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DISPUTE SETTLEMENT UNDER THE NAFTA AND THE WTO: CHOICE OF FORUM OPPORTUNITIES AND RISKS FOR THE NAFTA PARTIES

DAVID A. GANTZ*

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INTRODUCTION

Comprehensive dispute resolution mechanisms under both the North American Free Trade Agreement (“NAFTA”)¹ in its Chapter 20 and the World Trade Organization (“WTO”) in the Understanding on the Rules and Procedures Governing the Settlement of Disputes (“Dispute Settlement Understanding” or “DSU”)² have provided the three NAFTA governments—the United States, Canada, and Mexico—with choice of forum alternatives that effectively do not exist for any other group of nations. The overlapping or common substantive provisions of the two trade regimes, along with subtle differ-

1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1-9); 32 I.L.M. 605 (chs. 10-22) [hereinafter NAFTA].

2. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, 33 I.L.M. 1125, 1226 (1994) [hereinafter DSU].

ences in jurisdiction, procedures, and substantive content, are providing opportunities and challenges for the government trade attorneys of all three nations in deciding how best to resolve disputes among the three nations. Are the choices really as broad as they appear, or in many instances are they more apparent than real? Does one mechanism offer more opportunity for political manipulation or delays than the other? Does the quality of the analysis and decision-making differ as between the two entities? Is one mechanism more successful than the other in ensuring "enforcement" of decisions? What are the implications, if any, of decisions rendered under the Chapter 20 mechanisms for the NAFTA Parties' non-NAFTA trading partners? Is it too easy for Parties to bring multiple actions in parallel fora? Finally, what factors should influence NAFTA member government decisions and the efforts of private parties to "encourage" their respective governments to defend important interests with regard to which forum is selected?

Despite the enormous intra-regional trade³ within the NAFTA, only a limited number of trade disputes among NAFTA members have reached even the consultation stage under either NAFTA Chapter 20 (eleven) or the WTO Dispute Settlement Body (five).⁴ However, forum choices may be instructive even in the many instances where the disputes are resolved without resort to arbitration or are delayed. This limited body of jurisprudence, which includes three final arbitral panel decisions, thus provides a basis for a comparison of the two systems and an initial appraisal of the jurisdictional conflicts and choice of forum opportunities and risks presented to the NAFTA governments.

3. See U.S. Dep't of Commerce, *United States Foreign Trade Data* (last updated July 15, 1998) <<http://www.ita.doc.gov/industry/otea/usfth-tabcon.html>> (providing United States aggregate foreign trade data). Intra-regional trade was valued at \$482 billion in 1997, \$157 billion worth between Mexico and the United States, \$320 billion worth between Canada and the United States, and \$5 million between Canada and Mexico. See Canadian Department of Foreign Affairs and International Trade, *Fact Sheet—Mexico* (visited Jan. 9, 1999) <<http://www.dfait-maeci.gc.ca/mexico/fact-e.asp>> (listing and valuing Canadian exports to Mexico and imports from Mexico). The United States is both Canada and Mexico's largest trading partner based on dollar volume of trade; Canada is the United States' largest trading partner, while Mexico is third, after Japan. See *id.*

4. See *infra* Part II (presenting analyses of cases before the NAFTA and WTO dispute settlement mechanisms).

Part I of this article describes and analyzes the government-to-government trade dispute settlement provisions offered by the NAFTA and the WTO, respectively, focusing on jurisdictional and procedural aspects. Part II reviews the Chapter 20 and WTO consultations and panel decisions to date. Part III analyzes the significant differences in the processes and the approaches of the NAFTA governments, concentrating on the relative advantages and disadvantages of the two mechanisms. Part IV proposes suggested guidelines to forum selection to be applied on a case-by-case basis by the NAFTA Parties in future disputes.

I. THE NAFTA AND WTO DISPUTE SETTLEMENT MECHANISMS

The area of international trade law is the only one in which binding dispute resolution is available to most members of the international trading community—the members of the World Trade Organization.⁵ A prominent scholar has stated that “[t]he dispute settlement procedures in the 1994 WTO Agreement are the most ambitious worldwide system for the settlement of disputes among more than 130 states ever adopted in the history of international law.”⁶ Although the Statute of the International Court of Justice (“ICJ”) provides for the acceptance of compulsory jurisdiction, less than fifty states have accepted such jurisdiction, and less than one hundred cases have been referred to the ICJ in the first fifty years of its existence.⁷ Recent efforts to create an international criminal tribunal resulted in the conclusion of a treaty creating such a court, although the

5. See WTO, *About the WTO: The Organization, The Members* (last modified Feb. 10, 1999) <<http://www.wto.org/wto/about/organsn6.htm>> (listing the current 134 members).

6. Ernst-Ulrich Petersman, *From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System*, 1 J. INT'L ECON. L. 175, 183 (1998).

7. See International Court of Justice, *Response of the International Court of Justice to General Assembly Resolution 52/161 of December 15, 1997* (visited Feb. 9, 1999) <<http://www.icj-cij.org/icy/igeneral/information/igeninvarious/responseg/51297>> (commenting on the effect of an increased caseload by the International Court of Justice). While there are currently ten cases before the International Court of Justice (“ICJ”), in the 1970s the typical ICJ docket consisted of two cases. See *id.*

United States opposed the agreement.⁸ There is, however, no tribunal with global jurisdiction over human rights disputes.⁹ In contrast, during the first three years and eight months of the existence of the WTO's Dispute Settlement Body, members lodged nearly one hundred and fifty requests for consultations, forty of which have resulted—through consultation or adjudication—in an order directing a change in national trade law or policy.¹⁰

For the United States, Mexico, and Canada there are two options in many instances—the WTO and the NAFTA mechanisms. The NAFTA Chapter 20 mechanism is similar in scope and jurisdiction to the WTO's Dispute Settlement Understanding, whereas NAFTA's Chapter 19 incorporates a more limited scope—antidumping and countervailing duty matters—and operates under national rather than regional or international trade laws.

A. OVERVIEW OF THE TWO SYSTEMS

The NAFTA and its two “parallel” agreements on labor¹¹ and the environment¹² incorporate a broad and sometimes confusing variety

8. See Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, AM. SOC'Y INT'L L. INSIGHT (last modified Aug. 1998) <<http://www.asil.org/insigh23.htm>> (analyzing the provisions of the International Criminal Court and the United States' reasons for opposition). See generally Cara Levy Rodriguez, Comment, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805 (1999) (detailing the criticisms of the Rome Treaty establishing the United Nations International Criminal Court).

9. See generally A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN EUROPE 250-315 (3d ed. 1985) (describing such regional arrangements as the European Convention on Human Rights and the European Court of Human Rights and their roles in human rights protection).

10. See also WTO, *Overview of the State-of-play of WTO Disputes* (as modified Jan. 14, 1999) <<http://www.wto.org/wto/dispute/bulletin.htm>> [hereinafter *WTO Dispute Overview*]; Chad Bowman, *Dispute Settlement: Experts Say WTO Dispute Settlement Slow, Ill-Defined, Often Unsuccessful*, INT'L TRADE DAILY (BNA) (Oct. 30, 1998), available in LEXIS, Bnaid Library (citing remarks by Andrew W. Shoyer, a former United States Legal Adviser to the United States Mission to the WTO in Geneva, and discussing criticisms of the WTO dispute settlement process).

11. North American Agreement on Labor Cooperation, Sept. 13, 1993, 32 I.L.M. 1502.

12. North American Agreement on Environmental Cooperation, Sept. 13, 1993,

of mechanisms for resolving disputes relating to the interpretation and application of certain NAFTA provisions in specific situations. The principal dispute resolution provisions relate to: investment (Chapter 11), financial services (Chapter 14), interpretation and application of the agreement generally (Chapter 20), appeals of unfair trade actions (Chapter 19), failure to enforce environmental laws (North American Agreement on Environmental Cooperation), and failure to enforce labor laws (North American Agreement on Labor Cooperation). In addition, the NAFTA includes commitments to steps that will facilitate alternative resolution of commercial and agricultural disputes in the future.¹³ For purposes of this article and comparisons with the WTO mechanisms, only the Chapter 20 mechanism, and to a lesser degree, the Chapter 19 binational panel process for review of national agency determinations in unfair trade matters—antidumping and subsidies—are relevant.

Chapter 20 of the NAFTA provides a means for resolving disputes among the NAFTA governments over the application and interpretation of the NAFTA. Chapter 20 calls for consultation between the Parties, conciliation before the “Free Trade Commission”¹⁴ arbitration, and ultimately, implementation of the arbitral report.¹⁵ It was modeled after Chapter 18 of the Canada–United States Free Trade Agreement (“CFTA”),¹⁶ with certain modifications “that should facilitate and expedite the settlement of disputes between the three countries,”¹⁷ and, to some extent, the pre-1995 General Agreement on

32 I.L.M. 1482.

13. See NAFTA, *supra* note 1, arts. 707, 2022.

14. The “Free Trade Commission” consists of the trade ministers of the three NAFTA countries. See *infra* Part I.C (describing the composition and duties of the Free Trade Commission).

15. See NAFTA, *supra* note 1, arts. 2006-17.

16. Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA].

17. North American Free Trade Implementation Act, Statement of Administrative Action, *reprinted in* 1 JAMES R. HOLBEIN & DONALD J. MUSCH, NORTH AMERICAN FREE TRADE AGREEMENTS, BOOKLET 8, at 190 (1994) [hereinafter Statement of Administrative Action]. Among the most significant changes is the elimination of the distinction of the mandatory panel process and “binding arbitration,” which under the CFTA could be agreed to independently of the panel process as an alternative. See CFTA, *supra* note 16, art. 1806.

Tariffs and Trade ("GATT") Article XXIII procedures.¹⁸ CFTA, Chapter 18, includes essentially the same choice of forum legislation as NAFTA, Chapter 20.¹⁹

Both the WTO and the NAFTA mechanisms are at least nominally legalistic or "rule oriented" systems, which incorporate a formal adjudicatory decision-making process and effective enforcement mechanisms,²⁰ as distinct from more pragmatic and flexible models that rely upon diplomatic negotiations between treaty partners—or political power²¹—to resolve conflicts over the interpretation and application of international agreements.²² The choice between a mechanism designed to provide compromise settlements, at the expense of specific norms, and rule-based decisions that will serve the goals of long-term predictability and efficiency,²³ has been decisively resolved in favor of the latter.²⁴

Thus, the formal, legalistic dispute settlement approach favored by the United States, with strict time limits, prevailed, even though some members probably would have preferred a more informal, con-

18. See General Agreement on Tariffs and Trade, art. XXIII, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

19. Compare CFTA, *supra* note 16, art. 1801, with NAFTA, *supra* note 1, ch. 20.

20. KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 3-5 (1970) (comparing legalism and pragmatism with respect to international agreements).

21. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM 109 (1989) (suggesting that a reformed GATT dispute settlement system should encourage settlement "primarily with reference to the existing agreed rules rather than simply with reference to the relative economic or other power which the disputants possess").

22. See OLIVER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1985) (explaining that a balance of pragmatism and legalism should be used when dealing with international trade disputes); see also David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 408 (1993).

23. See Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 122-24 (1992) (discussing the GATT's role as a source of substantive legal rules versus the GATT's role as a forum for negotiation).

24. See Debra P. Steger & Susan M. Hainsworth, *World Trade Organization Dispute Settlement: The First Three Years*, 1 J. INT'L ECON. L. 199, 200 (1998) (noting that the Dispute Settlement Understanding "contains certain remarkable innovations that take the system in a more legalistic direction").

ciliation-oriented consensus-based approach, similar to that used under the GATT prior to 1995.²⁵ The largely ad hoc dispute settlement mechanism that evolved under the authority of GATT Article XXIII has been replaced by a unitary, detailed, and comprehensive dispute resolution system created by the WTO's DSU,²⁶ which applies to the full range of binding international trade rules encompassed by the WTO. In fact, the Uruguay Round negotiations leading to the WTO also resulted in greatly expanded coverage of international trade rules, including trade in agricultural and non-agricultural goods, trade in services, intellectual property, and, to a limited extent, trade-related investment issues, among others.²⁷ As a result, the number of trade barriers that are *not* subject to the discipline of binding international trade rules declined significantly.²⁸

B. JURISDICTION

The jurisdiction of the NAFTA Chapter 20 dispute resolution mechanism is defined as follows:

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of

25. See generally Richard O. Cunningham & Clint N. Smith, *Section 301 and Dispute Settlement in the World Trade Organization*, in THE WORLD TRADE ORGANIZATION ch. 16 (Terence P. Stewart ed., 1996). Compare GATT, *supra* note 18, with DSU, *supra* note 2.

26. See DSU, *supra* note 2 (establishing the rules and procedures under the GATT); see also Andrew W. Shoyer, *The First Three Years of WTO Dispute Settlement: Observations and Suggestions*, 1 J. INT'L ECON. L. 277, 283 (1998) (observing that fears of increased "legalism" that would make the system too rigid have not been realized).

27. See, e.g., General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 283, 33 I.L.M. 1125, 1168 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 319, 33 I.L.M. 1125, 1197 (1994) [hereinafter TRIPs]; WTO Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 43.

28. See RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW 1064 (1998).

this Chapter shall apply with respect to the avoidance of settlement of all disputes between the Parties regarding the interpretation of application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.²⁹

The subject matter coverage is broad for two reasons. First, the NAFTA's coverage itself is expansive. The NAFTA applies not only to trade in goods, specifically including automobiles,³⁰ textiles,³¹ energy, and basic petrochemicals,³² but to customs procedures,³³ agriculture, sanitary and phytosanitary measures,³⁴ and safeguards and technical barriers to trade.³⁵ The NAFTA contains special provisions on safeguards,³⁶ government procurement,³⁷ cross border trade,³⁸ telecommunications³⁹ and financial services.⁴⁰ Foreign investment is protected,⁴¹ as are intellectual property rights;⁴² furthermore, there is limited coverage for competition policy⁴³ and business travel.⁴⁴ Although special dispute settlement procedures are afforded to private parties with investment disputes against governments⁴⁵ or antidump-

29. NAFTA, *supra* note 1, art. 2004.

30. *See id.* ch. 3, Annex 300-A.

31. *See id.* ch. 3, Annex 300-B.

32. *See id.* ch. 6.

33. *See id.* ch. 5.

34. *See id.* ch. 7.

35. *See* NAFTA, *supra* note 1, ch. 9.

36. *See id.* ch. 8.

37. *See id.* ch. 10.

38. *See id.* ch. 12.

39. *See id.* ch. 13.

40. *See id.* ch. 14.

41. *See* NAFTA, *supra* note 1, ch. 11.

42. *See id.* ch. 17.

43. *See id.* ch. 15.

44. *See id.* ch.16.

45. *See id.* ch. 11, sec. B.

ing and countervailing duty determination challenges,⁴⁶ questions relating to the interpretation or application of those sections of the NAFTA are also cognizable under the Chapter 20 mechanisms.

Second, with certain exceptions, “disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.”⁴⁷ Where a NAFTA Party decides to initiate a GATT/WTO action against another NAFTA Party, and a third NAFTA Party expresses an interest and a preference for NAFTA dispute settlement, consultations are to take place, and “the dispute normally shall be settled under this Agreement [NAFTA].”⁴⁸

Certain types of disputes must be settled under the NAFTA’s Chapter 20 rather than under the GATT/WTO mechanism, including conflicts between the NAFTA and bilateral or multilateral environmental agreements listed in Article 104;⁴⁹ disputes under the NAFTA Chapters 7 (sanitary and phytosanitary measures) and 9 (standards-related measures) relating to human, animal, or plant life, or health, or protection of the environment, or raising factual issues concerning the environment, health, safety, or conservation, including directly related scientific matters.⁵⁰ In addition, there are certain areas covered by the NAFTA on which the WTO is silent. These include the regional tariff reduction measures (Chapter 3) and rules of origin (Chapter 4), as well as, NAFTA-specific customs measures (Chapter 5);⁵¹ most investment measures (Chapter 11); competition (Chapter 15); and business travel (Chapter 16). If a matter does not arise under

46. See *id.* ch.19; see also *infra* Part II.A.3 (discussing a dispute over United States import restrictions).

47. NAFTA, *supra* note 1, art. 2005.1.

48. *Id.* art. 2005.2.

49. See *id.* art. 2005.

50. See *id.* art. 2005.4.

51. Arguably, a NAFTA Party might contend that an action under Chapters 3-5 is a violation of GATT Article XXIV relating to free trade areas and customs unions. However, the NAFTA party is less likely to proceed with this argument than a non-NAFTA, WTO Member who may be concerned that a NAFTA provision is inconsistent with a NAFTA party’s GATT obligations.

both the NAFTA and the GATT—only under the NAFTA—it must be submitted to NAFTA procedures.

The WTO's DSU applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Annex 1."⁵² Generally, Annex 1 includes the Agreement Establishing the World Trade Organization, the multilateral trade agreements, as well as the agreements relating to services and intellectual property. Specifically, the agreements include the GATT 1994 and the agreements on agriculture; sanitary and phytosanitary measures; textiles and clothing; technical barriers to trade; trade related investment measures; antidumping; customs valuation; rules of origin; subsidies and countervailing measures; and safeguards.⁵³ The WTO procedures also apply to so-called "non-violation," or existence of any other situation, "nullification and impairment" complaints, but with procedures that are in the nature of recommendations rather than binding decisions.⁵⁴

The most important areas in which WTO jurisdiction is effectively exclusive for government to government disputes, absent some sort of ad hoc agreement to the contrary,⁵⁵ are dumping and subsidies. Under the NAFTA, "[e]ach Party reserves the right to apply its anti-dumping law and countervailing duty law to goods imported from

52. DSU, *supra* note 2, art. 1.1.

53. See WTO Agreement, *supra* note 2, Annexes 1A, 1B, 1C. DSU coverage extends to the "plurilateral trade agreements," such as the Agreement on Government Procurement, of which Canada and the United States, but not Mexico, are parties. See *id.* art. XXII.

54. See DSU, *supra* note 2, art. XXVI.

55. See, e.g., Softwood Lumber Agreement, May 29, 1996, 35 I.L.M. 1195 (providing an example of an ad hoc agreement, which protects the United States' softwood lumber industry from Canadian imports). With this agreement, the parties sought to resolve a long-running United States countervailing duty case between the United States and Canada. See *id.* The Agreement contains an ad hoc dispute settlement mechanism based in part on NAFTA Chapter 20 concepts to resolve differences over the interpretation of the Agreement. See *id.* art. V. The Agreement purports to limit Canadian softwood lumber imports into the United States by regulating subsidies to those exports. See *id.* Furthermore, it restricts the United States' countervailing duty proceedings against softwood lumber, "without prejudice to the position of either Party as to whether the programs and practices of either Party in respect of forest management constitute countervailable subsidies under domestic or international law." *Id.* art. VII(1).

the territory of any other Party.”⁵⁶ Each NAFTA Party also reserves the right to change or modify its antidumping and countervailing duty laws.⁵⁷

While this right of amendment is explicitly made subject to certain conditions, including the proviso that such amendment is not inconsistent with the GATT, the GATT Dumping or Subsidies Codes or any successor agreements—the WTO Antidumping and Subsidies Agreements⁵⁸—the review of antidumping and countervailing duty matters is explicitly excluded from the scope of Chapter 20.⁵⁹ One might argue that the affirmation by the NAFTA Parties of “their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party,”⁶⁰ which necessarily includes the GATT provisions on antidumping and subsidies—Articles VI and XVI—and the WTO Antidumping and Subsidies Agreements, provides a colorable basis for Chapter 20 action in antidumping matters not explicitly covered by Chapter 19. However, this clearly was not the intent of the Parties.⁶¹

There are also several areas that are explicitly excluded from Chapter 20 coverage, and by their subject matter would not come within the WTO framework. These areas include issues relating to the NAFTA’s limited coverage of competition policy⁶² and certain decisions regarding whether to permit foreign investment under the Investment Canada Act, Mexico’s National Commission on Foreign Investment, and the United States Exon-Florio legislation.⁶³

Nevertheless, the category of disputes potentially regarding any matter arising under both the NAFTA and the WTO is broad. First,

56. NAFTA, *supra* note 1, art. 1902.1.

57. *See id.* art. 1902.2

58. *See id.* art. 1902.2(d)(i).

59. *See id.* art. 2004.

60. *Id.* art. 103.1.

61. *See* Telephone Interview with a senior Canadian trade official (Nov. 16, 1998) [hereinafter Canadian Official Interview] (transcript on file with *American University International Law Review*).

62. *See* NAFTA, *supra* note 1, art. 1501(3).

63. *See id.* Annex 1138.2 (excluding review of investment exclusions on national security grounds).

many GATT/WTO rules are incorporated by reference into the NAFTA. For example, in the NAFTA, “[t]he Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party.”⁶⁴ The same national treatment principles apply:

Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the *General Agreement on Tariffs and Trade* (GATT) and its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.⁶⁵

The general GATT requirements are incorporated by reference into the NAFTA chapter on trade in petroleum products,⁶⁶ and in the NAFTA safeguards chapter (Chapter 8), “[e]ach Party retains its rights and obligations under Article XIX of the GATT or any safeguard agreement pursuant thereto.”⁶⁷ The NAFTA also contains language incorporating GATT Article XI, barring prohibitions and restrictions on imports, exports or sales of goods, by reference,⁶⁸ and the general exceptions in GATT Article XX.⁶⁹ Certain agricultural domestic support programs are subject to GATT disciplines,⁷⁰ and GATT obligations regarding technical barriers to trade are reaffirmed but not incorporated by reference in the NAFTA’s standards (Chapter 9).⁷¹

Furthermore, the subject matter overlap between the NAFTA and the WTO is extensive. Both agreements contain, *inter alia*, provisions governing agricultural trade; safeguards; sanitary and phytosanitary measures; technical barriers to trade; trade in textiles and

64. *Id.* art. 103.1.

65. *Id.* art. 301.1.

66. *See id.* art. 603.1.

67. *Id.* art. 802.1.

68. *See* NAFTA *supra* note 1, art. 309.1.

69. *See id.* art. 2101.1.

70. *See id.* art. 704.

71. *See id.* art. 903.

clothing; trade in services; and investment measures. The NAFTA also incorporates by reference the general exceptions to the GATT,⁷² and each agreement has a “national security” exception utilizing identical language.⁷³

Given the combination of the subject matter breadth of the NAFTA, the broad jurisdictional scope of Chapter 20, and the wholesale incorporation of GATT/WTO provisions into the NAFTA by reference, it is almost inevitable that the Chapter 20 dispute settlement mechanism will from time to time be required to deal with GATT/WTO legal issues as well as those arising exclusively under the NAFTA. It is also possible that a WTO dispute panel will be required on occasion to decide peripheral NAFTA issues relevant to the matter before the panel.

The financial services provisions of the NAFTA—relating chiefly to banking, insurance, and brokerage⁷⁴—incorporate a variation of Chapter 20 for dispute resolution. The Chapter 20 procedures apply, so that only governments may bring actions. However, the panelists are to be chosen from a special roster of financial services experts.⁷⁵

C. DISPUTE RESOLUTION UNDER NAFTA CHAPTER 20

The NAFTA creates a “Free Trade Commission” composed of the trade ministers of the three NAFTA governments, who have the responsibility of overseeing the implementation of the agreement and resolving disputes.⁷⁶ The Agreement also creates a NAFTA secretariat with national sections to provide assistance to the NAFTA Free Trade Commission and to the panels established under Chapters 19 and 20.⁷⁷ These national sections are tasked with a variety of func-

72. *See id.* art. 2101 (incorporating GATT Article XX).

73. *See id.* art. 2102; *see also* General Agreement on Tariffs and Trade, Art. XXI, Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994 [hereinafter GATT 1994], *reprinted in* 1 HANDBOOK OF WTO/GATT SETTLEMENT (Pierre Pescatore et al. eds., 1998).

74. *See* NAFTA, *supra* note 1, ch. 14.

75. *See id.* art. 1414.2.

76. *See id.* art. 2001. The Commission may respond to questions from national judicial or administrative proceedings regarding the interpretation or application of the NAFTA that are referred to the Commission. *See id.* art. 2001.1.

77. *See id.* art. 2002.3.

tions: (a) administering the budget of the dispute settlement process; (b) supervising the appointment and maintenance of panel members, including the code of conduct and conflicts of interest; (c) providing case management directly, including the holding of panel meetings and hearings, and assistance in the issuance of orders and decisions; (d) receiving, administering and safeguarding confidential information furnished by the governments; and (e) acting as liaison with the national administering authorities in Chapter 19 proceedings.⁷⁸

As with many other international dispute settlement procedures, the NAFTA mechanism is a three-step process. The process begins with a request for consultations: “[t]he consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement.”⁷⁹ If consultation fails to resolve the dispute within a stated time period, usually within thirty days of the request, the complaining Party may seek good offices, conciliation, or mediation by the NAFTA Free Trade Commission.⁸⁰ Thirty days later, or after “such other period as the consulting Parties may agree,” either Party may request the convening of an arbitral panel.⁸¹ Once a Party has initiated dispute settlement under Chapter 20, it is precluded from seeking parallel action under the WTO.⁸² However, this prohibition only applies once Commission action is requested; a request for NAFTA consultations does not preclude a parallel request before the WTO, as NAFTA dispute settlement procedures are con-

78. *See id.* arts. 1904, 2002. In the author’s experience with the Chapter 19 binational panel process—which is managed by the same national secretariats—each of the three sections of the NAFTA secretariat has been proven to be well-managed and efficient despite a variety of challenges not necessarily contemplated by the drafters of the agreement. Significantly, these sections do not exercise authority independently of the member governments. Therefore, they have no legal power to require the governments to comply with time limits specified for the appointment of arbitral panels, or with other procedural requirements.

79. *Id.* art. 2006.5.

80. *See* NAFTA, *supra* note 1, art. 2007.1.

81. *See id.* art. 2008.1.

82. *See id.* art. 2005.6. The reverse is true, except where in the course of a WTO dispute settlement an issue is raised under the NAFTA that is subject to the exclusive jurisdiction of Chapter 20. *See id.* arts. 2007.3, 2007.4, 2007.6.

sidered initiated when recourse is made to the Free Trade Commission under Article 2007.⁸³

The arbitral panel process contemplates the use of a standing roster limited to thirty persons designated by the NAFTA Parties, with experience in “law, international trade, other matters covered by this Agreement or the resolution of disputes arising under international trade agreements” who are independent of the governments and comply with an applicable code of conduct.⁸⁴ Thus, the panelists need not be lawyers, and presumably, the “independent of the governments” requirement means that they cannot be government employees.⁸⁵ Where there are no more than two disputing Parties, a group of five arbitrators will be chosen, normally from the roster.⁸⁶ Interestingly, in a unique “reverse selection process,” one Party chooses the two national arbitrators of the other Party. For example, in the *Dairy Product Export Subsidies* case,⁸⁷ the United States selected the two Canadian panelists from a list of candidates offered by Canada, and Canada selected the American panelists from a list of candidates offered by the United States.⁸⁸ The two governments choose the chairperson of the panel by agreement; if there is no agreement, a Party chosen by lot selects the chair of the panel, who may not be a citizen of the disputing Parties.⁸⁹ Thus, in the normally contemplated situation—and in fact in the two cases that have reached arbitration under Chapter 20—the panels consist of two nationals from each of the disputing Parties, and a chairperson from a neutral country. Where all three NAFTA Parties are involved in the proceeding, the chairperson will be chosen in the same manner, but the Party complained

83. See *id.* arts. 2005.6, 2007.

84. *Id.* art. 2009.2(a).

85. *Id.* art. 2009.2(b).

86. See NAFTA, *supra* note 1, arts. 2011.1, 2011.3. As of March 1999, the roster members had not been formally designated by the three governments.

87. See *infra* Part II.B.3 (discussing the *Dairy Product Export Subsidies* case pertaining to measures affecting the importation of milk and the exportation of dairy products).

88. See NAFTA, *supra* note 1, art. 2011.1(c) (providing that “within 15 days of the selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing party”).

89. See *id.* art. 2011.1(b).

against chooses two panelists, one national each from the complaining Parties, and the complaining Parties will choose two panelists who are nationals of the party complained against.⁹⁰

Despite the flexible criteria for panelists, eight of the ten panelists who have served on the two cases under Chapter 20 to date have been law professors.⁹¹ Of the remaining two panelists, one is an attorney, while the other is a non-lawyer government official.

The Rules of Procedure for Chapter 20 Panels⁹² generally contain few major innovations. The panel process contemplates written submissions and one or more hearings.⁹³ The NAFTA gives the Parties or the panels wide latitude in seeking information and technical advice from experts,⁹⁴ and provides for the use of scientific review boards in “environmental, health, safety or other scientific matters raised by a disputing Party.”⁹⁵ However, there is no right for anyone other than the Parties to participate in the proceedings. Provision is also made for translation and interpretation of submissions and argument in the event that more than one language is used during the proceedings.⁹⁶

90. *See id.* art. 2011.2.

91. *See In re Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01, Report of the Panel (Dec. 2, 1996), available in LEXIS, Intlaw Library, [hereinafter NAFTA Dispute Panel Report on Agricultural Products Tariffication] (appointing American law professors Sidney Picker, Jr. and Stephen Zamora, Canadian professors Ronald C.C. Cuming and Donald M. McRae, and British professor Elihu Lauterpacht to the binational review panel); *infra* Part II.A.2 (discussing the case); *see also In re U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, USA-97-2008-01, Report of the Panel (Jan. 30, 1988) [hereinafter NAFTA Dispute Panel Report on Brooms]; *infra* Part II.A.8 (discussing the case). In this case, the panelists were American law professors John H. Barton and Robert H. Hudec, Mexican law professor and attorney Dionisio Kaye, Mexican attorney Raymundo Enriquez, and a non-lawyer Australian government official, Paul O'Connor. *See id.* at 29.

92. *See Model Rules of Procedure for Chapter 20 Panels*, reprinted in 2 HOLBEIN & MUSCH, *supra* note 17, BOOKLET A-10 [hereinafter Model Rules].

93. *See id.* paras. 6-13, 21-29.

94. *See NAFTA*, *supra* note 1, art. 2014.

95. *Id.* arts. 2014-15.

96. *See Model Rules*, *supra* note 92, paras. 49-56.

The NAFTA contemplates that the panels will provide the Parties with an initial report, findings of fact, a determination of the legal issues, and recommendations for resolution of the issues in dispute.⁹⁷ Parties may submit written comments on the initial report within fourteen days.⁹⁸ A final report shall issue thirty days later, unless the Parties agree otherwise.⁹⁹ The decision of the panel is not automatically applicable to resolve the dispute. Rather, once the decision is rendered, the “disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel.”¹⁰⁰ Thus, some scholars characterize the panel determination as being more in the nature of a recommendation to the affected governments and implicitly criticize the determination for playing only a “facilitating role” that falls “short of authoritatively resolving the dispute.”¹⁰¹ Others describe the panel mechanism as a “political troubleshooting institution rather than as an independent arbitral body.”¹⁰²

The above characterizations are at minimum misleading. In fact, failure of the Parties to implement the arbitral report may result in prompt and serious consequences. If the report is not implemented or another mutually satisfactory resolution is not reached within thirty days of receipt of the final report, the complaining Party may retaliate, by suspending “the application to the Party complained against of benefits of equivalent effect until such time as they [the Parties] have reached agreement on a resolution of the dispute.”¹⁰³ However, the panel determinations are non-binding in the sense that they have

97. See NAFTA, *supra* note 1, art. 2016.

98. See *id.* art. 2016.4.

99. See *id.* art. 2017.1.

100. *Id.* art. 2018.1.

101. See, e.g., Frank J. Garcia, *Decision Making and Dispute Resolution in the Free Trade Area of the Americas: An Essay on Governance*, 18 MICH. J. INT'L L. 357, 379 (1997) (discussing criticisms of the NAFTA Panel's role as an arbitral body).

102. Huntington, *supra* note 22, at 416 (discussing the design of the Canada-United States Free Trade Commission).

103. NAFTA, *supra* note 1, art. 2019.1. If the suspension of trade benefits is considered “manifestly excessive” by the Party against which retaliation is made, that Party may request the establishment of a panel to review the issue. See *id.* art. 2019.3.

no direct effect on United States law, and neither federal or state governments are bound by findings or recommendations.¹⁰⁴

There is no provision for appeal of the Chapter 20 panel decisions, although use of the initial report/final report process provides the Parties with an opportunity to urge a reconsideration of determinations made in the initial report. Nor is there any process, other than continuing diplomatic negotiations and the threat of retaliation, to assure that any agreed resolution of the issues is faithfully implemented.

The Chapter 20 panel process is intended to remain confidential between the Parties, reflecting an almost obsessive concern for secrecy on the part of the governments. Thus, the Rules of Procedure must and do provide that “the panel’s hearings, deliberations, and initial report, and all written submissions to and communications with the panel shall be confidential.”¹⁰⁵ In fact, in the initial proceeding under Chapter 20, panelists were instructed that “[t]he names of the panel members are not public until the final report is published by the Parties.”¹⁰⁶ Apparently, the confidentiality is meant to protect panelists from “harassing inquiries” during the proceedings; however, the efforts—largely unsuccessful—to enforce such confidentiality may create a “Star Chamber” quality.¹⁰⁷

The existence of the Chapter 20 mechanism and a permanent NAFTA secretariat offers the NAFTA Parties the opportunity to use selected aspects of the Chapter 20 structure for ad hoc arbitrations. For example, in the 1996 Softwood Lumber Agreement,¹⁰⁸ the governments of Canada and the United States provided a dispute resolution mechanism that incorporates significant features of the Chapter 20 process, including cross-selection of national panelists by the

104. See Statement of Administrative Action, *supra* note 17, at 195; see also LEON E. TRAKMAN, DISPUTE SETTLEMENT UNDER THE NAFTA 18-19 (1996).

105. NAFTA, *supra* note 1, art. 2012.1(b); see also Model Rules, *supra* note 92, para. 35.

106. Sidney Picker, Jr., *NAFTA Chapter Twenty—Reflections on Party-to-Party Dispute Resolution*, 14 ARIZ. J. INT’L & COMP. L. 465, 469 n.35 (quoting a Jan. 19, 1996, letter from Cathy Beehan, Canadian NAFTA Secretary, to Panelist Sidney Picker).

107. See *id.* at 469.

108. See *supra* note 55 (describing the Softwood Lumber Agreement).

other government.¹⁰⁹ In the only case initiated under the Softwood Lumber Agreement to date, brought by the United States against Canada, the Canadian section of the NAFTA Secretariat is acting as the Secretariat for the ad hoc arbitration, and it appears likely that it will follow many of the NAFTA Chapter 20 procedures.¹¹⁰

D. SIGNIFICANCE OF NAFTA CHAPTER 19

While the only NAFTA mechanism for resolving “government-to-government” disputes generally is Chapter 20, the Chapter 19 dispute settlement mechanism is also relevant because of its subject matter—antidumping and subsidies disputes under national legislation.¹¹¹ Chapter 19 of the NAFTA, like Chapter 19 of the CFTA, provides a unique arbitral mechanism designed primarily for private “interested parties” to seek binational panel review of decisions of the administrative agencies of the three countries in antidumping and countervailing duty cases.¹¹²

Chapter 19, however, provides only a very narrow basis for government-to-government dispute settlement. Each NAFTA Party under Chapter 19 retains the right to modify its trade laws, subject to certain notice provisions, and the obvious requirement that national laws remain consistent with the GATT, including any successor agreements such as the Uruguay Round Antidumping and Subsidies Agreements relating to the subject.¹¹³ Each NAFTA Party also has the right to seek review of changes in national law by another NAFTA

109. See Softwood Lumber Agreement, *supra* note 55, art. V, paras. 4, 6-9 (referring to the rules governing the appointment of an arbitral panel).

110. See U.S., *Canada Agree on Final Panelist for Lumber Arbitration*, INSIDE U.S. TRADE, Dec. 4, 1998, at 12 (reporting that Professor Maureen Irish of Canada, David A. Gantz of the United States, and Michael Cartland of Hong Kong—as Chairman—would be the panelists).

111. See David A. Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297, 298 (1998) (providing a more extensive discussion of Chapter 19).

112. See NAFTA, *supra* note 1, art. 1901.1 (stating the scope of Article 1904). Cases relating to United States, Canadian, or Mexican customs service rulings on classification, valuation, and origin of merchandise, are not subject to panel review. See *id.*

113. See *id.* art. 1902.1.

Party that are alleged to be inconsistent with the NAFTA or with provisions of the GATT or WTO agreements.¹¹⁴ The inconsistency issue may be resolved solely by a distinct binational panel process under Chapter 19, not Chapter 20, in a government-to-government action that is controlled by international trade law rather than national law provisions.¹¹⁵ These particular Chapter 19 provisions do not, however, apply to existing national laws; alleged inconsistencies of such laws with GATT/WTO provisions are subject only to WTO DSB jurisdiction, as discussed earlier. The government-to-government provisions of Chapter 19 have not been invoked as of March 1999.

Because of the subject matter, actions relating to antidumping and countervailing duty actions may be brought both under NAFTA Chapter 19 and the WTO's DSU. Yet, although overlapping, these are not really parallel mechanisms; they serve different purposes and are available to different litigants. Chapter 19 is open only to private parties seeking review of national administrative determinations under national law, in lieu of recourse to local courts, while the WTO mechanism is restricted to governments seeking to challenge national law or determinations that are in conflict with the WTO agreements.¹¹⁶

The principal motivation for Chapter 19 of the CFTA, on which NAFTA Chapter 19 is based, appears to have been the refusal of the United States to provide Canada with an exemption from United States antidumping and countervailing duty laws. Specifically, the United States agreed to the process as part of a "compromise" in which Canada temporarily abandoned its demand for special trade remedy laws to be applicable in the United States and Canada.¹¹⁷ The

114. *See id.* arts. 1902.2, 1903.

115. *See id.* art. 1903, Annex 1903.2.

116. *See generally* Robert Howse, *Settling Trade Remedy Disputes: When the WTO Forum is Better than NAFTA*, 111 C.D. HOWE INSTITUTE COMMENTARY (1998). Canadian attorney Robert Howse criticizes the Chapter 19 process as ineffective with regard to politically-sensitive trade remedy disputes. *See id.* However, Howse erroneously appears to assume that Chapter 19 and the WTO Dispute Settlement Understanding provide alternative fora in which Canada may seek to resolve antidumping and countervailing duty disputes with the United States. *See id.* at 15.

117. *See* Brief for Intervenor the Government of Canada at 4, American Coali-

NAFTA Parties essentially adopted the same mechanism—but without the “temporary” aspect—when in the course of the NAFTA negotiations the United States again refused to incorporate special trade remedy provisions for its NAFTA partners.¹¹⁸

Under NAFTA Chapter 19, each Party’s substantive antidumping and countervailing duty laws continue to be applied, in accordance with the applicable statutes, legislative history, regulations, administrative practice, and judicial decisions.¹¹⁹ The Chapter 19 panels reviewing national administrative decisions are not international tribunals except in the sense that they are binational. The panels do not directly apply international law—provisions of the NAFTA, GATT Articles VI or XVI, or the provisions of the WTO Antidumping and Subsidies Agreements—except to the extent these international trade rules are considered part of the applicable national law.¹²⁰ Chapter 19 thus effectively substitutes a binational panel process for the federal courts of each party through which appeals from the administrative agencies are referred to five-person arbitral panels of trade experts who are nationals of the two countries whose citizens are involved in antidumping or countervailing duty actions.¹²¹ The panels’ powers are

tion for Competitive Trade v. United States, 128 F.3d 761 (D.C. Cir. 1997) (No. 97-1036); see also U.S. GEN. ACCOUNTING OFFICE, NO. GAO/GGD-95-175BR, U.S.-CANADA FREE TRADE AGREEMENT, FACTORS CONTRIBUTING TO CONTROVERSY IN APPEALS OF TRADE REMEDY CASES TO BINATIONAL PANELS 15 (1995) [hereinafter GAO Report]. Undoubtedly, Canada considered the costs and delays of the appellate process in antidumping and countervailing duty appeals to United States courts, and the perception of these courts as being overly deferential to the determinations of the Department of Commerce and the United States International Trade Commission, while negotiating the Canada-United States Free Trade Agreement. See GAO Report, *supra*, at 15. In particular, these considerations prompted Canadian negotiators to seek the special appellate process that removed such appeals from the jurisdiction of the federal courts of the United States and Canada. See *id.* (stating that “a major Canadian objective in the negotiations was to devise a new approach to replace these trade remedy laws”).

118. See NAFTA, *supra* note 1, Annex 1904.15 (providing Mexico’s schedule for implementation of the major procedural reforms in its domestic antidumping and countervailing duty laws).

119. See *id.* art. 1902.1.

120. Panel procedures are primarily governed by international rules and the Article 1904 Rules of Procedure; however, national law fills gaps where the Rules do not apply. See North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Reviews, 59 Fed. Reg. 8,686, 8,686 (1994).

121. See NAFTA, *supra* note 1, Annex 1901.2(1). The binational panelists

not co-equal with those of the federal courts. For example, a NAFTA panel may “uphold a final determination [of dumping or subsidies] or remand it for action not inconsistent with the panel’s decision.”¹²² It has no authority to reverse or dismiss an agency determination.¹²³

There is no appeal of a panel decision except where there is an allegation of gross misconduct, bias, or serious conflict of interest, where the panel decision departs from a fundamental rule of procedure, or where the panel exceeds its power, authority, or jurisdiction—including, significantly, and in a change from the CFTA, failure to apply the proper standard of review—and such actions materially affected the decision.¹²⁴ In such instances alone, an “extraordinary challenge procedure” or appeal is permitted to a special three person review panel for decision.¹²⁵

The very existence of the Chapter 19 panel process has become controversial in the United States. Some criticize the placement of decision-making power in the hands of individuals, including foreign nationals, who lack judicial experience, who are not accountable for their performance, who have not been appointed in accordance with Article III of the United States Constitution, and who may disregard

themselves are selected from standing rosters of at least twenty-five individuals designated by each of the NAFTA member states. *See id.* Furthermore, “candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law.” *Id.* Preference under the NAFTA is to be given to judges and former judges; however, no American judge or former judge has yet served on a NAFTA Chapter 19 panel, although at least one Canadian judge has been designated. *See* Telephone Interview with Cathy Beehan, Esq., Canadian NAFTA Secretary (Oct. 27, 1997) (transcript on file with the author). Panelists are normally trade practitioners or law professors serving on an ad hoc, part-time basis, and paid a very modest compensation—four hundred Canadian dollars per day as of the end of March 1999. *See id.* Since many are simultaneously practicing before the national trade agencies at the same time as they are serving as panelists, the risk of actual or apparent conflicts of interest is high, even though panelists are subject to a detailed code of conduct at the time of appointment and throughout their service as panelists. *See* Code of Conduct for Dispute Settlement Procedures Under Chapters Nineteen and Twenty of the North American Free Trade Agreement, 59 Fed. Reg. 8,721, 8,722 (1994).

122. NAFTA, *supra* note 1, art. 1904.8.

123. *See id.*

124. *See id.* art. 1904.13.

125. *Id.* Annex 1904.13.

the requirement that they behave like local courts and apply United States law.¹²⁶ Furthermore, there have been constitutional challenges against the panel process.¹²⁷ The absence of similar challenges to Chapter 20 may be due to the greater comfort level that many potential critics have with the concept of international arbitrators deciding questions of international—NAFTA or WTO—law, in a context where there is no alternative national court jurisdiction.

Appeals of administrative determinations in antidumping and countervailing duty cases disputes are the most common of those filed under NAFTA dispute settlement mechanisms, which is not surprising since the United States, Canada, and Mexico remain among the most frequent users of the antidumping laws. As of January 12, 1999, the countries filed a total of forty-four requests for re-

126. See *Joint Hearings on Extension of Fast Track Negotiating Authority Before the Subcomm. on Trade of the Committee on Ways and Means*, 102d Cong. 1-2 (1995) (statement of AK Steel Company, et al.) (opposing Fast-Track Procedures for Trade Agreements Containing the NAFTA Chapter 19 Binational Panel Dispute System). Opposition appears to be directed at problems encountered with a few well-publicized cases concerning softwood lumber, pork, and live swine, rather than the bulk of Chapter 19 cases that have resulted in unanimous and/or non-controversial decisions. See GAO Report, *supra* note 117, at 68 (listing the value of the imports involved in these three cases). Thus, in a study of fifteen cases challenging the determinations of the Department of Commerce and the United States International Trade Commission, only five—including those concerning live swine and softwood lumber—were not unanimous, and in only one did the panelists divide along nationality lines. See *id.* at 100-01.

127. See Harry B. Endsley, *Dispute Settlement Under the CFTA and NAFTA: From Eleventh-Hour Innovation to Accepted Institution*, 18 HASTINGS INT'L & COMP. L. REV. 659, 671-72 (1995) (discussing congressional concerns before the implementation of the CFTA). Plaintiffs have argued, *inter alia*, that the appointment of panelists without the advice and consent of the Senate is a violation of the "appointments" clause of the United States Constitution, Article II, Section 2(2), and that the removal of jurisdiction of the federal courts in favor of panels violates Article III, Section 1. See *NAFTA: Group Files Constitutional Challenge to NAFTA, Binational Panel System*, INT'L TRADE DAILY (BNA) 671-72 (Jan. 17, 1997), available in LEXIS, Bnaitd Library (discussing the filing of a complaint by the American Coalition for Competitive Trade). All constitutional challenges to the Chapter 19 panel process to date have been dismissed for lack of standing or withdrawn. See, e.g., *American Coalition for Competitive Trade v. United States*, 128 F.3d 761 (D.C. Cir. 1997). An action has also been filed challenging the NAFTA as a whole based on the fact that it was concluded as an executive agreement with Congressional approval rather than as a treaty. See *INSIDE U.S. TRADE*, Jul. 17, 1998, at 1, 21

view under the Chapter 19 mechanism.¹²⁸ Only one Chapter 19 matter to date has been subject to a parallel or subsequent proceeding before the WTO, although governments filed early WTO consultation requests with regard to Mexican tomatoes and American high fructose corn syrup. At this writing, the latter case is subject to both Chapter 19 adjudication and a request for WTO dispute settlement, and related issues—not directly involving Mexican antidumping laws—are before NAFTA Chapter 20 panels for consultations.¹²⁹

E. DISPUTE RESOLUTION IN THE WTO

Certain scholars have criticized the pre-1995 GATT dispute settlement's endless delays and political biases.¹³⁰ Under the consensus rules then in effect, a single GATT contracting party, including the offending party, could unilaterally block the adoption of panel reports indefinitely and thereby forestall remedial action. The WTO's DSU is intended to resolve most of these problems.¹³¹ In particular, panel decisions are adopted automatically unless there is consensus against their adoption—including the prevailing party.¹³²

128. See NAFTA Secretariat, *NAFTA Secretariat Status Report of Active and Completed NAFTA Panels* (Jan. 12, 1999) [hereinafter *NAFTA Secretariat Status Report*]. The forty-four requests include actions terminated by request of the interested parties before a decision was rendered, matters in which panel decisions have been rendered, but because of remands or other factors the cases have not been completed, matters under suspension pending completion of panel selection, and completed matters through decisions and compliance by Parties. *Id.*

129. See *infra* Parts II.A.9 and II.B.4 (discussing restrictions on sugar and high fructose corn sugar).

130. See JACKSON, *supra* note 21, at 99; see also BHALA & KENNEDY, *supra* note 28, at 26 (discussing dispute settlement in the pre-1995 GATT system).

131. For a comprehensive analysis of the first three years of WTO dispute resolution, see Timothy M. Reif & John R. Magnus, *Symposium on the First Three Years of the WTO Dispute Settlement System*, 32 INT'L L. 609 (1998) (detailing the symposium in reference to early operations of the DSU of the WTO). See also SPECIAL ISSUE: WTO DISPUTE SETTLEMENT SYSTEM, 1 J. INT'L ECON. L. 1, 175-327 (1998).

132. See BHALA & KENNEDY, *supra* note 28, at 39 (discussing the adoption of Panel and Appellate Body reports). While the two commentators have asserted that "the DSU guarantees the winning Member the fruits of its victory, even if all other WTO members object to the [panel] report," post-decision implementation remains less certain. See *id.*; see also *infra* notes 161-176 and accompanying text (detailing DSU WTO Appellate Body review and enforcement).

The NAFTA Chapter 20 and WTO DSU provide similar mechanisms for dispute resolution, but the process differs in significant respects, particularly in execution. The WTO process is managed by the DSB, constituting the full membership of the WTO,¹³³ and administered by the WTO Secretariat in Geneva.¹³⁴ While NAFTA incorporates a Free Trade Commission and a secretariat that on paper appear similar to the DSB and WTO Secretariat, both are creatures of the disputing parties when they are administering dispute settlement procedures. At least two members of the NAFTA Free Trade Commission are necessarily officials of the governments that are parties to a NAFTA Chapter 20 dispute.¹³⁵ In contrast, only two or a few WTO Members are parties to any single dispute under the WTO. Because the vast majority of the members of the DSB are not involved in the matter, they should be more or less impartial implementers of the dispute settlement process. Consequently, the existence of the independent DSB and the Secretariat appears somewhat more likely to assure the proper application and enforcement of the DSU's strict time limits.

As in the NAFTA, the DSU process begins with mandatory consultations.¹³⁶ If the WTO Member against which the request is made refuses to enter into consultations, or the consultations do not resolve the issue within sixty days of the request, the complaining Member may request the establishment of a panel.¹³⁷ Good offices, conciliation, and mediation through the person of the WTO Secretary General are available to the disputing Members, on a totally voluntary basis, and may continue even during the panel process.¹³⁸ Otherwise,

133. See DSU, *supra* note 2, art. 2.1 (providing a brief history of the dispute settlement body).

134. See *id.* art. 27 (listing the responsibilities of the Secretariat).

135. See NAFTA, *supra* note 1, art. 2001.1 (stating that the Free Trade Commission consists of the trade ministers of the three NAFTA governments).

136. See DSU, *supra* note 2, art. 4 (setting forth the procedures for consultations).

137. See *id.* art. 4.7 (explaining that the request may be made in less than sixty days if both Members agree, or in the event of urgency, including but not limited to perishable goods).

138. See *id.* art. 5.

the panel is automatically established no later than sixty days after the request for a panel is made.¹³⁹

Once the complaining Member insists on the establishment of a panel, the remaining dispute settlement process is subject to a strict timetable, with a limit of nine months for completion of the process or twelve months if there is an appeal.¹⁴⁰ Only if all disputing Members agree can the process be delayed.¹⁴¹ Moreover, the selection of panelists is largely automatic as well, eliminating another potential source of delay.

Essentially, the composition of the panel should be as follows:

[The panel should] be composed of well-qualified governmental and non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.¹⁴²

Panelists should be independent of the Members, and should reflect a diverse background with a wide range of experiences. Furthermore, the panelists need not have legal training or experience. Citizens of the disputing Members may not serve on panels in disputes in which their governments are parties, unless the disputing Members agree otherwise.¹⁴³ The Secretariat maintains a roster of potential panelists nominated by the WTO Member governments, and as of the end of 1996, the roster contained approximately 200 names.¹⁴⁴ As under the NAFTA, panelists serving in the WTO are subject to a code of conduct, designed to assure impartiality and

139. *See id.* art. 6.1 (stating that the Member against whom a complaint is lodged can object to the establishment of a panel at the first monthly meeting of the Dispute Settlement Body). The panel, however, will automatically be established at preceding monthly meeting of the DSB. *See id.*

140. *See id.* art. 20.

141. *See id.*

142. DSU, *supra* note 2, art. 8.1.

143. *See id.* arts. 8.2, 8.3.

144. *See* BHALA & KENNEDY, *supra* note 28, at 32.

avoid conflicts of interest.¹⁴⁵ Unless otherwise agreed, WTO panels consist of three persons.¹⁴⁶

The WTO procedures also contemplate a formal legal process, with briefing, a hearing, supplementary written submissions in appropriate circumstances, and written determinations.¹⁴⁷ The panel has broad discretion to “seek information and technical advice from any individual or body which it deems appropriate,”¹⁴⁸ subject to a requirement to advise the Member when the individual or body is within the jurisdiction of the Member. The panel may seek an advisory report from an expert review group where “a factual issue concerning an scientific or other technical matter raised by a party to a dispute” is at issue.¹⁴⁹ While there is no explicit right in the DSU itself permitting a disputing Member to provide expert testimony, there are no provisions that would preclude incorporating such information in the written filings of the Member before the panel, and the Appellate Body has explicitly ruled that briefs of non-governmental organizations appended to the briefs of the parties are to be treated by panels as part of the parties’ submissions.¹⁵⁰

Also, as with NAFTA Chapter 20, the deliberations of a WTO panel are confidential, and any opinions expressed by individual panel reports are anonymous.¹⁵¹ Information provided to a panel by experts remains confidential unless the submitter has formally authorized its release.¹⁵² Although the DSU does not appear to require closed proceedings, the entire panel process remains closed to the public, including the briefs, hearings, and panel report until deemed

145. See Rules of Conduct for Understanding on Rules and Procedures Governing the Settlement of Disputes, 1996, WTO Doc. No. WT/DSB/RC/1, art. IV, Annex 1a, 1b.

146. See DSU, *supra* note 2, art. 8.5 (stating that the Members may agree, up to ten days before the establishment of the panel, to a panel consisting of five people).

147. See *id.* art. 12.

148. *Id.* art. 13.1.

149. *Id.* art. 13.2.

150. See United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WTO Doc. No. WT/DS58/AB/R, at 30-31 (admitting briefs that were attached to party submissions).

151. See DSU, *supra* note 2, art. 14.

152. See *id.* art. 13.1.

final. Controversy has arisen in some instances because lawyer-consultants retained by some Members to assist with litigation before panels have not been permitted to attend the hearings.¹⁵³ Unfortunately, the United States government supports this exclusionary process.¹⁵⁴ However, the United States has taken the lead in advocating for a more transparent and open system. In a pending case relating to a dispute over Canada's dairy product import restrictions, the United States has argued unsuccessfully that the United States and Canada should set a favorable precedent by opening the proceedings to industry observers.¹⁵⁵ The United States has also called for the discussion of a more open system when the WTO's review of the DSU takes place in 1999.¹⁵⁶

The DSU requires the panel to circulate the factual and argument sections of its report to the disputing Members, obtain comments, and then circulate an interim report—including the panel's findings and conclusions—to the Members for comment.¹⁵⁷ The panel may hold an additional hearing on the issues raised, if a Member so requests.¹⁵⁸ The final report, reflecting any Member comments on the

153. See Steger & Hainsworth, *supra* note 24, at 220. Cf. WTO Appellate Body Report on European Communities-Regime for the Importation, Sale and Distribution of Bananas, Sept. 9, 1997, WTO Doc. No. WT/DS27/AB/R [hereinafter WTO Appellate Body Report on Bananas] (permitting a private legal adviser to the Government of St. Lucia to participate in the hearing). This particular aspect of the penchant for confidentiality is troubling for smaller member nations, who lacking sufficient international trade expertise within their governments may be required to seek outside legal assistance.

154. See Peter Lichtenbaum, *Procedural Issues in WTO Dispute Resolution*, 19 MICH. J. INT'L L. 1195, 1206-07 (1998) (stating that staff lawyers at the Office of the United States Trade Representative agree that private attorneys should not be permitted to attend panel hearings, not to mention present arguments).

155. See *Canada: Canada Says No to USTR Request for Industry Observers at WTO Talks*, INT'L TRADE DAILY (BNA) (Sept. 9, 1998), available in LEXIS, Bnaid Library (reporting that Canada rejected a proposal by the United States to allow industry observers to attend negotiations).

156. See *Preliminary Views of the United States Regarding Review of the DSU*, INSIDE U.S. TRADE, Nov. 6, 1998, at 9, 10 (stating the government's position that "the secrecy of submission fuels public suspicion of the dispute settlement process and undermines confidence in the WTO").

157. See DSU, *supra* note 2, art. 15.

158. See *id.* art. 15.2 (explaining that a party has the possibility, within a certain period of time, to submit a written request for the panel to review specific areas of

interim report, is then circulated to the DSB members. It is adopted automatically within sixty days unless the DSB rejects the report by consensus,¹⁵⁹ or unless an appeal is lodged by one of the disputing Members. This is in contrast to the earlier process under GATT Article XXIII, where any member government, including the government losing the panel decision, could unilaterally block adoption of the panel report.¹⁶⁰

Unlike NAFTA Chapters 20 and 19, and most other international arbitral procedures, the DSU provides an appellate level of review. The "Appellate Body" reviews panel decisions upon the request of any disputing Member.¹⁶¹ Specifically, it is authorized to conduct a review of the initial panel decision, "limited to issues of law covered in the panel report and legal interpretations developed by the panel."¹⁶² The Appellate Body is composed of seven members, three of whom are chosen to sit on each appeal, on a rotating basis.¹⁶³ Members of the Body serve four-year terms, with the possibility of reappointment for an additional term.¹⁶⁴ Basically, the Members are to be "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."¹⁶⁵ Proceedings before the Appellate Body are swift; they are normally completed in sixty days, with the possibility

the interim report before a final report is circulated to all Members).

159. See *id.* art. 16.4 (setting forth how a report is adopted or rejected).

160. See BHALA & KENNEDY, *supra* note 28, at 38-39 (delineating the old procedures for the adoption of panel and Appellate Body reports).

161. DSU, *supra* note 2, art. 17.

162. *Id.* art. 17.6.

163. See *id.* art. 17.

164. See *id.* art. 17.2. The initial seven members of the Appellate Body—nationals of the United States, Japan, Germany, Egypt, Uruguay, and the Philippines—reflect the directive that "the Appellate Body membership shall be broadly representative of membership in the WTO." *Id.* art. 17.3. Generally, the members of the Body receive an appointment for four-year terms, except three original members received an initial appointment of only two-year terms. See OFFICE OF THE U.S. TRADE REP., 1998 TRADE POLICY AGENDA AND 1997 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 67 (1998), available in <<http://www.ustr.gov/reports/tpa/1998/contents.html>>. Subsequently, the DSB re-appointed these three members to new four-year terms. See *id.*

165. DSU, *supra* note 2, art. 17.3.

of a maximum extension of ninety days.¹⁶⁶ Although adoption of the panel report by the DSB is stayed pending appellate review, the outcome of the appellate review is automatically adopted within thirty days of its circulation to the Members.¹⁶⁷

When the panel or Appellate Body determines that an action of a Member is inconsistent with one of the covered trade agreements, it recommends to the non-complying Member that it bring its actions into compliance and provides suggestions as to how that may occur.¹⁶⁸ Once the report is adopted by the DSB, the preferred result of the process is for the Member to eliminate its violation of the affected agreement, often by altering its national law or regulations, within a reasonable period of time; the Member has thirty days to advise the DSB whether it will comply.¹⁶⁹ Practice to date indicates that a “reasonable period of time” is frequently considered to be fifteen months—even where arguments could be made for a shorter compliance period.¹⁷⁰ If the Parties cannot agree upon a “reasonable period of time,” an arbitrator appointed by the Members or by the Secretary-General may determine the timetable.¹⁷¹ As the United

166. *See id.* art. 17.5 (stating the general rule regarding the duration of Appellate Body proceedings).

167. *See id.* art. 17.14 (delineating the adoption procedure).

168. *See id.* art. 19.

169. *See id.* art. 21 (discussing the surveillance of the implementation of recommendations and rulings of the DSB).

170. *See Preliminary Views of the United States Regarding Review of the DSU*, *supra* note 156, at 9 (stating the United States argument that “the negotiators of the DSU never intended that the period [for compliance with decisions] automatically be 15 months”).

171. *See DSU*, *supra* note 2, art. 21.3(c) (stating that a guide “should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report,” with the caveat that “the time may be shorter or longer, depending upon the particular circumstances”). In three of the four cases in which an arbitrator has been appointed under Article 21.3(c) to determine time for compliance with a WTO decision, the arbitrator determined that there were no “particular circumstances” that justified a departure from the fifteen-month guideline. *See European Communities-Measures Concerning Meat and Meat Products (Hormones)*, May 29, 1998, WTO Doc. No. WT/DS48/13 (Lacarte-Muro, Arb.); *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, Jan. 7, 1998, WTO Doc. No. WT/DS27/15 (El-Naggar, Arb.); *WTO Appellate Body Report on Bananas*, *supra* note 153; *Japan-Taxes on Alcoholic Beverages*, Feb. 14, 1997,

States government has carefully advised Congress, however, no Member is required as a result of an adopted panel or appellate report to change its laws or regulations.¹⁷²

If the Member found to be violating a covered trade agreement does not comply with the DSB's decision within a reasonable period of time, it may be required to enter into consultations "with a view to developing mutually acceptable compensation."¹⁷³ If a satisfactory arrangement on compensation is not reached within twenty days, the injured Member or Members may seek authorization from the DSB to retaliate against the violating Member by suspending tariff concessions or other obligations under the covered agreements, subject to certain guidelines and restrictions.¹⁷⁴ It is obvious from the language of the DSU, however, that the objective of the system is to eliminate Member actions that violate the covered agreements, rather than assure compensation for the resulting injuries.¹⁷⁵

Interestingly, the DSU fails to provide Members who settle their disputes without resort to arbitration the same mechanisms to assure that the settlement results are implemented. Rather, it leaves to the affected Members the responsibility of implementing settlement agreements; the injured Member may of course insist on formal DSU arbitration, but this is likely to occur only after significant delays.¹⁷⁶

WTO Doc. Nos. WT/DS10/15, WT/DS11/13, (Lacarte-Muro, Arb.) [hereinafter WTO Japan-Taxes on Alcoholic Beverages]. However, in the fourth case, the arbitrator indicated that under normal circumstances Indonesia should have been able to change its laws to comply with the WTO decision within six months, but permitted an additional six months for compliance due to Indonesia's status as a developing nation and its current financial crisis, for a total of twelve months. See Indonesia-Certain Measures Affecting the Automobile Industry, Dec. 7, 1998, WTO Doc. Nos. WT/DS59/13, WT/DS64/12 (Beeby, Arb.).

172. See The Uruguay Round Agreements Act: Statement of Administrative Action, Pub. L. No. 103-465, at 1008-09, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4300.

173. DSU, *supra* note 2, art. 22.2.

174. See *id.* arts. 22.2, 22.3 (stating that the process that must be followed for compensation and the suspension of concessions).

175. See *id.* art. 22.1 (setting forth that "[n]either 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").

176. See Shoyer, *supra* note 26, at 287.

II. EXPERIENCE UNDER NAFTA AND THE WTO

The actual jurisprudence created by NAFTA Chapter 20 and the WTO involving NAFTA parties in disputes against each other has been limited. There have been only two panel decisions under NAFTA Chapter 20 to date, and one decision at the WTO involving NAFTA Parties. However, there have been a total of eleven requests for consultation under the NAFTA mechanism and five under the WTO, a number of which remain pending as of January 31, 1999.¹⁷⁷ In at least four of the nine Chapter 20 requests—*Restrictions on Sugar*, *Safeguards on Brooms*, *Uranium Exports*, and the *Helms-Burton Act*—the Parties were required to decide on the most appropriate forum, and in each instance appear to have analyzed carefully the relevant factors. This history thus assists in understanding the manner in which the NAFTA governments are choosing a forum, on a case-by-case basis.

A. NAFTA CHAPTER 20

Overall, eleven matters have reached the consultation stage under NAFTA Chapter 20 through December 1998. Of these, one matter, *Uranium Exports*,¹⁷⁸ was clearly resolved through consultations. Two cases, *Agricultural Products Tariffication*¹⁷⁹ and *Safeguards on Brooms* (“*Brooms*”),¹⁸⁰ were submitted to panels and resulted in final panel reports, although the Chapter 20 process appears to have resolved definitively only one, *Agricultural Products Tariffication*. Two matters, *Restrictions on Tomato Imports* (“*Mexican Toma-*

177. See *infra* Parts II.A and II.B (analyzing the disputes among the NAFTA Parties under Chapter 20 and the WTO).

178. See generally *Canada Seeks NAFTA Consultations on U.S.–Russia Uranium Agreement*, INT’L TRADE DAILY (BNA) (Mar. 29, 1994), available in LEXIS, Bnaid Library [hereinafter *Canada Seeks Consultations on Uranium Agreement*] (providing an overview of the relevant issues in the *Uranium Exports* NAFTA matter); *infra* Part II.A.1 (discussing *Uranium Exports* dispute).

179. See NAFTA Dispute Panel Report on *Agricultural Products Tariffication*, *supra* note 91; *infra* Part II.A.2 (discussing the *Agricultural Products Tariffication* dispute).

180. See NAFTA Dispute Panel Report on *Brooms*, *supra* note 91; *infra* Part II.A.8 (discussing the *Broom Corn Brooms* dispute).

toes")¹⁸¹ and the *Helms-Burton Act*,¹⁸² were essentially resolved through mechanisms distinct from Chapter 20. The first sugar matter appears to have been resolved in bilateral consultations between Canada and the United States,¹⁸³ but a separate sugar related case between the United States and Mexico is pending.¹⁸⁴ The latter is linked to a United States WTO action challenging Mexico's imposition of antidumping duties on U.S. origin high fructose corn syrup. Four other matters, *Restrictions on Small Package Delivery* ("Small Package Delivery"),¹⁸⁵ *Truck Transport*,¹⁸⁶ *Bus Transport*,¹⁸⁷ and *Farm Products Blockade*¹⁸⁸ also remain pending or, in the case of agricultural shipments, suspended. The United States has been a party

181. See *U.S.-Mexico Consultations to Continue on Trucking, Tomato Quota, SECOFI Says*, 13 INT'L TRADE REP. (BNA) 102, 102 (Jan. 24, 1996) [hereinafter *NAFTA Tomato Consultations*]; *infra* Part II.A.6 (discussing the tomato tariff import dispute).

182. See *Canada Unwilling to Challenge Helms-Burton Over Fear of Impact on NAFTA*, 14 INT'L TRADE REP. (BNA) 1912, 1912 (Nov. 5, 1997) [hereinafter *Canada Unwilling to Challenge*]; *infra* Part II.A.7 (discussing the *Helms-Burton Act* dispute).

183. See Office of the U.S. Trade Representative, Exchange of Letters re: Sugar (visited Jan. 21, 1999) <<http://infoserve2.ita.gov/tcc/intern>>; Canadian Official Interview, *supra* note 61; *infra* Part II.A.3 (discussing Canadian sugar dispute).

184. See *Mexico Takes Next Step in Sugar Dispute as U.S. Fights HFCS Duties*, AMERICAS TRADE, Nov. 26, 1998, at 24 [hereinafter *Mexico Takes Next Step*] (discussing Mexico's request for a meeting of the Free Trade Commission); *infra* Parts III.A.9, III.B.4 (discussing Mexican sugar dispute under NAFTA Chapter 20 and the WTO Dispute Settlement Body).

185. See generally *USTR Asks Mexico For Consultations Over Treatment Of Express Delivery Firm*, INT'L TRADE DAILY (BNA) (Apr. 27, 1995), available in LEXIS, Bnaid Library [hereinafter *Consultations Over Package Deliveries*]; *infra* Part II.A.4 (discussing the *Small Package Delivery* dispute).

186. See *NAFTA: Mexico Seeks NAFTA Arbitration Panel on U.S. Resistance to Mexican Truckers*, INT'L TRADE DAILY (BNA) (Sept. 25, 1998), available in LEXIS, Bnaid Library [hereinafter *Mexico Seeks Panel on Truckers*]; *infra* Part II.A.5 (discussing the *Truck Transport* dispute).

187. See John Nagel, *NAFTA: Mexico Calls NAFTA Trade Minister Meeting to Gain Cross-Border Access for Its Trucks*, INT'L TRADE DAILY (BNA) (July 28, 1998), available in LEXIS, Bnaid Library [hereinafter *Consultations Sought on Truck and Bus Access*]; *infra* Part II.A.11 (discussing the *Bus Service* dispute).

188. See *U.S., Canada Agree to Intensive Trade Talks Aimed at Settling Disputes Over Farm Trade*, INT'L TRADE DAILY (BNA) (Oct. 6, 1998), available in LEXIS, Bnaid Library; *infra* Part II.A.10 (discussing the *Farm Products Blockade* dispute).

in all eleven matters, a moving party in three and a respondent in eight. Mexico has been a moving party in five and a respondent in two, while Canada has been a moving party in four and a respondent in one. There have been no cases brought by Mexico against Canada, or Canada against Mexico.

The volume of final panel decisions is thus considerably less than those rendered under the CFTA, totaling five decisions in five years.¹⁸⁹ During that same period, the United States and Canada were involved in five panel proceedings under GATT Article XXIII.¹⁹⁰

I. Uranium Exports (*Can. v. U.S.*)

In March 1994, Canada sought consultations with the United States under Chapter 20 regarding exports of uranium from Canada, in light of an agreement concluded between the United States and Russia to resolve an antidumping complaint.¹⁹¹ Canada claimed that the agreement violated the United States' "national treatment" obli-

189. See FTA Secretariat, *In re Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*, USA-93-1807-01, Report of the Panel (June 3, 1993); FTA Secretariat, *In re Interpretation of and Canada's Compliance With Article 701.3 with Respect to Durum Wheat Sales*, CAD-92-1807-01, Report of the Panel (Feb. 8, 1993); FTA Secretariat, *In re Article 304 and the Definition of Direct Cost of Processing Direct Cost of Assembling*, USA-92-1807-01, Report of the Panel (June 8, 1992); FTA Secretariat, *In re Lobsters from Canada*, USA-89-1807-01, Report of the Panel (May 25, 1990); FTA Secretariat, *In re Canada's Landing Requirement for Pacific Coast Herring, Salmon*, CDA-89-1807-01, Report of the Panel (Oct. 16, 1989).

190. See GATT Secretariat, *United States-Measures Affecting Imports of Softwood Lumber from Canada*, SCM/162, Report of the Panel (Oct. 27, 1993); GATT Secretariat, *Panel on Import, Distribution and Sale of Alcoholic Drinks By Canadian Provincial Marketing Agencies*, L/6304-355/37, Report of the Panel (Mar. 22, 1988); GATT Secretariat, *United States-Measures Affecting Alcoholic and Malt Beverages*, DS23/R-39S/206, Report of the Panel (June 19, 1992); GATT Secretariat, *Panel on Canadian Countervailing Duties on Grain Corn From the United States*, SCM/140 & Corr. 1-39S/411, Report of the Panel (Mar. 26, 1992); GATT Secretariat, *United States-Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, DS7/R-38S/30, Report of the Panel (July 11, 1991); GATT Secretariat, *Canada-Import Restrictions on Ice Cream and Yoghurt*, L/6568-36S/68, Report of the Panel (Dec. 5, 1989).

191. See *Canada Seeks Consultations on Uranium Agreement*, *supra* note 178 (stating that Canada requested consultations with the United States and notified Mexico).

gations under both the NAFTA and the GATT.¹⁹² The consultations held in October 1994 apparently produced assurances from the United States government that Canadian interests would be taken into account.¹⁹³ As a result, Canada did not seek further redress. Canada presumably could have requested consultations under the dispute settlement provisions of GATT Article XXIII and the 1979 Anti-dumping Code,¹⁹⁴ but did not do so, perhaps because it felt the new NAFTA Chapter 20 procedures were more promising.¹⁹⁵

2. *Agricultural Products Tariffication (U.S. v. Can.)*

In February 1995, after Canada began to implement the "tariffication" requirements of the WTO Agreement on Agriculture, which resulted in a conversion of quotas into high tariff rates, the United States requested consultations.¹⁹⁶ The United States argued that the actions, while legal under the WTO with regard to other WTO Members, were in conflict with Canada's NAFTA obligations. Formal consultations, which took place in March 1995, and a referral to the Free Trade Commission, which met in June 1995, were unsuccessful in resolving the dispute, and in July 1995, the United States requested that an arbitral panel be convened. Since this was the first panel request under Chapter 20, delays occurred in the process of choosing the panelists and the chairperson. Ultimately, in January 1996 the governments selected a distinguished British law professor as chairman.¹⁹⁷

192. *See id.* (listing Canada's contentions).

193. *See U.S. Barriers Still in Place, Says 1995 Canadian Register*, 12 INT'L TRADE REP. (BNA) 624, 625 (Apr. 5, 1995) (stating that "Canada has improved access to the U.S. market over the past 12 months through consultations, negotiations, and dispute settlement").

194. *See Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 9, 1979, 18 I.L.M. 621.

195. The WTO DSU did not become effective for the United States and Canada until January 1, 1995.

196. *See U.S. Requests Panel to Settle Canada Dairy Dispute*, U.S.-MEX. FREE TRADE REP., Aug. 21, 1995, at 5 (stating that this was the first case under NAFTA's Chapter 20 dispute settlement process).

197. *See NAFTA Chapter 20 Panel Selected in Farm Tariff Flap with Canada*, 13 INT'L TRADE REP. (BNA) 104, 104 (Jan. 24, 1996). The panel included Canadian law professors Ronald C.C. Cuming and Donald M. McRae, American law

While the dispute involved both GATT/WTO and NAFTA issues, the United States probably did not have any reasonable alternative to Chapter 20. No argument could be made that Canada had violated the WTO Agreement on Agriculture; rather, Canada's implementation of its obligations under the WTO led to the charges of NAFTA violations.

The case involved a direct conflict between Canada's NAFTA and WTO obligations. The WTO Agreement on Agriculture required Canada to convert quantitative restrictions to tariffs (a process known as "tariffication") beginning in 1995. The United States argued that the imposition of such tariffs for imports on agreed quota levels violated the NAFTA prohibition on tariff increases and the NAFTA obligation to progressively reduce tariffs.¹⁹⁸ Canada argued that neither the CFTA nor NAFTA constituted an agreement on treatment on the terms of market access for the goods now subject to increased tariff, and that under the NAFTA, which incorporated certain provisions of the CFTA, the United States and Canada had agreed that such trade would be governed by the emerging Uruguay Round agreements.¹⁹⁹ Specifically, NAFTA, Annex 702.1, incorporates CFTA Article 710, *inter alia*, by reference. CFTA Article 710 states that "[u]nless otherwise specifically provided in the Chapter, the Parties retain their rights and obligations with respect to agricultural, food, beverage, and certain related goods under the *General Agreement on Tariffs and Trade* (GATT) and agreements negotiated under the GATT, including their rights and obligations under GATT Article XI."²⁰⁰ GATT Article XI generally prohibits quantitative restraints, but provides certain exceptions for agricultural products. Under those circumstances, the replacement of non-tariff barriers with tariffs for agricultural products in accordance with the WTO Agreement on

professors Sidney Picker, Jr. and Stephen Zamora, and British law professor Elihu Lauterpacht. See NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91, at *1-*2.

198. See NAFTA, *supra* note 1, arts. 301(1)-(2). See also NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91, at *6.

199. See NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91, at *9.

200. CFTA, *supra* note 16, art. 710.

Agriculture was consistent with Canada's obligations under the NAFTA.²⁰¹

On July 16, 1996, the panel issued a preliminary report to the parties that essentially accepted the Canadian viewpoint.²⁰² After a comment period that ultimately delayed issuance of the final report, the panel issued a final report²⁰³ on December 2, 1996 that unanimously supported the Canadian analysis of the issues. The Report accepted the Canadian thesis that CFTA Article 710, preserving Canada's GATT rights, had been incorporated into NAFTA—through Annex 702.1—and rejected American contentions that the generally applicable NAFTA restrictions on tariff increases should prevail. It also accepted Canada's contention that even though CFTA Article 710 makes no reference to successor agreements to the GATT, later GATT modifications, including the WTO Agreement on Agriculture, effectively should be incorporated into the CFTA and NAFTA.²⁰⁴

Given that this was the first panel convened under Chapter 20, the fact that the process ultimately required twenty-two months from the date of the request for consultations to the date of the final report was neither particularly surprising nor unreasonable.²⁰⁵ Much of the delay

201. See NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91, at * 25.

202. See generally *U.S. Will Pursue Free Access to Canada for Certain Farm Products*, INT'L TRADE DAILY (BNA) (Sept. 26, 1996), available in LEXIS, Bnaid Library.

203. See NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91, at *81.

204. See *id.* at *58.

205. See *United States Asks for Panel to Examine New Canadian AG Tariffs*, INT'L TRADE DAILY (BNA) (July 18, 1995), available in LEXIS, Bnaid Library; see also NAFTA Dispute Final Report on Agricultural Products Tariffication, *supra* note 91, at *2-*3 (setting forth the schedule of the Binational Panel Review). The schedule was as follows:

February 2, 1995	United States request for consultations
March 1, 1995	Consultations between the Parties
June 1, 1995	United States request for Free Trade Commission meeting
June 7, 1995	Free Trade Commission meeting
July 14, 1995	United States request for panel
January 19, 1996	Panel constituted

—up to six months—resulted from the disagreement over the selection of the chairperson of the panel.²⁰⁶ The initial report generated both initial comments and a panel request for additional views from Canada, necessitating a three-month delay for the issuance of the final report.²⁰⁷ Since the panel supported existing Canadian actions, the issue of implementation did not arise. Nevertheless, the United States Government promised to continue to press Canada to eliminate the increased duties on agricultural products and facilitate better market access.²⁰⁸

3. *Import Restrictions on Sugar (Can. v. U.S.)*

Also in February 1995, Canada requested consultations regarding American import restraints on sugar imported from Canada.²⁰⁹ Canada was apparently concerned that United States implementation of the WTO Agreement on Agriculture prejudiced Canadian sugar exports to the United States, and that the implementation violated both the NAFTA and the WTO agreements.²¹⁰ Consultations were initially unsuccessful, and the matter was referred to the Free Trade Commission. In a related matter, Canadian sugar producers filed an anti-dumping action against refined sugar from the United States, which resulted in the imposition of antidumping duties. Specifically, the bi-

July 15, 1996 Initial Panel report circulated to the Parties

December 2, 1996 Final Panel report issued

Id.

206. See *NAFTA Dispute Panel in Place to Review Canadian Agriculture Tariffs*, INT'L TRADE DAILY (BNA) (Jan. 23, 1996), available in LEXIS, Bnaitd Library.

207. See *NAFTA Dispute Panel Report on Agricultural Products Tariffication*, *supra* note 91, at *4 (stating that “the fact of these exchanges meant that the panel was not in a position to present its Final Report to the disputing Parties on August 15, 1996 as previously determined”).

208. See *NAFTA Panel Upholds Canada in Dispute Over High Tariffs on U.S. Dairy Products*, INT'L TRADE DAILY (BNA) (Dec. 4, 1996), available in LEXIS, Bnaitd Library.

209. See *Canadian Government Seeks NAFTA Talks on U.S. Restrictions on Sugar Exports*, INT'L TRADE DAILY (BNA) (Feb. 14, 1995), available in LEXIS, Bnaitd Library (explaining Canada's application for formal procedures after informal discussions did not yield results).

210. See *id.*

national panel convened under NAFTA Chapter 19 affirmed the antidumping determination upon remand.²¹¹ At this time, Canadian government officials denied before Parliament that the filing of the antidumping action would prevent the continuation of bilateral consultations. Ultimately, perhaps as a result of increased pressure from its sugar producers, Canada negotiated a quota agreement with the United States.²¹²

4. *Restrictions on Small Package Delivery (U.S. v. Mex.)*

In April 1995, the United States sought consultations with Mexico arising out of Mexico's refusal to provide "national treatment" to an American-owned package delivery firm—the United Parcel Service ("UPS"). Mexico refused to allow UPS to utilize the same large trucks as its Mexican competitors.²¹³ While the dispute apparently was discussed in a meeting of the Free Trade Commission, there has been no formal resolution of the case, even though "informal" discussions were reported to be continuing as late as October 1996.²¹⁴ Meanwhile, UPS announced that it planned to abandon its Mexican operations, contending that "[b]urdensome customs procedures and protectionist regulatory practices have made our ground service to Mexico inefficient and costly to operate."²¹⁵ As this issue related solely to Chapter 19 of the NAFTA, there was no basis for pursuing the matter before the WTO.

211. See *In re Final Determinations of Dumping Regarding Certain Refined Sugar Refined from Sugar Cane or Sugar Beets, in Granulated, Liquid and Powdered Form, Originating in or Exported from the United States of America*, CDA-95-1904-04, Memorandum Opinion and Order, (Oct. 9, 1996); see also *NAFTA Secretariat Status Report*, *supra* note 128, at 8.

212. See Canadian Official Interview, *supra* note 61; see also Exchange of Letters, *supra* note 183.

213. See *Consultations Over Package Delivery*, *supra* note 185 (describing the United States' decision to request formal consultations under Chapter 20).

214. See Report on Trade Expansion Priorities Pursuant to Executive Order 12,901, 61 Fed. Reg. 52,827, 52,832 (1996).

215. Martha Brannigan, *UPS Cancels Land Service to Mexico*, WALL ST. J., July 12, 1995, at A2 (discussing UPS' complaints about Mexican government procedures).

5. Truck Transport (*Mex. v. U.S.*)

In January 1996, Mexico requested consultations with the United States regarding the refusal of the United States to comply with NAFTA requirements permitting the trucks of one country to deliver goods in the border states of the other country as of December 17, 1995.²¹⁶ The United States cited safety concerns for deferring implementation of the NAFTA requirements,²¹⁷ and the Teamsters' Union sought to enjoin Mexican truck access for similar reasons.²¹⁸ Unsuccessful consultations began in April 1996,²¹⁹ and have continuously failed to resolve the dispute. Finally, in July 1998²²⁰ Mexico formally requested a meeting of the Free Trade Commission and in August 1998,²²¹ the Commission convened to discuss the same dispute. On

216. See *Mexico Seeks Panel On Truckers*, *supra* note 186 (discussing announcement of request and justifications for consultations); *Mexico Expects to Consult on Trucking Under NAFTA Chapter 20*, *Official Says*, 13 INT'L TRADE REP. (BNA) 69, 69 (Jan. 17, 1996). Cf. generally Pamela C. Schmidt, Comment, *NAFTA: The Effect of the Motor Carrier Provisions on the Future of the Agreement*, 20 HASTINGS INT'L & COMP. L. REV. 505 (1997) (analyzing the trucking provisions of the NAFTA); NAFTA, *supra* note 1, Annex I (providing Mexico and United States' NAFTA requirements regarding Transportation: Land Transportation, Trucking, Courier Services, Intercity and Rural Bus Transportation, Bus Charter Service). As of three years from the date of signature of NAFTA—December 17, 1992—the United States must allow Mexican truck lines to operate such services in the four American border states, and Mexico must permit United States truck lines to work in the ten Mexican border states; as of six years from the date of signature—which would have been December 17, 1998—Mexico and the United States are to provide each other's trucks with full access to the other's territory for international shipments. See Schmidt, *supra*, at 505-06.

217. See *Consultations Sought on Bus and Truck Access*, *supra* note 187 (stating that the "U.S. government denied access to Mexican truckers, saying that Mexican vehicles failed to meet U.S. safety standards"). Cf. *NAFTA Mexico and United States Examine Safety Process For Trucks*, INT'L TRADE DAILY (BNA) (Apr. 24, 1996), available in LEXIS, Bnaitd Library [hereinafter *Mexico and United States Examine Safety Process*].

218. See Diane Lindquist, *Teamsters Try and Put Brakes on All of NAFTA*, SAN DIEGO UNION-TRIB., Oct. 9, 1996, at C-2 (describing the Teamsters Union's intent to delay the implementation of NAFTA provisions allowing Mexican cargo trucks in four American states bordering Mexico).

219. See *Mexico and United States Examine Safety Process*, *supra* note 219.

220. See *Consultations Sought on Truck and Bus Access*, *supra* note 187.

221. See John Nagel, *NAFTA Cross-Border Trucking Group Meets; Little Progress Reported, More Meetings Set*, INT'L TRADE DAILY (BNA) (Aug. 21, 1998),

September 23, 1998, after the Commission failed to resolve the dispute, the Mexican government requested the creation of an arbitral panel.²²² As the matter relates solely to an interpretation of NAFTA obligations,²²³ there was no basis for Mexico to seek adjudication by the WTO.

6. *Restrictions on Tomato Imports (Mex. v. U.S.)*

Responding to United States implementation of a tariff-rate quota on tomatoes from Mexico, the Mexican government requested Chapter 20 consultations in January 1996.²²⁴ However, resolution of the tomato quota dispute occurred via a separate United States anti-dumping action against Mexican tomatoes pursuant to a suspension agreement concluded under American antidumping laws.²²⁵ Under the agreement, Mexican tomato growers agreed to raise prices to eliminate the injurious effect of dumping.²²⁶ Therefore, there is no evidence that the Chapter 20 mechanism was instrumental in resolving the dispute. Mexico also filed a request for WTO consultations, which is discussed below in Part II.B.1.

7. *Helms-Burton Act (Mex. and Can. v. U.S.)*

In March 1996, Canada requested Chapter 20 consultations as a result of the United States enactment of the Helms-Burton Act,²²⁷ and

available in LEXIS, Bnaitd Library.

222. See *Mexico Seeks NAFTA Arbitration Panel on U.S. Resistance to Mexican Truckers*, INT'L TRADE DAILY (BNA) (Sept. 25, 1998), available in LEXIS, Bnaitd Library.

223. See NAFTA, *supra* note 1, art. 1202, Annex I (outlining standards for national treatment).

224. See *NAFTA Tomato Consultations*, *supra* note 181, at 102 (stating that the United States' "proposal to alter the regime under which quotas for Mexican tomato imports are calculated came after complaints by Florida Tomato growers that surges of Mexican tomatoes entering the United States were decimating the Florida industry").

225. See *Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,618, 56,619 (1996) (reporting the U.S. Commerce Department's suspension of antidumping investigation involving fresh tomatoes from Mexico).

226. See *id.* (summarizing resolution of investigation).

227. Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. secs.

Mexico exercised its NAFTA rights to participate in the consultations.²²⁸ Both countries argued that the provisions of the Act creating a private right of action for American citizens, including naturalized Cuban-Americans, against foreign companies who were “trafficking” in property expropriated by the Castro regime and limitations on travel in the United States for executives of such “trafficking” foreign parties could be violations of various provisions of the NAFTA.²²⁹ The Free Trade Commission convened in mid-1996 to discuss the issues, but did not resolve the dispute²³⁰ due to Canadian concerns that a final disposition would adversely impact other NAFTA benefits.²³¹ The European Union brought a parallel action in the WTO, but the European Union indefinitely suspended the matter after President Clinton agreed to exercise his authority under the Act to suspend the private right of action provisions—at six month intervals—and to seek legislation that would overturn the immigration provisions of the Act.²³²

Neither Canada nor Mexico joined the European Union action against the United States nor have they pursued the action brought under Chapter 20. Contending that Helms-Burton violated both the NAFTA and the GATT/WTO rules, however, Canada and Mexico could have joined the European Union’s WTO action at the outset in lieu of seeking a NAFTA Chapter 20 resolution. As discussed above,

6021-91 (1996).

228. See *NAFTA: Canada Files Formal NAFTA Challenge of U.S. Law Blocking Trade With Cuba*, INT’L TRADE DAILY (BNA) (Mar. 14, 1996), available in LEXIS, Bnaitd Library.

229. See *NAFTA*, *supra* note 1, chs. 11, 16. Arguably, the legislation violated the national treatment provisions of Chapter 11 (relating to investment) and the business travel provisions of Chapter 16 (temporary entry for business purposes).

230. See *NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 INT’L TRADE REP. (BNA) 1093, 1093 (July 3, 1996).

231. See *Canada Unwilling to Challenge*, *supra* note 182, at 1912-13 (describing Canada’s reluctance to challenge Helms-Burton under the NAFTA or the WTO).

232. See *United States-The Cuban Liberty and Democratic Solidarity Act*, May 3, 1996, WTO Doc. No. WT/DS38. The European Union suspended this request on April 21, 1997, and the Panel’s authority lapsed on April 22, 1998, under DSU Article 12.12. See *EU Suspends Effort to Challenge in WTO Helms-Burton Legislation*, 14 INT’L TRADE REP. (BNA) 742 (Apr. 23, 1997); see also DSU, *supra* note 2, art. 12.12.

once they initiated the NAFTA action, Canada and Mexico were precluded under the NAFTA from raising the same issues at the WTO.²³³ Presumably, Mexico and Canada chose the NAFTA consultations mechanism because the Helms-Burton immigration provisions were arguably a violation of the NAFTA²³⁴ and the various WTO agreements do not contain provisions relating directly to immigration.

8. *Safeguards on Brooms (Mex. v. U.S.)*

When the United States applied safeguards²³⁵ under United States law on broom corn brooms in August 1996, Mexico requested Chapter 20 consultations.²³⁶ Neither consultations nor Free Trade Commission discussions were successful.²³⁷ In December 1996, Mexico exercised its rights under the NAFTA²³⁸ and retaliated

233. See NAFTA, *supra* note 1, art. 2005.6 (stating that “forum selected shall be used to the exclusion of the other”).

234. See *id.* ch. 16 (incorporating NAFTA provisions that the Helms-Burton Act arguably violates concerning temporary entry of business persons).

235. See NAFTA Dispute Panel Report on Brooms, *supra* note 91 (explaining tariff obligations on broom corn brooms under the NAFTA). Under the NAFTA, imports into the United States of the brooms affected by the safeguards action had been entirely duty free as of January 1, 1994—valued at not more than 96 cents—or duty-free until a quota of 100,000 dozen units had been imported, after which the tariff was 22.4%—brooms valued at over 96 cents per unit. See *id.* at 1-2. Acting under authority of NAFTA Chapter 8, President Clinton established a three tariff-rate quota on the first category of brooms on November 28, 1996, under which all brooms over 121,478 dozen were subject to a tariff of 33 cents the first year, 32.5 cents the second year, and 32.1 cents the third year. See *id.* at 4. For the second category, brooms imported within the 100,000 units quota remained duty free, but the tariff on imports in excess of the quota was raised from 22.4% to 33% the first year, 32.5% the second year, and 32.1% the third year. See *id.* at 4-5.

236. See *Mexico Requests NAFTA Consultations Over Broom Corn Brooms Ruling by U.S.*, INT'L TRADE DAILY (BNA) (Aug. 28, 1996), available in LEXIS, Bnaid Library.

237. See NAFTA Dispute Final Report on Brooms, *supra* note 91, at 5 (explaining that Mexico and the United States held consultations in September and October 1996, and that Mexico requested a meeting of the Free Trade Commission on November 25, 1996).

238. See NAFTA, *supra* note 1, art. 802.6 (stating that “[i]f the Parties concerned are unable to agree on compensation, the Party against whose goods the action is taken may take action having trade effects substantially equivalent to the action taken”). Retaliation is also permitted after a Chapter 20 panel decision if the losing party does not comply with the results. See *id.* art. 2019.

against the American safeguards action by raising Mexican tariffs on table wines and other liquor products, certain furniture, flat glass, and chemically pure sugar products.²³⁹ The Mexican government explicitly chose these items because Mexico perceived the items as politically-sensitive and influential.²⁴⁰ Mexico requested the establishment of a NAFTA Chapter 20 panel in January 1997, which was ultimately created in July 1997.²⁴¹

In *Brooms*, Mexico argued that the United States' safeguards action violated both the NAFTA and the GATT; this contention marked the first and only time that a NAFTA Party has asked a NAFTA Chapter 20 panel to decide issues under both agreements. First, Mexico argued that the United States International Trade Commission ("USITC") violated the "completeness, consistency and transparency" requirements of NAFTA when it determined the level of injury to United States broom corn producers. In particular, Mexico disagreed with the USITC's determination that the relevant United States "domestic industry" consisted only of broom corn broom producers, rather than all broom producers—including those whom manufactured broom of plastic.²⁴² Thus, Mexico contended before the panel that the USITC's definition of "like product"—broom corn brooms rather than all brooms—was inconsistent with either the GATT or NAFTA requirements, and, in any event, was not properly explained in the USITC opinion.²⁴³ Furthermore, Mexico argued that

239. See *NAFTA: Mexico Raises Tariffs on U.S. Goods in Response to Corn Broom Safeguard*, INT'L TRADE DAILY (BNA) (Dec. 16, 1996), available in LEXIS, Bnaidd Library (reporting Mexico's announcement regarding tariff increases from 2% to 20% on certain American products).

240. See *id.* (quoting Secretaria de Comercio y Fomento Industrial (SECOFI) officials).

241. See NAFTA Dispute Final Report on Brooms, *supra* note 91, at 6. The panelists consisted of two American law professors, Robert E. Hudec and John H. Barton; a Mexican attorney/law professor; Dionisio Kaye; a Mexican attorney, Raymundo Enriquez; and an Australian government official, Paul O'Connor, as chairperson. See *id.* at 29.

242. See *id.* at 10.

243. See *id.* (arguing that the ITC determination rested on a definition of "like-product" that was not in accordance with the correct legal definition of that term in GATT/WTO and NAFTA agreements and certain elements of the ITC failed to conform with NAFTA Article 803 and Annex 803.3); see also NAFTA, *supra* note 1, art. 803 and Annex 803.3. The choice of the domestic industry and like product

the dispute arose under both the NAFTA and GATT, and therefore, under NAFTA Articles 802.1 and 2005, Mexico had the option of seeking dispute resolution under either NAFTA Chapter 20 or the GATT/WTO alternative.²⁴⁴

In contrast, the United States, in addition to defending the “domestic industry” and “like product” findings of the USITC, argued that the NAFTA panel lacked jurisdiction to adjudicate the validity of “global safeguard measures” under the WTO, because GATT Article XIX and the safeguards agreement had not been explicitly incorporated by reference into NAFTA Article 802.1.²⁴⁵ In its final report, the panel sidestepped the procedural issue of whether it had jurisdiction to determine whether the United States safeguards action was inconsistent with GATT Article XIX and the WTO Agreement on Safeguards. It decided instead that “it was possible to dispose of the issues in dispute under the NAFTA agreement alone,” in part because the provisions of the NAFTA and the WTO Safeguards Agreement have essentially the same requirements with regard to the requirement that the investigating authority—the USITC in the United States—set out its findings and conclusions in detail.²⁴⁶ The panel further observed the following:

is critical to a finding of “serious injury” in a safeguards case. *See* NAFTA Dispute Final Report on Brooms, *supra* note 91, at 7. If the United States industry and the like product are limited to broom corn brooms, the USITC compares American production of broom corn brooms to imports of broom corn brooms. *See id.* Mexico contended that the ITC analysis should have been based on analysis of the economic condition of both groups of United States producers—plastic brooms and broom corn brooms—as a result of increased imports of broom corn brooms. *See id.*

244. NAFTA Article 802.1 provides in pertinent part that “Each Party reiterates its rights and obligations under Article XIX of GATT or any safeguards agreement pursuant thereto. . . .” NAFTA, *supra* note 1, art. 802.1; *see also* NAFTA, *supra* note 1, art. 2005.1 (providing that disputes arising under NAFTA, GATT, or “successor agreements” can be adjudicated in either forum); *see also* NAFTA Dispute Final Report on Brooms, *supra* note 91, at 11 (discussing the panel’s jurisdiction over GATT/WTO issues).

245. NAFTA Dispute Final Report on Brooms, *supra* note 91, at 10. The United States also raised certain procedural arguments. *See id.* (arguing that Mexico “failed to give timely notice” of the claim).

246. *See id.* at 19 (applying NAFTA Annex 803.3(12) and Art. 3.1 of the WTO Safeguards Code).

Since the NAFTA and WTO versions of the rule are substantively identical, application of the WTO version of the rule would have in no way changed the legal conclusion reached under NAFTA 803.3(12). Accordingly, the panel chose to rest its decision entirely on NAFTA Annex 803.3(12), without relying on Article 3.1 of the WTO Safeguards Code.²⁴⁷

Since it is unlikely that the panel would chose this analysis over the objections of Mexico and the United States, one may speculate that at some time during the panel process—perhaps after the interim opinion was circulated to the Parties²⁴⁸—the two governments agreed to accept a decision based solely on the NAFTA. Perhaps either or both countries were mindful that a decision based on GATT Article XIX or the WTO Safeguards Agreement would create a precedent that might be relied upon in the future by a WTO panel; whereas, a decision based solely on NAFTA Chapter 8 could have repercussions only for future safeguards disputes under NAFTA.

On the merits, the panel concluded that the USITC's definition of "domestic industry" had indeed been critical. Since plastic brooms were displacing broom corn brooms within the United States market, the limitation of the domestic industry to broom corn brooms "increased the likelihood of finding injury."²⁴⁹ According to the panel, this necessarily raised the "like product" issue, which the USITC decision failed to address.²⁵⁰ Thus, the panel concluded that "the ITC's determination on the issue of 'domestic industry' is inconsistent with U.S. obligations under NAFTA, Annex 803.3(12) of the NAFTA Agreement,"²⁵¹ and the panel recommended that the United States "bring its conduct into compliance with the NAFTA at the earliest possible time."²⁵²

247. *Id.*

248. *See id.* at 6 (stating that documents were circulated on December 23, 1997, with comments provided to the Panel on January 16, 1998).

249. *Id.* at 22.

250. *See id.* (stating that the like-product definition is "therefore a central issue in this case").

251. NAFTA Dispute Final Report on Brooms, *supra* note 91, at 27.

252. *Id.* at 29.

The time between the request for consultations and the final panel report—seventeen months²⁵³—does not appear to be unreasonable. However, in this second Chapter 20 action six months passed from the date of the request to the creation of the panel²⁵⁴ and the United States did not comply with the panel recommendation until December 3, 1998—nine months after the issuance of the report²⁵⁵ and a year before the safeguards were scheduled to expire.²⁵⁶ In the Presidential Proclamation terminating the safeguards, President Clinton stated that he was acting because the United States industry had not made a positive adjustment to import competition as a result of the safeguards,²⁵⁷ a conclusion squarely based on a USITC Report.²⁵⁸ Also, pressure exerted by American industries subject to retaliation can be viewed as a catalyst for the termination of the safeguards.²⁵⁹ In

253. *See id.* at 5-6 (setting forth the schedule of the Binational Panel Review). The schedule was as follows:

August 21, 1996	Mexican request for consultations
September 6, 1996	Consultations between the Parties
October 9, 1996	Consultations between the Parties
November 25, 1996	Mexican request for Free Trade Commission Meeting
December 11, 1996	Free Trade Commission Meeting
January 14, 1997	Mexico request for panel
July 17, 1997	Panel constituted
December 23, 1997	Initial panel report circulated to the Parties
January 30, 1997	Final Panel Report issued

Id.

254. *See id.* at 5-6.

255. *See Tariffs: Clinton Removes Safeguard Tariffs on Broom Corn Brooms*, INT'L TRADE DAILY (BNA) (Dec. 7, 1998), available in LEXIS, Bnaidt Library [hereinafter *Clinton Removes Safeguard*] (reporting Clinton's December 3, 1998, announcement that "temporary duties" would be removed).

256. *See* Proclamation No. 6961, 61 Fed. Reg. 64,431, 64,432 (Dec. 4, 1996) (proclaiming November 27, 1999, as the sunset date).

257. *See* Proclamation No. 7154, 63 Fed. Reg. 67,761, 67,762 (Dec. 8, 1998) (ordering the termination of temporary duties on imports of broom corn brooms).

258. *See* U.S. Int'l Trade Comm., *Broom Corn Brooms: Efforts of Workers and Firms in the Industry to Make a Positive Adjustment to Import Competition*, USITC Pub. No. 3122, at 17 (Aug. 1998).

259. *See Industries Press USTR for Early Lifting of Broomcorn Safeguard Tar-*

any event, the proclamation terminating the safeguards relied entirely on the President's domestic legal authority and did not mention either NAFTA or the panel decision.²⁶⁰ The Mexican government indicated that Mexican retaliatory tariffs imposed before the panel proceeding would be terminated.²⁶¹

9. *Restrictions on Sugar (Mex. v. U.S.)*

In March 1998, Mexico requested Chapter 20 consultations with the United States regarding revised quotas on imports of Mexican sugar and sweeteners, which Mexico claimed to be inconsistent with a side letter negotiated as part of the NAFTA.²⁶² In November 1998, Mexico took the necessary second step, requesting a meeting of the Free Trade Commission.²⁶³ To date, the United States government has rejected most of Mexico's demands for significant increases in sugar exports to the United States, indicating a reluctance to make concessions so long as Mexico maintains its antidumping duties on high fructose corn syrup.²⁶⁴ It is evident that Mexico seeks a comprehensive settlement in which Mexican access to American high fructose corn syrup would equal United States access to Mexican

iffs, AMERICAS TRADE, Oct. 1, 1998, at 11 (reporting that United States firms that faced increased Mexican tariffs on their products as a result of Mexican retaliation had periodically called upon the United States government to terminate the broom corn broom safeguards before their scheduled expiration in late 1999).

260. See Proclamation No. 7154, *supra* note 257, at 67,762 (stating that Section 204 of the Trade Act of 1974 authorizes the President to terminate a safeguard action).

261. See AMERICAS TRADE, Dec. 24, 1998, at 8.

262. See *NAFTA Mexico and United States Hold Talks on Sugar, Sweetener Dispute*, INT'L TRADE DAILY (BNA) (Apr. 22, 1998), available in LEXIS, Bnaitd Library (reporting on the first round of negotiations); see also *USTR Launches Investigation Against Mexican Corn Syrup Practices*, INT'L TRADE DAILY (BNA) (May 19, 1998), available in LEXIS, Bnaitd Library [hereinafter *USTR Launches Investigation*] (noting that United States Trade Representative accepted a Section 301 of the 1974 Trade Act petition by United States corn refiners against certain Mexican practices on high fructose syrup).

263. See *Mexico Takes Next Step*, *supra* note 184, at 24.

264. See *USTR Limits Mexican Sugar Access to NAFTA with Small Exception*, INSIDE U.S. TRADE, Sept. 25, 1998, at 11-12 (stating that "Mexican efforts to pressure the United States for more access to its sugar market proved unsuccessful" and the "U.S. will continue to limit imports from Mexico").

sugar.²⁶⁵ In response to the Mexican antidumping action, the American sugar industry has brought an action under NAFTA Chapter 19 challenging the Mexican administrative decision imposing antidumping duties.²⁶⁶ Finally, a WTO panel is currently being formed to review the same Mexican antidumping duty determination.²⁶⁷

Significantly, and separately, the United States government has initiated a case under Section 301 of the Trade Act of 1974 challenging Mexican restrictions on sugar imports as being “unreasonable”—burdening or restricting American commerce, but not violating any international trade agreement.²⁶⁸ This is one of only two matters to date in which two NAFTA Parties—the United States and Mexico—have simultaneously pursued their dispute settlement options under NAFTA Chapter 20 and the WTO’s DSB for related aspects of a common dispute. The Chapter 20 panel does not have jurisdiction over challenges to Mexico’s antidumping laws.²⁶⁹

10. Farm Products Blockade (Can. v. U.S.)

In September 1998, Canada requested NAFTA Chapter 20 consultations, alleging that the states of South Dakota and Montana in the United States are blocking imports of Canadian farm products on the basis of false claims—that the products raise safety and health concerns and violate a series of NAFTA and WTO provisions.²⁷⁰ The request letter cites United States obligations under NAFTA Articles

265. See *Mexico Takes Next Step*, *supra* note 184, at 24.

266. See *id.* at 23.

267. See *infra* Part II.B.4 (discussing the United States-Mexico WTO High Fructose Corn Syrup proceedings).

268. See *USTR Launches Investigation*, *supra* note 262 (discussing acceptance of section 301 petition); see also *Initiation of Section 302 Investigation and Request for Public Comment: Mexican Practices Affecting High Fructose Corn Syrup (HFCS)*, 63 Fed. Reg. 28,544, 28,544-45 (May 26, 1998) [hereinafter *Initiation of HFCS Investigation*] (announcing USTR investigation).

269. See NAFTA, *supra* note 1, art. 2004 (stating that antidumping and countervailing duty matters are excluded from Chapter 20 jurisdiction).

270. See *Canada Requests WTO, NAFTA Consultations Over Farm Blockade*, INSIDE U.S. TRADE, Sept. 25, 1998, at 4; see also *Canadian Request for NAFTA Consultations*, AMERICAS TRADE, Oct. 1, 1998, at 24 (reprinting Sept. 24, 1998, letter from Canadian Trade Minister Sergio Marchi to United States Trade Representative Charlene Barshefsky).

105, 301, 309, 712, 904, 1202, 1203, 1204 and Annex 2004—chapters relating to general obligations, removal of trade restrictions, phytosanitary and sanitary measures, technical barriers to trade, cross-border services and dispute resolution.²⁷¹ Canada has also filed a parallel request with the WTO, citing solely WTO provisions.²⁷² Pending further bilateral discussions both actions are currently suspended,²⁷³ and the two governments appear to be moving toward a negotiated solution as of this writing.²⁷⁴ The Canadian decision to file simultaneous actions under the NAFTA and the WTO, in addition to possible political pressure considerations, takes into account the possibility that judicious framing of the issues might allow parallel actions to go forward on different “matters” relating to the same dispute. For example, Canada might challenge the allegedly false health and safety concerns under the NAFTA’s Sanitary and Phytosanitary Measures provisions,²⁷⁵ and denial of entry under the quantitative restraint prohibitions of GATT, Article XI.²⁷⁶

11. Bus Service (Mex. v. U.S.)

On October 30, 1998, the Mexican Commerce Minister announced that Mexico had requested a panel under Chapter 20, challenging the United States Department of Transportation’s refusal to approve applications for operating authority that would permit Mexican sched-

271. See *Canadian Request for NAFTA Consultations*, *supra* note 270, at 24 (listing NAFTA Articles).

272. See *Canadian Request for WTO Consultations*, AMERICAS TRADE, Oct. 1, 1998, at 24-25 (reprinting Canada’s September 29, 1998 request for consultations on *Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*).

273. See *Agriculture: U.S., Canada Agree to Intensive Trade Talks Aimed at Settling Disputes Over Farm Trade*, INT’L TRADE DAILY (BNA) (Oct. 6, 1998), available in LEXIS, Bnaitd Library.

274. See U.S. Trade Rep., *USDA Announces Series of New Measures to Open Canadian Farm Markets*, USTR Press Release 98-107 (Dec. 4, 1998), available in <<http://www.ustr.gov/releases/1998/12/98-107.pdf>> (announcing an initial agreement between the United States and Canada on removing trade restrictions on the trade of hogs, cattle, and wheat).

275. See NAFTA, *supra* note 1, ch. 7, sec. B.

276. See Canadian Official Interview, *supra* note 61 (opining that one could raise a challenge under the WTO concerning a customs issue).

uled bus service between Mexico and the United States.²⁷⁷ The Mexican action followed consultations and an August 1998 meeting of the Free Trade Commission that did not resolve the dispute.²⁷⁸ Since there are no provisions of the WTO agreement relating to cross-border bus service, Mexico's only recourse in this matter was to Chapter 20.

B. WTO DISPUTE SETTLEMENT UNDERSTANDING

As of October 1998, there have been five formal requests for consultation under the DSU by one or more NAFTA Parties against another NAFTA Party. Of these, the United States was the moving party in three matters and the respondent in two, while Mexico was the moving party in one and the responding party in one, and Canada was the moving party in one and the respondent in two. As under Chapter 20, there were no disputes between Canada and Mexico.

1. *Mexican Tomatoes (Mex. v. U.S.)*

In July 1996, Mexico requested consultations with the United States regarding an American antidumping investigation of imports of fresh and chilled tomatoes from Mexico, alleging violations of the WTO Antidumping Agreement.²⁷⁹ Mexico sought expedited procedures because of the "perishable" nature of the product.²⁸⁰ Although the request was apparently never formally withdrawn, the parties ultimately resolved the dispute with a suspension agreement concluded

277. See *Mexico Seeks NAFTA Arbitration Panel on U.S. Resistance to Mexican Bus Service*, INT'L TRADE DAILY (BNA) (Nov. 3, 1998), available in LEXIS, Bnaid Library (quoting the SECOFI's announcement). The United States is obligated to permit Mexican persons to provide cross-border scheduled bus services three years after the date of entry into force of NAFTA. See NAFTA, *supra* note 1, Annex 1.

278. See *Consultations Sought on Truck and Bus Access*, *supra* note 187; *Mexico Seeks NAFTA Arbitration Panel on U.S. Resistance to Mexican Bus Service*, *supra* note 277.

279. See *United States-Antidumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico, Request for Consultations, July 8, 1996*, WTO Doc. No. WT/DS49/1 [hereinafter *WTO Tomato Request for Consultations*]; see also *Mexico Seeks WTO Consultations Over U.S. Review of Tomato Imports*, INT'L TRADE DAILY (BNA) (July 2, 1996), available in LEXIS, Bnaid Library.

280. See *WTO Tomato Request for Consultations*, *supra* note 279.

under the United States antidumping laws.²⁸¹ However, both the WTO and the Department of Commerce consider the case “settled” or “inactive.”²⁸² Had the antidumping action resulted in a final antidumping determination appealable under NAFTA Chapter 19, it is likely that the matter would have been pursued in that forum as well.

2. *Split-Run Periodicals (U.S. v. Can.)*

In March 1996, the United States asked Canada for consultations under the DSU on (i) Canadian measures that prohibited the importation into Canada of periodicals that contained advertising directed to the Canadian market that was not contained in issues distributed in the country of origin; (ii) Canadian assessment of an 80 percent excise tax on such “split-run” periodicals when more than 20 percent of the editorial content is the same as in issues distributed in the country of origin; and (iii) postal rates applicable to Canadian owned and controlled periodicals for distribution in Canada but not to imported periodicals.²⁸³ After consultations failed to resolve the dispute, the parties submitted the dispute to panel review and Appellate Body review. This is the only case among NAFTA Parties that has become final under the WTO’s DSU.

In this case, the United States’ reason for choosing the WTO forum over the NAFTA Chapter 20 forum was obvious. Under the GATT, the United States could argue that the Canadian restrictions violated the “national treatment” requirement and provisions prohibiting quantitative restraints.²⁸⁴ Under the NAFTA, in contrast, Canadian discrimination against foreign owned or produced periodicals was explicitly permitted. A NAFTA exception incorporated by reference the CFTA definition of “cultural industry” to include, *inter alia*, “the publication, distribution, or sale of books, magazines, periodicals or newspapers” and to generally exempt the aforementioned

281. See Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, 61 Fed. Reg. 56,618, 56,619 (1996).

282. *WTO Dispute Overview*, *supra* note 10, at *23.

283. See Report of the WTO Panel, Canada-Certain Measures Concerning Periodicals, Mar. 14, 1997, WTO Doc. No. WT/DS31/R, at 1-4 [hereinafter WTO Periodicals Panel Report].

284. See GATT, *supra* note 18, arts. III, XI.

from the provisions of the Agreement.²⁸⁵ Because of the grounding of the United States allegations on provisions of GATT 1994, there was no question with regard to WTO panel jurisdiction, except with regard to the excise tax, which Canada claimed was a service measure rather than relating to trade in goods.²⁸⁶

The reviewing panel, composed of citizens of Sweden, Brazil, and Austria, determined that the import ban was a violation of GATT Article XI, and the excise tax a violation of Article III:4.²⁸⁷ However, the panel rejected the U.S. challenge to the preferential postal rates, on the grounds that the rates were a permitted subsidy under GATT Article III:8(b).²⁸⁸ Both Canada and the United States cross-appealed. The appeal, heard by the Japanese, German, and Uruguayan members of the Appellate Body, effectively affirmed the appealed aspects of the panel decision on the import ban and excise tax issues, and reversed the panel on the issue of preferential postal rates, determining that the latter were also a violation of Article III of the GATT.²⁸⁹ The Appellate Body also confirmed the panel determination that the GATT 1994 was applicable to periodicals, rejecting again the Canadian argument that the excise tax was a services measure.²⁹⁰

Canada notified the DSB of its intent to comply with the panel and appellate reports, and agreed with the United States that compliance would occur within fifteen months.²⁹¹ Specifically, progress reports on implementation were to be submitted before each monthly DSB meeting after March 25, 1998.²⁹²

285. NAFTA, *supra* note 1, art. 2106, Annex 2106; *see also* CFTA, *supra* note 16, arts. 2005, 2012.

286. *See* WTO Periodicals Panel Report, *supra* note 283, at 16 (explaining that the excise tax was a measure pertaining to advertising services).

287. *See id.* at 68 (determining that the steps taken by the Canadian government constituted a contravention of Articles III(4) and XI of the GATT).

288. *See id.*

289. *See* Report of the WTO Appellate Body, Canada-Certain Measures Concerning Periodicals, June 30, 1997, WTO Doc. No. WT/DS31/AB/R, at 35-38.

290. *See id.* at 20-22.

291. *See* OFFICE OF THE U.S. TRADE REP., *supra* note 164, at 69.

292. *See id.*

The *Split-Run Periodicals* case demonstrates what many perceive as a significant advantage of the WTO process, as compared to experience to date under NAFTA Chapter 20. While the time period between the request for consultations and the issuance of the final panel report in the *Split-Run Periodicals* is only slightly shorter than the period in the *Agricultural Products Tariffication*²⁹³ and *Brooms*²⁹⁴ cases—fifteen and a half months²⁹⁵ compared to twenty-two months²⁹⁶ and seventeen months,²⁹⁷ respectively—initial compliance appeared to be achieved quite rapidly under the DSB, while compliance in *Brooms* was delayed for nine months. In July 1998, however, the Office of the United States Trade Representative requested consultations with Canada regarding proposed Canadian legislation that would prohibit Canadian companies from advertising in split-run editions of foreign magazines, suggesting that such legislation would be inconsistent with the WTO ruling.²⁹⁸ In January 1999, the United

293. See *supra* Part II.A.2 (discussing the *Agricultural Products Tariffication* case under NAFTA Chapter 20).

294. See *supra* Part II.A.8 (discussing the *Safeguards on Brooms* case under NAFTA Chapter 20).

295. See WTO Periodicals Panel Report, *supra* note 283, at 1. The schedule was as follows:

March 11, 1996	United States request for consultations
April 10, 1996	Consultations between the Parties
May 24, 1996	United States request for establishment of Panel
June 19, 1996	DSB establishes Panel
February 21, 1997	Panel report circulated confidentially to the Parties
March 14, 1997	Final panel report issued
April 29, 1997	Canada files notice of appeal
June 30, 1997	Appellate Body report issued
July 30, 1997	DSB adopts panel and appellate reports
August 29, 1997	Canada notifies DSB that it will implement the Report

See *id.*

296. See *supra* note 206 and accompanying text (setting forth the schedule of the *Agricultural Products Tariffication* case).

297. See *supra* note 253 and accompanying text (setting forth the schedule of the *Safeguards on Brooms* case).

298. See *WTO Compliance: Barshefsky Says U.S. Response Planned if EU, Canada Fail to Meet WTO Rulings*, INT'L TRADE DAILY (BNA) (Sept. 25, 1998),

States threatened to retaliate against Canadian steel, wood, and textiles, thereby denying Canada trade benefits, if the Canadian legislation were passed, contending that "substituting one form of protectionism for another ignores both the letter and spirit of the WTO rules."²⁹⁹ Interestingly, certain CFTA provisions, incorporated into NAFTA's "cultural industries" exception, allow the United States to retaliate by taking "measures of equivalent commercial effect."³⁰⁰

3. Dairy Product Export Subsidies (*U.S. v. Can.*)

In October 1997, the United States requested consultations regarding Canada's tariff rate quota on milk and export subsidies allegedly granted by Canada on dairy products. The United States alleged that the subsidies were in conflict with the WTO Agreement on Subsidies; no NAFTA issues were raised.³⁰¹ Since consultations were unsuccessful, the United States requested a panel, which was established in March 1998.³⁰² The panel is comprised of citizens of Singapore, Mexico, and Germany, and began its work in late August, with a decision expected by the end of February 1999.³⁰³ As discussed above, in a relatively rare occurrence in the WTO, the process encountered delays in selecting the members of the panel as a result of the United States government's insistence that the panel proceeding

available in LEXIS, Bnaitd Library (stating that the legislation "looked like a new prohibition on U.S. companies' ability to do business in Canada").

299. See *U.S. Trade Rep Threatens to Deny Canada Trade Benefits if New Magazine Bill Passes*, INT'L TRADE DAILY (BNA) (Nov. 3, 1998), available in LEXIS, Bnaitd Library; see also *U.S. Stand Over Magazine Legislation Shows Lack of Understanding, Minister Says*, INT'L TRADE DAILY (BNA) (Jan. 14, 1999), available in LEXIS, Bnaitd Library (responding to U.S. retaliation that the threats demonstrate a "profound misunderstanding of the issues involved").

300. CFTA, *supra* note 16, art. 2005.2 (incorporated into NAFTA under Art. 2106).

301. See *Panelist Selection Breaks Deadlock in WTO Case Against Canada Dairy*, AMERICAS TRADE, Aug. 20, 1998, at 7.

302. See *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Request for Consultations*, Oct. 13, 1997, WTO Doc. No. WT/DS103/1; see also *WTO Dispute Overview*, *supra* note 10, at *6.

303. See *Panelist Selection Breaks Deadlock in WTO Case Against Canada Dairy*, *supra* note 301, at 7. As of March 15, 1999, the panel report had not been adopted and was not publicly available.

should be open to industry observers.³⁰⁴ Despite the United States' urging, there has been no agreement on permitting non-government observers. Australia and Japan have reserved their third party rights, assuring that they will also benefit in the event that the panel ultimately finds against Canada. The likelihood of support from non-NAFTA WTO members may have been a factor encouraging the United States government to bring the action before the WTO. On March 16, 1999, the WTO panel sided with the United States and determined that the Canadian programs constituted export subsidies inconsistent with the WTO Agreement on Agriculture. The panel decision is subject to appeal.³⁰⁵

4. *High Fructose Corn Syrup (U.S. v. Mex.)*

In September 1997 and again in May 1998, the United States requested WTO consultations about an antidumping investigation initiated earlier by Mexico against high fructose corn syrup from the United States. The earlier investigations resulted in the imposition of Mexican antidumping duties on United States corn syrup in January 1998.³⁰⁶ Since the dispute—which also encompasses United States restrictions on imports of Mexican sugar under the NAFTA—was not resolved through WTO consultations, the DSB accepted the United States' request for the establishment of a panel.³⁰⁷ The United States alleges that the Mexican antidumping investigation violated the WTO Antidumping Agreement by accepting an antidumping petition against high fructose corn syrup from Mexican sugar producers.³⁰⁸

304. See *supra* notes 153-156 and accompanying text (detailing the United States attempts to eliminate secrecy).

305. See *Agriculture: USTR Hails WTO Panel's Decision Striking Down Canadian Dairy Subsidy*, Int'l Trade Daily (BNA) (Mar. 19, 1999), available in LEXIS, Bnaid Library.

306. See, e.g., *Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Request for Consultations*, Sept. 15, 1997, WTO Doc. No. WT/DS101/1.

307. See *Mexico Takes Next Step*, *supra* note 184, at 23-24 (noting that Mexico requested a meeting of NAFTA trade ministers); see also *WTO Dispute Overview*, *supra* note 10, at *7 (stating that the DSB established a panel on November 25, 1998).

308. See *Mexico Takes Next Step*, *supra* note 184 (noting that, ordinarily, WTO

5. *Farm Products Blockade (Can. v. U.S.)*

As noted above, Canada has charged South Dakota and Montana with blocking the movement of Canadian farm products in violation of both the NAFTA and WTO requirements.³⁰⁹ The WTO request cites only violations of WTO obligations, while the NAFTA request is limited to the alleged violation of NAFTA obligations.³¹⁰ While Canada ultimately will be required to choose between WTO and NAFTA Chapter 20 dispute settlement in the event that the controversy is not resolved through negotiations, Canada is arguably within its rights in seeking simultaneous consultations in both the NAFTA and the WTO dispute bodies,³¹¹ even though it has avoided raising WTO violations under the NAFTA and vice versa.

In sum, of these five cases, one case—*Mexican Tomatoes*—has effectively been withdrawn because of settlement in non-WTO negotiations, and a second case—*Split Run Periodicals*—has been initially resolved through the WTO DSU, although new Canadian measures threaten to negate the benefits of the victory for the United States. Two others cases, *Dairy Product Export Subsidies* and *High Fructose Corn Syrup*, are pending and appear likely to be resolved through WTO dispute settlement unless they are settled earlier. It is too early to predict how the *Farm Products Blockade* case will be resolved, and in what forum.

rules permit only producers of “an identical or directly competitive product” to bring an antidumping petition).

309. See *supra* note 272 and accompanying text (discussing Canada’s September 29, 1998, request for WTO consultations on certain measures affecting the import of cattle, swine, and grain from Canada).

310. Compare *Mexico Takes Next Step*, *supra* note 184 (reprinting Canada’s request for consultations, which contends that the United States violated provisions of the Agreements on Sanitary and Phytosanitary Measures, Technical Barriers to Trade, the Agreement on Agriculture and the Dispute Settlement Understanding), with *Canadian Request for NAFTA Consultations*, *supra* note 270, at 24-25 (listing alleged violations, including provisions concerning removal of trade restrictions, phytosanitary and sanitary measures, technical barriers to trade, cross border services and dispute resolution).

311. See NAFTA, *supra* note 1, art. 2005.6 (precluding simultaneous proceedings only beginning with the referral of a matter to the Free Trade Commission under the NAFTA).

III. THE CHALLENGES OF DISPUTE SETTLEMENT OPTIONS: AN ASSESSMENT

A. COMPARISON OF THE TWO SYSTEMS

The similarities between the mechanisms created under NAFTA Chapter 20 and the WTO's DSU, at least on paper, are substantial and are much greater than the differences. Both systems contemplate a binding international arbitration process using ad hoc trade experts as arbitrators, preceded by mandatory consultations, and voluntary good offices and conciliation. Both are designed to assure a speedy process in which no Party or Member can significantly delay or impede the result. Both require the issuance of opinions or reports that show in detail the rationale for decisions. And both contemplate a process that is protected from public scrutiny or review until completed. In operation, however, they differ in significant respects, and these differences, both in jurisdiction and in the nature of the procedures, may alter, or raise the possibility, of altering the result, and thus may dictate a different forum in specific circumstances.

In operational terms the significant differences between NAFTA Chapter 20 and the WTO's DSU can be summarized as follows:

1. In terms of jurisdiction, there are some areas where coverage is afforded only under the NAFTA or under the WTO, but not both as discussed earlier.³¹² Also, there are matters that could be brought under parallel provisions of the NAFTA and the WTO, such as those relating to sanitary and phytosanitary measures or to trade in agricultural products. However, there are subtle differences. For example, the GATT Article XX exceptions incorporated into the body of the NAFTA SPM provisions³¹³ are not incorporated within the parallel WTO agreement. Furthermore, where "non-violation" or "nullification and impairment" actions occur, only the Chapter 20 mechanism is capable of providing binding decisions, a factor that may be important in some circumstances.³¹⁴

312. See *supra* Part I.B (differentiating the jurisdiction of the NAFTA Chapter 20 dispute mechanism from the WTO dispute settlement mechanism).

313. See NAFTA, *supra* note 1, art. 712.

314. See DSU, *supra* note 2, art. XXVI (providing WTO procedures concerning "non-violation" and "nullification and impairment" actions).

2. Since there is no NAFTA secretariat or committee of the whole independent of the disputing governments, there is no independent authority in NAFTA to assure prompt choice of panelists and compliance with other time requirements, even where they exist, or to provide institutional memory independent of the governments. There have been significant delays in the two cases to date—*Agricultural Products Tariffication*³¹⁵ and *Brooms*³¹⁶—in part because the NAFTA Parties have not agreed to standing rosters of panelists. Should there be a large increase in the number of matters submitted to Chapter 20 resolution, the lack of a roster and the difficulties experienced by the Parties in reaching agreement on acceptable panelists could lead to very troubling delays in the system.

Notwithstanding the apparent advantages of the WTO's panel selection procedures, there have been some substantial delays under that system as well. In *Dairy Product Export Subsidies*, for example, a panel was originally requested in October 1997, but panel selection was not completed until August 1998.³¹⁷

3. Although the final panel decision under NAFTA Chapter 20 is binding under the system in the absence of a different negotiated settlement, there is arguably stronger pressure for compliance under the WTO, at least on paper: “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.”³¹⁸ The WTO's record, however, despite the applicable legal provisions and a secretariat to assist in implementation of panel reports, is considerably less than perfect. The United States has charged that “[a]s the end of the fourth year of the DSU approaches, the instances in which implementation of an adverse panel report has been completed are substantially outnumbered by those in which implementation is pend-

315. See *supra* note 205 and accompanying text (setting forth the schedule of the Binational Panel Review and discussing the delay in the *Agricultural Products Tariffication* case, which lasted twenty-two months).

316. See *supra* note 253 and accompanying text (setting forth the schedule of the Binational Panel Review and discussing the delay in the *Brooms* case, which lasted seventeen months).

317. See *supra* note 304 and accompanying text (explaining that panel selection constituted the primary reason for the delay).

318. DSU, *supra* note 2, art. 21.1.

ing.”³¹⁹ The United States requested DSU Review Members to consider two modifications or objectives. First, the United States asked the DSU to clarify DSU Rules “to ensure prompt implementation of the recommendations of the DSB.”³²⁰ Second, the United States argued that “[m]embers should not have to tolerate a situation in which one violation of WTO obligations is simply replaced with another, different, violation.”³²¹ With respect to the United States’ first objective, the suggested rule clarification relates directly to the United States unfortunate experience in the WTO Bananas action.³²² As a result of the WTO Bananas action the United States has threatened retaliation for failure to comply with the WTO’s recommendations concerning the European Communities’ regime for the importation, sale, and distribution of Bananas.³²³ The deadline was January 1, 1999, but the WTO’s DSB found it necessary to reconvene the original panel to determine whether the European Union’s measures to implement the DSB recommendation were WTO-consistent,³²⁴ and the United States imposed trade sanctions on \$500 million of European Union imports on March 4, 1999.³²⁵ The United States’ second

319. See *U.S. Paper on DSU Review*, INSIDE U.S. TRADE, Nov. 6, 1998, at 9 (reprinting “Preliminary Views of the United States Regarding Review of the DSU”).

320. *Id.*

321. *Id.*

322. See WTO Appellate Body Report on Bananas, *supra* note 153.

323. See Implementation of WTO Recommendations Concerning the European Communities—Regime for the Importation, Sale and Distribution of Bananas, 63 Fed. Reg. 63,099, 63,100 (Nov. 10, 1998) (proposing 100 percent *ad valorem* tariffs on a list of products imported into the United States from the European Union).

324. See WTO Dispute Overview, *supra* note 10, at *1; see also DSU, *supra* note 2, art. 21.5 (specifying that “[w]here 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, including where possible resort to the original panel”); see also *U.S. to Request WTO Consultations with EU to Resolve Banana Fight*, INSIDE U.S. TRADE, Jan. 15, 1999, at 1 (stating that of January 14, 1999, the United States notified the Dispute Settlement Body that it will request authorization for retaliation against the European Union by imposing 100 percent *ad valorem* tariffs on about \$520 million worth of European Union products exported to the United States). The European Union sought to block such retaliation pending the convening of a new panel to review WTO compliance. See Elizabeth Olson, *Banana Talks with Europe Turn Nasty*, N.Y. TIMES, Jan. 26, 1999, at C6.

325. See Office of the U.S. Trade Rep., *Press Release: United States Takes*

objective stems from the United States' experience in the *Split-Run Periodicals* case, where the United States has again threatened to retaliate if Canada proceeds with new legislation which will again discriminate against American periodicals, thereby negating the United States' WTO victory.³²⁶

Under the NAFTA, the prevailing party is specifically authorized to retaliate and may do so within thirty days of the issuance of the final panel report.³²⁷ There is no automatic adoption of panel reports, nor an explicit provision requiring the report to be implemented, nor a mechanism independent of the NAFTA governments to encourage or enforce compliance, or extensive secretariat or member pressure to comply. In short, the right to retaliate is limited only by the proviso that the retaliation not be "manifestly excessive."³²⁸ Even then, the only remedy is the establishment of a panel by the Commission to review the level and extent of retaliation. To date, there is no established practice—as in the WTO—for implementation of a decision.³²⁹ In *Brooms*, the only NAFTA panel decision to date requiring implementation, the United States Government waited nine months before complying with the decision.³³⁰ Moreover, during that compliance period, the Mexican government maintained in force the trade sanctions permitted it under Chapters 8 and 20.³³¹

Customs Actions on European Imports (visited Mar. 12, 1999) <<http://www.ustr.gov/releases/1999/03/99-17.html>>. The United States suspended customs liquidation of affected shipments, permitting the subsequent imposition of one hundred percent penalty duties on all subsequent imports if no settlement is reached.

326. See *U.S. Trade Rep Threatens to Deny Canada Trade Benefits if New Magazine Bill Passes*, *supra* note 299 (detailing the United States' retaliatory threats).

327. See *supra* note 103 and accompanying text (providing the relevant NAFTA retaliatory provision and explaining the procedure).

328. See *id.*

329. See *supra* notes 140-141 and accompanying text (stating that the WTO dispute settlement process lasts nine months or twelve months if there is an appeal, or longer, but only if all disputing members agree).

330. See *supra* notes 254-256 and accompanying text (detailing the United States' compliance schedule to the NAFTA panel report).

331. See *supra* note 261 and accompanying text (reporting that the retaliatory tariffs imposed by Mexico remained in force until the United States complied with the NAFTA panel report).

4. Chapter 20 provides for the inclusion of nationals of the disputing parties on the arbitral panels, which does not normally occur under GATT/WTO procedures except at the appellate level.³³² Furthermore, a NAFTA panel is comprised of five members instead of three.³³³ While securing objectivity of national panelists is potentially difficult—a former senior United States trade official has suggested that American panelists generally feel an obligation to bend over backwards to be fair, while in his experience non-United States panelists feel much less of an obligation³³⁴—there may be a benefit in some instances from familiarity with the laws and legal systems of the two NAFTA Parties, as in *Brooms*, where highly technical NAFTA provisions were at issue. Also, regional panelists may have a broader practical knowledge of how the North American trading system works. On the other hand, there may be fewer available NAFTA panelists than GATT/WTO panelists with a deep knowledge of GATT law. Aside from the few university professors and government officials, the latter barred from NAFTA panel service,³³⁵ there are relatively few persons with GATT expertise in North America. Moreover, in a situation where there are no standing rosters, or even if rosters are ultimately chosen by the NAFTA Parties, the NAFTA Parties appear to exercise more direct control over selection of panelists than is normally the case in the WTO where the Secretariat manages the process of selecting panels.

The differences between a three person and a five person system are subtle but significant in some cases. With NAFTA Chapter 20, where each Party in a bilateral dispute may select two panelists, there is added flexibility in choosing legal or non-legal expertise that may be relevant to a specific dispute, such as a disagreement over fishing

332. See WTO Appellate Body Report on United States-Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WTO Doc. No. WT/DS58/AB/R, and WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, Oct. 4, 1996, WTO Doc. No. WT/DS8,10,11/AB/R, for examples of two WTO Appellate cases where one of the panelists was of the same nationality as one of the Parties.

333. See *supra* notes 84-91 and accompanying text (discussing panel selection and composition).

334. See Telephone Interview with a former USTR official (Nov. 18, 1998) (transcript on file with *American University International Law Review*).

335. See NAFTA, *supra* note 1, art. 2009.2(b).

rights,³³⁶ while still being able to select an international trade law generalist of one's choosing. The broader variety of opinions and experiences may produce a more satisfactory review of the issues.³³⁷

5. There are dynamics in a multilateral process than are not present in NAFTA's present trilateral context, in addition to the broader "peer pressure" for compliance, noted earlier. A case brought under Chapter 20 can, at most, incorporate two complaining Parties, as in the *Helms-Burton* case.³³⁸ A WTO case, in contrast, may provide the complaining Party with the opportunity to enlist the support of non-NAFTA nations who share the concerns of the NAFTA party, and thus increase the political pressure on the defending Party.³³⁹ On the other hand, the involvement of multiple interested parties may retard a negotiated settlement, as it may be less costly in economic terms for one NAFTA Party to reach agreement with another NAFTA Party if the undertakings apply only to the other NAFTA Party, and not to a larger group of WTO member nations.

6. NAFTA Chapter 20 fails to provide a process for appeals comparable to the WTO's standing Appellate Body, although the obligation for the NAFTA panel to circulate its report to the Parties on an interim basis and consider comments in formulating its final report effectively provides a limited opportunity for reconsideration.³⁴⁰ The WTO's Appellate Body may be important in terms of assuring both consistency and fairness in a rule-based adjudicatory process. Moreover, United States lawyers and many others are comfortable

336. See Canadian Official Interview, *supra* note 61 (referring to actions filed under the U.S. Free Trade Agreement concerning Pacific Coast Herring and Lobsters from Canada).

337. See, e.g., Softwood Lumber Agreement, *supra* note 55, art. V(4) (creating an express agreement and an ad hoc dispute settlement mechanism based in part on NAFTA Chapter 20 to successfully resolve disputes over the agreement).

338. See *supra* Part II.A.7 (discussing Mexico and Canada's objections to the Helms-Burton Act).

339. In the bananas dispute, for example, United States retaliation prior to the completion of WTO proceedings drew criticism of the United States by many WTO members not party to the dispute. See *Bananas: At WTO Meeting, Members Blast U.S., Urge Settlement of Dispute*, Int'l Trade Daily (BNA) (Mar. 9, 1999), available in LEXIS, Bnaid Library; *supra* text accompanying note 325.

340. See *supra* notes 97-104 and accompanying text (discussing NAFTA Chapter 20's procedure upon the issuance of a panel report).

with a process that provides an appeal of right for any judicial decision.³⁴¹ On the other hand, officials have criticized recent Appellate Body cases as being at odds with the intent of the GATT/WTO parties,³⁴² and the existence of a right of appeal may thus not be as significant as earlier assumed.

7. Prior adopted GATT or WTO panel decisions are not binding precedent for current WTO panels and the Appellate Body, since interpretation of the WTO agreements is the responsibility of two WTO organs, the Ministerial Conference and the General Council.³⁴³ The prior adopted decisions, however, "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."³⁴⁴ Regardless of the

341. See generally 28 U.S.C. secs. 1291-92 (1996) (providing a right of appeal to the United States Circuit Courts).

342. See, e.g., *U.S. Uses World Trade Body to Criticize EU Over Computer Ruling, Banana Issue*, INT'L TRADE DAILY (BNA) (June 23, 1998), available in LEXIS, Bnaitd Library (setting forth the USTR's charge that the Appellate Body's ruling in *European Communities, United Kingdom and Ireland-Customs Classification of Certain Computer Equipment* had failed to answer the question of whether the EU had violated its agreed ceiling on computer equipment tariffs, and left "substantial uncertainty" as to the treatment members of the WTO could expect with regard to tariffs); *WTO: WTO Formally Adopts Shrimp-Turtle Ruling as Thailand Fears Victory May be Pyrrhic*, INT'L TRADE DAILY (BNA) (Nov. 9, 1998), available in LEXIS, Bnaitd Library (providing Thailand's criticism of the WTO Appellate Body's ruling concerning import prohibitions of certain shrimp and shrimp products). Specifically, Thailand criticized the Appellate Body for improperly making factual determinations—rather than confining itself to legal findings—and interpreting GATT Article XX(g) relating to conservation of natural resources in a manner that would encourage unilateral actions rather than cooperation on environmental issues. See *id.*

343. See WTO Agreement, *supra* note 2, art. IX.2 (stating that "[t]he Ministerial Council and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and the Multilateral Trade Agreements," and such decisions shall be taken by a three-fourths majority of the Members).

344. WTO Appellate Body Report on Japan-Taxes on Alcoholic Beverages, Oct. 4, 1996, WTO Doc. Nos. WT/DS10/AB/R, WT/DS11/AB/R, at 14. Unadopted panel reports have no legal status, but could nevertheless provide a panel with useful guidance. See *id.* at 15. Consequently, it is clear that when Art. XVI:1 of the WTO Agreement states, "[e]xcept as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the *decisions*, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947," the reference is not to court decisions. *Id.* at 16 (emphasis added). For analysis of the use

extent to which prior GATT decisions are considered to have precedential value, it can be assumed that future WTO panels—and Chapter 20 panels as well—will both look at prior decisions, particularly those of the Appellate Body, at least for guidance, notwithstanding the caveat against “making law.”³⁴⁵ Still, the sheer volume of WTO panel and Appellate Body determinations is likely to assure that WTO determinations will become the dominant body of international trade decisional law, except where purely NAFTA questions are at issue. Thus, even where dispute settlement is sought under Chapter 20, it can be expected that current panels will rely extensively on WTO and pre-1995 GATT panel decisions.³⁴⁶ In disputes where both Parties prefer not to create a WTO precedent, however, these considerations could make NAFTA Chapter 20 the preferred option, as it is less likely that a WTO panel would view Chapter 20 decisions as authoritative even if they interpreted WTO provisions.

The NAFTA Chapter 19 mechanism is generally similar to the Chapter 20 mechanism with regard to overall structure. Panel decisions have been implemented by the Investigating Authorities in all instances without delay.³⁴⁷ Despite the less political nature of the proceedings, the existence of national rosters and automatic selection of the fifth panelist on the basis of rotation,³⁴⁸ inattention on the part of

of prior decisions in WTO practice, see Steger & Hainsworth, *supra* note 24, at 208-09, and Lichtenbaum, *supra* note 154, at 1244-48.

345. See WTO Appellate Body Report on United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India, Apr. 25, 1996, WTO Doc. No. WT/DS33/AB/R, at 14 (stating that “[g]iven the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute”).

346. See, e.g., NAFTA Dispute Panel Report on Agricultural Products Tariffication, *supra* note 91 (citing a variety of GATT and WTO panel decisions); NAFTA Dispute Panel Report on Brooms, *supra* note 91 (same).

347. See David A. Gantz, *Resolution of Trade Disputes Under NAFTA's Chapter 19; The Lessons of Extending the Binational Panel Process to Mexico*, 29 LAW & POL'Y INT'L BUS. 297, 313 (1998) (noting that no “extraordinary challenges” to Chapter 19 panel decisions have been filed by the NAFTA parties). This contrasts with the experience under the CFTA, where three such challenges were submitted. See *id.*

348. For example, in the first case between the United States and Mexico, the panel will have three Mexican members and two American ones. In the next case,

the governments has resulted in endemic delay. As of January 1999, of the eleven active Chapter 19 cases appealing decisions of the Department of Commerce, six of these cases had been suspended at some time during the proceedings, for more than six months in several instances.³⁴⁹ Except for *High Fructose Corn Syrup*, none of the panel proceedings to date have involved issues that were simultaneously before Chapter 20 or WTO panels. However, several Chapter 19 actions involved antidumping duty administrative reviews in which the underlying antidumping order had been challenged in a prior GATT panel proceeding.³⁵⁰ There have been no panels convened to date under Chapter 19 to consider the consistency of new national antidumping or countervailing duty laws with the NAFTA or GATT/WTO rules. It is reasonable to assume, however, that where a NAFTA Party challenges another Party's final antidumping or countervailing duty determination at the WTO, the private interested parties will almost certainly seek review under Chapter 19 as well.

B. FACTORS INFLUENCING PARTY CHOICES

The cases brought before the NAFTA and WTO mechanisms can be divided into three categories: (1) no effective choice of forum; (2) apparent choice, with legal or political considerations in some instances dictating one forum over the other; and (3) availability of parallel fora.

the numbers will flip, with two Mexican and three United States panelists. Then the next case will have three Mexican and two American members, and so on.

349. See *NAFTA Secretariat Status Report*, *supra* note 128; see also *NAFTA Trade Officials Break Logjam on Trade Dispute Panels*, AMERICAS TRADE, Jan. 14, 1999, at 1, 10.

350. Three NAFTA Chapter 19 panel proceedings have involved Gray Portland Cement and Clinker from Mexico, which was the subject of United States-Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, Sept. 7, 1992, GATT Doc. ADP/82; another involving live swine from Canada, related to United States-Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, July 11, 1991, GATT Doc. DS7/R-38S/30. See also *NAFTA Secretariat Status Report*, *supra* note 128.

1. *No Effective Choice of Forum*

For two of the three matters actually resulting in final panel reports there was effectively no choice of forum. With regard to *Agricultural Products Tariffication*,³⁵¹ the Canadian measures under dispute were clearly consistent with the WTO Agreement on Agriculture; only the issue of NAFTA legality was in doubt. In *Split-Run Periodicals*,³⁵² the reverse was true; while the Canadian measures were covered by the "cultural industries" exception of NAFTA, they were held illegal under GATT/WTO rules.

Also, in many of the cases that have not gone beyond consultations, a forum choice did not effectively exist. In several cases the NAFTA Parties could seek dispute resolution only under NAFTA because no GATT/WTO violation can be alleged to provide DSU jurisdiction. *Small Package Delivery*,³⁵³ *Truck Transport*,³⁵⁴ and *Bus Service*³⁵⁵ all fall within this category. Similarly, the *Dairy Products Exports Subsidies*³⁵⁶ WTO case, because it turns on interpretation of the WTO Subsidies Agreement, appears to raise no NAFTA violations that could be the basis of Chapter 20 jurisdiction.

2. *Effective Choice of Forum*

Of the three disputes among the NAFTA parties that have resulted in final panel reports, only one, *Brooms*,³⁵⁷ raised a clear choice of forum issue. In addition, *Helms-Burton Act*³⁵⁸ while ultimately referred to the NAFTA mechanism, logically could have been brought by Mexico or Mexico and Canada, respectively, under the WTO DSU. The same is probably true with *Restrictions on Sugar*³⁵⁹ and *Uranium*

351. See *supra* Part II.A.2.

352. See *supra* Part II.B.2.

353. See *supra* Part II.A.4.

354. See *supra* Part II.A.5.

355. See *supra* Part II.A.11.

356. See *supra* Part II.B.3.

357. See *supra* Part II.A.8.

358. See *supra* Part II.A.7.

359. See *supra* Part II.A.9.

Exports.³⁶⁰ In all instances, however, there were subtle reasons that dictated the complaining Party's choice.

In *Brooms*, Mexico had colorable arguments that the United States' safeguards were invalid under specific provisions of both the NAFTA and the WTO. Why, then, did Mexico choose Chapter 20 rather than the DSU? There is some evidence of a disagreement within the Mexican government. Some officials apparently argued that the WTO was a more efficient process in which the appointment of panels was more automatic and less subject to delay. Moreover, interpretation of the NAFTA safeguard provisions applicable to "global" safeguards actions and the "emergency action" raised technicalities that might be difficult to resolve and did not exist under WTO Safeguards Agreement.³⁶¹ Other officials favored NAFTA Chapter 20 because of their view that it would operate more quickly and that prompt compliance by the United States was more likely.³⁶² Also, since Mexico had already exercised its right to retaliate by suspending trade benefits under NAFTA Article 803.6, the prospect of delays in the panel selection process under Chapter 20 was not as daunting as it might have been had relief been deferred until the final panel report. In retrospect, the time required for the Chapter 20 panel decision in *Brooms*, even with the delay in compliance, was comparable to that normally experienced in the WTO. There may also have been a belief among the Parties that avoiding a WTO precedent on safeguards was desirable.

The *Helms-Burton* matter presented Mexico and Canada with several options. They could have joined a WTO action brought against the United States by the European Union, challenging the legality of the legislation under various provisions of the GATT and the General Agreement on Trade in Services.³⁶³ In this particular instance, however, the arguments that the legislation violated NAFTA may have been stronger than the GATT arguments, because the NAFTA includes extensive provisions on investment and limited rights regard-

360. See *supra* Part II.A.1.

361. See Interview with former Mexican Government Official (Oct. 22, 1998) (transcript on file with author).

362. See *id.*

363. See *WTO Dispute Overview*, *supra* note 10, at *22 (listing the dispute as inactive).

ing business travel.³⁶⁴ The “national security” GATT exception³⁶⁵ upon which the United States expected to rely in defense of Helms Burton at the WTO is reproduced in substantially identical form in the NAFTA.³⁶⁶ Thus, Canada and Mexico might have pursued violations of both sections of the NAFTA much more effectively under Chapter 20 than in a WTO panel proceeding. Moreover, in retrospect, the settlement of the WTO case—in which President Clinton agreed to continue to defer the availability of the private right of action provisions of the Act and seek modification of the immigration provision—benefited Canada and Mexico equally even though they were not parties to the WTO action, as both might reasonably have anticipated.

In *Import Restrictions on Sugar*, the Canadian government believed that the United States actions in implementing the WTO Agreement on Agriculture violated both the Agreement and the NAFTA and requested consultations. The NAFTA forum appears to have been chosen because the solution was perceived to be political rather than strictly legal, since from the American point of view the sugar matter was linked to United States’ concerns over Canadian policies on wheat and other agricultural products, and possibly to other disputes.³⁶⁷

364. See NAFTA, *supra* note 1, art. 1105.1 (requiring a NAFTA Party to treat investments of another Party, wherever located, “in accordance with international law”). Helms-Burton, by providing remedies to persons who were not United States citizens at the time of expropriation, arguably is a violation of international law. See NAFTA, *supra* note 1, art. 1603.1 (obligating NAFTA Parties to permit temporary entry of the business persons of other NAFTA Parties who are otherwise qualified for entry). Helms-Burton appears to conflict with this obligation on the part of the United States where Canadian or Mexican citizens are excluded from entry to the United States because they are executives of firms that have “trafficked” in Cuban property expropriated from United States citizens. See Alan S. Lederman, *Evaluation of Helms-Burton Under NAFTA, International Law and GATT*, Oct. 24, 1996, at 2-3 (on file with *American University International Law Review*).

365. See GATT, *supra* note 18, art. XXI (stating that “[n]othing in this Agreement shall be construed . . . (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests”).

366. See NAFTA, *supra* note 1, art. 2102.1(b).

367. See *Canadian Government Seeks NAFTA Talks on U.S. Restrictions on Sugar Exports*, *supra* note 210.

In *Uranium Exports*, Canada's 1994 consultation request under Chapter 20 could have been made just as easily under the GATT Article XXIII procedures because the dispute raised national treatment obligations under both the NAFTA and the GATT. It is important to note that at that time the WTO DSB was not yet available. There appear to be two main reasons why Canada chose Chapter 20, both of which are speculative. First, since the NAFTA had only recently gone into force, Canada might have been interested in testing the new Chapter 20 proceedings. Second, the then-existing GATT Article XXIII alternative offered few advantages over Chapter 20 in terms of time required and implementation of panel reports. As noted earlier, those procedures did not assure prompt panel action, and a single GATT Contracting Party could effectively block GATT implementation of a panel report.

3. *Availability of Parallel Fora*

There are relatively few instances in which actions have been filed in parallel fora, and two of the three cases have involved antidumping. As noted above, where antidumping and countervailing duties are the main issues, one can expect actions in multiple fora, as demonstrated in the related Mexican sugar and high fructose corn syrup matters.³⁶⁸ It is almost certain that an interested private party in an antidumping or countervailing duty proceeding will seek review of a national administrative decision under national law through Chapter 19, while his government in relatively rare instances simultaneously may question the validity of the determination under the WTO Antidumping or Subsidies Agreements before a WTO panel.³⁶⁹ Of course, the overlap here is not complete. The Chapter 19 panel is limited to reviewing the administrative decision with regard to its consistency with national antidumping law—which should be, but may not be, consistent with the WTO Antidumping or Subsidies Agreements, unless a special Chapter 19 panel convenes at the request of a

368. See *supra* Parts II.A.9, II.B.4 (settling issue under both NAFTA Chapter 20 and WTO Dispute Settlement Body).

369. See, e.g., United States—Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada, Sept. 25, 1998, WTO Doc. No. WT/DS144/1 (reflecting a matter where actions were simultaneously pending before a Chapter 19 panel and under the WTO dispute settlement system).

NAFTA Party to determine the consistency of a Party's change in its antidumping or countervailing duty laws with the NAFTA or the GATT/WTO rules. However, the WTO proceeding would permit a challenge to existing national law, or the national investigating authority's application thereof, on the grounds that it is inconsistent with GATT Articles VI or XVI, or the WTO Agreements on Anti-dumping or Subsidies.

Moreover, the sugar disputes—*Restrictions on Sugar* and *High Fructose Corn Syrup*—raise even further possibilities. Since Mexico alleges that the American quotas violate a NAFTA side letter, presumably that issue could properly have been only raised under NAFTA Chapter 20. The Section 301 action, since it does not allege violations of either NAFTA or the WTO agreement, can only be pursued through bilateral consultations with Mexico.³⁷⁰ Whether the Section 301 action will be pursued probably depends more on political than legal considerations.³⁷¹

From the point of view of efficiency alone, one may well question the advisability of “balkanizing” the dispute over sugar into four separate legal actions. There may be no obvious alternative, however, in a legally and politically sensitive matter such as this one. In particular, Chapter 19 is not subject to the control of the NAFTA Parties in individual cases, because it is a remedy provided of right to the private “interested parties” in antidumping or countervailing duty cases. A government is seldom in a position to demand that an interested party forego its right to judicial review of an administrative decision imposing antidumping or countervailing duties.

370. See Initiation of HFCS Investigation, *supra* note 268, at 28,545.

371. See David A. Gantz, *Lessons from The United States-Japan Semiconductor Dispute*, 15 ARIZ. J. INT'L & COMP. L. (forthcoming April 1999). The United States does not yet appear willing to renounce use of section 301 in matters that do not constitute violations of GATT/WTO agreements, despite the doubtful legality of such actions. See *id.* Presumably, the United States can seek negotiations under Section 301 as it wishes. See *id.* However, if it imposes sanctions unilaterally—without first obtaining a WTO panel or Appellate Body decision approved by the Dispute Settlement Body—the sanctions, which are usually 100 percent duties on select products, presumably would be violations of GATT Article I (most favored nation treatment) and, possibly, Article XI (restrictions on quantitative restrictions). See *id.*

Similarly, had the case not been settled, the *Tomatoes* case could have produced three separate proceedings. First, the Mexican government action likely would have pursued its critique of the United States antidumping proceedings as violations of the WTO Anti-dumping Agreement in the WTO DSB. Second, the Mexican industry undoubtedly would have appealed the American antidumping duty order to a binational panel under Chapter 19. Finally, earlier Mexican complaints about NAFTA-based United States import restrictions would have presumably been pursued under Chapter 20 since Mexico alleged a NAFTA—or NAFTA side letter—violation.

The *Farm Products Blockade (NAFTA)* and *Farm Products Blockade (WTO)* disputes also offer a basis for interesting speculation. In the unlikely event that negotiations do not resolve the dispute, will Canada pursue these parallel actions already filed under Chapter 20 and the WTO? Even though technically separate “matters or measures” have been alleged in the two fora, it is obvious that the two parallel action involves the same dispute. This approach would frustrate the efforts of the NAFTA drafters to protect against “double jeopardy” by requiring a choice between the NAFTA Chapter 20 and WTO fora, and significantly increase the administrative and other costs of international litigation. Should two decisions ultimately be issued there would be an obvious risk of conflicting results, and potential failure to resolve the conflict definitively.

IV. RECOMMENDED CONSIDERATIONS FOR FORUM CHOICE

What factors should the NAFTA governments and private interests encouraging governments to act on their behalf consider in deciding in future disputes whether to seek resolution through NAFTA or the WTO, or perhaps both? Clearly, such decisions will be made on a case-by-case basis, and influenced by legal, political, and practical considerations, as well as which NAFTA Party is the complainant. It is, nevertheless, reasonable to suggest that certain factors should be among those carefully reviewed in reaching a decision. It may be useful in this analysis to ask the following four questions in light of the preceding discussion when making a determination: (1) Are there legal requirements that dictate one forum over the other; (2) If not, are there obvious substantive law advantages for one forum over the

other; (3) are there procedural differences that are likely to be important; and (4) what political considerations affect the choice?

A. LEGAL REQUIREMENTS CONTROLLING CHOICE OF FORUM

As discussed earlier, certain cases must be brought under the NAFTA or under the WTO to the exclusion of the other forum.³⁷² The following must be resolved within the NAFTA:

1. Conflicts between the NAFTA and bilateral or multilateral agreements listed in NAFTA Article 104; and
2. Disputes under Section B of Chapter 7 or Chapter 9 relating to human, animal or plant life or health, or protection of the environment, or raising factual issues concerning the environment, health, safety or conservation, including directly related scientific matters.³⁷³

In addition, others effectively must be resolved under the NAFTA because there are no comparable WTO provisions to provide the basis of allegations of a violation, including:

1. NAFTA-specific regional tariff reductions in Chapter 3 and the NAFTA rules of origin in Chapter 4;
2. NAFTA-specific customs measures in Chapter 5;
3. Inter-governmental disputes relating to the investment measures covered by Chapter 11, except for the few performance requirements that are actionable under the WTO's Agreement on Trade Related Investment Measures (TRIMs);³⁷⁴
4. Matters relating to competition (Chapter 15) and to business travel (Chapter 16).

372. See *supra* Part I.B (discussing jurisdictional issues under the NAFTA and the WTO).

373. See NAFTA, *supra* note 1, arts. 2005.3-4.

374. See Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 139, 33 I.L.M. 81 (1994) [hereinafter TRIMs]. Disputes between NAFTA private investors and host governments are subject to arbitration under the mechanism provided in Chapter 11, Section B.

5. Matters relating to government procurement (Chapter 10) involving Mexico, since Mexico is not a party to the WTO Agreement on Intellectual Property.³⁷⁵

Also, there remains some uncertainty as to whether the apparent choice of forum between the NAFTA and WTO mechanisms offered by Article 2005.1 is available when NAFTA provisions refer to GATT rights, as in Article 802.1, but do not explicitly incorporate the GATT provisions by reference. This issue was raised, but, unfortunately, not decided, in *Brooms*.

The principal area where NAFTA lacks jurisdiction vis-a-vis the WTO's Dispute Settlement Body is in the area of antidumping and countervailing duties. Chapter 19 is essentially the exclusive remedy for resolving matters in these two areas, to the exclusion of Chapter 20. Chapter 19, however, provides the NAFTA Parties—as distinct from “interested parties” before a national administrative agency—only with a basis for challenging new national laws as inconsistent with the WTO Antidumping or Subsidies Agreements. A NAFTA Party challenge to existing national legislation, or the application of such legislation in a manner allegedly in violation of one of the WTO agreements, would have to be taken to the WTO under the DSU and specific dispute settlement provisions of the Antidumping or Subsidies Agreements,³⁷⁶ unless the Parties explicitly provide for an alternative ad hoc forum.³⁷⁷

375. Unlike the “multilateral trade agreements,” which are binding on all WTO Members, the “plurilateral trade agreements,” including the Government Procurement Agreement, are optional. See, e.g., Agreement on Government Procurement, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 4, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 383.

376. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 17, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 145; Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 30, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 229.

377. See Softwood Lumber Agreement, *supra* note 55, art. V (providing a forum for resolving disputes under the Agreement, which seeks to resolve a long-running countervailing duty action by the United States against softwood lumber from

B. EXISTENCE OF SUBSTANTIVE LAW ADVANTAGES.

Due to the parallel nature of most NAFTA chapters and specific WTO agreements, the NAFTA Parties may have the luxury in many instances of choosing the provisions that are most favorable to their cases. For example, it can be argued that Article 301 of the NAFTA incorporates Article III of the GATT, along with its interpretative notes, as of January 1, 1994.³⁷⁸ If this interpretation is sustainable, a Party will wish to review the elements of a possible GATT Article III claim—over which there is both NAFTA and WTO jurisdiction—to ascertain whether the post-1993 development of Article III is favorable to its position.

Where a matter arises under explicit environmental provisions of the NAFTA, as noted earlier, Chapter 20 must be used.³⁷⁹ Other disputes, however, based on measures taken for environmental reasons, could conceivably arise. Under those circumstances, the Party defending its environmental measures would most likely prefer the NAFTA to the WTO mechanism. In both instances, the GATT Chapter XX exceptions apply, including those relating to protection of human, animal or plant life or health, and conservation of exhaustible natural resources.³⁸⁰ However, under the NAFTA Chapter 20, *environmental* measures relating to protection of human, animal or plant life or health, and conservation of living and non-living exhaustible natural resources, are explicitly recognized.³⁸¹

Similarly, a dispute over whether a NAFTA Party is imposing performance requirements³⁸² that are in conflict with international rules

Canada.)

378. See NAFTA, *supra* note 1, art. 301.1 (stating that with regard to the goods of another party, each Party shall comply with “Article III of the GATT and its interpretive notes, or any equivalent provision of a successor agreement to which all Parties are party [such as the GATT 1994]”).

379. See *supra* Part IV.A (discussing cases that must be brought under the NAFTA); NAFTA, *supra* note 1, arts. 104, 709-24 (ch. 7, sec. B), 901-15 (ch. 9).

380. See GATT 1994, *supra* note 73, arts. XX(b), XX(g).

381. See NAFTA, *supra* note 1, art. 2101.1 (emphasis added).

382. Examples of performance requirements are the conditioning of benefits provided to investors on the investors’ use of local raw materials or intermediate products, exportation of a certain volume or percentage of finished product, limitation of domestic sales to a certain percentage of export sales.

could be brought under the WTO's Agreement on Trade Related Investment Measures, or under Article 1106 of NAFTA. While the list of prohibited performance requirements is longer and more detailed in the NAFTA, there may be circumstances under which the particular requirement objected to fits more neatly under the Agreement on Trade Related Investment Measures.³⁸³ Appropriate comparisons of the provisions relating to protection of intellectual property³⁸⁴ or agricultural trade³⁸⁵ would also seem appropriate before a decision on forum is finalized.

Additionally, where GATT principles are involved—either directly or where incorporated into the NAFTA—the analysis of legal issues may be more likely to reflect the full body of GATT “law.” The predisposition toward the GATT will also be apparent in the intentions of the negotiators, since WTO panelists are much more likely than NAFTA panelists to be existing or former government officials who have experience in negotiating or interpreting GATT provisions.

C. ADVANTAGES AND DISADVANTAGES OF DIFFERING PROCEDURES

While the NAFTA Chapter 20 and WTO DSU procedures significantly differ as written, both processes are still evolving, and the actual differences in some cases are more apparent than real, as indicated above. Moreover, the WTO is undertaking a “review” process which may result in changes to the WTO system that make it more effective.³⁸⁶ No similar review is contemplated with regard to Chapter 20, although, if and when a permanent roster is appointed by the NAFTA Parties, some of the delays relating to selection of panelists

383. See TRIMs, *supra* note 374.

384. Compare NAFTA, *supra* note 1, ch. 17, with TRIPs, *supra* note 27.

385. Compare NAFTA, *supra* note 1, ch. 7(A), with WTO Agreement on Agriculture, *supra* note 27.

386. See WTO Ministerial Decision, Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 33 I.L.M. 1259-60 (requiring the WTO Ministerial Conference to complete a “full review of dispute settlement rules and procedures” within four years of the entry into force of the WTO agreements); see also *Preliminary Views of the United States Regarding Review of the DSU*, *supra* note 156, at 9. The review is not likely to be complete before the end of 1999.

may be reduced. The most significant procedural considerations are summarized as follows:

1. Delays in the process are probably less likely in the WTO than under Chapter 20, due to the existence of an independent secretariat and a mechanism for choosing panelists from a permanent roster, despite the existence of an appeal. As long as there is no permanent NAFTA roster, a Party has some control over the proceedings simply by drawing out the selection process, including, but not limited to, the fifth arbitrator, who traditionally has not been a North American national, and for which there is no mandatory choice mechanism. Thus, a NAFTA Party that wishes to go slow initially—perhaps in the hope that the matter may be settled—may wish to encourage dispute resolution under Chapter 20 rather than at the WTO, where it is more difficult for a Party to delay the initial proceedings.

2. In practice, panel decisions are equally binding, with one exception. The NAFTA lacks a detailed mechanism for implementation and lacks provisions to encourage the Parties to comply within a reasonable time. However, the *de facto* adoption of a fifteen-month period for WTO compliance means that NAFTA results are likely to be implemented more rapidly, since retaliation thirty days after the final report is permitted, and there are fewer restraints on retaliation than in the WTO. Thus, a NAFTA Party that is reasonably sure of its legal case and will be satisfied with self-help trade retaliation measures may well prefer Chapter 20. With “nullification or impairment” cases, the NAFTA mechanism is preferable, because decisions based on nullification or impairment of benefits are of the same binding nature as those related to violations of NAFTA provisions. In contrast, nullification or impairment claims are subject to different rules under the WTO DSB.

3. Whether NAFTA or WTO panelists are preferred as arbitrators, and whether five is preferable to three, depends on the particular circumstances of the case. If the issue relies on knowledge of the GATT, whether directly or indirectly, a WTO panel is more likely to have expertise, given that most of the panelists are present or former government official representatives to the GATT/WTO. If certain aspects of the case require knowledge of the North American economic or legal situation—as in *Farm Products Blockade*—or environmental law expertise, however, it may be easier to find NAFTA

nationals with the desired expertise, particularly where each Party may choose two panelists. On the other hand, if the presence of the other Party's nationals is believed to jeopardize the fairness and objectivity of the process, the WTO, with its rule against nationals of the disputants on the panel except at the Appellate Body level, may be preferred.

4. Theoretically, the Appellate Body of the WTO should produce a higher degree of predictability and consistency than the single-stage Chapter 20 process. It is not yet clear that this record will be the norm, at least until the WTO Review defines the scope of responsibility of and the use of precedent by Appellate Body members more explicitly. Nor is it clear that NAFTA panelists are less likely to follow relevant GATT/WTO panel and Appellate Body decisions than future WTO panels, given that prior GATT or WTO panel decisions are not binding on future panels. Both Chapter 20 panels to date have cited GATT panel decisions extensively, as have WTO panels. On the other hand, it is much less likely that GATT/WTO panels will cite Chapter 20 decisions. Thus, if one or more NAFTA Parties wish to resolve a dispute without setting a precedent that might be adverse if similar issues are raised in the WTO—as apparently was the case in *Brooms*—the Chapter 20 process is preferable.

D. POLITICAL CONSIDERATIONS

Politics is likely to be a factor in some cases, in the sense that the Parties seek to place maximum pressure on each other toward settlement. This may well lead to multiple filings, as in *Restrictions on Tomatoes (Quotas)/Mexican Tomatoes (Dumping)*,³⁸⁷ *Restrictions on Sugar/High Fructose Corn Syrup*,³⁸⁸ and *Farm Products Blockade (NAFTA)/Farm Products Blockade (WTO)*.³⁸⁹ Where a NAFTA Party believes that it is desirable to do so, it may be able to follow the Canadian approach in *Farm Products Blockade*, and avoid the “double jeopardy” rules of the NAFTA³⁹⁰ by characterizing different

387. See *supra* Parts II.A.6, II.B.1 (discussing the filings).

388. See *supra* Parts II.A.9, II.B.4 (discussing the filings).

389. See *supra* Parts II.A.10, II.B.5 (discussing the filings).

390. See NAFTA, *supra* note 1, art. 2006.6 (prohibiting a Party, once dispute settlement proceedings have been initiated under either the NAFTA or the WTO,

aspects of the same dispute as separate “matters.”³⁹¹ The United States may well contribute to the proliferation of parallel actions by filing Section 301 actions relating to the principal case, as in *High Fructose Corn Syrup*, even in circumstances where it is unlikely that such unilateral approaches will be pursued. In this respect, Mexico and Canada are at a tactical disadvantage because their laws incorporate no equivalent to Section 301.

Even where the NAFTA and WTO legal provisions are equivalent, there may be political advantages in using the multilateral organization over the trilateral because of the likelihood of attracting support from other WTO members through peer pressure, including, but not limited to, joining the action or reserving third party rights.³⁹² On the other hand, a NAFTA Party may be more willing to reach a negotiated settlement if the settlement need be implemented only with regard to a single nation rather than for multiple plaintiffs.

Finally, a Party's track record within each forum may be a relevant consideration in choosing a new forum. Canada and Mexico have each won the sole case pursued by them to binational panel resolution under Chapter 20, *Agricultural Products Tariffication* and *Brooms*, with unanimous panel decisions in each instance. The United States has, of course, lost both cases. Whether this experience will prejudice the official views of the American government against the Chapter 20 process, when and if new matters arise that could be brought in either forum, remains to be seen. The United States has been the complaining Party in only two Chapter 20 cases, *Agricultural Products Tariffication* and *Restrictions on Small Package Delivery*, and in neither case was there a viable WTO alternative.

Canada, on the other hand, has arguably achieved at least some satisfaction in all four of the NAFTA Chapter 20 consultations it has initiated, *Uranium Exports*, *Import Restrictions on Sugar*, *Helms-Burton Act*, and the *Farm Products Blockade*, and prevailed in the only action in which it was the respondent, *Agricultural Products Tariffication*. One government trade official has suggested that from

from pursuing settlement of the same dispute in the other forum).

391. See *id.* art. 2005.1.

392. See DSU, *supra* note 2, arts. 9.1, 10.1, 10.2 (indicating that the rights of third party members covered under the agreement at issue should be taken into account).

his point of view, that Chapter 20 is at least as successful as the WTO's Dispute Settlement Body.³⁹³ A Member of the Canadian Parliament, however, has questioned whether the NAFTA rules are as favorable to those of the WTO and advocated consideration of a permanent NAFTA "court."³⁹⁴

The experience of the NAFTA Parties at the WTO has been generally positive, but mixed. In the eighteen cases that were fully litigated—through the Appellate Body where applicable—through January 14, 1999, the United States, a Party in thirteen cases, prevailed in seven and lost in six.³⁹⁵ The United States has prevailed at the WTO in both cases brought against Canada, *Split-Run Periodicals* and *Dairy Products Export Subsidies*. Canada, a party in four cases, has prevailed in three, and Mexico, a party in two cases, has prevailed in one.³⁹⁶ It does not appear, however, that the experience of any of the three countries before the WTO is so far superior to its experience under Chapter 20 that this factor alone should determine forum choices in future disputes. Moreover, as is obvious from the experience of the NAFTA Parties under both the NAFTA and the WTO, the disputes are between Mexico and the United States or Canada and the United States, not between Mexico and Canada.³⁹⁷

393. See Canadian Official Interview, *supra* note 61 (noting, *inter alia*, a preference for five person over three person panels in some instances; similar enforceability; and more effective remedies for non-violation "nullification and impairment" matters).

394. See William C. Graham, *Proceedings of the Canada-United States Law Institute Conference: NAFTA Revisited: NAFTA Vis-A-Vis the EU-Similarities and Differences and Their Effects on Member Countries*, 23 CAN.-U.S. L.J. 123, 133 (1997) (citing the advantages of the WTO as a multilateral framework with greater certainty and "a potential of an appeals court").

395. See *WTO Dispute Overview*, *supra* note 10.

396. See *id.* Three cases involved both Canada and the United States, while one involved both Canada and Mexico. See *id.*

397. See also *NAFTA Secretariat Status Report*, *supra* note 128, at 2-3. Under the Chapter 19 panel process, which reviews national antidumping and countervailing duty determinations, in one of the forty-three cases brought to date, Mexican steel producers have challenged a Canadian antidumping order—on injury grounds—and in another, Canadian steel producers have challenged a Mexican antidumping order. See *NAFTA Secretariat Status Report*, *supra* note 128, at 2-3.

CONCLUSION

Mexico, Canada, and the United States have the unique luxury of forum-shopping with regard to many international trade disputes. NAFTA Chapter 20 and the WTO Dispute Settlement Understanding, with their significant jurisdictional overlap, provide the NAFTA Parties with choices available to no other members of the WTO, as the two mechanisms differ in significant respects in scope and function. Although the choices do not in fact exist in all or even most circumstances, the limited experience to date suggests that the three nations are generally taking advantage of the legal and procedural choices offered. Hopefully, they will continue to do so, resisting the temptation to use multiple fora for the same dispute where this practice would lead to redundancy and inefficiency.