have, therefore, is still a power-based system with a formal mechanism interposed to legitimize the exercise of that power.

Even if Canadians recognize that the decisions are fair, the conclusion they are likely to draw is that, as opponents of free trade predicted, Canada has lost a little of its sovereignty and can no longer legislate freely to protect its own. This, of course, is one of the objectives of the FTA, namely to harmonize the trade policies of the two trading partners - the issue is whether harmonization will help both economies or only make the larger one even larger.

The better view is that, as illustrated by the *Interest*, *Durum Wheat*, and *UHT Milk* cases, two losses do not a pattern make. The *Interest* case shows unequivocally that the protections afforded by the FTA cut both ways and that a panel is capable of recognizing when the U.S. is being unreasonable as well as when Canada is being so.

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[127] See *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, *supra* note 82.

The *Durum Wheat* case, it can be argued, demonstrates in fact that in cases of ambiguity, Canada can be the winner. It would have been comparatively easy for a panel to have concluded that a pricing mechanism which is supported by the Canadian government constitutes a prohibited export subsidy. Yet the panel recognized that the FTA was not intended to prohibit Canada from continuing to use marketing board practices when those practices did not result in manifest unfairness to the United States.

Particularly when the background to the *Durum Wheat* case is known, it becomes apparent how necessary a legal dispute resolution system is to the operation of a free trade agreement. The United States has challenged the Canadian marketing system for wheat on a number of occasions and has lost each challenge.[128] There is considerable pressure in the United States by the farming lobby to restrict imports of Canadian wheat, and it is clear that if the matter were to be decided in the political realm only, the lobbyists would have their way.[129] Thus particulary where one country has almost overwhelming political power over another, a dispute resolution system based on negotiated principles of trade is required.

The *UHT Milk* case further demonstrates that a bilateral panel will also recognize when one of the parties has been bullying the other even though such bullying does not offend any explicit provision or principle of the FTA.

All of the cases are essentially well reasoned and well-written, though at times the reasoning in the *Lobster* case stretches the limits of interpretation. The cases also show that panels will examine GATT principles extensively and are not deciding cases in a vacuum, particularly in the *UHT Milk* decision where the panel examined GATT

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[128] See M. Benson, "The NAFTA Durum Dispute and the Canada Grain Act: A Study in Institutional Development" (1994) Constitutional Forum, Vol. 5, Nos. 3 and 4, 81.

[129] "Clinton plays U.S. politics at our farmers's expense" *The Edmonton Journal* (23 June 1994) A8.

principles and international law principles of treaty interpretation[130] to ensure that the FTA provisions were placed in their proper context.

Notwithstanding that former Canada Supreme Court Chief Justice Brian Dickson sat on the *Durum Wheat* panel, the *UHT Milk* decision is the most legalistic. It reviews the evidence extensively, breaks the submissions into manageable parts, and even declines to rule on a number of what would seem to be cogent issues, much as common law judges often review the law surrounding an issue and then decline to determine the issue on the basis that it need not be addressed to determine the main question.

VII. Conclusions

The compromises illustrated in the FTA between a purely legalistic model and a purely diplomatic model for dispute resolution were arrived at after considerable investigation and reflect the wishes of parties who had investigated the range of alternatives available.

It is clear that the mechanics established for the system are built upon GATT foundations with a view to improving those foundations in the areas of notification and time limits, though with the adoption of the WTO Understanding, the differences in time limits is greatly diminished. Despite its relative simplicity in comparison to the somewhat lengthy and occasionally cumbersome WTO Understanding, the FTA is the more legalistic of the two systems examined thus far, incorporating into the panel procedure concepts borrowed more from arbitration models that the GATT model. In particular, Chapter 18 of the FTA leaves more flexibility to the panelists to determine their own procedure, unlike the WTO Understanding which itself acts as a code of

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[130] The *Durum Wheat* panel, as well, referred to the Vienna Convention on treaty interpretation. See *supra*, note 120 at para. 64.

procedure. Yet in none of the cases brought through the system to date was the arbitration mechanism invoked, demonstrating that the parties are quite content with the panel system evolved from the GATT.

Panels have generally been comprised of intelligent and thoughtful trade or legal experts who have demonstrated their willingness to interpret the FTA in the spirit in which it was negotiated having regard to established principles of legal interpretation. And with the exception of the *Lobster* case, the partisanship almost inevitable in a two party agreement has not been evident from the panel decisions which fairly set out and evaluate the positions of each party.

It is too early to declare that the panel process will always be a neutral final arbiter of the parties' interests, although essentially the system has been good to Canada. Like any adjudicatory body, a panel of experts is unlikely to please both sides all of the time, but from the limited jurisprudence available to date, it appears that the panels are at least as capable as any adjudicatory body of deciding the merits of a case.

It is also too early to determine how effective the preliminary steps in the process will be, since published panel decisions are not necessarily representative of the machinations of the consultative process which may resolve disputes before they reach a panel. The continuing dispute over Canadian durum wheat exports and the history of the UHT milk negotiations suggest that the parties are not inclined to reach agreement at a political level and will continue to defer tough decisions to panels. But even in this sense the FTA dispute resolution system can be considered successful insofar as it allows the parties to hold their ground politically, knowing that ultimately they can fall back on a formal mechanism as a justification to their constituents that the matter has run its full course and been determined according to law.

As will be seen next, the adoption of Chapter 18 concepts and procedures in the NAFTA is further evidence of the parties' satisfaction with the Chapter 18 mechanism.

CHAPTER 4

DISPUTE RESOLUTION IN THE NAFTA

I. Introduction

Until the 1980's, Mexico had typically looked inward for its economic growth, adopting a policy of import substitution to promote domestic production and to protect it from what was seen as potentially threatening influence from its giant northern neighbour. This changed in the 1980's toward a more liberal trade policy as a means of enhancing economic growth and increasing industrialization. Still with nothing formal in the way of a comprehensive trade agreement, the United States and Mexico in 1981 commenced discussions which led to the creation of a Joint Commission on Commerce and Trade, a tribunal which proved inadequate to deal with the countries' concerns in any meaningful way. In 1987, the United States and Mexico signed the "U.S. Mexico Framework Agreement"[131] (the "Framework"), which established for the first time between the two countries a "comprehensive consultative mechanism"[132] to address bilateral trade and investment issues. Two means to do so were mandated by the Framework:

1. Either party could request of the other consultations on any matter concerning bilateral trade or investment, such consultations to commence within thirty days, with the GATT prodedures or any other procedures in place between the two parties to be invoked if agreement was not reached.

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[131] Understanding Between the Government of the United States of America and the Government of the United Mexican States Concerning a Framework of Principles and Procedures for Consultations Regarding Trade and Investment Relations, 27 I.L.M. 439 (1988).

[132] Guy Smith, "*The United States - Mexico Framework Agreement: Implications for Bilateral Trade* " (1989) 20 Law and Policy in International Business 655 at 657.

2. Annual cabinet level consultations.

In addition, the Framework provided for the exchange of statistical information and required further negotiations on a number of contentious trade issues between the parties.

In June, 1990, the United States and Mexico continued their progress toward greater economic integration by agreeing in principle to negotiate a bilateral trade agreement. While Mexico's rationale for this move can be understood primarily as a means of accelerating its industrialization, it could also be argued that to a certain extent, Mexico, like Canada before it,[133] had a greater fear of U.S. protectionism in the 1980's than it did of the threat to its cultural and national sovereignty posed by closer economic integration with the United States. For its part, the United States had three primary reasons for its interest in negotiating such a relationship:[134]

1. It had a long-standing interest in freer economic relationships with Mexico and Canada and had already negotiated such a relationship with Canada;

2. Mexico had only recently begun to loosen its restrictions on external trade; and

3. The influence of other regional trading blocs or powers, namely in Europe and south-east Asia, was perceived as an increasing threat to its traditional economic strength.[135]

With the U.S. and Mexico negotiating a bilateral trade agreement, the question arose as to whether Canada should stand aside and wait for spillover effects or join in

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[133] Joseph A. McKinney, "Dispute Settlement under the U.S. - Canada Free Trade Agreement" (1991) 25 W.T.J. 6, 117.

[134] Terry Wu and Neil Longley, "A U.S. - Mexico Free Trade Agreement: U.S. Perspectives" (1991) 25 J.W.T. 3, 5. While these are essentially economic reasons, it can be argued as well that the U.S. had less obvious reasons such as slowing illegal immigration and promoting democracy and stability in South America by encouraging Mexico's development.

[135] See Lester Thurow, *Head to Head* (New York, William Morrow, 1992).

the negotiations to help shape a tripartite agreement,[136] though to pose the question that way is really to answer it as well. As Michael Hart, one of Canada's FTA negotiators, points out,[137] Mexico was only Canada's 17th largest trading partner in 1988, so the value of bilateral trade between the two countries was clearly not sufficient to warrant a bilateral agreement. But in conjunction with the United States, Mexico becomes a market of some 360 million with potential for expansion to other American nations. Perhaps more importantly, if Canada were to allow the U.S. and Mexico to enter a bilateral agreement, "footloose" industries looking to locate somewhere in North America would be more likely to pick either the U.S. or Mexico in order to gain access to both markets.

These are among the three reasons cited by the then Conservative federal government for Canada's participation in NAFTA:[138]

1. To gain access to the Mexican market which is seen as part of one of the fastest growing economies in the world;

2. To improve and protect the FTA in areas such as rules of origin and dispute settlement; and

3. To ensure that Canada remains attractive to foreign and domestic investors by making it part of a larger trade area.

With these stated objectives in mind, Canada advised the United States and Mexico on September 24, 1990 that it wished to be part of the NAFTA discussions, and on February 5, 1991, the leaders of all three countries announced their intention to negotiate a trilateral agreement culminating in a signed agreement December 17, 1992.

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[136] Michael Hart, *A North American Free Trade Agreement: The Strategic Implications for Canada* (Halifax: Centre for Trade Policy and Law, 1990).
[137] *Ibid.*
[138] *NAFTA: What's it all about?* (Ottawa: External Affairs and Int'l. Trade Canada, 1993).

The NAFTA subsequently survived both Congressional opposition in the United States[139] and a change of federal government in Canada[140] to come into effect on January 1, 1994.[141]

An obvious failing of the NAFTA is that it does not specifically deal with the relationship between the FTA and NAFTA but instead deals with their interaction in an oblique fashion. Pursuant to NAFTA Article 103:1, the three Parties re-affirm their GATT obligations and obligations under "other agreements to which such Parties are party." The drafting of this second part of Article 103:1 is unfortunate in that it could be interpreted either as meaning that all three Parties must be parties to the "other agreements" or that each of the Parties re-affirms its obligations under agreements between it and one of the other Parties.

NAFTA Article 103:2 goes on to state that the NAFTA prevails over such "other agreements" to the extent of any inconsistency. Arguably therefore, even if "other agreements" includes agreements such as the FTA, to which only the U.S. and Canada are party, the NAFTA dispute resolution provisions prevail over those in the FTA. This appears to be the intent of the three countries, at least as expressed by Canada:[142]

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[139] The actual vote was 234 to 200 in favour of the NAFTA, a greater margin than was generally expected in the run up to the vote (see *Inside U.S.Trade*, Vol. 11 No. 26, November 19, 1993). Because of the so-called "fast-track" nature of the negotiations in the U.S., Congress could only accept or reject the NAFTA in its entirety and could not amend its terms. By way of footnote, the importance to the United States of having Canada remain a party to the NAFTA may be gleaned from President Clinton's promises to Congress to examine certain Canadian trade issues in exchange for Congressional support. One conclusion of this political concession might be that the U.S. was prepared to antagonize Canada in order to conclude its deal with Mexico.

[140] A Liberal government replaced the previous Conservative government in October 1993. On December 2, 1993, Prime Minister Jean Chretien announced that his government would approve the implementation of NAFTA on the strength of promises by the U.S. and Mexico to set up trilateral working groups to clarify NAFTA's antidumping and subsidy rules. At the same time, to address Canada's concern that certain provisions of NAFTA might be interpreted to require Canada to export water resources, all three parties agreed to an interpretation of NAFTA as covering bottled water only.

[141] 32 I.L.M. 297 (1993).

[142] *NAFTA, An Overview* (Ottawa, 1992) at iv (parentheses added).

> The degree of overlap between the FTA and the NAFTA is even more extensive and more complicated [than that between the FTA and GATT] because much of the language has been adjusted to make it more suitable for accession by other countries. To address this matter, Canada and the United States have agreed to use a procedure similar to that used in 1947, when the multilateral GATT replaced the 1938 bilateral Canada-U.S. Reciprocal Trade Agreement. At the same time as they brought the GATT into force, the two governments exchanged letters agreeing to supend the 1938 Agreement as long as the GATT was in force between them.
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> In effect, Canada and the United States have agreed that the NAFTA, with all of its improvements, takes priority over the FTA. Certain specific provisions of the FTA will be suspended where the NAFTA repeats or builds upon FTA obligations, as long as the NAFTA is in force between them...

While an issue as important as this should have been dealt with directly in the agreement rather than in an exchange of letters, it seems that so long as Canada and the U.S. remain parties to the NAFTA, the dispute resolution provisions of the FTA are superseded and all trade disputes between the two countries will be dealt with under the NAFTA. This, of course, is the more logical approach since to allow otherwise would be to allow the various parties to choose from among the GATT, NAFTA, FTA, and agreements between the U.S. and Mexico, encouraging forum-shopping to an undesirable degree.

II. Dispute Resolution Proposals

Little appears to have been written about proposals for a dispute resolution mechanism in the NAFTA, perhaps because it was presumed by all parties that it would closely resemble that contained in the FTA. A working group (the "Joint Working Group") comprised of members of the American, Canadian, and Mexican Bar

Associations, however, developed a set of recommendations which are set out below and are referred to in this paper as the "Recommendations".[143]

The Recommendations are stated to be concerned with three main components of a dispute resolution formula. These are, in order of priority:

1. the establishment of a tribunal for dispute settlement;
2. recourse for private parties concerned in disputes; and
3. a system for identification and management of disputes.

The Joint Working Group recommended that the NAFTA dispute resolution system follow that in the FTA but recognized that the addition of a third party by itself complicates the process and that adding a third language, legal system, and culture would require more than simply incorporating the FTA system into the NAFTA.

To deal with the complications of managing disputes among three parties, the Joint Working Group concluded that the NAFTA should include a permanent tribunal (North American Trade Tribunal) to deal with disputes, a form of permanent committee to replace the ad hoc committees allowed for in Article 1802:4 of the FTA, that would deal almost exclusively with early identification and non-confrontational management of disputes.

The Recommendations, unfortunately, although advocating retention of FTA Chapter 19 panel procedures, deal only cursorily with the mechanics of the general dispute resolution mechanism. The Recommendations include having the Tribunal itself deal with the equivalent of FTA Chapter 18 disputes, though the Joint Working Committee recognized that panels may continue to be used for these types of disputes in addition or as an alternative to having the Tribunal adjudicate them. It was suggested that this would allow for greater flexibility.

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[143] Joint Working Group of the American Bar Association, the Canadian Bar Association, and the Barra Mexicana, "Section Recommendations and Reports: American Bar Association Section of International Law and Practice Reports to the House of Delegates - Dispute Settlement Under a North American Free Trade Agreement" (1992) 26 International Lawyer 855.

Interestingly, the Recommendations also advocated allowing private parties to appear before the Tribunal when it is performing in its adjudicatory capacity and to make written submissions to the Tribunal when it is performing in its interpretive capacity.

In short, the Joint Working Party clearly saw the NAFTA dispute settlement system as closely paralleling that in the FTA with the refinements of greater involvement in adjudication by the Tribunal and a more significant role for private parties.

III. The Mechanism

As is the case with the FTA, the NAFTA contains a number of provisions designed to provide specialized dispute resolution mechanisms in specific areas covered by the agreement. As an example, Chapter 11, which covers investment, contains extensive procedures for dealing with disputes between a Party and an investor of another Party. These procedures culminate in binding arbitration,[144] a mechanism consistent with the semi-private nature of such disputes. And Chapter 14, which covers financial services, incorporates the general dispute mechanism from Chapter 20 modified at the option of the Parties to ensure that panelists have expertise in financial services.[145] In addition, Chapter 19 establishes the dispute resolution mechanism for anti-dumping and countervail actions.

Chapter 20 is self-titled "Institutional Arrangements and Dispute Settlement Procedures". Not surprisingly, Section A of Chapter 20 which sets out the institutional arrangements closely parallels Article 18 of the FTA. Article 2001 establishes a Free Trade Commission ("FTC"), the NAFTA equivalent of the

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[144] Article 1119.

[145] Article 1414. For other specialized dispute settlement procedures, see Articles 804 (Emergency Actions in the agricultural sector) and 1606 (temporary business entry).

Commission established by Article 1802 of the FTA, comprised of cabinet representatives of the Parties or their designees. Convening at least annually and making decisions by consensus[146], the FTC is charged with:

1. supervising implementation of NAFTA;
2. overseeing its further elaboration;
3. resolving disputes;
4. supervising committees and working groups;[147] and
5. generally considering other matters arising under NAFTA.

It may also establish its own committees or working groups and delegate responsibilities to them. It should be noted that the above duties are identical to those of the Commission under the FTA with the exception that the FTC is specifically given authority to supervise working groups and committees. The Commission under the FTA has such authority only by implication.

If the FTC is the political organ of the Parties, their institutional body is the Secretariat established by the FTC under Article 2002. Among its other functions, the Secretariat is to provide administrative assistance to dispute resolution panels established under Chapters 19 and 20.[148] It is also to provide assistance to the FTC and, as directed by the FTC, committees and working groups established under the NAFTA.[149] The Secretariat is to be comprised of national "Sections" which, while not defined, are presumably the departments of each of the Parties charged with responsibility for NAFTA-related trade matters. Each Section is to have a permanent office operated at its own expense and is to designate a Secretary as its chief administrative officer. Apart from this, there are no specific provisions in Article 2002 for the organization of the Secretariat, and one is left to conclude that the Parties

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[146] Article 2001:4.
[147] Annex 2001.2 establishes fourteen working groups, committees, and subcommittees dealing with trade in particular goods and services.
[148] Article 2002:3(b).
[149] Article 2002:3(c).

acting through their respective Secretaries will choose a structure that allows the Secretariat to advise the FTC and perform its other functions in a cohesive fashion. But in a document as detailed as NAFTA, it is surprising that the drafters omitted to design a particular structure for the Secretariat. On the other hand, the FTA does not even contain the framework for an institutional equivalent of the Secretariat, yet no serious problems have arisen as a result of this deficiency. The writer earlier[150] presumed that this omission of a bureaucratic structure in the FTA was the result of Canada and the United States already having in place sufficient bureaucratic institutions to lend to the Commission, and these institutions can presumably also be amalgamated into a structure suitable for the Secretariat.

Section B of Chapter 20 contains the substantive dispute settlement provisions which, with several important distinctions, again parallel those in the FTA. Article 2003 is the general provision which obliges the Parties to endeavour to "agree on the interpretation and application" of the Agreement through cooperation and consultation. While FTA Article 1804 combines this obligation with provision for consultation, consultations are dealt with separately in Article 2006 of the NAFTA which goes on to provide the mechanism for such consultations. These are to take place on notice to each of the other Parties through their respective Sections of the Secretariat. Addressing the perennial problem of delay in the consultative process, Article 2006:4 requires that consultations on perishable agricultural goods commence within fifteen days of delivery of the notice commencing the consultations.

Article 2004, the NAFTA equivalent of FTA Article 1801, establishes the scope of the general dispute settlement provisions, providing that they are to be used for all but anti-dumping and countervail disputes and cases where specific dispute settlement provisions apply (eg. financial services). As is the case in the FTA and

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[150] See Chapter 3.

GATT regimes,[151] Chapter 20 of the NAFTA applies not only to disputes but also to a situation where "a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the NAFTA or cause nullification or impairment" of benefits under the NAFTA.[152]

NAFTA Article 2005 is an attempt to provide that disputes may be settled either under the NAFTA or GATT, an "attempt" because, as will be examined below, while the complainant may initially choose one forum or the other, the provisions of Article 2005 allow this choice to be thwarted.

The formal dispute settlement resolution system commences with a Party requesting a meeting of the FTC following the breakdown of consultations commenced under Article 2006. Under Article 2007, in the case of most disputes, such request may only be made if consultations have been unsuccessful for thirty days,[153] and the FTC is to meet within ten days of receiving the formal written request. Under Article 2007:5, the FTC is given a broad mandate to assist the parties in resolving the dispute using good offices, conciliation, mediation, technical advisers, or working groups. If the FTC has convened as required but the dispute has not been resolved within thirty days or such other period to which the Parties agree, any of the Parties to the dispute may request under Article 2008 that an arbitral panel be established, and the FTC must do so. A third Party with a "substantial interest" in the dispute may demand to be added as a complainant within seven days of the request establishing the panel,[154] although no provision is made for automatic notification of a third Party, so one wonders how it can know the date of the request. Presumably the Parties through the Secretariat will establish procedures for notification of one another

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[151] FTA Article 1801, GATT Article XXIII.
[152] NAFTA Article 2004.
[153] This time limit for consultations is abridged to fifteen days in cases involving perishable goods and extended to forty five days if a third Party has been involved in the consultations. See Article 2007:1(b) and Article 2007:1(c).
[154] Article 2008:3.

of the progress of disputes. To avoid multiple proceedings, a third Party which has the opportunity to intervene but does not do so may not thereafter initiate or continue a dispute over the same matter under NAFTA or the GATT.

Panels

Articles 2009 through 2011 govern the establishment of a roster of panelists and the procedure for selecting panelists for particular disputes. The Parties are to maintain a roster of thirty individuals who serve three year terms and may be reappointed. They are to be independent of the Parties and must possess expertise in trade or international law or international dispute resolution. It will be recalled that the FTC under Article 2007:5 may appoint experts or working groups to conciliate or mediate a dispute in its early stages, and implicit in Article 2007:5 is that such experts or groups may be chosen from amongst the roster, although such persons are then unable to sit as panelists for that dispute.[155]

Whether the dispute involves two or more Parties, the roster of panelists consists of five members. In the case of a two-Party dispute, the Parties are to agree upon a chair within fifteen days of delivery of the request to form a panel, failing which the chair is to be appointed by one of the Parties chosen by lot, although a chair thus chosen cannot be a citizen of the choosing Party. What is not specified is whether the chair so chosen must be from one of the disputing Parties or may be from the neutral party. In the interest of furthering non-partisanship, it can be safely assumed that in most two Party disputes the chair will be a citizen of the neutral Party. Each Party then, within fifteen days, selects two panelists who must be citizens of the other Party, failing which they are selected from the roster by lot but may not be citizens of the Party doing the selection. The result of this procedure is that each Party will have chosen or have had appointed by lot draw two panelists from the other Party.

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[155] Article 2010:2.

In the case of a three-party dispute, again the Parties are given the opportunity to select a chair, failing which a Party chosen by lot is to appoint a chair who must be a citizen of one of the other Parties. Then, within fifteen days, the Party complained against is to select two panelists who are citizens of the other Parties. The complaining Parties then select two panelists who are citizens of the Party complained against. The result of this procedure is that the panel will consist of a chair and two panelists from the Party complained against and one panelist from each of the other Parties.

Interestingly, while under Article 2011:3 panelists are normally to be chosen from the roster, they may be chosen from outside of the roster, although such an appointee is subject to a peremptory challenge within fifteen days of his or her appointment. Individuals chosen from the roster are not subject to this type of challenge; a Party may only attack such an appointee by persuading the other Parties that the appointee is in violation of the code of conduct (established by the FTC), whereupon another individual is to be chosen.

Procedure

Pursuant to Article 2012, the FTC is to establish Model Rules of Procedure, which are to provide as a minimum for:

a) one hearing before the panel with the opportunity to present initial and rebuttal written submissions; and

b) the confidentiality of the panel hearing and submissions to and communications with the panel.

Article 2012 leaves open the opportunity for the Parties to deviate from the Model Rules of Procedure if they so agree.

A third Party to the dispute may nevertheless under Article 2013 deliver written notice to the other Parties and its Section of the Secretariat and is thereupon

entitled to attend all hearings as well as to receive and make written submissions. This is in addition to the Party's right to intervene under Article 2008:3 if it has a substantial interest in the dispute, although it is unclear whether there is a difference in the level of participation under Article 2008:3 and Article 2013.

Pursuant to Article 2016:1, the panel is to present an initial report to the disputing Parties within ninety days of the selection of the last panelist unless the parties agree otherwise. That initial report must contain findings of fact, a determination of the merits of the case, and the panel's recommendation for resolution of the dispute if it decides the merits in favour of the complainant. A complainant then has fourteen days to make written submissions on the initial report, whereupon the panel may seek submissions from the other Party or Parties to the dispute and either reconsider its report or make any further examination it finds necessary. Under Article 2017, the panel must then present its final report within thirty days of its initial report, allowing sixteen days for reconsideration of or amendments to the initial report.

It is worth noting that while panelists may furnish separate opinions on matters not unanimously agreed upon,[156] the panel cannot in its initial or final report disclose which panelists are associated with majority or minority opinions.[157]

Following receipt of the final report, the disputing parties are to attempt to agree to a resolution of the dispute, normally in conformity with the panel's recommendations and consisting of removal or non-implementation of the offensive measure.[158] If agreement is not reached within thirty days of receipt of the final report, the complainant under Article 2019 may suspend benefits to the other Party until such time as agreement is reached. The benefits suspended are to be of equivalent effect to the measure found offensive, preferably in the same sector as the

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[156] Article 2016:3.
[157] Article 2017:2.
[158] Article 2018.

offensive measure.[159] If a Party then complains that the level of benefits suspended is "manifestly excessive,"[160] it may require the establishment of a panel to make this determination, and the circle is complete.

Private Dispute Resolution

Section C of Chapter 20 consists of Articles 2020 through 2022 which, respectively:

a) allow the Parties to notify their Sections that an issue of interpretation of the NAFTA has arisen in a domestic judicial or administrative proceeding that merits a response from the FTC;

b) prohibit the Parties from providing rights of action against another Party on the ground that a measure of that Party is inconsistent with the NAFTA; and

c) encourage the Parties to take steps to encourage and facilitate the use of alternative dispute resolution methods for the settlement of international trade disputes between private parties, require the Parties to implement laws to recognize arbitral awards in such disputes, and establish an Advisory Committee on Private Commercial Disputes to examine the use and effectiveness of such alternative dispute resolution.

IV. Analysis of the NAFTA Dispute Settlement Mechanism in the Mexican Context

While the FTA was the first comprehensive trade agreement between the U.S. and Canada to include a self-contained dispute resolution, there was never an issue as to whether a law-based, as opposed to a power-based, dispute resolution system would be employed. Both legal systems evolved from English common law, and it is

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[159] Article 2019:2.
[160] Article 2019:3.

therefore not surprising from a Canadian and American perspective that the NAFTA dispute resolution system is based upon that employed in the FTA. But during the negotiations leading to the NAFTA, concern was expressed respecting the form of dispute resolution system necessary in a three party agreement where one of the parties is a less developed nation than the other two and has a distinctly different legal system.[161] But while Mexican law evolved from a different legal tradition than Canadian and American law, Mexican trade law is now necessarily similar in many respects to the trade law of Canada and the United States in that Mexican law allows for the enforcement of arbitration decisions in relation to commercial disputes.[162] While we may think of the FTA system as having evolved along the lines of a common law system, it can be argued that it has as much in common with civil law systems insofar as it is a mechanism designed to have trained experts interpret a code consisting of a mix of general principles and specific rules. Because its legal system is based on the inquisatorial system common to civil law systems, and particularly since Mexico now has experience with the GATT dispute resolution system,[163] it can be anticipated that Mexico will have little difficulty with the dispute resolution system in the NAFTA, which owes much to GATT principles.[164] Nevertheless, it is worthwhile to look briefly at certain aspects of Mexican law which may bear on its ability to work within the NAFTA system.

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[161] Sharon D. Fitch, "Dispute Settlement Under the North American Free Trade Agreement: Will the Political, Cultural and Legal Differences Between the United States and Mexico Inhibit the Establishment of Fair Dispute Settlement Procedures?" 22 Calif. Western Int'l Law Journal 353.

[162] T. Siqueiros, "Legal Framework for the Sale of Goods into Mexico"(1990) Houston Int'l Law Journal 291.

[163] Mexico became a signatory to the General Agreement in 1986. It was a complainant against the U.S. in 1990 with respect to U.S. measures respecting tuna imports and a co-complainant with Canada and the EEC in the 1987 *Petroleum* case.

[164] At least one writer also cites the "good track-record" of the FTA dispute resolution mechanism, which he presumed was to form the foundation for the NAFTA dispute resolution mechanism, as a further reason for optimism respecting the development of an effective dispute settlement mechanism despite Mexico's different legal system. See Joseph A. McKinney, "Dispute Settlement Under the U.S.-Canada FTA" (1991) 25 J.W.T. 6 117 at 125.

Mexican law is based upon the Napoleonic Code[165] modified considerably to incorporate principles from other continental civil codes and uniquely Mexican provisions. To the extent that the NAFTA itself is a code dealing with international trade among the parties, it cannot be argued that Mexican panelists and advocates will be at a disadvantage in dealing with the panel process generally. While the NAFTA system can be said to be law-based, that law is as much civil law as common law.

Mexican civil procedure contains several other important distinctions from the Anglo-American traditions that are relevant to our analysis of the application of NAFTA dispute resolution provisions to Mexico. Mexican pleadings typically consist of three sections: a statement of the facts, considerations of law, and a prayer for relief. Anglo-American pleadings usually contain only the first and third of these sections, with a brief of law submitted only at the trial or appellate level. The Mexican form of pleadings lends itself well to the NAFTA provisions under which a party requests a hearing by the Commission by filing a request which states the matter complained of and the relevant provisions of the NAFTA itself, ie. the law.

A second important distinction involves the hearing process. Under Mexican law there is not a trial *per se*. Instead, there is a series of hearings at which evidence is introduced and reduced to a written record which is made available to a judge notwithstanding that the judge may not have been present at the hearing where the evidence was introduced. While the NAFTA process may involve only one hearing, again the Mexican system is similar to the extent that much of the evidence at a NAFTA panel hearing will be by way of statistical information and other trade documentation as opposed to the sworn testimony of witnesses.

Thirdly, there is no formal discovery process in Mexican civil procedure since with a series of hearings there is little likelihood of surprise evidence that would not

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[165] References to Mexican law in this section are from J. Herget and J. Camil, *An Introduction to the Mexican Legal System* (Buffalo: William S. Hein & Co., 1978).

have been discovered at one of the hearings. But neither is there a discovery process in the NAFTA. Instead, a panel may request additional information or the assistance of a panel of experts in much the same way as a Mexican judge questions witnesses as opposed to relying on examination and cross-examination by counsel.

For these reasons, there do not appear to be any provisions in the NAFTA panel process that will cause difficulty for Mexico notwithstanding that its legal system is in many ways different from that of Canada and the United States. It is certainly conceivable that, as one commentator has speculated,[166] Mexican commercial law will begin to shift towards the Anglo-American model. Already Mexico has enacted new anti-trust legislation which in its style borrows more from the common law than the civil law system[167], and while it may be premature to expect to see the integration of the three legal systems to the extent found in the European Community, a certain amount of coordination is both desirable and inevitable.

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[166] Eduardo F. Ramirez, "NAFTA and the Co-ordination of North American Commercial Law" in A.R.Riggs and T.Velk, eds., *Beyond NAFTA: An Economic, Political and Sociological Perspective* (Vancouver: The Fraser Institute, 1993) 233 at 237.
[167] *Ibid.*

CHAPTER 5

DISCUSSION AND CONCLUSIONS

It is clear from an examination of the NAFTA dispute settlement mechanism that it evolved from the FTA model which in turn derives many of its characteristics from the GATT dispute resolution mechanisms, particularly the general concept of using ad hoc panels which are empowered only to recommend[168] a solution to the governing body. But the NAFTA mechanism incorporates several subtle and not so subtle distinctions from those in both the General Agreement and FTA. This chapter examines these distinctions with a view to determining whether they can be considered improvements and where there may be room for further improvement.

I. Distinctions Among the General Agreement, FTA, and NAFTA

Notification

If one criterion of an effective dispute settlement system is preventing disputes from arising, neither the General Agreement nor the NAFTA can be considered as effective as the FTA, which in Article 1803 requires that the Parties provide written notice to one another of any proposed or actual measure that the Party considers might materially affect the operation of the FTA. This type of requirement is admittedly impractical in the GATT with its large and diverse membership and complex trading relationships, and it can be argued that the best that can be achieved under the GATT system is consultation when one member is notified by another that a

[168] The exception is the ability of the parties to the FTA and GATT 1994 to choose binding arbitration under Article 1806(1) of the FTA and section 25 of the WTO Understanding.

measure employed by it is offensive. But it is surprising that the analogous NAFTA provision appears to withdraw somewhat from the FTA position in that NAFTA Article 1803 requires only that the parties so notify each other about potentially offensive measures "[t]o the maximum extent possible". What is the maximum extent possible if it is not in writing?

Panel Selection Procedure

NAFTA Article 2009 contains several refinements to both the GATT and FTA panel selection procedures. Neither the General Agreement nor the FTA provides for terms of appointment for panelists, while NAFTA panelists are appointed for terms of three years subject to reappointment. Under the Canadian and American legal systems, fixed term (or lifetime) appointments to quasi-judicial positions are considered a safeguard of independence.[169] To this extent the idea of term appointments in NAFTA appears to be an improvement over the General Agreement and the FTA, though this type of tenure is increasingly being challenged when it appears to the public that fixed term or lifetime appointments may protect the incompetent as much as they protect the independence of the competent. In any event, permanent appointment of panelists under an organization as large and diverse as the GATT might result in only a limited number of countries being "represented" on a roster since having a permanent roster of appointees from each country would result in an unwieldy number. Under a tripartite agreement such as NAFTA, a roster of up thirty individuals allows equal representation to the parties without resulting in too large a pool of potential panelists, and three year terms provide both a sense of permanence and independence. It should also be noted that the truly judicial body under the WTO Understanding, the Appellate Body, is comprised of appointees

[169] The major distinction between judicial appointments in the two countries, of course, is the election of judges in the United States. Whether this feature adds to or detracts from independence is debatable, but the tenure of the judges is fixed at least between elections.

serving rotating four year terms which allows for a considerable degree of independence from the influence of any one member.

In furtherance of the theme of independence, NAFTA Article 2009 requires that panelists be independent of and not take instructions from any of the Parties. Article 8 of the WTO Understanding, while providing for specific examples of the types of acceptable experience or expertise expected of panelists,[170] allows panelists to have presented arguments to a panel and, in fact, to have served as senior trade policy officials of a GATT member. Such persons are certain to be seen as closely affiliated with a GATT member even though they may not at the time be taking instructions from the member. Of course, under the WTO Understanding, a citizen of a country to a dispute cannot be a panelist for that dispute except by agreement of the parties,[171] so that affiliation with a government may not be of any particular advantage. Also, while all three agreements require that the panels establish rules of procedure, only NAFTA Article 2009(2)(c) requires that panelists adhere to a code of conduct. It might be argued that panelists chosen on the basis of their expertise or experience in law or international trade and who are required to be independent of the Parties need not be bound by such a code, but as in the professions and, increasingly, in politics, the existence of a code of conduct is conducive not only to the maintenance of internal discipline but to the public perception of an objective and accountable body.

However, perhaps of greater interest is the innovative system employed in the NAFTA for the selection of panelists. As can readily be seen from Article 2011, the method set out for selecting the panel chair ensures that the chair is not a citizen of either of the parties and may, in a two-party dispute, be from the neutral party. In addition, the appointment of the other four members of the panel must be made by each of the parties from citizens of the other parties. While the WTO Understanding

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[170] For example, they may have taught or published on international trade or policy.
[171] Section 8.3.

in Section 8.3 also ensures that citizens to a party to a dispute not sit in on the dispute (except by consensus), it can be appreciated that this prohibition is not appropriate for a three party agreement. But either of these methods is likely to provide for a more objective panel than that provided for under FTA Article 1807:3, which requires that the Parties choose panelists from among their own citizens. This mandated partisanship, as evidenced by the *Lobster* case, is almost certain to lead to panelists leaning toward their country's side in a close dispute.

A further distinction between the NAFTA and GATT panel processes is the arrangement for compensation of the panel. Under NAFTA, the costs of a panel are borne by the parties to the dispute.[172] Under the WTO Understanding, the World Trade Organization is required to make provision in its budget for panelists' expenses. The NAFTA model appears preferable in this instance because a neutral party is not obliged to bear the cost of other Parties' disputes.[173] A private law lawyer will notice that none of the three agreements provides that the "loser" bears the costs as is typically the case in common law judicial systems and is often the case in private law arbitration in order to discourage needless litigation. The absence of this system in these three agreements can be explained both by the relatively insignificant costs given the parties' financial resources and by the philosophy that the dispute resolution systems are designed more to restore the balance than to pick winners and losers.

Arbitration

Both the FTA in Article 1806 and the WTO Understanding in section 25 allow the Commission, in the case of the FTA, and the parties themselves, in the case of the WTO Understanding, to choose arbitration as an alternative to the panel process. This

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[172] NAFTA Annex 2002.2.

[173] For a contrary view, see Gary Horlick and F. Amanda DeBusk, "Dispute Resolution under NAFTA - Building on the U.S. Canada FTA, GATT, and ICSID" (1993) 27 J.W.D. No. 1, 34, where the authors argue that the GATT system is preferable because it further removes the panelists from the financial influence of their own countries.

option is missing in NAFTA and can be considered a serious defect. In both the FTA and GATT systems, panel recommendations are just that, and they must be adopted by the respective governing bodies before they have any but moral authority. A provision allowing for arbitration, on the other hand, allows a panel to make a ruling which binds[174] the parties without the added political element inherent in the adoption of the report, even though under the GATT 1994 such adoption is now virtually guaranteed and in the FTA the successful party in the panel process may suspend application of benefits to the other if the Commission does not adopt the panel report.

A possible reason for this omission in the NAFTA is that, while the choice of binding arbitration has been available to the Commission under the FTA, it has not been used in the five-year history of the agreement. A possible reason for this reluctance may be that the Parties, through the Commission, are reluctant to relinquish the opportunity to continue to negotiate a solution to a dispute after receiving a panel report. In a similar fashion, the existence of an appellate review alternative in the WTO Understanding allows the "losing" party to a dispute to continue to exercise some leverage by initiating an appeal, thereby allowing it further time to negotiate a satisfactory settlement. Allowing an arbitration panel to issue a binding ruling removes the final diplomatic step in the process.

Remedies

There are subtle differences among the three agreements respecting enforcement of panel decisions, and a fundamental difference between the remedies available under the FTA and GATT 1994 and those available under the NAFTA.

Under the FTA, if the Commission fails to agree on the resolution of a dispute within thirty days of receiving the panel's final report, the aggrieved Party may

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[174] The reference in FTA Article 1806 is to "binding" arbitration. In section 25.1 of the 1993 Understanding, the reference is simply to "arbitration", but section 25.3 requires that the parties abide by the arbitration award.

"suspend the application to the other Party of benefits of equivalent effect."[175] The same applies if a Party fails to abide by the ruling of a binding arbitration panel except that the Parties also have the option of agreeing on compensation or other remedial action in lieu of accepting the panel's ruling.[176]

Compensation is also an alternative under section 22 of the WTO Understanding, though it is made clear that the preferred alternative is that the offensive measure be withdrawn.

Compensation is not specified even as an alternative under the NAFTA. Article 2019 essentially reproduces the language found in FTA Article 1809 with more specificity respecting the suspension of benefits, ie. that they be preferably in the same sector as those which are found offensive. But as evidenced by the *Pork Countervail* case where the U.S. ultimately was required to and did pay compensation to Canada for a breach of its GATT obligations, compensation can be a precise and direct remedy whereas retaliation may constitute an imprecise and indirect response which leads to further disagreement.

II. What is in Store for NAFTA Dispute Resolution?

Dispute negotiation and panel decisions under NAFTA will undoubtedly prove to be of considerable interest in the future.

The most important distinction between the FTA and the NAFTA is, of course, that the NAFTA is a three party agreement. For that reason, it is likely that the types of consultations under NAFTA will bear more resemblance to those under the GATT regime than those under the FTA. Even a dispute notionally limited, for example, to the United States and Mexico under NAFTA will have impact on Canada, prompting

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[175] FTA Article 1807:9.
[176] FTA Article 1806:3.

Canada to get involved to protect its interest. Will temporary alliances be formed by Canada and the U.S. against Mexico because of the relative similarities of those two parties? Or will Canada and Mexico form an alliance as an effort by the two less powerful parties against the powerful? We will undoubtedly see evidence of these types of conduct in consultations depending on the nature of the dispute. But it is equally likely that each party will attempt to remain largely neutral in disputes in which it is not directly concerned in order that it not create a problem for itself when it finds itself directly involved in a dispute. Politicians will have to consider carefully the merits of intervening in a dispute

In the case of three-party disputes, it will be interesting to see whether the parties withdraw somewhat from a legal to a more conciliatory attitude, recognizing that conciliation better accounts for the interests of all of the parties.

Panels will have to be cognizant as well that the results of their decisions in two-party disputes will affect not only those two parties but also the neutral party. In the case of three-party disputes, panels must recognize that their decision may have a differing effect on each of the parties concerned and that what may be an obvious determination to make respecting one of the parties may be inappropriate for another.

The true test of the NAFTA dispute resolution system will be whether the parties favour it over the GATT system. If, as we saw in the case of the beer disputes between Canada and the U.S., the parties to NAFTA habitually elect to use the GATT system, it can be concluded either that the parties place little faith in the NAFTA dispute resolution system or that the NAFTA has obvious holes in its application. In either case, the parties will have to address the problem.

This situation could arise also with respect to Canada and the U.S. in relation to the FTA. Because the application of NAFTA Articles 103:1 (the parties re-affirm their obligations under existing agreements) and 2004 (all disputes respecting the NAFTA are to be decided under NAFTA) does not specifically override the provisions

of the FTA, can Canada and the U.S. still invoke the FTA dispute resolution system? It appears that at least respecting matters not covered under NAFTA, they can. Thus in cases where, for example, the U.S. does not want to be concerned with the intervention of Mexico, it is possible that it will interpret the NAFTA narrowly in order to exclude the disputed matter from its operation. If this type of disguised forum-shopping occurs with any degree of frequency, it will threaten the integrity of the NAFTA itself.

A further test of the success of NAFTA will be whether other countries accede to it. If they see it as providing positive benefits to its initial members, including a stable and fair dispute resolution system, they will seek to join. If they see its application as being unstable and unfair, they are likely to continue to rely on their GATT membership.

What is clear from the above examination, however, is that nations dedicated to continuing freer trade are continuously striving to improve the mechanisms used to see that trade remains free and fair in accordance with negotiated obligations, whether those negotiations are multi-lateral, bi-lateral, or tri-lateral. The dispute resolution systems in each of the GATT, FTA, and NAFTA, while sharing certain characteristics, show that their members are dedicated to tailoring the systems to their specific needs and improving their application as these needs evolve.

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APPENDIX I

Article XXII

Consultation

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

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

Article XXIII

Nullification or Impairment

1. 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,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to

be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

1. *Coverage and Application*

1.1 The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement rules and procedures of the agreements listed in Appendix 1 to this Understanding, hereinafter referred to as the "covered agreements." The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the Multilateral Trade Organization (MTO) and of this Understanding taken in isolation or in combination with any other covered agreement.

1.2 These rules and procedures shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered Agreement, if there is a conflict between special or additional rules and procedures of such Agreements under review, and where the parties to the dispute cannot agree on rules and procedures within twenty days of the establishment of the panel, the Chairman of the Dispute Settlement Body, in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within ten days after a request by either Member. The Chairman of the Dispute Settlement Body shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

2. *Administration*

2.1 The Dispute Settlement Body (DSB) established pursuant to the Agreement Establishing the MTO shall administer these rules and procedures and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the DSB shall have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements. With respect to disputes arising under covered agreements contained in Annex 4 to the MTO Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Annex 4 Agreements. Where the DSB administers the dispute settlement provisions of a covered agreement contained in Annex 4, only those Members that are parties to that agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

2.2 The DSB shall inform the relevant MTO councils and committees of any developments in disputes related to provisions of the respective covered agreements.

2.3 The DSB shall meet as often as necessary to carry out its functions within the time-frames provided in this Understanding.

2.4 Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus[1].

3. *General Provisions*

3.1 The members of the MTO (hereinafter referred to as "Members") affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947, as further elaborated and modified herein.

3.2 The dispute settlement system of the MTO is a central element in providing security and predictability to the multilateral trading system. The Members of the MTO recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

3.3 The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the MTO and the maintenance of a proper balance between the rights and obligations of Members.

3.4 Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

3.5 All solutions to matters formally raised under the consultation and dispute settlement rules and procedures of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

3.6 Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant councils and committees, where any Member may raise any point relating thereto.

3.7 Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

[1]The Dispute Settlement Body shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the Dispute Settlement Body when the decision is taken, formally objects to the proposed decision.

3.8 In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

3.9 The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision making under the Agreement Establishing the MTO or a covered agreement.

3.10 It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if disputes arise, all Members will engage in these procedures in good faith in an effort to resolve the disputes. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

3.11 This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of this Understanding. With respect to disputes for which the request for consultations was made under the GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of this Understanding, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of this Understanding shall continue to apply.[2]

3.12 Notwithstanding paragraph 3.11 above, if a complaint based on any of the Agreements covered by this Understanding is brought by a developing country Member against a developed country Member, the complaining party shall have the rights to invoke, as an alternative to the provisions contained in paragraphs 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of CONTRACTING PARTIES of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time frame provided for in paragraph 7 of that decision is insufficient to provide its report and with the agreement of the complaining party, that time frame may be extended. To the extent that there is a difference between the rules and procedures of those paragraphs and the corresponding rules and procedures of the Decision, the latter shall prevail.

4. *Consultations*

4.1 The Members affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by Members.

4.2 Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of the covered agreements taken within the territory of the former.[3]

4.3 If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after its receipt and shall enter into consultations in good faith within a period of no more than thirty days from the date of the request, with a view to reaching a mutually satisfactory solution. If the Member

[2]This paragraph shall also be applied to disputes on which panel reports have not been adopted or fully implemented.

[3]Where the provisions of any other covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such other covered agreement shall prevail.

does not respond within ten days, or does not enter into consultations within a period of no more than thirty days, or a period otherwise mutually agreed, from the date of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

4.4 All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

4.5 In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.

4.6 Consultations shall be confidential, and without prejudice to the rights of either Member in any further proceedings.

4.7 If the consultations fail to settle a dispute within sixty days after the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the sixty-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

4.8 In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than ten days from the date of the request. If the consultations have failed to settle the dispute within a period of twenty days after the request, the complaining party may request the establishment of a panel.

4.9 In cases of urgency, including those which concern perishable goods, the parties to the dispute, panels and the appellate body shall make every effort to accelerate the proceedings to the greatest extent possible.

4.10 During consultations Members should give special attention to the particular problems and interests of developing country Members.

4.11 Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held pursuant to Article XXII:1 of the GATT, Article XXII:1 of the GATS Agreement or the corresponding provisions in other covered agreements,[4] such Member may notify the consulting Members and the DSB, within ten days of the circulation of the request for consultations under 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 Article XXII:1 or XXIII:1 of the GATT, Article XXII:1 or XXIII:1 of the GATS Agreement or the corresponding provisions in other covered agreements.

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[4]The corresponding consultations provisions in the covered agreements are listed hereunder: Agreement on Rules of Origin, Article 7; Agreement on Preshipment Inspection, Article 7; Agreement on Implementation of Article VI of the GATT, Article 18.6; Agreement on Technical Barriers to Trade, Article 14.1; Agreement on Import Licensing Procedures, Article 6; Agreement on Subsidies and Countervailing Measures, Articles 13 and 30; Agreement on Agriculture, Article 18.1, and Part C, Agreement on Sanitary and Phytosanitary Measures, paragraph 35; Trade-Related Aspects of Investment Measures, Article 8; Agreement on Textiles and Clothing Article 8.4; Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, Article 64; Agreement on Trade in Civil Aircraft Article 8.8; Agreement on Government Procurement, Article VII:3; International Diary Arrangement, Article VIII:7; Arrangement Regarding Bovine Meat, Article VI:6.

5. *Good Offices, Conciliation and Mediation*

5.1 Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the parties to the dispute so agree.

5.2 Proceedings involving good offices, conciliation and mediation, and in particular positions taken by the parties to the dispute during these proceedings, shall be confidential, and without prejudice to the rights of either party in any further proceedings under these procedures.

5.3 Good offices, conciliation and mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once terminated, the complaining party can then proceed with a request for the establishment of a panel.

5.4 When good offices, conciliation or mediation are entered into within sixty days of a request for consultations, the complaining party must allow a period of sixty days from the date of the request for consultations before requesting the establishment of a panel. The complaining party may request a panel during the sixty days if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute.

5.5 If the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the panel process proceeds.

5.6 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.

6. *Establishment of Panels*

6.1 If the complaining party so requests, a panel shall be established 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.[3]

6.2 The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference.

7. *Terms of Reference of Panels*

7.1 Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within twenty days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document DS/... 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."

[3] If the complaining party so requests, a meeting of the Dispute Settlement Body shall be convened for this purpose within fifteen days of the request, provided that at least ten days' advance notice of the meeting is given.

7.2 Panels shall address the relevant provisions in any covered agreement/s cited by the parties to the dispute.

7.3 In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute subject to the provisions of paragraph 7.1 above. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

8. *Composition of Panels*

8.1 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 an MTO Member or of a contracting party to the GATT 1947 or as a representative to a 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.

8.2 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.

8.3 Citizens of Members whose governments[6] are parties to the dispute or third parties as defined in paragraph 10.2 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

8.4 To assist in the selection of panelists, the Secretariat shall maintain an indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1 above, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists that was established by the GATT CONTRACTING PARTIES 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 this Understanding. 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.

8.5 Panels shall be composed of three panelists unless the parties to the dispute agree, within ten days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the Panel.

8.6 The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

8.7 If there is no agreement on the panelists within twenty days from 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 committee or council, shall form the panel by appointing the panelists whom he or she considers most appropriate in accordance with any relevant special or additional

[6] 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.

procedure of the covered agreement, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than ten days from the date he or she receives such a request.

8.8 Members shall undertake, as a general rule, to permit their officials to serve as panelists.

8.9 Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel.

8.10 When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

8.11 Panelists' expenses, including travel and subsistence allowance, shall be met from the MTO budget in accordance with criteria to be adopted by the General Council of the MTO, based on recommendations of the Committee on Budget, Finance and Administration.

9. *Procedures for Multiple Complainants*

9.1 Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all Members concerned. A single panel should be established to examine such complaints whenever feasible.

9.2 The single panel will organize its examination and present its findings to the DSB so that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired. If one of the parties to the dispute so requests, the panel will submit separate reports on the dispute concerned. The written submissions by each of the complainants will be made available to the other complainants, and each complainant will have the right to be present when one of the other complainants presents its view to the panel.

9.3 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.

10. *Third Parties*

10.1 The interests of the parties to a dispute and those of other Members[7] of a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

10.2 Any Member, of a covered agreement at issue in a dispute, having a substantial interest in a matter before a panel and having notified its interest to the DSB, (hereinafter referred to as a "third party") shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report.

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[7]With respect to disputes arising under covered agreements contained in Annex 4 to the MTO Agreement, the term "Member" as used herein shall refer only to those Members that are parties to the relevant Annex 4 Agreements. Where the DSB administers the dispute settlement provisions of a covered agreement contained in Annex 4, only those Members that are parties to that agreement may participate in decisions or actions taken by the DSB with respect to that dispute.

10.3 Such third parties shall receive submissions of the parties to the dispute for the first meeting of the panel.

10.4 If a third party considers 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 this Understanding. Such a dispute shall be referred to the original panel wherever possible.

11. *Function of Panels*

11.1 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 make 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 and give them adequate opportunity to develop a mutually satisfactory solution.

12. *Panel Procedures*

12.1 Panels shall follow the Working Procedures appended hereto unless the panel decides otherwise after consulting the parties to the dispute.

12.2 Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.

12.3 After consulting the parties to the dispute, the panelists shall, as soon as practicable and whenever possible within one week after the composition and terms of reference of the panel have been agreed upon, fix the timetable for the panel process, taking into account the provisions of paragraph 4.9, if relevant.

12.4 In determining the timetable for the panel process, the panel shall provide sufficient time for the parties to the dispute to prepare their submissions.

12.5 Panels should set precise deadlines for written submissions by the parties and the parties should respect those deadlines.

12.6 Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the panel and to the other party or parties to the dispute. The complaining party shall submit its first submission in advance of the responding party's first submission unless the panel decides, in fixing the timetable referred to in paragraph 12.3 above and after consultations with the parties to the dispute, that the parties should submit their first submissions simultaneously. When there are sequential arrangements for the deposit of first submissions, the panel shall establish a firm time period for receipt of the responding party's submission. Any subsequent written submissions shall be submitted simultaneously.

12.7 Where the parties to the dispute have failed to develop a mutually satisfactory solution, the panel shall submit its findings in a written form. In such cases, the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes. Where a settlement of the matter among the parties to the dispute

has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

12.8 In order to make the procedures more efficient, the period in which the panel shall conduct its examination, from the time the composition and terms of reference of the panel have been agreed upon to the time when the final report is provided to the parties to the dispute, shall, as a general rule, not exceed six months. In cases of urgency, including those relating to perishable goods, the panel shall aim to provide its report to the parties to the dispute within three months.

12.9 When the panel considers that it cannot provide its report within six months, or within three months in cases of urgency, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case should the period from the establishment of the panel to the submission of the report to the Members exceed nine months.

12.10 In the context of consultations involving a measure taken by a developing country Member, the parties may agree to extend the periods established in paragraphs 4.7 and 4.8. If, after the relevant period has elapsed, the consulting parties cannot agree that the consultations have concluded, the Chairman of the DSB shall decide, after consultation with the parties, whether to extend the relevant period and, if so, for how long. In addition, in examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation. The provisions of paragraphs 20.1 and 21.4 are not affected by any action pursuant to this paragraph.

12.11 Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

12.12 The panel may suspend its work at any time at the request of the complaining party for a period not to exceed twelve months. In the event of such a suspension, the time frames set out in paragraphs 12.8, 12.9, 20.1 and 21.4 shall be extended by the amount of time that the work was suspended. If the work of the panel has been suspended for more than twelve months, the authority for establishment of the panel shall lapse.

13. *Right to Seek Information*

13.1 Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.

13.2 Panels 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.

14. *Confidentiality*

14.1 Panel deliberations shall be confidential.

14.2 The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

14.3 Opinions expressed in the panel report by individual panelists shall be anonymous.

15. *Interim Review Stage*

15.1 Following the consideration of rebuttal submissions and oral arguments, the panel shall submit the descriptive (factual and argument) sections of its draft report to the parties. Within a period of time set by the panel, the parties shall submit their comments in writing.

15.2 Following the deadline for receipt of comments from the parties, the panel shall issue an interim report to the parties, including both the descriptive sections and the panel's findings and conclusions. Within a period of time set by the panel, a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to the Members. At the request of a party, the panel shall hold a further meeting with the parties on the issues identified in the written comments. If no comments are received from any party within the comment period, the interim report shall be considered the final panel report and circulated promptly to the Members.

15.3 The findings of the final panel report shall include a discussion of the arguments made at the interim review stage. The interim review stage shall be conducted within the time period set out in paragraph 12.8.

16. *Adoption of Panel Reports*

16.1 In order to provide sufficient time for the Members of the DSB to consider panel reports, the reports shall not be considered for adoption by the DSB until twenty days after they have been issued to the Members.

16.2 Members having objections to panel reports shall 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.

16.3 The parties to a dispute shall have the right to participate fully in the consideration of the panel report by the DSB, and their views shall be fully recorded.

16.4 Within sixty days of the issuance of a panel report to the Members, the report shall be adopted at a DSB meeting[8] unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its intention to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal. This adoption procedure is without prejudice to the right of Members to express their views on a panel report.

[8]If a meeting of the DSB is not scheduled within this period at a time that enables the requirements of paragraphs 16.1 and 16.4 to be met, a meeting of the DSB shall be held for this purpose.

17. *Appellate Review*

Standing Appellate Body

17.1 A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on of the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body.

17.2 The DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once. However, the terms of three of the seven persons appointed immediately after the entry into force of this Understanding shall expire at the end of two years, to be determined by lot. Vacancies shall be filled as they arise. A person appointed to replace a person whose term of office has not expired shall hold office for the remainder of his or her predecessor's term.

17.3 The Appellate Body shall be comprised of 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 MTO. 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 MTO. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

17.4 Only parties to the dispute, not third parties, may appeal a panel decision. Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 10.2 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.

17.5 As a general rule, the proceedings shall not exceed sixty days from the date a party to the dispute formally notifies its intent to appeal to the date the Appellate Body issues its decision. In fixing its timetable the Appellate Body shall take into account the provisions of paragraph 4.9, if relevant. When the Appellate Body considers that it cannot provide its report within sixty days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed ninety days.

17.6 An appeal shall be limited to issues of law covered in the panel report and legal interpretation developed by the panel.

17.7 The Appellate Body shall be provided with appropriate administrative and legal support as it requires.

17.8 The expenses of persons serving on the Appellate Body, including travel and subsistence allowance, shall be met from the MTO budget in accordance with criteria to be adopted by the General Council of the MTO, based on recommendations of the Committee on Budget, Finance and Administration.

Procedures for Appellate Review

17.9 Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.

17.10 The proceedings of the Appellate Body shall be confidential. The reports of the Appellate Body shall be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made.

17.11 Opinions expressed in the Appellate Body report by individuals serving on the Appellate Body shall be anonymous.

17.12 The Appellate Body shall address each of the issues raised in accordance with paragraph 17.6 during the appellate proceeding.

17.13 The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

Adoption of Appellate Reports

17.14 An appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within thirty days following its issuance to the Members.[9] This adoption procedure is without prejudice to the right of Members to express their views on an appellate report.

18. *Communications with the panel or Appellate Body*

18.1 There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body.

18.2 Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statement of its own positions to the public. Members shall treat as confidential, information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

19. *Panel and Appellate Body Recommendations*

19.1 Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned[10] bring the measure into conformity with that Agreement. [11] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

19.2 In accordance with paragraph 3.2 above, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

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

[10] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed.

[11] With respect to recommendations in cases not involving a violation of the GATT and any other covered agreement, see section 26.

20. *Time-Frame for DSB Decisions*

20.1 Unless otherwise agreed to by the parties to the dispute, the period from the establishment of the Panel by the DSB until the DSB considers the panel or appellate report for adoption shall not as a general rule exceed nine months where the report is not appealed or twelve months where the report is appealed. Where either the panel or the Appellate Body has acted, pursuant to paragraph 12.9 or 17.5, to extend the time of providing its report, the additional time taken shall be added to the above periods.

21. *Surveillance of Implementation of Recommendations and Rulings*

21.1 Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

21.2 Particular attention should be paid to matters affecting the interests of developing country Members with respect to measures which have been subject to dispute settlement.

21.3 At a DSB meeting held within thirty days[12] of the adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within forty-five days following adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within ninety days following adoption of the recommendations and rulings. [13] In such arbitration, a guideline for the arbitrator[14] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed fifteen months from the adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

21.4 Except where the panel or the Appellate Body has extended, pursuant to paragraph 12.9 or 17.5, the time of providing its report, the period from the date of establishment of the panel by the DSB until the determination of the reasonable period of time shall not exceed fifteen months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the fifteen-month

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

[13] If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

[14] The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

period: provided that unless the parties to the dispute agree that there are exceptional circumstances, the total time shall not exceed eighteen months.

21.5 Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, involving resort to the original panel wherever possible. The panel shall issue its decision within ninety days of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

21.6 The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be on the agenda of the DSB meeting after six months following the establishment of the reasonable period of time pursuant to paragraph 21.3 and shall remain on the DSB's agenda until the issue is resolved. At least ten days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

21.7 If the matter is one which has been raised by a developing country Member the DSB shall consider what further action it might take which would be appropriate to the circumstances.

21.8 If the case is one brought by a developing country Member, in considering what appropriate action might be taken, the DSB shall take into account not only the trade coverage of measures complained of, but also their impact on the economy of developing country Members concerned.

22. *Compensation and the Suspension of Concessions*

22.1 Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

22.2 If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 21.3 above, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within twenty days after the expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

22.3 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 sectors, 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.

(d) In applying the above principles, that party shall take into account:

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

(ii) the broader economic elements related to the nullification or impairment and the broader economic consequences of the suspension of concessions or other obligations.

(e) If that party decides to request authorization to suspend concessions or other obligations pursuant to (b) or (c) above, it shall state the reasons therefor in its request. At the same time as the request is forwarded to the DSB, it also shall be forwarded to the relevant Councils and also, in the case of a request pursuant to (b), the relevant sectoral bodies.

(f) For purposes of this paragraph, "sector" means:

— With respect to goods, all goods;

— With respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors;[15]

— With respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods ("Agreement on TRIPS").

(g) For purposes of this paragraph, "agreement" means:

— With respect to goods, the agreements listed in Annex 1A of the MTO Agreement, taken as a whole as well as the agreements listed in Annex 4 of the MTO Agreement in so far as the relevant parties to the dispute are parties to these agreements;

— With respect to services, the GATS;

[15] The list in document MTN.GNS/W/120 identifies eleven sectors.

— With respect to intellectual property rights, the Agreement on TRIPS.

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.

22.5 The Dispute Settlement Body shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

22.6 When the situation described in paragraph 22.2 above occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within thirty days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 22.3 above have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 22.3(b) or (c) above, the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator[16] appointed by the Director-General and shall be completed within sixty days of the expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

22.7 The arbitrator[17] acting pursuant to paragraph 22.6 above shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement.* However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 22.3 above have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 22.3 above. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

22.8 The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 21.6 above, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

22.9 The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to

[16]The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

[17]The expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator.

compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.[18]

23. *Strengthening of the Multilateral System*

23.1 When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

23.2 In such cases, 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;

(b) follow the procedures set forth in Section 21 of this Understanding to determine the reasonable period of time for the Member concerned to implement the recommendations and rulings; and

(c) follow the procedures set forth in Section 22 of the Understanding to determine the level of suspension of concessions or other obligations and obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under the covered agreements in response to the failure of the Member concerned to implement the recommendations and rulings within that reasonable period of time.

24. *Special Procedures involving Least-Developed Country Members*

24.1 At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members. In this regard, Members shall exercise due restraint in raising matters under these procedures involving a least developed country Member. If nullification or impairment is found to result from a measure taken by a least developed country Member, complaining parties shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to these procedures.

24.2 In dispute settlement cases involving a least-developed country Member where a satisfactory solution has not been found in the course of consultations the Director-General or the Chairman of the DSB shall, upon request by a least-developed country Member offer their good offices, conciliation and mediation with a view to assisting the parties to settle the dispute, before a request for a panel is made. The Director-General or the Chairman of the DSB, in providing the above assistance, may consult any source which they deem appropriate.

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[18]Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail.

25. *Arbitration*

25.1 Expeditious arbitration within the MTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.

25.2 Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.

25.3 Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the council or committee of any relevant agreement where any Member may raise any point relating thereto.

25.4 Sections 21 and 22 of this Understanding shall apply mutatis mutandis to arbitration awards.

26. *Non-Violation*

26.1 *Complaints of the Type Described in Article XXIII:1(b) of GATT 1994*

Where the provisions of Article XXIII:1(b) of the GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of Article XXIII:1(b) of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(a) The complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement.

(b) Where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.

(c) Notwithstanding the provisions of paragraph 21, the arbitration provided for in paragraph 21.3, upon request of either party, may include a determination of the level of benefits which have been nullified or impaired, and may also suggest ways and means of reaching a mutually satisfactory adjustment; such suggestions shall not be binding upon the parties.

(d) Notwithstanding the provisions of paragraph 22.1, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

26.2 *Complaints of the Type Described in Article XXIII:1(c) of GATT 1994*

Where the provisions of Article XXIII:1(c) of the GATT 1994 are applicable to a covered agreement, a panel may only make rulings and recommendations where a party considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the existence of any situation other than those to which the provisions of Article XXIII:1(a) and (b) of GATT 1994 are applicable. Where and to the extent that such party considers and a panel determines that the matter is covered by this paragraph, the procedures of this Understanding shall apply only up to and including the point in the proceedings where the panel report has been issued to the Members. The dispute settlement rules and procedures contained in the Decision of the GATT Council of Representatives of 12 April 1989 (BISD 36S/61) shall apply to consideration for adoption, and surveillance and implemation of recommendations and rulings. The following shall also apply:

(a) The complaining party shall present a detailed justification in support of any argument made with respect to issues covered under this paragraph.

(b) In cases involving matters covered by this paragraph, if a panel finds that cases also involve dispute settlement matters other than those covered by this paragraph, the panel shall issue a report addressing any such matters and a separate report on matters falling under this paragraph.

27. *Responsibilities of the Secretariat*

27.1 The MTO Secretariat shall have the responsibility of assisting the panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support.

27.2 While the Secretariat assists Members in respect of dispute settlement at their request, there may also be a need to provide additional legal advice and assistance in respect of dispute settlement to developing country Members. To this end, the Secretariat shall make available a qualified legal expert from the MTO technical co-operation services to any developing country Member which so requests. This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat.

27.3 The Secretariat shall conduct special training courses for interested Members concerning these dispute settlement procedures and practices so as to enable Members' experts to be better informed in this regard.

APPENDIX 1

AGREEMENTS COVERED BY THE UNDERSTANDING

A) Agreement Establishing the Multilateral Trade Organization

B) Annex 1A: Agreements on trade in goods
Annex 1B: General Agreement on Trade in Services
Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

C) Annex 4: Agreement on Trade in Civil Aircraft
Agreement on Government Procurement
International Dairy Arrangement
Arrangement Regarding Bovine Meat

The applicability of this Understanding to Annex 4 Agreements shall be subject to the adoption of a decision by the Signatories of each Agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the Dispute Settlement Body.

APPENDIX 2

SPECIAL OR ADDITIONAL RULES AND PROCEDURES

CONTAINED IN THE COVERED AGREEMENTS

Agreement	*Rules and Procedures*
Anti-Dumping	17.4 to 17.7
Technical Barriers to Trade	14.2 to 14.4, Annex 2
Subsidies and Countervailing Measures	4.2 to 4.12, 6.6, 7.2 to 7.10, 8.5, footnote 33, 25.3 to 25.4, 28.6, Annex V
Customs Valuation	19.3 to 19.5, Annex II.2(f), 3, 9, 21
Sanitary and Phytosanitary Regulations	36
Textiles	2.14, 2.21, 4.4, 5.2, 5.4, 5.6, 6.9, 6.10, 6.11, 8.1 to 8.12
General Agreement on Trade in Services	XXII:3, XXIII:3
Financial Services	4.1
Air Transport Services	4
Minsterial Decision on Services Disputes	1 to 5

The list of rules and procedures in this Appendix includes provisions where only a part of the provision may be relevant in this context.

Any special or additional rules or procedures in ANNEX 4 Agreements as determined by the competent bodies of each Agreement and as notified to the DSB.

APPENDIX 3

WORKING PROCEDURES

1. In its proceedings the panel will follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes. In addition, the following working procedures will apply.

2. The panel will meet in closed session. The parties to the dispute, or other interested parties, will be present at the meetings only when invited by the panel to appear before it.

3. The deliberations of the panel and the documents submitted to it will be kept confidential. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential, information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

4. Before the first substantive meeting of the panel with the parties, both parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.

5. At its first substantive meeting with the parties, the panel will ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought will be asked to present its point of view.

6. All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session.

7. Formal rebuttals will be made at a second substantive meeting of the panel. The party complained against will have the right to take the floor first to be followed by the complaining party. Both parties shall submit, prior to that meeting, written rebuttals to the panel.

8. The panel may at any time put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.

9. The parties to the dispute and any third party invited to present its views in accordance with Section 8 of the Understanding shall make available to the panel a written version of their oral statements.

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 9 above will be made in the presence of both parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the panel, will be made available to the other party.

11. Any additional procedures specific to the panel.

12. The panel proposes the following timetable for its work:

(a) Receipt of first written submissions of the Parties:	
(1) complaining Party: _____	3-6 weeks
(2) Party complained against: _____	2-3 weeks
(b) Date, time and place of first substantive meeting with the Parties; Third Party session: _____	1-2 weeks
(c) Receipt of written rebuttals of the Parties: _____	2-3 weeks
(d) Date, time and place of second substantive meeting with the Parties: _____	1-2 weeks
(e) Submission of descriptive part of the report to the Parties: _____	2-4 weeks
(f) Receipt of comments by the Parties on the descriptive part of the report: _____	2 weeks
(g) Submission of the interim report, including the findings and conclusions, to the Parties: _____	2-4 weeks
(h) Deadline for Party to request review of part(s) of report: _____	1 week
(i) Period of review by panel, including possible additional meeting with Parties: _____	2 weeks
(j) Submission of final report to Parties to dispute: _____	2 weeks
(k) Circulation of the final report to the Members: _____	3 weeks

The above calendar may be changed in the light of unforeseen developments. Additional meetings with the Parties will be scheduled if required.

APPENDIX 4

EXPERT REVIEW GROUPS

The following rules and procedures shall apply to expert review groups established in accordance with the provisions of Article 13.2.

1. Expert review groups are under the panel's authority. Their terms of reference and detailed working procedures shall be decided by the panel, and they shall report to the panel.

2. Participation in expert review groups shall be restricted to persons of professional standing and experience in the field in question.

3. Citizens of parties to the dispute shall not serve on an expert review group without the joint agreement of the parties to the dispute, except in exceptional circumstances when the panel considers that the need for specialized scientific expertise cannot be fulfilled otherwise. Government officials of parties to the dispute shall not serve on an expert review group. Members of expert review groups shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Governments or organizations shall therefore not give them instructions with regard to matters before an expert review group.

4. Expert review groups may consult and seek information and technical advice from any source they deem appropriate. Before an expert review group seeks such information or advice from a source within the jurisdiction of a Member, it shall inform the government of that Member. Any Member shall respond promptly and fully to any request by an expert review group for such information as the expert review group considers necessary and appropriate.

5. The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information.

6. The expert review group shall submit a draft report to the parties to the dispute with a view to obtaining their comments, and taking them into account, as appropriate, in the final report, which shall also be circulated to the parties to the dispute when it is submitted to the panel. The final report of the expert review group shall be advisory only.