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Dispute Settlement under the North American Free Trade Agreement: A Model for Future Trade Agreements?

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1. INTRODUCTION

It is undeniable that most countries consider international trade to be a key part of their economies and therefore encourage exports. It is also true that as the international business transactions increase, so will the disputes amongst trading partners. Therefore, a very important part of international trade agreements are the dispute resolution mechanisms in order to avoid national courts.

National courts are often seen as the less preferable alternative for parties in disputes involving issues such as dumping or subsidies. Parties view the national courts as displaying national favoritisms. For this reason, countries often include dispute resolution procedures to deal with disputes that may arise under the agreement. The North American Free Trade Agreement (the NAFTA) is no exception.[1]

Part II of this paper will provide an overview the dispute resolution mechanisms in the NAFTA. Part III will focus on Chapter 19 of the NAFTA and discuss some problems that have arisen under this Chapter. Part IV will compare Chapter 20 of the NAFTA with the dispute resolution mechanism under the World Trade Organization (WTO). Part V will discuss the future of Chapters 19 and 20 under a possible future Free Trade Agreement of the Americas (FTAA).

[1] North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (entered into force Jan. 1, 1994) (hereinafter NAFTA).

2. DISPUTE RESOLUTION MECHANISMS UNDER NAFTA

The NAFTA and its labor and environment side agreements include a variety of mechanisms for resolving disputes. These mechanisms are in the following chapters:

(1) Chapter 11 - resolution of investment disputes between foreign investors and host governments;

(2) Chapter 14 - disputes over the provision of financial services;

(3) Chapter 19 – appeals of antidumping and countervailing duty determinations by national administrative authorities;

(4) Chapter 20 – inter-governmental disputes over the interpretation and application of the agreement generally;

(5) North American Agreement on Environmental Cooperation – alleged failure of a NAFTA government to enforce national environmental laws; and

(6) North American Agreement on Labor Cooperation – alleged failure of a NAFTA government to enforce national labor laws.[2]

Of the above listed, the one that has been used more often is Chapter 19. In the first four years of NAFTA there had been three cases filed under Chapter 11, no cases under Chapter 14, forty under Chapter 19, two under Chapter 20, thirteen actions under the labor side agreement, and seventeen under the environmental side agreement.[3] As of January

[2] 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 (1998).
[3] *Id.* at 303.

11, 2003, there were twenty-nine active cases and sixty-nine completed cases under Chapter 19.[4] By looking at the numbers, it can be observed that Chapter 19 has had considerable testing and for this reason we will first focus on the experience of dispute resolution under this Chapter.

3. DISPUTE RESOLUTION UNDER CHAPTER 19

A. General Provisions

Chapter 19 is one of the most important chapters dealing with dispute resolution regarding the most common of the unfair trade practices in international trade, dumping and countervailing duties. Dumping occurs when the good produced in one country is sold in the territory of another country at below "normal value" and the resulting sales cause injury to the domestic producers in the importing country.[5] As a result, and in accordance to the General Agreement on Tariffs and Trade (GATT)[6], member countries may impose antidumping duties to offset the injury. On the other hand, countervailing duties may be imposed to offset certain government subsidies to the producer in one country that result in subsidized sales in another country and those sales cause injury to producers of similar goods in the importing country.[7]

Chapter 19 Article 1901 states, "Article 1904 applies only with respect to goods that the competent authority of the importing Party, applying the importing Party's antidumping or countervailing duty law to the

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[4] Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 Tex. Int'l L.J. 489 (2003).
[5] GANTZ, *supra* note 2, at 303.
[6] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. 1700, 55 U.N.T.S. 187 (hereinafter GATT).
[7] GANTZ, *supra* note 2, at 304.

facts of a specific case, determines are goods of another Party."[8] As member countries of GATT, the basic procedure for imposing antidumping and countervailing duties in Canada, the United States, and Mexico is covered in the Agreement on the Implementation of Article VI of GATT. Therefore, the internal procedures of each country should be very similar. A very brief description of the procedure includes the steps mentioned below.

First, the national production, presents a complaint to the administrative agency regarding an identical or similar product that is coming into the country at below normal value or is subsidized and that is causing or threatening to cause harm to the national industry. The administrative agencies in the United States, Mexico, and Canada differ as to who carries out the investigation. In Canada the antidumping and subsidy margins are determined by the Revenue Canada. In the United States they are determined by the Department of Commerce. The injury part in Canada is determined by the Canadian International Trade Tribunal and in the United States by the U.S. International Trade Commission. In Mexico both the antidumping or subsidy margins and the injury are determined by the Secretaría de Comercio y Fomento Industrial (SECOFI, now the Secretaría de Economía SE). The establishment of antidumping and countervailing duties is regulated by national law under Chapter 19 and must be in accordance to the GATT.

Second, there is an investigation that may lead to a preliminary finding of dumping or subsidization and a preliminary antidumping or countervailing duty may be imposed. The antidumping duty is usually the difference between the normal value (what the product is sold for in its country of origin) and the export price. In the case of subsides, the

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[8] See NAFTA, *supra* note 1, art. 1901(1).

countervailing duty is the amount (in percentage) of the subsidization. Later, that preliminary determination may become a final determination of antidumping duty or countervailing duty or it may be reversed because there is a finding that dumping or subsidization did not occur. Once a final determination is made, the losing party has the option to appeal internally to the national federal courts or may opt to appeal to the binational panel process as established in the NAFTA, Chapter 19.

The binational panel process substitutes the federal courts of each NAFTA Party. "Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party."[9] Each Party reserves the right to change or modify its antidumping law or countervailing duty law subject to some notice requirements.[10] Therefore, the panel, since it stands in the shoes of the each Party's federal courts, must apply the substantive antidumping and countervailing duty laws of the importing nation (the country where the original antidumping dispute arose). The panel must consider the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents of the importing country. [11] The panel may "uphold a final determination or remand it for action not inconsistent with the panel's decision."[12]

The establishment of a binational panel is found in Annex 1901.2. It states that the Parties shall establish and maintain a roster of individuals to serves as panelists, including judges and former judges to the fullest extent possible.[13] This list shall have a list 75 candidates, at least 25 from each country. Candidates shall be of good character, high

[9] See NAFTA, *supra* note 1, art. 1902 (1)
[10] See NAFTA, *supra* note 1, art. 1902 (2)
[11] See NAFTA, *supra* note 1, art. 1902 (1)
[12] See NAFTA, *supra* note 1, art. 1904(8)
[13] NAFTA, *supra* note 1, Annex 1901.2

standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity of international trade law, amongst other requirements.[14] There will be five panelists chosen from the roster, each Party choosing two panelists and both Parties agreeing on the fifth. Once the panelists are chosen, the panelists choose a chairperson. The panelists must follow a strict code of conduct. Panelists are required to disclose any circumstances that raise a conflict or appearance of conflict.[15]

The decision of the panel must be decided by majority vote and all panelists must vote. "If a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist..."[16] This may cause delays in the proceedings.

> Once the panel makes a determination, there is no appeal. The only exception to this is when 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, for example by failing to apply the appropriate standard of review.[17] In this case the Parties involved shall establish an extraordinary challenge committee. This committee will be comprised of three members selected from a 15-person roster where each country provides five members to the list. This type of challenge is very limited...[18]

This type of challenge was only used three times under the Canada-United States Free Trade Agreement[19] and only one Extraordinary Challenge Committee request has been made under NAFTA.[20]

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[14] NAFTA, *supra* note 1, Annex 1901.1(1)
[15] See NAFTA Code of Conduct, § II(A).
[16] See NAFTA, *supra* note 1, Annex 1901.2, para. 9.
[17] See NAFTA, *supra* note 1, art. 1904, para. 13.
[18] GANTZ, *supra* note 2, at 313.
[19] The Canada-United States Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, Can.-U.S., 27 I.L.M.

In addition to having very limited opportunity to appeal once the decision is made, "the decision of the panel … shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel."[21] That is to say, the panel decision will not create binding precedent for future panels. This may lead to inconsistencies in the decisions of the panels. However, some panels have used former panel decisions as persuasive.

B. Challenges Faced in Reviewing Mexican Cases

The addition of Mexico to the binational panel process that was already in practice between the United States and Canada for several years created unexpected challenges to the Chapter 19 proceedings. Several of these challenges will be discussed below.

First of all, Mexico has a civil law tradition. This created a new challenge because the CUSFTA had been between two common law countries. In panel proceedings where there are lawyers from two different legal traditions the way of thinking about legal issues may be different, especially when one does not fully understand the system of the other. "For example, Mexican practice requires extensive, properly executed, and authenticated powers of attorney before an attorney can represent a client before a court of law or obtain access to the confidential portions of the administrative record without posting of a bond. Some such matters, which are at best questions of administrative procedure in the United States, reach a level of

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281 (1988) (hereinafter CUSFTA).

[20] Michael Wallace Gordon, *Forms of Dispute Resolution in the North American Free Trade Agreement*, 13 Fla. J. Int'l L. 16 (2000).

[21] NAFTA, *supra* note 1, art. 1904, para. 9.

constitutional guarantee in Mexico."[22] This may be the source of major controversy between the panelists because on the one hand the American panelist may not think that this is very important (if there was a problem, just fix it, a pragmatic approach) whereas a Mexican panelist may consider that the whole case depends on this precise procedural matter (a formalistic approach).

Another major distinction is that the Mexican civil law system does not recognize precedent as understood by American lawyers. Mexican courts decisions are not binding unless a court at the appellate level has ruled in the same manner in regards to the same legal issue at least five times and then, only then, does it become binding precedent (known as "jurisprudencia"). This may become a difficulty because panelists must "consider the relevant statutes, legislative history, regulations, administrative practice, and judicial precedent" of the importing country. Additionally, "judicial review of final administrative determination in antidumping and subsidies cases in Mexico did not exist before 1994."[23] Therefore, the panelists, that stand in the shoes of the Mexican federal reviewing court have no direction as to how the Mexican Federal Tax Court would have decided the issue under Mexican law.

Another matter that was not anticipated for Chapter 19 panel proceeding was the language differences with regards to permitting more time. One consideration is that the entire process will take more time than that foreseen because of the need to translate all documents for monolingual panelists.

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[22] GANTZ, *supra* note 2, at 318.
[23] *Id.* at 320.

Furthermore, the Mexican international trade bar is limited in comparison with the United States and Canada. Some problems have arisen because of conflict of interests of Mexican panelists. The conflicts standard "appearance of conflict" is very broad and this caused that in the first Mexican NAFTA case two Mexican panelists to resign because of actual or alleged conflict.[24] This of course caused delays in the proceedings.

Another delay in Mexican cases has been caused by the fact that in Mexico *Secretaría de Economía* (SE) makes both dumping margin and injury determinations. In the United States and Canada these are separate issues and analyzed by separate agencies. An appeal of each issue is taken to a different panel. In Mexico both issues are reviewed by SE. In other words, when parties appeal to a binational panel from a Mexican case, the panel must review both issues and thus, because of the added burden, the panels usually take more time.

The Chapter 19 procedure has been strongly criticized by some American authors as "fundamentally flawed and undemocratic."[25] The argument made is that, "it places far reaching decision-making power in the hands of private individuals who do not have judicial experience and who are not accountable for their performance."[26] The claim is that it is an unconstitutional procedure that should not be extended to other countries that the U.S. intends to enter into trade agreements. It is argued that the difficulties of lawyers from diverse legal systems interpreting each others laws seems fruitless if the parties could just as well resolve their disputes under the World Trade Organization

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[24] See Rolled Steel Plate from Canada, MEX-96-1904-02, Decision (English) at 12-13. One panelist resigned for lack of time; the other because he took a consultancy position with the Canadian government.

[25] See Jennifer Danner Riccardi, *The Failure of Chapter 19 in Design and Practice: An Opportunity for Reform,* 28 Ohio, N.U.L. Rev. 727 (2002).

[26] *Id.*

procedures. One proposal for reform includes having judicial review by U.S. courts of the panel decisions prior to implementation. This proposal may of course sound reasonable from a U.S. perspective but, it may not be the case from a Canadian or Mexican perspective, unless each country could review the decision in their own court system. Consequently, the parties requesting review would be back in national courts, which is what they wanted to avoid in the first place.

On the other hand, others claim that "while Chapter 19 is in need of some minor tinkering, it is on the whole functioning well."[27] Richard O. Cunningham recognizes that the introduction of the panel process to Mexico introduced numerous complexities, such as those mentioned above. However, he argues that there "are compelling reasons to maintain the Chapter 19 panel process as an alternative" (to the WTO panel procedure). Although, he cites advantages to the WTO process, such as it being more expeditious than the binational panel appeals from Mexican decisions where the process has had serious delays, he claims that the Chapter 19 process provides a useful alternative. He asserts that the binational panels have, with few exceptions, reached well-reasoned decisions. And, "unlike the WTO system, in which private parties must persuade their governments to initiate dispute settlement, the Chapter 19 system gives aggrieved private parties the power to bring their own challenges. Thus, under Chapter 19, the aggrieved parties are not inhibited by external politics or the government's own internal policies."[28] He concludes, that "most importantly, the Chapter 19 panel process serves a valuable function with respect to Mexican import decisions, as to which it represents the

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[27] Richard O. Cunningham, *NAFTA CHAPTER 19: How Much Does it Work? How Much is Needed?* Proceedings of the Canada-United States Law Institute Conference, The Management and Resolution of Cross Border Disputes as Canada/U.S. Enter the 21st Century, Cleveland, Ohio, April 14-26, 2000, 26 Can.-U.S. L.J. 79 (2000).
[28] *Id.* at 88.

only viable means of ensuring compliance with domestic law and procedures."[29]

4. DISPUTE RESOLUTION UNDER THE WTO AND CHAPTER 20.

The dispute resolution mechanism under the WTO is covered by the Dispute Settlement Understanding (DSU).[30] This part of the paper will not discuss the entire DSU process but will point out some differences with dispute resolution under Chapter 20 of the NAFTA.

First of all one major difference is that member states in the WTO follow one settlement procedure when a conflict arises. All the WTO agreements refer the members to the DSU. This is quite different from what can be observed in NAFTA. As discussed in Part II, NAFTA has six mechanisms for resolving disputes depending on the subject.

Secondly, although the procedure seems similar between the NAFTA and the WTO they have some interesting differences. Each has some sort of body or institution that is in charge of dispute resolution, the Dispute Settlement Body for the WTO and the Free Trade Commission for the NAFTA. The NAFTA provides for a choice of forum as to whether disputes will be settled in NAFTA or the WTO.[31] Both the DSU and Chapter 20 of the NAFTA follow a process that begins with consultations. However after consultations, NAFTA requires a meeting with the Free Trade Commission to attempt to mediate the difference, whereas the WTO permits mediation at any point during the procedure and it is not a mandatory step prior to requesting a panel. The next step for both is the establishment of the panel. The WTO has three

[29] *Id.*
[30] See Understanding on Rules & Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 33 I.L.M. 112 (1994) (hereinafter DSU).
[31] See NAFTA, *supra* note 1, at art. 2005.

panelist (with a choice of five) and NAFTA requires five panelists. The selection process is also different. The NAFTA requires a cross-selection where each party chooses two from the list of the other party and a chair selected by agreement. The panelists in the WTO are not to be from the countries in dispute, without the parties agreeing otherwise.[32] The WTO has one list and the three panelists are chosen from that list. The functions and qualification requirements of the panelists are basically the same in both.

A major difference between the both systems arises after the panel has made its determination. Under the WTO the losing party can appeal to the Appellate Body, a standing Appellate Body. The Appellate Body may reexamine the case with regard only to "issues of law… and legal interpretations", and not to issues of fact.[33] Chapter 20 of the NAFTA does not have an appeal process similar to that of the WTO. Chapter 19 does not either. We must consider that Chapter 19 is already reviewing a prior decision, made at the national level so it is acting like a reviewing body. Whereas, Chapter 20 reviews for the first time. However, Chapters 19 decisions can be attacked under the very restricted conditions of the Extraordinary Challenge Committees mentioned above. This however, is not a regular appeal as understood in common law systems.

Both the WTO and NAFTA appear to implement the final decisions in a very similar manner. Both provide for suspension of benefits if, at the end of the day, the parties cannot work out an agreement. However, a distinction between the two is the supervision of the panel's final recommendation. The WTO provides for in Article 22 of the DSU that the DSB can authorize the suspension of benefits and supervises the

[32] See *supra* note 30, at art. 8(3).
[33] See DSU, *supra* note 30, at art. 17(4) & (6).

implementation stage. The NAFTA's implementation phase is not supervised, which may lead to a failure in any real resolution to the dispute.

Professor David Lopez discusses Chapter 20 dispute settlement and notes that few disputes are pushed to arbitration.[34] He observes that of the eight complaints lodged by the end of 1996, only three have gone to arbitration … Canadian agricultural tariffication, U.S. escape clause restraints on Mexican brooms, and U.S. refusal to admit Mexican trucks and buses.[35] Of the three, two have been by Mexico against the United States.

In the first case, the U.S. International Trade Commission found in 1996 that the elimination of tariffs on Mexican brooms resulted in a surge of imports that were substantial cause of serious injury or its threat to the U.S. broom industry.[36] A tariff increase was recommended, through the escape clause proceedings, but the USTR attempted to negotiate a solution with Mexico. When the negotiations failed, Mexico requested consultations under Chapter 20. President William Clinton imposed substantial tariffs and tariff-rate-quotas on brooms from Mexico and other countries for three years.[37] Mexico retaliated by raising tariffs on several U.S. products, such as U.S. wine, brandy, bourbon, whiskey, to name an few. In 1998 the NAFTA Chapter 20 arbitration panel ruled in Mexico's favor and U.S. officials indicated that they would comply. The U.S. took nine months to do so and Mexico removed its retaliatory tariffs.[38] This is one example of how Chapter 20 does in fact work. However, the other case by Mexico

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[34] David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience,* 32 Tex. Int'l L. J. 163 (1997).
[35] *Id.*
[36] RALPH H. FOLSOM, NAFTA IN A NUTSHELL, WEST GROUP 1999.
[37] *Id.*
[38] *Id.*

against the U.S. demonstrates the contrary. The trucking case demonstrates that the Chapter 20 dispute resolution mechanism needs improvement.

Trucking services transport almost three-fourths of the U.S.-Mexico trade.[39] Trade between the U.S. and Mexico grew from $100 billion in 1994 to $248 billion in 2000.[40] Pursuant to the NAFTA agreement, Mexican trucks should have been allowed into the four border states on December 18, 1995.[41] Access throughout the United States was to be liberalized on January 1, 2000.[42] The U.S. did not comply with these commitments. U.S. highway safety concerns were the primary reason given by the U.S. for noncompliance. However, "some commentators argue that congressional concern for highway safety is simply a façade for the real issue of potential loss of American jobs."[43] Nonetheless, the moratorium on issuance of operating authority to foreign carriers, established by the Bus Regulatory Reform Act of 1982, was not lifted with respect to Mexican carriers pursuant to the agreement obligations. Consequently, Mexico initiated Chapter 20 proceedings against the United States.

As can be observed form the above procedure, the first step is consultations, which Mexico requested in December 1995, pursuant to Article 2006. This article states that "any Party may request … consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation

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[39] Carrie Anne Arnett, *The Mexican Trucking Dispute: A Bottleneck to Free Trade. A Tough (Road) Test on the NAFTA Dispute Settlement Mechanism,* 25 Hous. J. Int'l L. 561 (2003). See In the Matter of Cross-Border Trucking Servs., Secretariat File No. USA-MEX-98-2008-01, Final Report (Feb. 6, 2001), available at http://www.ustr.gov/enforcement/trucking.pdf.

[40] Id.

[41] See NAFTA, *supra* note 1 at 746-47.

[42] See NAFTA, *supra* note 1 at 704-05.

[43] ARNETT, *supra* note 39, at 572.

of this Agreement."[44] Consultations were unsuccessful and Mexico requested a meeting with the NAFTA Trade Commission in July 1998, which did not resolve the dispute. Thus, in accordance with Chapter 20 a panel was established.

The panel resolved based on the arguments presented by Mexico and the U.S. In summary, the U.S. position was that the delay in lifting the moratorium was "both prudent and consistent with U.S. obligations under the NAFTA."[45] This argument was based on Mexico's inadequate safety regulatory system. The United States argued that it had no obligation to license the operation of the Mexican trucking firms in circumstances in which: "(1) serious concerns persist regarding their overall safety record; (2) Mexico is still developing first-line regulatory and enforcement measures needed to address trucking safety standards, and (3) essential bilateral cooperative arrangements are not fully in place."[46]

On the other hand, Mexico argued that Mexican-owned carriers were denied national and most-favored nation treatment in their ability to obtain operating authority to provide cross-border truck services in the border states as of December 18, 1995 and throughout the U.S. as of January 1, 2000. Mexican-owned carriers should have been allowed to apply for operating authority based on the same procedure as those applied to U.S. and Canadian carriers.[47] Mexico stated that no conditions were provided for in NAFTA that required Mexico to adopt an identical regulatory safety system.[48] Mexico argues that a blanket

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[44] See NAFTA, supra note 1 at 694.
[45] ARNETT, *supra* note 39, at 586.
[46] ARNETT, *supra* note 39, at 587.
[47] *Id.* at 483.
[48] *Id.*

refusal by the U.S. to examine all Mexican applications was a direct violation of NAFTA's national treatment obligations.

Additionally, Mexico argued a violation of the most-favored nation treatment principle. The U.S. does not impose the same rigid safety requirements, regulations, and restrictions on Canadian carriers.[49]

The U.S. responded to both of the Mexican arguments presented above that in the obligations of national and most-favored nation treatment, the United States defined "like circumstances" as not necessitating that "a particular measure must in every case accord exactly the same treatment to U.S. and Canadian service providers."[50] Thus, "the United States may make and apply legitimate regulatory distinctions for purposes of ensuring the safety of U.S. roadways."[51] The U.S. further argued that because of the differences between the regulatory systems, "the circumstances relevant of the treatment of the Mexican-based trucking firms for safety purposes are not like those applicable to the treatment of Canadian and U.S. carriers."[52]

The panel unanimously held that a blanket refusal by the U.S. to grant operating authority and investment to Mexican nationals was impermissible under NAFTA.[53] The panel held the following: First, that the U.S. failure to review and consider applications for cross-border authority from Mexican nationals was and remains a breach of the U.S. obligations under Annex I, Articles 1202 and 1203; Second, the Panel dismissed the U.S. justification for inaction, the inadequacies in the Mexican regulatory system; Thirdly, in respect to investment, the panel

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[49] *Id.*
[50] ARNETT, *supra* note 39, at 587.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 589.

also determined against the U.S. as being in breach of its NAFTA obligations. [54]

The U.S. has been slow to comply with the panel's determination and recommendations. In June 2001, the U.S. complied with the investment portion of the panel's decision and allowed Mexican investment in U.S. transportation companies, subject to all U.S. safety laws and regulations.[55] The moratorium was lifted in late 2002.[56] However, because of internal political conflicts, the legislation to implement the decision was slow and later court action brought implementation to a complete halt.

On January 16, 2003, the 9th Circuit Court of Appeals in San Francisco ruled unanimously that the U.S. government must complete an environmental impact review before Mexican trucks are allowed beyond the existing 20-mile commercial border zone.[57] Appeals Court Judge Kim M. Wardlaw wrote, "although we agree with the importance of the United States' compliance with its treaty obligations with its southern neighbor, Mexico, such compliance cannot come at the cost of violating United States Law."[58] Thus, the borders remain closed to Mexican trucks.

The trucking case is a classic example of how this dispute resolution mechanism under NAFTA does not work as planned. A case should take 220 days, from the request for the formation of a panel until the

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[54] *Id.*
[55] ARNETT, *supra* note 39, at 587.
[56] *Id.*
[57] Diane Lindquist, *Court Keeps Mexico's Long-Haul Trucks Back,* San Diego Union, January 17, 2003.
[58] Henry Weinstein, *The Nation U.S. Court Bars Mexican Trucks Ruling, Says a Thorough Review of Possible Environmental Effects is Required Before Bush can Invoke NAFTA and Lift Restrictions,* L.A. Times, January 17, 2003.

final report.[59] The trucking case began on December 18, 1995 and a panel decision was made on February 6, 2001, six years. This time-frame obviously does not respond to the need for an efficient dispute resolution mechanism. Furthermore, once the panel decision has been handed out, the parties should agree on a resolution. However, the NAFTA does not provide a mechanism to force the parties to comply with their obligations or panel recommendations.

Needless to say that the perspective from the Mexican side is clearly one of disappointment. The U.S. cannot simply disregard its international obligations under agreements made with other countries. This conduct weakens U.S. credibility in the international arena. Other countries may look at this behavior and be less willing to enter into trade negotiations and agreements with the U.S. if at the end of the day its international obligations will be undermined by an internal court. Therefore, the entire dispute resolution mechanism of the NAFTA is called into question because of the non-compliance with a decision issued by a binational panel.

5. THE FUTURE OF DISPUTE SETTLEMENT IN THE AMERICAS

The NAFTA provides several options for dispute settlement. However, in analyzing Chapters 19 and 20 of the NAFTA and making some general comparisons with dispute settlement under the WTO, one can see that the NAFTA dispute settlement mechanisms can be improved. This part will make some recommendations for improvement and will also analyze whether the NAFTA can work for a possible Free Trade Area of the Americas.

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[59] ARNETT, *supra* note 39, at 617.

First of all, it seems that Chapter 19 procedures should allow for more time to adjust for the lag time due to translation work that was not contemplated by the negotiating Parties. Perhaps a simple modification of the time schedule is needed.

Second, the conflict of interest requirement is too broad. The language could be changed to limit a conflicts period to a set amount of years so that there will be more persons qualified to be on the rosters.

Third, the rosters for Chapter 19 and Chapter 20 could be reduced. In this manner there are less persons on each list and they would be called more often to serve as panelist and this would improve the expertise of panel members and the consistency of the decisions. This however, would mean that panelist would need to be better compensated.

Fourth, some authors have suggested that a standing appellate body should be implemented into the NAFTA. Others disagree with this proposal and state that this would just cause more delays in the final decisions. More time would mean more money and so the costs would go up.

Another suggestion is that Chapter 19 be expanded to include appellate review. This would resolve inconsistencies and make panel jurisprudence more stable and consistent. This of course would also extend the weight given to panel decisions as creating precedent that could be followed by subsequent panels.

With all of these suggestions, could the NAFTA dispute resolution mechanism be extended to other countries if a Free Trade Agreement of the Americas is accomplished? The answer depends on which dispute

resolution mechanism of the NAFTA we are referring to. If we discuss Chapter 19, it seems quite a difficult task if we multiply the challenges faced in the Mexican NAFTA cases times the other new countries. For example, if Brazil were incorporated the panel could include panelists speaking English, Spanish, and Portuguese and the travel distance for panelists to travel to meet would also be extended. Additionally, the panelist would have to apply Brazilian unfair trade practices national law and be able to apply the standard of review under Brazilian law. Multiply this effort by each country added to the free trade area. The matter gets more complicated. Perhaps if the free trade area extended further down then the WTO dispute resolution mechanism for dumping and countervailing duty matters might be the better option. Some authors have suggested that Chapter 19 no longer will be used if the FTAA comes into being. For example, "the European Union does not permit one country to challenge another for subsidies or dumping. If there is a trade issues that appears to involve unfair trade, it is brought under the antitrust provisions of the Rome Treaty."[60] Others have suggested that antidumping and countervailing cases will disappear as the countries integrate more fully and so the question may become moot.

Additionally, if Chapter 20 negotiations are complicated between three Parties then it is much more complex if more members are added. The political influence in the negotiations would make it more difficult to arrive at mutually-satisfactory agreements once more members are involved. Furthermore, supervision of panel recommendations would also be an issue. The trucking case shows that when the parties do not have equal bargaining power, as is the case between Mexico and the

[60] GORDON, *supra* note 20.

U.S., then it is difficult to compel another country to comply with its obligations.

6. CONCLUSION

After analyzing the dispute settlement mechanisms of the NAFTA and particularly Chapters 19 and 20 it is the belief of this author that the Chapter 19 mechanism has resolved a large quantity of antidumping and countervailing disputes successfully. Although their have been some difficulties along the way, especially with regards to Mexican cases, most have been resolved by unanimous panels and where the panels have split it has not been along country lines. This may demonstrate that as panelists learn more about the other legal systems the difficulties may be smoothed out in the near future. On the other hand, Chapter 20 cases demonstrate that there is still plenty of room for improvement, specifically in the supervision of panel determinations. As a final point, it is not foreseeable that the Parties will renegotiate the terms of the NAFTA that deal with dispute settlement.