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Old Wine, New Skins: NAFTA and the Evolution of International Trade Dispute Resolution

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OLD WINE, NEW SKINS: NAFTA AND THE EVOLUTION OF INTERNATIONAL TRADE DISPUTE RESOLUTION†

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INTRODUCTION

A. *Opening Remarks*

The recently completed North American Free Trade Agreement[1] (NAFTA) is an event of great pith and moment, not just for trade lawyers, but for the world in general. NAFTA will be the world's largest trading bloc,[2] and has caused a heated, multipartisan debate within Canada, Mexico, and the United States.[3] Moreover, the economic dis-

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† The author wrote this Note in the spring of 1993, and it was reviewed and accepted for publication in the summer of the same year. On the eve of its publication, Congress passed NAFTA along with two side agreements which addressed labor and environmental concerns. Although these developments may render some statements in the Note somewhat dated, the Note as a whole remains predominantly current.

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1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

2. *See, e.g.*, Eleanor R. Lewis, *Negotiation of NAFTA Text Completed*, INT'L L. NEWS (A.B.A. Sec. Int'l L. & Proc.), Fall 1992, at 1, 5–7 (documenting size of proposed NAFTA text); Scott Pendleton, *Clinton, Mexican President Endorse Trade Agreement in First Foreign Summit*, CHRISTIAN SCI. MONITOR, Jan. 11, 1993, at 9 (NAFTA's 360 billion consumers and $6 trillion economy will be largest market in the world).

3. For discussions of the various asserted consequences of NAFTA, see GARY C. HUFBAUER & JEFFREY J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 35 (1992) (asserting that NAFTA accession will "continue and solidify the ongoing [Mexican] reform process"); Drusilla K. Brown et al., North American Integration 1, 5 (Discussion Paper No. 312, Research Forum on International Economics, Institute of Public Pol'y Studies, the University of Michigan) (later published in *Economic Journal*, Sept. 1992) (implying Mexican participation in NAFTA will "strengthen [its] democratic institutions"); *id.* at 5 (trade liberalization by Mexico will greatly improve the Mexican economy); Leonard B. Feldman, *U.S. Mexico Free Trade Agreement*, 4 TRANSNAT'L LAW. 553, 579 (1991) (citing consolidation of Mexican economic reforms and desire to stop flow of illegal aliens as U.S. goals in NAFTA); Gary C. Hufbauer & Jeffrey J. Schott, *Options for a Hemispheric Trade Order*, 22 U. MIAMI INTER-AM. L. REV. 261, 282–83 (1991) [hereinafter Hufbauer & Schott] (cataloging participants' interests in NAFTA: Mexico seeks to attract investment, to regain flight capital, and to solidify economic reforms; Canada primarily wants to safeguard its prior gains; the United States seeks to boost the economies of border states and Mexico, to create market for U.S. exports, to draw on Mexican labor and resources, to stabilize Mexican democracy, to reinforce Mexican economic reforms, to stem the flow of illegal immigrants, and to show the European Communities that the Americas can also form a trading bloc); David Zirnhelt, *Fear Trade: B.C. is Right: Canada Has No Chance of Getting A Fair Shake*

parities between NAFTA members will be the greatest of any free trade area or customs union to date.[4] This aspect fuels the general controversy and also makes NAFTA an experiment for any trade agreements between the European Communities (EC) and their impoverished, formerly communist, eastern neighbors.[5] Finally, many see NAFTA as the next step[6] towards a Western Hemisphere Free Trade Agreement (WHFTA).[7] Because NAFTA may be the basis for WHFTA, it is all the more important that NAFTA be carefully crafted, not only for immediate concerns, but also for future developments.

This Note examines NAFTA's effort in meeting the needs of the moment (i.e., North American integration) and those of the future (i.e., hemispheric integration) regarding the issue of dispute resolution.[8]

With NAFTA, VANCOUVER SUN, July 7, 1992, at A13 (NAFTA creating unfair hub and spoke deal, with the United States as the hub and Canada and Mexico as the spokes of the trade deal).

4. *See Baucus Outlines Safeguards He Says are Necessary for Acceptable NAFTA*, 9 Int'l Trade Rep. (BNA) 1020 (June 10, 1992) (quoting letter characterizing NAFTA as first free trade agreement between a developed and developing country).

5. *Cf. Western Europe Not Doing Enough to Help East, Brock Tells Briefing*, 8 Int'l Trade Rep. (BNA) 983 (June 26, 1991) (former U.S. Trade Representative calls for more Eastern European access to Western European markets, drawing a parallel with Mexico-U.S. trade negotiations).

6. The first step was the Canada-United States Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter CUSFTA].

7. *See, e.g.*, Brown et al., *supra* note 3, at 11 (discussing the strong possibility of hemispheric expansion); Jonathan T. Fried, *Squaring the Circle: Unilateralism, Bilateralism and Multilateralism in US Trade Policy*, 8 B.U. INT'L L.J. 231, 237 (1991) (mentioning possibility of expanding NAFTA to a hemispheric agreement); Hufbauer & Schott, *supra* note 3, at 263, 276–77, 291–92 (predicting the development of a hemispheric trade order, with CUSFTA serving as a model for NAFTA and a Western Hemisphere Free Trade Agreement [hereinafter WHFTA], and with Chile as the next member of an expanded NAFTA or WHFTA); Richard Feinberg & Peter Hakim, *NAFTA: Key to Hemispheric Unity*, CHRISTIAN SCI. MONITOR, Aug. 27, 1992, at 19 (describing concerns for possible NAFTA expansion into WHFTA).

Proponents of NAFTA and WHFTA underscore both the economic and non-economic benefits to be reaped by Latin American countries from free trade. *See, e.g.*, Hufbauer & Schott, *supra* note 3, at 263 (predicting hemispheric trade arrangement will also produce "social pacts" on such matters as health, safety, and environment); Feinberg & Hakim, *supra* (placing free trade at the leading edge of hemispheric convergence towards democracy, free markets, and multilateral cooperation); *Third World Debt*, ECONOMIST, Sept. 12, 1992, at 21, 23 (implying free trade is necessary to sustain fragile Latin American economic reforms). These predicted benefits increase the importance of carefully drafting NAFTA, ensuring both its own viability and that of any following agreement. For expected Mexican benefits from NAFTA, see *supra* note 3 and accompanying text.

But see Marc Levinson, *Let's Have No More Free-Trade Deals, Please*, NEWSWEEK, Aug. 17, 1992, at 40 (opposing idea of WHFTA as politically and economically infeasible and characterizing NAFTA as a purely political, economically dubious arrangement).

8. Dispute resolution is so crucial and delicate an issue between the United States and Canada that disagreements over it caused debates about abolishing CUSFTA and ending NAFTA talks. *See, e.g.*, Daphne Bramham, *Canada Gets Short End of the Stick: U.S. Ruling on Softwood Ignores Free Trade Deal*, VANCOUVER SUN, May 16, 1992, at A1, (British

Dispute resolution is key to any trade agreement; without an effective means of settling specific disputes and enforcing provisions generally, parties will have a little incentive to honor their trade commitments.[9] Moreover, ineffective dispute resolution hurts smaller, less developed countries in agreements with larger, more developed countries, because the larger countries will be tempted to use their economic leverage to solve disputes to the disadvantage of the smaller ones.[10] A strong, rule-based dispute resolution mechanism (DRM) protects the weaker nations from the excesses of the stronger ones.[11] These concerns drive Canada and Mexico to seek reliable DRMs,[12] especially since the alternative

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Columbia Premier calls for withdrawal from NAFTA negotiations because of unfavorable subsidies ruling); *Estranged Partners: Trade Disputes Threaten the FTA*, MACLEAN'S, Mar. 16, 1992, at 34, 34–35 (Canadian officials privately warning of danger to CUSFTA and NAFTA stemming from automotive rules of origin and softwood lumber disputes; Canadian opposition party pledging to abrogate NAFTA if elected to power); Mary Williams Walsh, *Canada is Unhappy With U.S. Trade Pact*, L.A. TIMES, Mar. 11, 1992, at D1, D12 (stating that adverse trade decisions are prompting Canadian reevaluation of CUSFTA; that a Canadian trade minister has hinted that NAFTA will not go forward until CUSFTA disputes are resolved; Canadian CUSFTA negotiators have expressed doubt over it in the wake of subsequent disputes).

9. For a general discussion of this issue see JOHN H. JACKSON, THE WORLD TRADING SYSTEM 83–88 (1989).

10. *See id.* at 85–86 (discussing the disadvantages of weaker countries in disputes with larger ones).

11. *See id.* at 86 (describing advantages of rule-based dispute resolution).

12. *See, e.g.*, Robert Hage, *Dispute Settlement under the Canada-United States Free Trade Agreement*, 1990 CAN. Y.B. INT'L L. 361, 363 (perceiving U.S. abuse of trade remedies as a major irritant in Canada-U.S. relations); Ted L. McDorman, *The Dispute Settlement Regime of the Free Trade Agreement*, 2 REV. INT'L BUS. L. 303, 305 (1988) (citing Canadian concerns over the effect of U.S. negotiating strength upon dispute settlement); Alan M. Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 ME. L. REV. 305, 305 (1988) [hereinafter Rugman] (citing size asymmetry as source of Canadian drive for rules-based trading system); James F. Smith & Marilyn Whitney, *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D. L. REV. 567, 594 (1992) (noting Mexican desire for binding arbitration in NAFTA to counter-act U.S. tendency to settle disputes with trade strength); Ann Carlsen, Note, *The Canada United States Free Trade Agreement: A Bilateral Approach to the Reduction of Trade Barriers*, 12 SUFFOLK TRANSNAT'L L.J. 299, 308, 315 (1989) (Canada especially concerned with dispute resolution because of perceived arbitrary application of trade remedy laws by the United States).

But cf. Stephen G. Hirsch, *Free Trade Pact Rapped Over Dispute Resolution*, RECORDER, Sept. 4, 1992, *available in* LEXIS, Genfed Library, RECRDR File (quoting a law professor who characterizes NAFTA's dispute resolution provisions as weak and "less immune to power politics than it should be"); *see also infra* note 116 and accompanying text (discussing concerns with antidumping and countervailing duty dispute resolution).

The best statement of Canadian concerns regarding DRMs is in *Hage*, *supra*:

> For Canada, [the dispute resolution] provisions are an essential part of the FTA [Free Trade Agreement]. Canada's objective . . . had not only been to obtain greater access to the United States market . . . , but also to ensure that any trade differences between the two countries were resolved in a dispassionate, predictable fashion. As the smaller trading partner, and thus the one with the greatest trade dependance on the other, Canada could not count on its political and economic

General Agreement on Tariffs and Trade (GATT)[13] DRMs are considered inadequate.[14]

Although NAFTA modifies the DRMs of its predecessor, the Canada-United States Free Trade Agreement (CUSFTA),[15] it has by no means perfected the system. NAFTA's dispute resolution system shares some of the weaknesses of CUSFTA and GATT, the systems on which it is based. These weaknesses, which are discussed below in Section II, should have been acknowledged and addressed. Moreover, NAFTA adds a potentially serious problem of its own: the failure to integrate CUSFTA and NAFTA dispute resolution systems. This omission sets the stage for future misunderstandings and discord.[16] By failing to recognize these potential sources of tension, NAFTA's proponents lost an opportunity to guide the evolution of trade dispute resolution and to smooth the path to hemispheric economic integration.[17]

> weight to resolve these trade differences and therefor provided the impetus for . . . procedures under which trade disputes would be settled through institutionalized consultation procedures and, if they fail, through dispute settlement panels.

Id. at 361–62.

13. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. 3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

14. *See, e.g.*, JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 74 (1990) [hereinafter JACKSON, RESTRUCTURING GATT] (noting considerable comment about weaknesses of GATT dispute settlement processes); JACKSON, *supra* note 9, at 109; Jean Anderson & Jonathan T. Fried, *The Canada-U.S. Free Trade Agreement in Operation*, 17 CAN.-U.S. L.J. 397, 398–400 (1991) (characterizing GATT problems of delay, unavailability of knowledgeable, independent panelists, and need for consensus); McDorman, *supra* note 12, at 305 (the United States and Canada wanted CUSFTA's dispute resolution procedure to be more adjudicative because both believed that GATT obligations were too easily avoided); Carlsen, *supra* note 12, at 316 (GATT dispute resolution perceived inadequate); Shaun A. Ingersoll, Note, *Current Efficacy of the GATT Dispute Settlement Process*, 22 TEX. INT'L L.J. 87, 95–98 (1987) (describing GATT dispute resolution measures as ineffective because of built-in opportunities for delay and parties' ability to legally avoid compliance); Christopher J. Murphy, *Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedures: Will They Hold?*, 4 TRANSNAT'L LAW. 585, 620–21 (1991) (calling GATT part of a world trade system "in decay.").

15. CUSFTA, *supra* note 6.

16. *See infra* part III.B.3.

17. Recent developments underscore the need for foresight and diplomacy while working towards a hemispheric trade arrangement. *See, e.g.*, Luis Abugattas, *The Uruguay Round of Multilateral Trade Negotiations: Developments and Prospects*, 22 U. MIAMI INTER-AM. L. REV. 353, 360–62, 369 (1991) (discussing the recent tendency of Latin American and other developing countries to disrupt trade negotiations which are not going their way and noting Latin American perception of AD/CVD measures as a "new type of protectionism."). Abugattas provides a provocative discussion of the new international role for Latin American and other developing countries. *Id.* For further discussion see Hufbauer & Schott, *supra* note 3, at 277, 287–91 (cautioning a slow approach to WHFTA because of disparities between the United States and Latin America and advising accession of Latin American countries to WHFTA only after they meet specified economic and political criteria); Horacio A. Grigera Naon, *Arbitration in Latin America: Overcoming Traditional Hostility (An Update)*, 22 U.

B. *Difficulties, Approach, and Structure*

The lack of a ratified NAFTA text and a scarcity of literature which addresses NAFTA DRMs presented difficulties in writing this Note. Lack of a truly final NAFTA text is troubling mainly because of the heated opposition by several influential members of Congress and some highly visible non-governmental organizations (NGOs) to NAFTA in general[18] as well as its DRMs in particular.[19] However, given President

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MIAMI INTER-AM. L. REV. 203, 204, 255–57 (1991) (noting slowly developing Latin American acceptance of international commercial arbitration in general); *FTA is Canada's Defense Against U.S. Protectionism*, N. AM. REP. ON FREE TRADE, Dec. 23, 1991, at 7, available in LEXIS, Nexis Library, OMNI File (citing slow reform and political problems as obstacles to free trade with Latin America).

For a predictable, but nevertheless disquieting potential complication, see *Western Governors Approve NAFTA Statement Urging Protection of State Standards*, 9 Int'l Trade Rep. (BNA) 1095 (June 24, 1992) (reporting U.S. Western Governors' Association's call for state participation in dispute resolution panels addressing state practices).

18. *See, e.g.*, *AFL-CIO Speaks Out on Free Trade*, BUSINESS MEXICO, May 1991, at 10, 10–11 (Secretary-Treasurer of AFL-CIO opposing proposed NAFTA); *Citizen Groups Score Leaked NAFTA Draft; USTR Declines to Verify its Accuracy*, 9 Int'l Trade Rep. (BNA) 516 (Mar. 25, 1992) (Sierra Club Public Citizen criticizing leaked NAFTA text on environmental, consumer interest grounds; Institute for Agriculture and Trade Policy claiming family farmers would be harmed by proposed text); *House Democrats Letter on NAFTA*, INSIDE U.S. TRADE, Oct. 16, 1992, at 13 (reprinting letter of Oct. 3, 1992 opposing NAFTA for labor reasons and sent by 96 Democratic Representatives to Presidential Candidate Clinton); *ITC Chairman Newquist Says Approval Process for NAFTA May be Difficult*, 9 Int'l Trade Rep. (BNA) 936 (May 27, 1992) (U.S. International Trade Commission Chairman Don Newquist predicting congressional opposition to NAFTA on environmental, labor, and border infrastructure grounds); *NAFTA Dispute Settlement Issues Discussed at Lawyer's Meeting*, 9 Int'l Trade Rep. (BNA) 639 (Apr. 8, 1992) (Sen. Donald W. Riegle, Jr. (D-Mich.) attempting to change NAFTA's fast-track no-amendment procedures; National Wildlife Federation reiterating "concerns" about NAFTA); *Senate Finance Debates Fast Track*, 8 Int'l Trade Rep. (BNA) 726, 727 (May 15, 1991) (Senators Ernest F. Hollings (D-S.C.), Daniel Patrick Moynihan (D-N.Y.), Thomas A. Daschle (D-S.D.), and Donald W. Riegle, Jr. supporting resolution in Senate Finance Committee that would disapprove extension of fast-track authority to NAFTA).

19. *See, e.g.*, Edmund G. ["Jerry"] Brown, Jr., *Free Trade Fetish; Things Have Changed Since David Ricardo's Time*, WASH. POST, Sept. 14, 1992, at A15 (describing danger of NAFTA-type DRMs as a "fundamental conflict between intrusive international trade regulations and American democracy"); Nancy Dunne, *Political Worries May Force Bush to Delay NAFTA Deal*, FIN. TIMES, Nov. 26, 1991, at 9 (Congressman Richard Gephardt opposing extension of antidumping and countervailing duty dispute resolution mechanisms (hereinafter DRMs) to Mexico); *NAFTA Dispute Settlement Issues Discussed at Lawyer's Meeting*, *supra* note 18, at 639 (Sen. Riegle attempting to change NAFTA's dispute settlement provisions; National Wildlife Federation reiterating "concerns" about NAFTA dispute settlement); *Riegle, Other Senators Will Press for Change in Fast-Track Rule on NAFTA*, 9 Int'l Trade Rep. (BNA) 1443 (Aug. 19, 1992) (Senators Donald W. Riegle, Jr. (D-Mich.), Harris Wofford (D-Pa.), and Kent Conrad (D-N.D.) seeking Senate resolution to amend NAFTA dispute resolution); Senate Finance, *House Ways and Means Clear Way For Floor Action on Fast-Track Request*, 8 Int'l Trade Rep. (BNA) 726, 726–27 (May 15, 1991) (Sen. Riegle introducing resolution to amend NAFTA dispute resolution provisions).

Clinton's willingness to accept the main text,[20] it is fairly safe to assume that the dispute settlement provisions will survive intact if the treaty is indeed ratified.

For purposes of this Note, the scarcity of literature on NAFTA DRMs is more serious. Because of the similarity between NAFTA and CUSFTA DRMs, sources draw heavily on CUSFTA DRM scholarship. Thus, evaluation of NAFTA DRM structure is conducted through analysis of analogue CUSFTA provisions. Where appropriate, similar use of GATT literature will be made.

The approach of this Note is to describe the NAFTA structure and compare it with the CUSFTA system on which it is based. The description is followed by a selective critique of specific elements in the system.

I. DESCRIPTION OF THE DISPUTE RESOLUTION SYSTEM

Both NAFTA and CUSFTA DRM structures may be divided into three sections: General Dispute Resolution, Antidumping (AD) and Countervailing Duty (CVD) Dispute Resolution, and Special Dispute Provisions. The three general sections of the two treaties will be described and compared in the following subsections.

A. *General Dispute Resolution Provisions*

NAFTA's Chapter 20[21] governs its general DRM. CUSFTA's Chapter 18[22] concerns its general dispute settlement procedures. The following comparison of NAFTA and CUSFTA general DRMs is divided into descriptions of dispute settlement institutions and dispute settlement procedure.

1. General Dispute Resolution Institutional Provisions

NAFTA's primary institutional body is the Free Trade Commission (FTC), which is comprised of cabinet-level representatives of the Parties or their designees.[23] The CUSFTA equivalent is the Canada-United

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20. *See, e.g., Extension of Fast-Track Not Necessary for Supplements, U.S. Trade Official Says*, 16 Int'l Env't Rep. (BNA) 109 (Feb. 10, 1993) (reporting President Clinton's endorsement of NAFTA as negotiated, but calling for supplemental agreements on labor and environment); Scott Pendleton, *Clinton, Mexican President Endorse Trade Agreement in First Foreign Summit*, CHRISTIAN SCI. MONITOR, Jan. 11, 1993, at 9.

21. NAFTA, *supra* note 1, ch. 20, 32 I.L.M. at 693–99 (Institutional Arrangements and Dispute Settlement Procedures).

22. CUSFTA, *supra* note 6, ch. 18, 27 I.L.M. at 383–86 (Institutional Provisions).

23. NAFTA, *supra* note 1, art. 2001(1), 32 I.L.M. at 693.

States Trade Commission (CTC), which has a similar composition.[24] Both the FTC and the CTC are directed to resolve disputes concerning interpretation or application of the trade agreements.[25] Both the commissions make decisions by consensus,[26] although the FTC may agree to act otherwise.[27] Additionally, both dispute resolution systems have impermanent bodies, which are described in some detail in the next subsection. They include expert panels, arbitration panels, arbitral panels, expert committees, and scientific committees.

Structurally, both the FTC and CTC must establish Secretariats, which are adjunct bodies composed of national Sections.[28] The NAFTA Secretariat's main task is to assist the FTC[29] and the panels and committees established under NAFTA's general dispute and AD/CVD dispute provisions.[30] By contrast, the CUSFTA's Secretariat is primarily intended to facilitate antidumping or countervailing dispute resolution, and

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24. CUSFTA, *supra* note 6, arts. 1802(1)–(2), 27 I.L.M. at 384 (establishing Canada-United States Trade Commission (hereinafter CTC) and describing its composition).

25. NAFTA, *supra* note 1, art. 2001(2)(c), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(1), 27 I.L.M. at 384.

Additionally, the CTC and NAFTA's Free Trade Commission (hereinafter FTC) must supervise implementation of the agreements, NAFTA, *supra* note 1, art. 2001(2)(a), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(1), 27 I.L.M. at 384; they must also oversee further elaboration of the agreements. NAFTA, *supra* note 1, art. 2001(2)(b), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(1), 27 I.L.M. at 384; finally, they must consider any other matter which may affect operation of the respective agreements. NAFTA, *supra* note 1, art. 2001(2)(e), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(1), 27 I.L.M. at 384.

26. NAFTA, *supra* note 1, art. 2001(4), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(5), 27 I.L.M. at 384.

27. NAFTA, *supra* note 1, art. 2001(4), 32 I.L.M. at 605, 693.

FTC and CTC residual duties include establishing their own rules and procedures, NAFTA, *supra* note 1, art. 2001(4), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(5), 27 I.L.M. at 384; and meeting at least annually, NAFTA, *supra* note 1, art. 2001(5), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(3), 27 I.L.M. at 384.

Moreover, both bodies have identical discretionary power to establish and delegate responsibilities to standing or ad hoc committees or working groups, NAFTA, *supra* note 1, art. 2001(3)(a), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(4), 27 I.L.M. at 281, 384, and to seek the advice of non-governmental persons or groups, NAFTA, *supra* note 1, art. 2001(3)(b), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1802(4), 27 I.L.M. at 384. Additionally, the FTC will be allowed to establish and delegate to expert groups. *See* NAFTA, *supra* note 1, art. 2001(3)(a), 32 I.L.M. at 693. Expert groups play a more central role in CUSFTA dispute resolution. *See infra* notes 91–95 and accompanying text.

28. NAFTA, *supra* note 1, art. 2002(1), 32 I.L.M. at 693. Each national Section has a Secretary to administer and manage it, NAFTA, *supra* note 1, art. 2002(2)(c), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1909(4)–(6), 27 I.L.M. at 391; and a permanent office, NAFTA, *supra* note 1, art. 2002(2)(a), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1909(2), 27 I.L.M. at 391.

29. NAFTA, *supra* note 1, art. 2002(3)(a), 32 I.L.M. at 693.

30. *Id.* art. 2002(3)(b)(i)–(ii), 32 I.L.M. at 693. The Secretariat also has residual duties at the discretion of the FTC. *Id.* art. 2002(3)(c)(i)–(ii), 32 I.L.M. at 694.

not necessarily to assist the CTC directly.[31]

Although the FTC Secretariat provides assistance, it also enlarges the FTC's responsibilities. The FTC must supervise a complex network of working groups and committees established under NAFTA.[32] The number of these groups[33] and the diversity of their areas of expertise[34] impose a substantial burden on the FTC.[35] In contrast, the CTC has a much lighter supervisory role.[36]

2. General Dispute Resolution Procedures

The general dispute settlement provisions of NAFTA apply in three situations: first, where a dispute exists between the Parties over the interpretation or application of NAFTA;[37] second, where a Party believes that another Party's actual or proposed measure is inconsistent with NAFTA;[38] and finally, where a Party believes such a measure is consistent with NAFTA but causes nullification or impairment of any benefit reasonably to be expected under most[39]

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31. CUSFTA, *supra* note 6, art. 1909(1), (7), 27 I.L.M. at 391 (creating CUSFTA Secretariat to facilitate operation of AD/CVD dispute resolution and giving the CTC discretion to use its services). Otherwise, the CTC closely resembles the FTC in composition and structure.

32. NAFTA, *supra* note 1, art. 2001(d), 32 I.L.M. at 693 (referring to Annex 2001.2, which lists the affected bodies).

33. *Id.* annex 2001.2, 32 I.L.M. at 698. The annex lists 13 committees and subcommittees and 7 working groups.

34. These range from Trade in Worn Clothing, *id.* annex 2001.2(A)(2), 32 I.L.M. at 698, to Telecommunications Standards, *id.* annex 2001.2(A)(5), 32 I.L.M. at 698, and Agricultural Subsidies, *id.* annex 2001.2(B)(2), 32 I.L.M. at 698. *See id.* annex 2001.2(A) & (B), 32 I.L.M. at 698, for the full panoply of subjects covered.

35. Moreover, the FTC must supervise any other committees or working groups established under NAFTA. *Id.* annex 2001.2(C), 32 I.L.M. at 698.

36. The CTC must supervise eight agricultural working groups, a select panel on automotive trade and production, a joint advisory committee on outstanding issues related to retransmission rights, and the working group on unfair pricing. *See* CUSFTA, *supra* note 6, arts. 708, 1004, 1907, and 2006(4), 27 I.L.M. at 320–21, 347, 390, 397 (establishing these different bodies and providing for CTC supervision).

37. NAFTA, *supra* note 1, art. 2004, 32 I.L.M. at 694.

38. *Id.*

39. A Party may not plead nullification and impairment with respect to benefits accruing under any of the following:

(1) any provisions of Annex 300-A (Automotive Sector) relating to investment;
(2) any provisions of chap. 6 (Energy) relating to investment;
(3) or to any measure that is subject to an exception under NAFTA, *id.* art. 2101 (General Exceptions), and involves a provision of:
    (a) Part Two (Trade in Goods), to the extent the benefit arises from cross-border trade in services provision of Part Two; or
    (b) Part Three (Technical Barriers to Trade), to the extent the benefit arises

NAFTA provisions.[40] There are, however, several exceptions and modifications to Chapter 20's dispute resolution coverage. The most significant is AD/CVD disputes,[41] described *infra* Part I.B; other exceptions and modifications are discussed *infra* Part I.C. CUSFTA's general dispute settlement regime has a similar structure[42] because it presumptively covers every dispute under CUSFTA[43] but AD/CVD disputes.[44] However, the application of "nullification or impairment" does not have as many exceptions.[45] Other differences between CUSFTA and NAFTA general DRM coverage are discussed in Part I.C below.[46]

A Party Complainant bringing a dispute under NAFTA's general DRM must, if the dispute is also covered by GATT, decide whether to pursue its claim under GATT or NAFTA.[47] If there is more than one Complainant with similar disputes, they must agree to use GATT or the dispute defaults to NAFTA.[48] Once the Complainant has

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from any cross-border trade in services of Part Two; or
(c) Chapter Twelve (Cross-Border Trade in Services); or
(d) Part Six (Intellectual Property).

See id. annex 2004(1)–(2), 32 I.L.M. at 694.

Subject to these exceptions, a Party may plead nullification and impairment with respect to any benefit it could reasonably expect to accrue to it under any provision of Part 2 (Trade in Goods), Part 3 (Technical Barriers to Trade), ch. 12 (Cross-Border Trade in Services), and Part 6 (Intellectual Property).

Compare CUSFTA, *supra* note 6, art. 2011(2), 27 I.L.M. at 398 (exempting Canadian cultural industries from nullification or impairment actions), *with* NAFTA, *supra* note 1, annex 2106, 32 I.L.M. at 702 (evidently preserving Canada's cultural industries exemption).

40. NAFTA, *supra* note 1, art. 2004, annex 2004, 32 I.L.M. at 694, 699 (creating a cause of action defining "nullification" and "impairment").

41. *Id.* note 1, art. 2004, 32 I.L.M. 694.

42. *See* CUSFTA, *supra* note 6, art. 1801(1)–(3), 27 I.L.M. at 383 (describing application of CUSFTA's general DRM).

43. *Id.* art. 1801(1), 27 I.L.M. at 383.

44. *Id.*

45. Only CUSFTA's Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases and Cultural Industries are exempted from nullification or impairment. CUSFTA, *supra* note 6, ch. 19, art. 2005, 27 I.L.M. at 386–95, 396; *see also id.* art. 2011(2), 27 I.L.M. at 398; *supra* note 39 (detailing exceptions to NAFTA "nullification or impairment" coverage).

46. As a final jurisdictional matter, neither NAFTA nor CUSFTA general DRMs create a private right of action. In other words, only the governments of signatory countries (Parties or Party) can resort to the general DRMs of NAFTA or CUSFTA. *See* NAFTA, *supra* note 1, art. 2021, 32 I.L.M. at 398 (specifically prohibiting creation of private right of action); CUSFTA, *supra* note 6, ch. 18, 27 I.L.M. at 683–86 (while CUSFTA does not specifically deny a private right of action, it does so impliedly by speaking only in terms of the Parties).

47. NAFTA, *supra* note 1, art. 2005(1), 32 I.L.M. at 694.

48. *Id.* 32 I.L.M. at 694.

initiated dispute settlement[49] in one forum, it is usually to the exclusion of the other.[50] However, if the Complainant initiates GATT dispute settlement, the defending Party Respondent can invoke the NAFTA general DRM within fifteen days, if the dispute: (1) involves NAFTA Article 104 (Relation to Environmental and Conservation Agreements); or (2) arises under NAFTA Chapter 7, Section B (Sanitary and Phytosanitary Measures) or Chapter 9 (Standards Related Measures); and (3) concerns a measure to protect life or the environment and raises factual issues respecting the environment, health, safety, or conservation.[51] CUSFTA requires a similar initial choice between GATT and CUSFTA by the Complainant; however, the Respondent does not have the option to demand use of CUSFTA.[52] For purposes of this Note, it is assumed that the Complainant chooses NAFTA or CUSFTA DRMs; GATT DRMs will not be discussed. At this juncture, NAFTA and CUSFTA general DRMs diverge sufficiently to merit separate discussion.

a. NAFTA

Any Party may request consultations with any other Party on any matter which might affect the operation of NAFTA,[53] and if a conflict exists, the consulting Parties must make every effort to resolve the matter.[54] Normally, if the Parties have not resolved the issue within thirty days of the request for consultations, any consulting Party may request a meeting of the FTC.[55] The FTC must convene within ten days

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49. Only NAFTA defines when a dispute procedure is considered initiated. *See id.* art. 2005(6)–(7), 32 I.L.M. at 694 (establishing that a dispute settlement is initiated under NAFTA when a Party uses art. 2007 to request a meeting of the FTC, or when settlement proceedings have been initiated under the GATT by a Party requesting a panel or committee investigation under that treaty).

50. *Id.* art. 2005(6), 32 I.L.M. at 694.

51. *See id.* art. 2005(3)–(5), 32 I.L.M. at 694 (creating art. 104, ch. 7, § B, and ch. 9 exceptions; mandating time limits and compulsory NAFTA jurisdiction).

52. *See* CUSFTA, *supra* note 6, art. 1801(2)–(3), 27 I.L.M. at 383.

53. NAFTA, *supra* note 1, art. 2006(1), 32 I.L.M. at 694. This right is subject, of course, to the exemptions listed *supra* notes 39–40 and *infra* part II.C).

54. NAFTA, *supra* note 1, art. 2006(5), 32 I.L.M. at 694. To this end the consulting Parties shall share pertinent information, protect confidential material, and avoid hurting the interests of a non-Participating Party. *See id.* art. 2006(5)(a)–(c), 32 I.L.M. at 694. If the dispute concerns perishable agricultural goods, consultations must begin within 15 days of a request. *See id.* art. 2006(4), 32 I.L.M. at 694. Otherwise, there is no guideline for how quickly the consultations must begin.

Unless the FTC provides otherwise, a third Party with a substantial interest in the matter is entitled to participate upon request. *Id.* art. 2006(3), 32 I.L.M. at 694.

55. *Id.* art. 2007(1)(a), 32 I.L.M. at 695. *But see id.* art. 2007(1)(b)–(d), 32 I.L.M. at 695 (providing time limits of 45 days if a third Party has requested or participated in consul-

of the request in order to resolve the dispute.[56] A consulting Party may request an arbitral panel if the matter is not resolved after thirty days of FTC efforts.[57] Upon delivery of such a request,[58] the FTC must establish an arbitral panel within thirty-five or forty days.[59] Panelists are selected through a complex process which guarantees equal representation and prohibits a Party from choosing its own citizens.[60] Panelists are normally chosen from a roster[61] of up to thirty individuals established and maintained by the Parties.[62] The roster members must be experienced in law, international trade, international trade dispute resolution, or any matter covered by NAFTA.[63] Additionally, roster members must be independent of the influence of any Party.[64] Any disputing Party may

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tations, of 15 days if the matter concerns perishable agricultural goods, and of other limits as the Parties may otherwise agree); *see also id.* art. 2007(2), 32 I.L.M. at 685 (allowing request for FTC meeting after withdrawal from GATT dispute resolution pursuant to *id.* art. 2005(5), 32 I.L.M. at 694 or after consultations pursuant to *id.* arts. 513, 723, 914, 32 I.L.M. at 363, 382, 391 (establishing Working Group on Rules of Origin; Sanitary and Phytosanitary Measures-Technical Consultations; and Standards-Related Measures-Technical Consultations)).

56. *Id.* art. 2007(4), 32 I.L.M. at 695. The FTC may resolve disputes using a variety of traditional DRMs, including good offices, consulting outside advisers (including technical advisers, working groups, and expert groups), and making recommendations. *Id.* arts. 2007(5)(a)–(c), 32 I.L.M. at 695. Other available DRMs include "conciliation, mediation, or other such dispute resolution procedures. . . ." *See id.* art. 2007(5)(b), 32 I.L.M. at 695. The FTC also has discretion to consolidate certain types of proceedings. *See id.* art. 2007(6), 32 I.L.M. at 695.

57. *See id.* arts. 2008(1)(a)–(b), 32 I.L.M. at 695 (providing for time limit of 30 days after FTA convenes for the consolidated matter most recently referred to it). *But cf. id.* art. 2008(1)(c), 32 I.L.M. at 695 (allowing Parties to agree to any other time limit).

58. *See id.* arts. 2008(2)–(5), 32 I.L.M. at 695. A third Party with a substantial interest in the matter has a right to join as a Complainant within seven days of delivery of the request for an arbitral panel. *See id.* art. 2008(3), 32 I.L.M. at 695; *see also id.* 32 I.L.M. at 695 (providing that a third Party who does not join pursuant to art. 2008(3) shall normally refrain from thereafter initiating or continuing a NAFTA or GATT action on substantially similar grounds).

At this point, disputes under NAFTA, articles 1415 (Investment Disputes in Financial Services) and 1136(3) (Finality and Enforcement of [Investment Dispute] Award) may be referred to an article 2008 panel.

59. The timeline depends on the number of disputing Parties and their cooperativeness. *See id.* art. 2011(1)–(2), 32 I.L.M. at 696 (describing selection methods in detail, including selection by lot in case of deadlock).

60. Essentially, disputing Parties must choose a chair by consensus; if they cannot agree, a disputing Party chosen by lot selects a chair who is not its citizen. Each disputing side then selects two additional Panelists who are citizens of the other disputant(s). *See id.* art. 2011(1)–(2), 32 I.L.M. at 696.

61. *Id.* art. 2011(3), 32 I.L.M. at 696.

62. *Id.* art. 2009(1), 32 I.L.M. at 695 (providing for appointment of roster members by consensus of the Parties for terms of three years).

63. *Id.* arts. 2009(2)(a), 2010(1), 32 I.L.M. at 695–96.

64. *Id.* arts. 2009(2)(b), 2010(1), 32 I.L.M. at 695–96. Additional provisions prescribe the selection of panelists based on objectivity, reliability, and sound judgment, *id.* art. 2009(2)(a), 32 I.L.M. at 695, mandate panelist compliance with the code of conduct established by the FTC, *id.* art 2009(2)(c), 32 I.L.M. at 696, provide for the removal of a panelist who violates

peremptorily challenge panelists not chosen from the roster within fifteen days of the panelists' nomination.[65]

Panel proceedings are normally in accordance with Model Rules of Procedure,[66] which assure certain rights to the Parties.[67] Disputants must provide specific terms of reference within twenty days after the request for a panel has been made;[68] apparently, this is the only way to plead nullification or impairment.[69] The panel uses standard terms of reference where the parties fail to provide their own.[70] It may, subject to the terms agreed upon by the disputants, seek input from experts or scientific review boards, either on its own or at the request of a disputant.[71]

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the code of conduct, *id.* art. 2011(4), 32 I.L.M. at 696, and disqualify individuals as panelists for any dispute in which they have participated pursuant to art. 2007(5), *id.* at 2010(2), 32 I.L.M. at 696.

The roster members must also be willing to serve as panelists. *Id.* art. 2009(1), 32 I.L.M. at 695.

65. *Id.* art. 2011(3), 32 I.L.M. at 696.

66. *Id.*, art. 2012(2), 32 I.L.M. at 696. However, the Parties may agree otherwise. *See id.* The FTC must establish the Model Rules of Procedure. *See id.* art. 2012(1), 32 I.L.M. at 696.

67. These rights are: at least one hearing before the panel; the opportunity to provide initial and rebuttal written submissions; confidentiality of all written submissions to the panel; and confidentiality of the panel's hearings, deliberations, and initial written report. *Id.* art. 2012(1)(a)–(b), 32 I.L.M. at 696.

68. *Id.* art. 2012(3), 32 I.L.M. at 696.

69. *Compare id.* art. 2012(3), 32 I.L.M. at 696 (setting limit for modifying standard terms of reference, which do not mention nullification or impairment) *with id.* art. 2013(4), 32 I.L.M. at 696 (requiring terms of reference to specify nullification or impairment as a cause of action).

70. The standard terms of reference call for an examination of the matter in light of relevant NAFTA articles, followed by panel findings, determinations, and recommendations. *Id.* art. 2012(3), 32 I.L.M. at 696; *see also id.* art. 2012(5), 32 I.L.M. at 696 (requiring terms of reference to specify if panel is to make finding of the degree of harm caused by an unacceptable measure).

71. *See id.* arts. 2014–15, 32 I.L.M. at 696–97 (Role of Experts and Scientific Review Boards). Interestingly, the Parties placed tight controls on the use of scientific review boards. Disputing Parties may quash a panel request for a scientific review board, *id.* art. 2015(1), 32 I.L.M. at 696. The board is selected in consultation with disputants and scientific bodies set out in the Model Rules of Procedure, *id.* art. 2015(2), 32 I.L.M. at 697. Participating Parties must be provided advance notice of, and opportunity to comment on, issues to be referred to the board. *Id.* art. 2015(3)(a), 32 I.L.M. at 697. Participants must also have an opportunity to comment on the board's report and the scope of a board's inquiry is limited to "any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding." *Id.* art. 2015(1), 32 I.L.M. at 697. However, if a scientific board is convened, the panel is required to take its report, and any Party comments on the report, into account. *Id.* art. 2015(4), 32 I.L.M. at 697. *Cf. id.* art. 1133, 32 I.L.M. at 696 (enabling Parties to disapprove and set terms for use of experts to resolve factual scientific, environmental, health, or safety matters in the special investment DRM).

Evidently, the Parties wish to control any environmentally-related dispute. For related discussion see *infra* part I.A.1.a.iii.

The panel must also accept input from a non-disputing Party which so requests. NAFTA, *supra* note 1, art. 2013, 32 I.L.M. at 696. The non-disputant is also entitled to attend all hearings and to receive written submissions of the disputants. *See id.*

A panel has ninety days after selection of the final panelist to issue an initial report,[72] which includes findings of fact, determination of whether the measure is inconsistent with NAFTA or is consistent but causes nullification or impairment,[73] and any recommendations for resolution of the matter.[74] Disputants have fourteen days to comment in writing on the initial report.[75]

Within thirty days after the initial report, the panel presents a final report to the disputants, presumably with contents similar to the initial report.[76] The disputants must forward the final report to the FTC within a reasonable time, complete with any written comments a disputant wishes to add and any scientific review report.[77] The final report is confidential unless published by the FTC, which will normally occur fifteen days after receipt by the FTC.[78]

Upon receipt of the final report, the disputants are expected to resolve the disagreement.[79] The resolution should conform to any recommendation of the panel[80] and should, wherever possible, constitute the abrogation or non-implementation of the measures at issue; otherwise, the Complainant is compensated.[81] If the measure at issue is determined to be unacceptable, and the disputants fail to reach an agreement thirty days after receiving the final report, the Complainant may suspend

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72. *Id.* art. 2016(2), 32 I.L.M. at 697. The Parties may modify this time limit. *See id.*

73. Throughout the remainder of this subsection, measures meeting this definition under CUSFTA or NAFTA shall be referred to as "unacceptable measures."

74. NAFTA, *supra* note 1, art. 2016(2), 32 I.L.M. at 697. *See also, id.* art. 2016(3), 32 I.L.M. at 697 (allowing dissenting panelists to furnish separate opinions). The report is normally based only on material submitted during the investigation by the Parties, or from requested expert or scientific review. *Id.* art. 2016(1), 32 I.L.M. at 697. However, the Parties may otherwise agree. *See id.*

75. *Id.* art. 2016(4), 32 I.L.M. at 697. If such comments are submitted, the panel may take further action on its initial report. *See id.* art. 2016(5), 32 I.L.M. at 697 (giving panel, in the event of comments on the initial report, discretion to request views of any participant, reconsider its report, or make appropriate further examination).

76. *See id.* art. 2017(1), 32 I.L.M. at 697 (mandating 30 day limit, unless Parties agree otherwise, but not specifying relationship between contents of initial and final reports). The final report includes separate opinions. *Id.* Additionally, no panel report may reveal which panelists issued majority and minority opinions. *Id.* art. 2017(2), 32 I.L.M. at 697.

77. *Id.* art. 2017(3), 32 I.L.M. at 697. The mandatory inclusion of scientific review reports is further evidence of the Parties' concern over controlling input into environment and health related disputes. For related discussion see *infra* part II.A.1.a.iii.

78. *Compare* NAFTA, *supra* note 1, art. 2017(3), 32 I.L.M. at 697 (final report forwarded to FTC on a confidential basis) *with* art. 2017(4), 32 I.L.M. at 697 (final report presumptively published 15 days after receipt by FTC).

79. *Id.* art. 2018(1), 32 I.L.M. at 697.

80. *Id.*

81. *Id.*

NAFTA benefits "of equivalent effect" until an agreement is reached.[82] The Complainant should attempt to suspend these benefits in the same trade sector or sectors affected by the measure at issue[83] unless this is not practicable or effective.[84] Any disputant may request a panel to review whether the suspension of benefits is "manifestly excessive."[85] However, there is no mention of what, if any, remedial action is required nor is there mention of when the retaliatory suspension should be stopped. Presumably, any remedial action must be modified, if it is "manifestly excessive," and remedial suspension stops if an agreement is reached.

b. CUSFTA

The general dispute resolution procedure of CUSFTA largely parallels that of NAFTA. However, it is less complex and has some noteworthy differences. The comparative simplicity and many differences exist largely because NAFTA has three members, while CUSFTA has only two.

In addition to the GATT-or-NAFTA choice discussed in Part I.A.2.a, CUSFTA also requires Party consultations, with a view to dispute resolution.[86] If no agreement is reached within thirty days, either disputant may request a meeting of the CTC, which must convene within ten days.[87] The CTC will try to facilitate a settlement[88] and has discretion to use technical advisers or a mediator.[89] After thirty days of fruitless CTC effort, one of two additional dispute fora may be used: arbitration[90] or an expert panel.[91]

The CUSFTA expert panel procedure closely resembles the NAFTA

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82. *Id.* art. 2019(1), 32 I.L.M. at 697.

83. *Id.* art. 2019(2)(a), 32 I.L.M. at 697.

84. *Id.* art. 2019(2)(b), 32 I.L.M. at 697.

85. *Id.* art. 2019(3), 32 I.L.M. at 697; *see also id.* art. 2019(4), 32 I.L.M. at 698 (providing that an art. 2019(3) review panel will proceed under the Model Rules of Procedure, and establishing 60 day review limit).

86. CUSFTA, *supra* note 6, art. 1804(2), 27 I.L.M. at 384. As in NAFTA, exchanged confidential information is protected. *See id.* art. 1804(3), 27 I.L.M. at 384.

87. *Id.* art. 1805(1), 27 I.L.M. at 384.

88. *Id.*

89. However, any mediator must be acceptable to both sides. *Id.* art. 1805(2), 27 I.L.M. at 384.

90. *See id.* art. 1806(1)(b), 27 I.L.M. at 384–85 (providing option of arbitration after 30 days).

91. *See id.* art. 1807(2), 27 I.L.M. at 384–85 (providing option of expert panel after 30 days if arbitration is not used; this time limit may be extended by the CTC).

arbitral panel process and may only be used if arbitration is not used.[92] A panel must be appointed within thirty days of a request,[93] and panelists are normally chosen from a roster maintained by the CTC.[94] Roster members must be independent of Party influence but need not have any general expertise in law or trade.[95] A panel consists of five members, two from each Party and a chair from any country.[96] Unlike NAFTA, there is no CUSFTA prohibition against choosing a party's own citizens.[97] There is also no provision for peremptory challenges under CUSFTA[98] or for the creation of Model Rules of Procedure.[99] However, CUSFTA panels are required to provide virtually the same substantive and procedural rights as a NAFTA panel.[100] CUSFTA does not explicitly mention terms of reference but provides them by requiring the panel to consider the matter and submit a report containing findings, determination of a measure's unacceptability, and any recommendations for resolution.[101] In contrast to NAFTA, under CUSFTA, a Party need not specifically plead nullification and impairment.[102]

While a CUSFTA panel must submit an initial report to the Parties

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92. *See id.*

93. *See id.* art. 1807(2)–(3), 27 I.L.M. at 385.

94. *Id.* art. 1807(1), 27 I.L.M. at 385.

95. *See id.* There is a weak requirement that panelists have expertise in a particular matter under consideration, where appropriate. *See id.* Moreover, as in NAFTA, panelists have "soft" qualifications of "objectivity, reliability and sound judgment." Panelists must also be willing to serve. *Id.*

96. *Id.* art. 1807(3), 27 I.L.M. at 385.

97. *Compare id.* with NAFTA, *supra* note 1, art. 2011(1)–(2), 32 I.L.M. at 696 and *supra* text accompanying note 60. Another difference is that CUSFTA panelists are chosen by consensus or by lot, where under NAFTA, only the chair is chosen by consensus. *Compare* CUSFTA, *supra* note 6, art. 1807(3), 27 I.L.M. at 385 *with* NAFTA, *supra* note 1, art. 2011(1)–(2), 32 I.L.M. at 385 *and supra* text accompanying note 60.

98. *Cf.* NAFTA, *supra* note 1, art. 2011(3), 32 I.L.M. at 696 (allowing peremptory challenges under NAFTA).

99. *Cf. id.* art. 2012(1), 32 I.L.M. at 696, and text accompanying note 66. Evidently, each CUSFTA panel will be left to its own devices. CUSFTA, *supra* note 6, art. 1807(4), 27 I.L.M. at 385. However, the CTC does have discretion to establish rules for a panel. *See id.*

100. These rights include confidentiality, at least one hearing, and the opportunity to provide written submissions and rebuttal arguments. *See* CUSFTA, *supra* note 6, art. 1807(4). There are minor differences in the specific enumeration confidentiality rights; the author regards them as largely inconsequential. *Compare id. with* NAFTA, *supra* note 1, art. 2012(1)(b), 32 I.L.M. at 696. *But see infra* part II.B.3 (discussing problems of non-integration).

101. *See* CUSFTA, *supra* note 6, arts. 1807(2), 27 I.L.M. at 385 (requiring panel to consider matters referred to it and delimiting contents of report).

102. *See id.* art. 1807(5), 27 I.L.M. at 385. As in NAFTA, a disputant must request determination of adverse affect. *Compare id. with* NAFTA, *supra* note 1, art. 2012(5), 32 I.L.M. at 696.

within three months of impanelment,[103] it must normally first give the Parties a chance to comment on the findings of fact.[104] The CUSFTA panel procedure requires comment, further deliberation, and final report periods which are virtually identical to NAFTA.[105] The CUSFTA also provides similar, though less explicit, report confidentiality.[106] The final report is sent directly to the CTC,[107] which must agree upon a resolution similar to that required under NAFTA.[108] The CTC has thirty days to resolve the matter, or the Complainant may suspend CUSFTA benefits of equivalent effect until an agreement has been reached, but only if it feels its fundamental CUSFTA interests have been harmed.[109] There is no mention of review for excessiveness or sectoral limitations on retaliatory suspension.[110]

As an alternative to the expert panel process, the Parties may refer any other CUSFTA dispute to binding arbitration on such terms as the Parties agree.[111] Arbitration must commence after thirty days of unsuccessful CTC mediation in the case of an emergency action dispute; otherwise, arbitration may commence after thirty days.[112] Arbitration panels are formed and conducted in accordance to procedures similar to those which apply to expert panels.[113] The Parties can implement the panel's findings or agree upon some other resolution "in a timely fash-

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103. CUSFTA, *supra* note 6, art. 1807(5), 27 I.L.M. at 385. *Cf.* NAFTA, *supra* note 1, art. 2016(2), 32 I.L.M. at 697 (NAFTA panel has 90 days). However, the Parties may change this deadline. CUSFTA, *supra* note 6, art. 1807(5), 27 I.L.M. at 385.

104. CUSFTA, *supra* note 6, art. 1807(5), 27 I.L.M. at 385.

105. *Compare id.* art. 1807(6), 27 I.L.M. at 385 *with* NAFTA, *supra* note 1, arts. 2016(4)–(5), 2017(1), 32 I.L.M. at 697. Also, as in NAFTA, dissenting opinions are allowed, and Parties may append views to the final report. CUSFTA, *supra* note 6, arts. 1807(5)–(7), 27 I.L.M. at 385 (allowing dissenting opinions and views of the Parties to be attached to final report).

106. *Compare* CUSFTA, *supra* note 6, arts. 1807(4), (7), 27 I.L.M. at 385 (providing confidential panel proceedings and allowing CTC to publish the final report) *with* NAFTA, *supra* note 1, art. 2012(1)(b), 32 I.L.M. at 696.

107. This distinction from NAFTA is not significant because the Parties and the CTC will represent the same nations. Not so under NAFTA, where a non-disputant very well may be on the FTC and sending the report directly to the FTC would therefore be inappropriate.

108. *See* CUSFTA, *supra* note 6, art. 1807(8), 27 I.L.M. at 385–86 (requiring resolution upon receipt; preferring resolution by abrogation or non-implementation of unacceptable measure; and allowing compensation instead).

109. *Id.* art. 1807(9), 27 I.L.M. at 386.

110. *Cf.* NAFTA, *supra* note 1, art. 2019(3), 32 I.L.M. at 696 (allowing such review under NAFTA).

111. CUSFTA, *supra* note 6, art. 1806(1)(b), 27 I.L.M. at 384.

112. *Id.* art. 1806(1), 27 I.L.M. at 384.

113. *Id.* art. 1806(2), 27 I.L.M. at 384. However, there is no explicit time limit on when arbitration panels must produce a report. *Id.* art. 1807(1), (3)–(4), 27 I.L.M. at 384 (providing no explicit time limit).

ion;" otherwise, the Complainant has the option of suspending equivalent CUSFTA benefits.[114]

B. *AD/CVD Dispute Resolution Mechanisms*

The second element of the NAFTA and CUSFTA dispute resolution structures is the AD/CVD binational panel system. Although dispute resolution in general is important to all trade agreements, and to CUSFTA and NAFTA in particular,[115] the importance of an effective AD/CVD dispute resolution system to all signatories of both trade pacts can hardly be overemphasized. Canadian, Mexican, and U.S. interests each perceive the AD/CVD enforcement actions of the others more as trade protectionism than as a legitimate exercise of regulatory power.[116] The AD/CVD DRMs of NAFTA and CUSFTA were designed to ad-

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114. *Id.* art. 1806(3), 27 I.L.M. at 385.

115. *See supra* text accompanying notes 8–12.

116. *See, e.g.*, Anderson & Fried, *supra* note 14, at 405–407 (tracing U.S.-Canadian AD/CVD problems throughout the 1980s); Feldman, *supra* note 3, at 562–64, 574 (discussing Canadian concerns over "frivolous" U.S. CVD/AD claims and noting Mexican concerns over U.S. AD/CVD law); Kevin C. Kennedy, *Binational Dispute Settlement Under the Canada-U.S. Free Trade Agreement*, 13 MD. J INT'L L & TRADE 71, 72 (1988) (noting that U.S.-Canadian friction caused AD/CVD actions, and cataloging U.S. actions from 1980–1985); Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapter 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal*, 24 N.Y.U. J. INT'L L. & POL. 269, 270 (1991) (describing the Canadian view of U.S. AD/CVD law as "contingent protectionism," and contrasting U.S. view of its own law as "defense against unfair trade"); McDorman, *supra* note 12, at 318–19 (characterizing Canadian fears of U.S. CVD actions as especially strong because of possible targeting of Canadian regional development and social welfare programs); John A. Ragosta, *Natural Resource Subsides and the Free Trade Agreement: Economic Justice and The Need for Subsidy Discipline*, 24 GEO. WASH. J. INT'L L. & ECON. 255, 255–56 (1990) (Canadian and U.S. CVD actions both criticized). *See generally*, Rugman, *supra* note 12, (providing in-depth discussion of Canadian complaints over U.S. AD/CVD laws and how CUSFTA dispute resolution is to alleviate perceived abuse); Smith & Whitney, *supra* note 12, at 569, 587 (both Mexico and Canada view U.S. AD/CVD law as "administered protectionism"); Peter Huston, Note, *Antidumping and Countervailing Duty Dispute Settlement Under the United States-Canada Free Trade Agreement: Is the Process Constitutional?*, 23 CORNELL INT'L L. J. 529, 532 n.21 (1990) (describing Canadian perceptions that U.S. administration of AD/CVD laws is protectionist, and noting Canadians' economic concerns in the face of perceived increases in U.S. protectionism); Murphy, *supra* note 14, at 590 (noting Canadian perception of politically driven AD/CVD determinations and crediting softwood lumber cases of '83 and '86 as leading to special CUSFTA AD/CVD provisions); Brendan Hudson, *The Background for NAFTA Dispute Resolution*, BUS. MEX., Nov. 1991, at 40, 42 (noting Mexican worries about "frequent" U.S. CVD actions against Mexico and Mexican development of, and willingness to use, its own AD/CVD laws); Clearly, given the plethora of literature on the matter, AD/CVD laws are a matter of concern. *But see infra* text accompanying note 318 (suggesting that AD/CVD mechanism are not intrinsically protectionist, just the convenient weapon of the day).

In terms of WHFTA's relation to AD/CVD concerns, see Abugattas, *supra* note 17, at 369 (describing general Latin American belief that AD/CVD measures are "a new type of protectionism.").

dress these concerns and have enjoyed general high regard,[117] despite some skepticism[118] and their curious pedigree.[119]

NAFTA AD/CVD dispute resolution is governed by NAFTA Chapter 19.[120] CUSFTA's equivalent is CUSFTA Chapter 19.[121] The

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117. *See, e.g.*, Anderson & Fried, *supra* note 14, at 410 (noting that CUSFTA AD/CVD panel reviews have largely worked well to date, have not split along national lines as feared, have usually been unanimous, and have been thoughtful, well analyzed, and perhaps better quality than judicial review); Fried, *supra* note 7, at 235 (stating that CUSFTA AD/CVD DRM causes objective, transparent administration of trade laws, and should have a disciplinary effect on national investigating authorities); Gary N. Horlick, *The US-Canada FTA and GATT Dispute Settlement Procedures. The Litigant's View*, J. WORLD TRADE, April 1992 at 5, 10–11 (contrasting CUSFTA AD/CVD DRM favorably to the disappointing effect of CUSFTA general DRM and emphasizing that its success is due to the use of experts on the panels, and the fact that the panels are driven by private parties); Kennedy, *supra* note 116, at 104 (advocating use of CUSFTA's AD/CVD DRM as a model for GATT); Lowenfeld, *supra* note 116, at 272, 334–35 (describing CUSFTA's AD/CVD DRM as "a clear success" with regard to efficiency); (characterizing CUSFTA AD/CVD panels as working "extraordinarily well" overall; producing thorough, articulate and persuasive decisions; being considerably quicker than alternatives; and being strong on due process); Rugman, *supra* note 12, at 321–23 (cataloging the benefits of CUSFTA AD/CVD DRM: speed; deterrence of frivolous U.S. actions; increased perception of fairness and impartiality in administration of unfair trade laws; and increased access to system by smaller businesses, who could not afford lengthy judicial review); Smith & Whitney, *supra* note 12, at 585–86 (CUSFTA AD/CVD procedures provide impartial, binding, and rapid rule-adjudication); Penny L. Turner, Note, *The Feasibility of a United States-Japan Free Trade Agreement*, 26 TEX. INT'L L.J. 275, 291–92 (1991) (suggesting use of CUSFTA AD/CVD DRM as the model for a United States-Japan Free Trade Agreement DRM).

The idea of a United States-Japan Free Trade Agreement is not as obscure as one might at first believe. *See* Fried, *supra* note 7, at 235 (mentioning call by Sen. Max Baucus (D-Mont.) for a bilateral United States-Japan trade agreement).

118. *See* David P. Cluchy, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335 (1988). Cluchy states that: "[I]t is difficult to conclude that a binational panel will reach a different result from that which the Court of International Trade or the Court of Appeals for the Federal Circuit would reach in reviewing determinations of the International Trade Commission and the Commerce Department under United States trade laws." *Id.* at 347. *See also* McDorman, *supra* note 12, at 322 (characterizing final review determinations as "a leap of faith in third-party dispute settlement" and questioning the effectiveness of AD/CVD statutory review); Murphy, *supra* note 14, at 595–96 (claiming underlying academic and professional dissatisfaction with AD/CVD panel procedures); Carlsen, *supra* note 12, at 320 (expressing doubt that Canada will be satisfied with CUSFTA's AD/CVD binational panel decisions because review is not on substantive grounds, but on the correct application of substantive laws).

119. The CUSFTA AD/CVD binational panel system was evidently a hastily-drafted, eleventh-hour proposal, which was only necessary because U.S. and Canadian negotiators could not reach an agreement on harmonizing underlying dumping and subsidies laws. *See* Anderson & Fried, *supra* note 14, at 408 (claiming that binational panel provisions were negotiated Oct. 1–3, 1988, under the deadline of fast-track expiration); Lowenfeld, *supra* note 116, at 270–71 (describing panel process as a procedural solution, which resulted from inability to resolve substantive AD/CVD differences); Murphy, *supra* note 14, at 589–91 (characterizing binational panel procedures as a product of the fast-track expiration deadline and the failure to produce an agreement on subsidies in time to meet it; crediting Rep. Sam M. Gibbons (Democrat-N.D.), Chairman of the House Ways and Means Subcommittee on Trade, with tabling the binational panel procedures).

120. NAFTA, *supra* note 1, ch. 19, 32 I.L.M. at 682–93 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters).

121. CUSFTA, *supra* note 6, ch. 19, 27 I.L.M. at 386–95. (Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases).

CUSFTA and NAFTA binational panel systems are almost identical; consequently, this discussion applies to both structures. The few technical differences are mentioned in the footnotes; the two important ones are discussed *infra* Part B.2.d.

As a final introductory matter, the Parties under both NAFTA and CUSFTA reserve their right to apply national AD/CVD law to the goods of the other Parties.[122] Moreover, each Party retains the power to modify its AD/CVD laws, subject to certain restrictions.[123]

1. AD/CVD Dispute Resolution Institutional Provisions

The Secretariat is a permanent body which facilitates the resolution of AD/CVD disputes.[124] It has national sections[125] with permanent offices,[126] each managed by a national Secretary.[127] The Secretaries jointly provide administrative assistance to AD/CVD dispute resolution panels and committees.[128] The AD/CVD DRM also has the following im-

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122. NAFTA, *supra* note 1, art. 1902(1), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1902(1), 27 I.L.M. at 386. "Law" includes relevant statutes, legislative history, regulations, administrative practice, and judicial precedents. *Id.*

123. NAFTA, *supra* note 1, art. 1902(2), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1902(2), 27 I.L.M. at 386–87. The restrictions are that amendments only apply to other Parties if the amending statute so specifies that the amending Party should notify the other Parties as far in advance of enactment as possible, that the amending Party consults with affected Parties on demand, and that such amendment is not inconsistent with GATT, the GATT Subsidies and Antidumping Codes, and the objects and purposes of NAFTA or CUSFTA, as appropriate. *See id.*

Anticipating the completion of the Uruguay negotiations, the NAFTA drafters added a phrase which provides that amendments must be consistent with any successor agreements to the GATT and its two listed codes. *See* NAFTA, *supra* note 1, art. 1902(2)(d)(i), 32 I.L.M. at 682.

124. NAFTA, *supra* note 1, art. 1908, 32 I.L.M. at 686 (directing establishment of sections within the Secretariat, created under NAFTA, to facilitate operation of the AD/CVD dispute chapter; and directing the Secretariat to support all AD/CVD dispute resolution panels and committees); CUSFTA, *supra* note 6, art. 1909, 27 I.L.M. at 391 (establishing a Secretariat to facilitate operation of the AD/CVD dispute chapter and directing the Secretariat to support all AD/CVD dispute resolution panels and committees).

125. NAFTA, *supra* note 1, art. 2002(1), 32 I.L.M. at 693 (providing explicitly for national sections); CUSFTA, *supra* note 6, art. 1909(2)–(3), 27 I.L.M. at 391 (providing implicitly for national sections).

126. NAFTA, *supra* note 1, art. 2002(2)(a), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1909(2), 27 I.L.M. at 391.

127. NAFTA, *supra* note 1, art. 2002(2)(c), 32 I.L.M. at 693; CUSFTA, *supra* note 6, art. 1909(4)–(5), 27 I.L.M. at 391.

128. NAFTA, *supra* note 1, art. 1908(2), 32 I.L.M. at 686; CUSFTA, *supra* note 6, art. 1909(8), 27 I.L.M. at 391.

However, the Secretary for the Party which hosts a dispute resolution proceeding prepares the official record for those proceedings. NAFTA, *supra* note 1, art. 1908(2), 32 I.L.M. at 686; CUSFTA, *supra* note 6, art. 1909(8), 27 I.L.M. at 391. Furthermore, the Secretaries of the Secretariat must freely exchange relevant AD/CVD dispute information. NAFTA, *supra* note 1, art. 1908(2)–(4), 32 I.L.M. at 686; CUSFTA, *supra* note 6, art.

permanent elements: the binational panel, the extraordinary challenge committee, and the special committee.[129]

2. AD/CVD Procedural Provisions

There are four distinct procedures in the AD/CVD provisions: Statutory Amendment Review,[130] Review of Final AD and CVD Determinations,[131] Consultations,[132] and Special Committee Review.[133]

a. Statutory Amendment Review

Any affected Party may request review of an AD or CVD statutory amendment, on the grounds that (1) it is inconsistent with GATT, the GATT Dumping or Subsidies Codes, or the object and purpose of NAFTA or CUSFTA;[134] or (2) has the "function and effect" of overturning the prior decision of an AD/CVD Final Determination Review Panel.[135] The Parties will establish a Statutory Amendment Review Panel no later than fifty-five to sixty-one days after the panel request.[136] Panelists are normally chosen from a roster (established by the Parties) of at least seventy-five[137]

1909(10), 27 I.L.M. at 391.

129. The special challenge committee is the substantive difference between CUSFTA and NAFTA. *See infra* part I.B.2.d.

130. NAFTA, *supra* note 1, art. 1903, 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1903, 27 I.L.M. at 387.

131. NAFTA, *supra* note 1, art. 1904, 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904, 27 I.L.M. at 387.

132. NAFTA, *supra* note 1, art. 1907, 32 I.L.M. at 685–86; CUSFTA, *supra* note 6, art. 1908, 27 I.L.M. at 390.

133. NAFTA, *supra* note 1, art. 1905, 32 I.L.M. at 684–85; note that this is the substantive difference between NAFTA and CUSFTA AC/CVD DRMs. *See infra* part I.B.2.d.

134. NAFTA, *supra* note 1, art. 1903(1)(a), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1903(1)(a), 27 I.L.M. at 387.

135. NAFTA, *supra* note 1, art. 1903(1)(b), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1903(1)(b), 27 I.L.M. at 387.

136. The timeline varies, depending on how cooperative the Parties are. *See* NAFTA, *supra* note 1, annex 1901.2, 32 I.L.M. at 687; *id.* art. 1901(2), 32 I.L.M. at 682; CUSFTA, *supra* note 6, annex 1901.2, 27 I.L.M. at 393; *id.* art. 1901(2), 27 I.L.M. at 386. Specifically, the disputing Parties in consultation each must appoint two panelists within 30 days of the panel request. Each Party then has until day 45 to exercise up to four peremptory challenges, and to replace any of its panelists who are peremptorily challenged. *See* NAFTA, *supra* note 1, annex 1901.2(2), 32 I.L.M. at 687; CUSFTA, *supra* note 6, annex 1901.2(2), 27 I.L.M. at 393. If a Party does not meet these deadlines, its missing panelists will be appointed by lot. *Id.* Within 55 days of the panel request, the Parties choose the fifth panelist. If this deadline is missed, one Party is chosen by lot to appoint, the fifth panelist from the roster, discussed *infra* notes 137–39 and accompanying text, by the 61st day excluding candidates who were peremptorily challenged.

137. CUSFTA provides for at least 50 roster members. *See* CUSFTA, *supra* note 6, annex 1901.2(1), 27 I.L.M. at 393.

individuals;[138] the majority of panelists must be lawyers in good standing.[139] After impanelment, a chairman is selected by vote or by lot from the lawyers on the panel.[140] Panelists must guarantee they will safeguard confidential information divulged to them during panel proceedings.[141] Moreover, a panelist may not appear as counsel before another panel while serving as a panelist.[142] Finally, panelists are immune from all legal action for official acts, except violations of confidential guarantees.[143]

Panel proceedings are confidential and conducted according to rules of procedure established by the panelists.[144] Within ninety days of selecting a chairman, the panel issues an initial written opinion on whether the relevant amendment is unacceptable.[145] If the amendment is

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138. NAFTA, *supra* note 1, annex 1901.2(1), 32 I.L.M. at 687; CUSFTA, *supra* note 6, Annex 1901.2(1), 27 I.L.M. at 393. Each Party selects at least 25 roster members, in consultation with the others. All candidates must be citizens of the Parties of good character, high standing and repute; be independent of Party influence; and shall be chosen for objectivity, reliability, sound judgment, and general familiarity with international trade law. *Id.* If the panelists are not chosen from the roster, they still must meet these qualifications. *See* NAFTA, *supra* note 1, annex 1901.2(2), 32 I.L.M. at 687; CUSFTA, *supra* note 6, annex 1901.2(2), 27 I.L.M. at 393. Additionally, NAFTA mandates that "[t]he roster shall include judges or former judges to the fullest extent practicable." NAFTA, *supra* note 1, annex 1901.2(1), 32 I.L.M. at 687.

139. NAFTA, *supra* note 1, annex 1901.2(2), 32 I.L.M. at 687; CUSFTA, *supra* note 6, annex 1901.2(2), 27 I.L.M. at 393. Moreover, panelists will be subject to a code of conduct established by the Parties pursuant to NAFTA, *supra* note 1, art. 1909, 32 I.L.M. at 686, or CUSFTA, *supra* note 6, art. 1910, 27 I.L.M. at 391, respectively. A panelist who violates the code will be replaced. *See* NAFTA, *supra* note 1, annex 1901.2(6), 32 I.L.M. at 687; CUSFTA, *supra* note 6, art. 1901.2(6), 27 I.L.M. at 393.

140. NAFTA, *supra* note 1, annex 1901.2(4), 32 I.L.M. at 687; CUSFTA, *supra* note 6, annex 1901.2(4), 27 I.L.M. at 393.

141. NAFTA, *supra* note 1, annex 1901.2(7)–(8), 32 I.L.M. at 688. Failure to sign an agreement to this effect will disqualify a panelist. Further, the Parties must establish sanctions for violation of the protective agreements. *Id.*

142. *Id.* annex 1901.2(11), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1901.2(11), 27 I.L.M. at 394. Otherwise, the only restrictions on outside business activities are that they not interfere with performance of panel duties and are in keeping with the code of conduct. *See* NAFTA, *supra* note 1, annex 1901.2(10), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1901.2(10), 27 I.L.M. at 394.

143. NAFTA, *supra* note 1, annex 1901.2(12), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1901.2(12), 27 I.L.M. at 394.

144. NAFTA, *supra* note 1, annex 1903.2(1), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(1), 27 I.L.M. at 394. The Parties may agree not to keep the proceedings confidential. Also, they may agree on other rules of procedure prior to panel establishment. In any event, the rules of procedure shall guarantee at least one hearing before the panel and the right to present written submissions and rebuttal arguments. Panel decisions will be based on the Parties' arguments and submissions. *Id.*

145. NAFTA, *supra* note 1, annex 1903.2(2), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(2), 27 I.L.M. at 394. The initial opinion must contain findings of fact, as well as the decision on unacceptability, and the disputing Parties may agree to modify the 90 day limit. *Id.* For purposes of this subsection, an "unacceptable" amendment is one that violates GATT, the relevant GATT codes, or the object and purpose of NAFTA or CUSFTA, respectively. *See supra* notes 134–35 and accompanying text.

unacceptable, the initial opinion may include recommendations to make it acceptable.[146] The disputants have fourteen days to object to the initial decision; otherwise it becomes the final opinion.[147] If an objection is made, the panel must request the views of both disputants and reconsider its initial opinion.[148] Within thirty days of any objection, and after appropriate further examination, the panel issues its final opinion.[149] The final opinion is made public, unless the disputants otherwise agree.[150]

If the panel recommends modification to an unacceptable statute, the disputants have ninety days from the final decision to reach a resolution.[151] If no corrective legislation is enacted within nine months of the ninety day consultation period and no other solution is reached, the Complainant Party may take equivalent, retaliatory action or terminate the FTA with the Respondent upon sixty days written notice.[152]

b. Review of Final AD or CVD Determinations

This type of AD/CVD DRM is designed to replace judicial review of final AD or CVD administrative determinations.[153] It may be invoked by an involved Party on its own initiative and must be invoked by a Party at the request of a Party's national who has the right to commence domestic judicial review of the final determination.[154] Any request for binational panel review must be made within thirty days after a participant has reason to know of a final determination by a competent

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Dissenting panelists may provide separate opinions on matters upon which they did not agree. NAFTA, *supra* note 1, annex 1903.2(3), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(3), 27 I.L.M. at 394.

146. NAFTA, *supra* note 1, annex 1903.2(3), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(3), 27 I.L.M. at 394.

147. NAFTA, *supra* note 1, annex 1903.2(3)–(4), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(3)–(4), 27 I.L.M. at 394.

148. NAFTA, *supra* note 1, annex 1903.2(4), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(4), 27 I.L.M. at 394.

149. NAFTA, *supra* note 1, annex 1903.2(4), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(4), 27 I.L.M. at 394. The final opinion includes separate opinions of any panelist. *Id.*

150. NAFTA, *supra* note 1, annex 1903.2(5), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1903.2(5), 27 I.L.M. at 394. Separate opinions of panelists, and any written views the Parties wish, shall also be published. *Id.*

151. NAFTA, *supra* note 1, art. 1903(3)(a), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1903(3)(a), 27 I.L.M. at 387.

152. NAFTA, *supra* note 1, art. 1903(3)(b), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1903(3)(b), 27 I.L.M. at 387.

153. NAFTA, *supra* note 1, art. 1904(1), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(1), 27 I.L.M. at 387.

154. NAFTA, *supra* note 1, art. 1904(5), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(5), 27 I.L.M. at 388.

investigating authority.[155]

Resort to this procedure precludes domestic judicial review of the determination, and Parties may not legislatively provide for an appeal from a binational panel decision to its domestic courts.[156] However, Parties must amend their laws so that (1) procedures for domestic judicial review cannot begin unless the thirty-day panel request period is over; and (2) the appellant has notified affected Parties or persons of his intent to seek judicial review no later than day twenty of the panel request period.[157]

The Final Determination Binational Review Panel is formed using the same roster and timeline as those used for Statutory Amendment Review.[158] The Panel reviews a final AD or CVD determination, based on the administrative record, to decide if it is consistent with the AD or CVD law of the importing Party.[159] The Panel applies the law as a court of the importing Party would in reviewing such a final determination.[160] Proceedings are in accordance with rules of procedure established by the

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155. NAFTA, *supra* note 1, art. 1904(4), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(4), 27 I.L.M. at 388. "Reason to know" means publication of a final determination in official journal of the importing Party or notification of the affected Party by the importing Party. *See id.* "Competent investigating authority" means any of the following or their successors: the Canadian International Trade Tribunal (the Import Tribunal under CUSFTA), the Canadian Deputy Minister of National Revenue for Customs and Excise, the U.S. International Trade Administration, the U.S. International Trade Commission, or the designated authority within the Mexican *Secretaria de Comercio y Fomento Industrial*. *See* NAFTA, *supra* note 1, annex 1911, 32 I.L.M. at 691–93; CUSFTA, *supra* note 6, art. 1911, 27 I.L.M. at 391–93.

Additionally, requests for binational panel review of the same final determination by both involved Parties are consolidated. NAFTA, *supra* note 1, art. 1904(6), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(6), 27 I.L.M. at 388.

156. NAFTA, *supra* note 1, art. 1904(11), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(11), 27 I.L.M. at 388.

157. NAFTA, *supra* note 1, art. 1904(15)(c), 32 I.L.M. at 684; CUSFTA, *supra* note 6, art. 1904(15)(g), 27 I.L.M. at 390. There is also a provision for general amendment of the Parties' AD and CVD laws so as to achieve the objectives of the final determination review panel. *See generally* NAFTA, *supra* note 1, art. 1904(15), 32 I.L.M. at 684; *id.* annex 1904.15, 32 I.L.M. at 689; CUSFTA, *supra* note 6, art. 1904(15), 27 I.L.M. at 389–90 (providing illustrative list of statutes to be amended). Moreover, the AD/CVD panel procedure cannot be used where a final determination directly results from the remand of a prior final determination by a domestic court of the importing Party, where neither involved Party sought Binational Panel review of the original decision. NAFTA, *supra* note 1, art. 1904(12)(b), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(12)(b), 27 I.L.M. at 388.

158. NAFTA, *supra* note 1, art. 1901(2), 32 I.L.M. at 682; CUSFTA, *supra* note 6, art. 1901(2), 27 I.L.M. at 386.

159. NAFTA, *supra* note 1, art. 1904(2), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(2), 32 I.L.M. at 387. For the purposes of making this determination, AD and CVD law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedence, to the extent that a court of the importing Party would use them.

160. NAFTA, *supra* note 1, art. 1904(2), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(2), 27 I.L.M. at 389.

Parties,[161] and each participant has a right to appear and be represented by counsel.[162] A final determination is due within 315 days of the panel request.[163] A Final Determination Review Panel may uphold a final determination or remand it for action consistent with the panel's decision.[164]

i. Extraordinary Challenge of Final Determination Review

The final panel decision is binding on the involved Parties with respect to the matter in dispute.[165] Although a final decision is not reviewable on substantive grounds, it may be challenged on the grounds of: (1) gross misconduct, bias, serious conflict of interest, or material breach of rules of conduct by a panelist;[166] (2) serious departure from a fundamental rule of procedure by a panel;[167] or (3) a panel manifestly exceeding its powers, authority, or jurisdiction.[168] In addition, the breach must materially affect the panel's decision and threaten the integrity of the binational panel system.[169] In these extreme circumstances, an extraordinary challenge committee convenes.[170]

Within fifteen days of a request, the Parties form an extraordinary

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161. NAFTA, *supra* note 1, art. 1904(6), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(6), 27 I.L.M. at 388. Illustrative guidelines for the contents of the rules of procedure are provided in NAFTA, *supra* note 1, art. 1904(14), 32 I.L.M. at 684, and CUSFTA, *supra* note 6, art. 1904(14), 27 I.L.M. at 389.

162. NAFTA, *supra* note 1, art. 1904(7), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(7), 27 I.L.M. at 388. "Participants" include the competent investigating authority whose decision is being reviewed and those persons who had standing to appeal the final determination to a domestic court.

163. NAFTA, *supra* note 1, art. 1904(14), 32 I.L.M. at 684; CUSFTA, *supra* note 6, art. 1904(14), 27 I.L.M. at 389.

164. The remand period shall be as brief as possible and in no event shall exceed the maximum amount of time the investigating authority had to make the original final determination. If review of a remand is necessary, the same panel reviews the remand action and issues a final decision within 90 days of receiving the remand result. NAFTA, *supra* note 1, art. 1904(8), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(8), 27 I.L.M. at 388.

165. NAFTA, *supra* note 1, art. 1904(9), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(9), 27 I.L.M. at 388.

166. NAFTA, *supra* note 1, art. 1904(13)(a)(i), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13)(a)(i), 27 I.L.M. at 389.

167. NAFTA, *supra* note 1, art. 1904(13)(a)(ii), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13)(a)(ii), 27 I.L.M. at 389.

168. NAFTA, *supra* note 1, art. 1904(a)(iii), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13)(a)(iii), 27 I.L.M. at 389.

169. NAFTA, *supra* note 1, art. 1904(13)(b), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13)(b), 27 I.L.M. at 389.

170. NAFTA, *supra* note 1, art. 1904(13), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13), 27 I.L.M. at 388–89.

challenge committee,[171] composed of three members chosen from a roster of fifteen[172] judges or former judges.[173] Proceedings conform to the rules of procedure established by the Parties.[174] The committee will reach a final decision within thirty (for CUSFTA)[175] or ninety (for NAFTA)[176] days of its establishment, and the decision binds the involved Parties as to the matter in contention.[177] If the committee determines that a breach occurred, it remands to the original panel for action consistent with its decision or vacates the original panel decision, which causes a new review panel procedure to begin.[178] Otherwise, the challenge is denied, and the original panel decision is affirmed.[179]

c. Consultations

The consultations DRM is the least developed AD/CVD DRM in both NAFTA and CUSFTA, though NAFTA does elaborate on the idea. CUSFTA and NAFTA both provide for consultations between designated Party officials where required to carry out CUSFTA's AD/CVD chapter.[180] NAFTA adds requirements for annual Party consultations on problems relating to the AD/CVD chapter[181] and annual consultations

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171. NAFTA, *supra* note 1, annex 1904.13(1), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(1), 27 I.L.M. at 395. The only time limit on the request for an extraordinary challenge process is that it be "within a reasonable time after the panel decision is issued." NAFTA, *supra* note 1, art. 1904(13), 32 I.L.M. at 683; CUSFTA, *supra* note 6, art. 1904(13), 27 I.L.M. at 388–89.

172. CUSFTA provides for a ten member roster. *See* CUSFTA, *supra* note 6, annex 1904.13(1), 27 I.L.M. at 395.

173. The judges or former judges must be from a U.S. or Mexican federal-level judicial court or a Canadian judicial court of superior jurisdiction. Each Party names five persons to the roster. NAFTA, *supra* note 1, annex 1904.13(1), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(1), 27 I.L.M. at 395. Each involved Party selects one committee member from the roster, and, in NAFTA, the involved parties decide by lot which of them will select the third member from the roster. NAFTA, *supra* note 1, annex 1904.13(1), 32 I.L.M. at 688. CUSFTA provides that the two selected committee members choose the third member from the roster. *See* CUSFTA, *supra* note 6, annex 1904.13(1), 27 I.L.M. at 395.

174. The Parties must also establish the rules before the respective dates of entry into force of the two agreements. NAFTA, *supra* note 1, annex 1904.13(2), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(2), 27 I.L.M. at 395.

175. CUSFTA, *supra* note 6, annex 1904.13(2), 27 I.L.M. at 395.

176. NAFTA, *supra* note 1, annex 1904.13(2), 32 I.L.M. at 688.

177. *Id.* annex 1904.13(3), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(3), 27 I.L.M. at 395.

178. NAFTA, *supra* note 1, annex 1904.13(3), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(3), 27 I.L.M. at 395.

179. NAFTA, *supra* note 1, annex 1904.13(3), 32 I.L.M. at 688; CUSFTA, *supra* note 6, annex 1904.13(3), 27 I.L.M. at 395.

180. CUSFTA, *supra* note 6, art. 1908, 27 I.L.M. at 390.

181. NAFTA, *supra* note 1, art. 1907(1), 32 I.L.M. at 685.

between the investigating authorities.[182] Finally, NAFTA contains an agreement to consult on alternative AD/CVD rules and disciplines.[183]

d. Special Committee Review

NAFTA makes two big changes to CUSFTA's AD/CVD dispute resolution regime. The first is the apparent abandonment of any serious attempt to harmonize the Parties' AD/CVD laws.[184] The second is the provision of a special committee process to safeguard the panel review system.[185]

A Party resorts to the special committee review if it believes another Party's domestic law has interfered with any binational panel process.[186] The Complainant requests consultations on the matter, which begin within fifteen days.[187] If the Parties do not resolve the matter in forty-five days, the Complainant may request a special committee.[188] Within fifteen days of the request, a special committee is established,[189] using the same roster and selection procedure as does the extraordinary challenge procedure.[190] Special committee proceedings conform to rules

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182. *Id.* art. 1907(3), 32 I.L.M. at 686. NAFTA also provides an illustrative list of matters for the investigating authorities to consider. *See id.*

183. *Id.* art. 1907(2), 32 I.L.M. at 685.

184. *Compare id.* arts. 1901(3), 1902, 32 I.L.M. at 682 (providing that no provision of NAFTA imposes obligations on a Party with respect to its AD or CVD laws) *with* CUSFTA, *supra* note 6, arts. 1906, 1907, 27 I.L.M. at 390 (allowing for a maximum of seven years for the United States and Canada to harmonize AD/CVD laws, or face possible termination of CUSFTA and establishing a working group to harmonize the Parties' AD/CVD laws. This discrepancy could mean that Canada and the United States will continue their harmonization efforts under CUSFTA, regardless of NAFTA. For a related discussion, see *infra* part II.A.2. *But see* NAFTA, *supra* note 1, art. 1907(2), 32 I.L.M. at 685 (providing a weak requirement that parties consult to develop more effective rules and disciplines to govern unfair pricing and government subsidization, and providing for potential reliance upon a substitute system of rules on transborder pricing and government subsidization). For further elaboration of this topic, see *infra* part II.A.2.

185. NAFTA, *supra* note 1, art. 1905, 32 I.L.M. at 684.

186. *Id.* art. 1905(1), 32 I.L.M. at 684. Specifically, the provision mentions allegations that "the application of another Party's domestic law" has: (1) prevented the establishment of a panel requested by the Complainant; (2) prevented a panel requested by the Complainant from reaching a final decision; (3) prevented implementation or denied the binding force of a panel requested by Complainant; or (4) failed to provide for review of final AD/CVD final administrative determinations by a panel or by an independent domestic court of competent jurisdiction. *See id.* Evidently this review applies equally to statutory review panels and final AD or CVD determination review panels. *See infra* note 200.

187. NAFTA, *supra* note 1, art. 1905(1), 32 I.L.M. at 684.

188. *Id.* art. 1905(2), 32 I.L.M. at 684. The consulting Parties may modify this deadline. *See id.*

189. *Id.* art. 1905(3), 32 I.L.M. at 684. The disputing Parties may modify this deadline. *See id.*

190. *See id.* art. 1905(4)–(5), 32 I.L.M. at 684 (mandating the same roster and requiring the same procedures and number of panelists).

of procedure provided by the Parties[191] and are confidential.[192] An initial report is typically issued sixty days after the committee is formed, followed by a final report thirty days later.[193] Involved Parties must comment on the initial report within fourteen days.[194] The final decision is published ten days after it is issued.[195] A finding of interference by the Respondent will automatically stay many binational panel or extraordinary challenge committee reviews[196] and will stop the clock on requests for panel or committee review.[197]

If the special committee determines that a Party's domestic law has interfered with any panel process, the disputing Parties have sixty days to consult on a resolution.[198] A "resolution" may be either an agreement between disputants or unilateral action by the Respondent that satisfies the special committee.[199] If the dispute is not resolved in sixty days, the Complainant may suspend either operation of final AD/CVD determination review procedures or any appropriate NAFTA benefits with respect to the Respondent.[200]

If the Complainant suspends the final determination provisions, the

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191. *See id.* art. 1905(6), annex 1905.6, 32 I.L.M. at 684, 691. The rules will provide, *inter alia*, for the right to at least one hearing before the special committee, as well as the opportunity to provide initial and rebuttal written submissions. *See id.* annex 1905.6(a), 32 I.L.M. at 691.

192. *Id.* annex 1905.6(c), 32 I.L.M. at 691.

193. *Id.* annex 1905.6(b), 32 I.L.M. at 691.

194. *Id.*

195. *Id.* annex 1905.6(d), 32 I.L.M. at 691. However, the Parties may agree otherwise. Also, the final report includes any separate opinions of panelists and any written views the disputing Parties wish to attach. *Id.*

196. *Id.* art. 1905(11)(a), 32 I.L.M. at 685. This article provides an intricate guideline as to when and how final determination proceedings will be stayed. The scheme operates to the advantage of the Complainant by leaving a stay of its proceedings within its discretion, and mandating the stay of the Respondent's proceedings. Automatic stay of proceedings only applies to actions under NAFTA's final determination review, not to statutory amendment review. *Id.*

197. *Id.* art. 1905(11)(b), 32 I.L.M. at 685. The clock will resume if either party suspends final determination review proceedings. *Id.* art. 1905(12), 32 I.L.M. at 685.

198. *Id.* art. 1905(7), 32 I.L.M. at 684. Further, the Parties must begin the consultations within ten days of the report. *Id.*

199. *See id.* art. 1905(8), 32 I.L.M. at 684–85 (providing for unilateral action by the Complainant if the Respondent does not meet either of these requirements). Either Party may demand that the special committee reconvene and rule on the sufficiency of Respondent's unilateral action. *Id.* art. 1905(10)(b), 32 I.L.M. at 685. For time limits and the effects of such a ruling, see *infra* notes 203–204 and accompanying text.

200. *Id.* art. 1905(8), 32 I.L.M. at 684–85. Evidently, suspending the final determination review provision is retaliation for interference with the final determination review process and suspending other benefits is retaliation for interference in the statutory amendment process. However, the text is not clear on this issue.

Respondent may reciprocate.[201] However, if the Complainant suspends other appropriate benefits, the Respondent may only appeal to the special committee on grounds that the suspension is "manifestly excessive."[202] The special committee has forty-five days to consider either the excessiveness of the Complainant's retaliatory benefit suspension or the sufficiency of any corrective action.[203] A finding of sufficient action requires reinstatement of suspended benefits by both Parties.[204] Although the effect of a finding of "manifestly excessive" retaliatory suspension is not mentioned, presumably there should be some remedial action. If either Party suspends final determination review proceedings, automatically stayed proceedings[205] are terminated and irrevocably referred to domestic courts for review.[206] Any imposed sanctions are presumably lifted if agreement is reached, but NAFTA is silent on this issue.

C. *Special Dispute Resolution Provisions*

Both NAFTA and CUSFTA have a network of special dispute resolution provisions, which are defined as provisions which modify or substitute for the general and AD/CVD DRMs. NAFTA excludes much more from the "nullification or impairment" provision than does CUSFTA.[207] Also, NAFTA creates a special DRM for certain investment-related disputes[208] and exempts several types of investment disputes altogether.[209] By contrast, CUSFTA only encourages use of experts in the general DRM[210] without creating a special mechanism, and it only excludes *one* type of investment dispute.[211] NAFTA excludes competi-

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201. *Id.* art. 1905(9), 32 I.L.M. at 685. If either Party suspends the final determination review process, it must notify the other in writing. *Id.*

202. *See id.* art. 1905(10)(a), 32 I.L.M. at 685 (providing both Parties the right to demand a ruling on this issue).

203. *Id.* art. 1905(10), 32 I.L.M. at 685.

204. *Id.*

205. *See supra* note 196 and accompanying text (describing automatic stay of panel procedures).

206. NAFTA, *supra* note 1, art. 1905(12), 32 I.L.M. at 685. Similar to an automatic stay of proceedings, the system works to the advantage of the Complainant by leaving termination of all proceedings largely within its discretion, or in the discretion of private parties to panel proceedings.

207. *Compare* NAFTA, *supra* note 1, annex 2004, 32 I.L.M. at 699 *with* CUSFTA, *supra* note 6, art. 2011, 27 I.L.M. at 398 (illustrating the different exemptions in CUSFTA and NAFTA).

208. NAFTA, *supra* note 1, ch. 11 § B, 32 I.L.M. at 642–47.

209. *Id.* art. 1138, 32 I.L.M. at 647.

210. CUSFTA, *supra* note 6, art. 1608(4), 27 I.L.M. at 376.

211. *Id.* art. 1608(1), 27 I.L.M. at 376.

tion law from any dispute procedure;[212] CUSFTA does not. NAFTA provides a special DRM for financial services;[213] CUSFTA excludes them altogether from dispute resolution[214] but provides for Party consultations on matters affecting CUSFTA financial services.[215] In case of *actual* "escape clause" action, NAFTA provides the less formal DRM of direct Party consultation to negotiate compensation[216] but otherwise excludes escape clause actions from formal dispute settlement.[217] CUSFTA directs compulsory binding arbitration for disputes over actual escape clause actions but nevertheless excludes proposed emergency actions from any formal DRM.[218] Both CUSFTA and NAFTA guarantee special bid-challenge procedures for disputes over government procurement.[219] CUSFTA also gives either Party the right to refer to arbitration any dispute over levels of government support for wheat, oats, and barley.[220] Finally, both agreements provide a number of provisions[221] allowing or directing consultations in certain circumstances. Mostly, these provide for various bodies to discuss agreement-related matters. In NAFTA, these consultations occasionally substitute for formal dispute resolution, as with escape clause actions discussed above.

II. Critique of the NAFTA Dispute Resolution Structure

This critique of the NAFTA dispute resolution structure is far from exhaustive. Instead, examination of the system focuses on several discrete issues. These issues are initially divided into matters of commission (i.e., changes which were made) and matters of omission (i.e., changes which should have been made). Tentative suggestions for solutions to perceived problems are included in each section.

Before critiquing the NAFTA DRM structure, it is important to reiterate that the CUSFTA system from which NAFTA evolved has worked very well so far. Even though this critique focuses on perceived

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212. NAFTA, *supra* note 1, art. 1501(3), 32 I.L.M. at 663.

213. *Id.* arts. 1414–15, 32 I.L.M. at 660–61.

214. CUSFTA, *supra* note 6, art. 1801(1), 27 I.L.M. at 383.

215. *See id.* art. 1704(2), 27 I.L.M. at 382 (providing for consultations between the Canadian Department of Finance and the U.S. Department of the Treasury).

216. NAFTA, *supra* note 1, arts. 801(4), 802(6), 32 I.L.M. at 383, 384.

217. *See id.* art. 804, 32 I.L.M. at 384 (precluding the use of arbitral panels for escape clause actions).

218. CUSFTA, *supra* note 6, art. 1103, 27 I.L.M. at 352.

219. *See id.* art. 1305(3), annex 1305.3, 27 I.L.M. at 354, 360; NAFTA, *supra* note 1, art. 1017, 32 I.L.M. at 619.

220. CUSFTA, *supra* note 6, annex 705.4(16), 27 I.L.M. at 324.

221. There are 20 to 30 for CUSFTA and over 50 for NAFTA.

weaknesses, the reader should not lose sight of the strong track record of the basic dispute resolution structure. This Note does not contend that the system is flawed altogether; however, it does suggest that the CUSFTA dispute resolution system's success should be seen in the light of its limited application between two very similar trading partners. It also suggests that the NAFTA dispute system is not as good as it could or should be for the needs of ongoing hemispheric integration between vastly different would-be trading partners.

A. *Matters of Commission*

This Section of the critique analyzes those NAFTA DRM provisions which have diverged from the CUSFTA dispute resolution structure.[222] The discussion is divided into the following subsections: (1) changes to the general DRM; (2) changes to the AD/CVD DRM; and (3) changes to special dispute resolution procedures.

1. Changes to General Dispute Resolution

This set of changes further breaks up into several subsets. They are the alteration of the overall general DRM structure; modifications to the rules on use of retaliatory suspensions;[223] and miscellaneous procedural changes.

a. Structural Changes

Structural changes are those changes which add or subtract steps from the general DRM. At first glance, the structural changes to the basic CUSFTA DRM system are impressive: NAFTA consolidates CUSFTA expert panel and arbitration panel procedures into a single "arbitral panel" process;[224] it eliminates mandatory arbitration;[225] it allows for review of retaliatory suspension;[226] and it provides a "GATT-escape" clause.[227] Further examination reveals that only one change —

222. Alterations which are trivial, *pro forma*, or due primarily to the increase from two to three members will not be discussed.

223. "Retaliatory suspensions" are the suspensions of benefits of equivalent effect authorized by both CUSFTA and NAFTA after an unsuccessful attempt at dispute resolution. *See supra* notes 82–84, 109 and accompanying text.

224. *See supra* part I.A.2.a.

225. *Cf. supra* notes 111–14 and accompanying text (describing CUSFTA binding arbitration).

226. *See supra* note 85 and accompanying text (providing such review for NAFTA).

227. *See supra* notes 51–52 and accompanying text.

the "GATT-escape" clause — has direct impact on the NAFTA dispute resolution structure and its future development.

i. Consolidation and Elimination

The consolidation of the expert panel and arbitration panel processes eliminated all binding arbitration from the NAFTA general DRM system.[228] The remaining "arbitral panel" process is actually quite similar to the "expert panel" CUSFTA system.[229] Thus, it appears that NAFTA has eliminated an important dispute resolution forum.

Although this elimination seems a bold stroke, the change is not of great practical importance. As of the date of this writing,[230] neither arbitration process has been used at all under CUSFTA, and there is no reason to believe there would be great demand for them under NAFTA. The non-use of the arbitration panel is likely due to the CUSFTA Parties' unwillingness to use any *explicitly binding* DRM. The only exceptions were for problems historically very volatile within and between the Parties — grain subsidies and escape clause actions — where quick solution was the primary concern. Evidently, the arbitration panel was a DRM designed for intractable problems which have not occurred. Thus, the demise of binding inter-Party arbitration between CUSFTA and NAFTA is not particularly meaningful for effective dispute settlement. However, the fact that the difference between the systems still exists in theory, if not in fact, contributes to the problems of non-integration discussed *infra* Part II.B.3.

ii. Review of Retaliatory Suspension

NAFTA provides that any Party may request review of a retaliatory suspension of trade agreement benefits in order to determine if they are "manifestly excessive."[231] Although this addition seems a welcome innovation, both its effectiveness and the need for it are questionable.

The effectiveness of the review is most open to attack because the relevant NAFTA article[232] does not provide a separate remedial measure if "manifest excessiveness" is found.[233] Presumably, a finding of "manifest excessiveness" requires action by the suspending Party, but the

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228. *Compare supra* part I.A.2.a *with supra* part I.A.2.b.

229. *Compare supra* part I.A.2.a *with supra* part I.A.2.b.

230. March 1993.

231. *See supra* note 85 and accompanying text.

232. NAFTA, *supra* note 1, art. 2019(3)–(4), 32 I.L.M. at 697–98.

233. This discussion ignores the question of what constitutes "manifest excessiveness." Difficult questions of line drawing always exist in flexible clauses like this one. Still, a list of illustrative examples would clarify the concept.

reviewing panel is only given power to make a determination, not recommendations. Action on the report seems to be left to the disputing Parties or to the FTC by default. Since the Party levying "manifestly excessive" sanctions will necessarily be a member of both groups, it will be able to block any action because both bodies act by consensus. To the extent the review produces a swift, independent evaluation of the matter, it may put some pressure on the retaliating Party to lighten the sanctions. However, any Party is unlikely to concede that its sanctions are manifestly excessive, especially given the high tension levels reached by this stage.

The clause is also unnecessary, for, if a Party retaliates in a "manifestly excessive" manner, its victim under either Agreement can always resort to its own general dispute settlement action based on breach of the clause limiting retaliatory suspension to a level of "equivalent benefits."[234]

On the whole, the "manifestly excessive" review clause adds little or nothing to effective NAFTA dispute settlement. It could become more effective if the review panel is given power to make recommendations which are explicitly binding on the retaliating Party. However, to the extent it creates a different system from CUSFTA, it also exacerbates the issues of non-integration, discussed *infra* Part II.B.3.

iii. The "GATT-escape" Clause

The "GATT-escape" clause is the NAFTA provision which allows Respondents in certain cases to force a Complainant who has chosen GATT dispute settlement back into NAFTA.[235] These cases are disputes involving specific environment and health provisions of NAFTA.[236] Although it appears to be a technical change to the CUSFTA system, it is actually a stage in an ongoing struggle over environmental and health measures as they apply to trade relationships.

Few, if any, NAFTA issues have generated the amount and intensity of controversy as have environment and health.[237] Partisans of all de-

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234. *See* NAFTA, *supra* note 1, art. 2019(1), 32 I.L.M. at 697; *see also* CUSFTA, *supra* note 6, art. 1807(9), 27 I.L.M. at 386 (both limiting retaliatory suspensions to "benefits of equivalent effect.").

235. *See supra* note 51 and accompanying text.

236. *See id.*

237. Although labor and other political concerns have figured prominently in the NAFTA debate, see *supra* notes 3, 7, 18, 19 and accompanying text, the environmental rhetoric has been strong as well. *See, e.g.*, *U.S.-Canadian Relations Hinge on Free Trade Agreement, Economy*, DET. NEWS, Jan. 3, 1993, at 1B, 5B (quoting Canadian ambassador to U.S. describing the importance of the environment and trade to U.S.-Canada relations);

scription have touted NAFTA as both environmentally safe[238] and as an environmental hazard.[239]

The debate over the proper relationship of trade to environmental and health concerns exploded over the "*Tuna-Dolphin*" case.[240] In that

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Daphne Bramham, *U.S. Trade Commissioner Urges Removal of Exchange Barriers*, VANCOUVER SUN, Apr. 29, 1992, at D6 (citing U.S. International Trade Commissioner who emphasized consideration of the environment before signing NAFTA); Edward M. Ranger, Jr., *Environment Gains an Edge*, BUS. MEX., Oct. 1992, at 38, 38 (noting presidential candidate Clinton's commitment to "adequate" environmental protection under NAFTA and quoting Mexican President Salinas' opposition to NAFTA-caused pollution); *Environmental Organizations Propose 'Green Language' for Inclusion in NAFTA*, 9 Int'l Trade Rep. (BNA) 973 (June 3, 1992) (documenting environmentalist desire for public participation in harmonization of NAFTA-Parties' environmental standards). For a general discussion of the issues surrounding trade and the environment, see John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?*, 49 WASH. & LEE L. REV. 1227 (1992).

For a thumbnail discussion of current international environmental issues, see EDITORS OF THE HARVARD LAW REVIEW, TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW (1992). The authors include a section on international dispute resolution. They generally lambast the international system for failing to develop an operational liability regime. Finally, they close the dispute resolution section by expressing little faith in the ability of lawyers to devise such a regime and instead looking to "diplomats, economists, financiers, and scientists." *Id.* at 15–45, 46.

238. *See, e.g.*, Brown et al., *supra* note 3, at 10–11 (concluding that evidence that NAFTA will cause increased Mexican pollution is inconclusive and that most likely NAFTA will improve Mexican environmental standards); Steven Greenhouse, *Trade Proposal Includes Import Bans*, N.Y. TIMES, July 8, 1992, at D2 (quoting Ambassador Carla A. Hills, U.S. Trade Representative, that NAFTA will safeguard U.S. environmental interests and "go further to address environmental concerns" than any previous trade accord); *U.S.-Mexico Environmental Accord Expected to be Signed Soon, Fisher Says*, Int'l Env't Daily (BNA) (Sept. 14, 1992), *available in* LEXIS, Nexis Library, BNAIED File (citing a U.S. negotiator who claims that opposition to NAFTA may be "the biggest environmental mistake of the decade" and describing the EPA as "pleased" with NAFTA); Ranger, *supra* note 237, at 38 (quoting President Bush's belief that NAFTA maintains high environmental standards and encourages improvement and citing the Council of the Americas' conviction that NAFTA will improve environmental performance).

239. *See, e.g.*, Brown, *supra* note 19, at A15 (claiming NAFTA may cause environmental "race to the bottom"); Julie Cazzin, *A Blueprint for Freer Markets*, MACLEAN'S, Aug. 24, 1992, at 46, 47 (citing "apparently unanimous opinion among environmentalists" that NAFTA will not prevent or clean up Mexican pollution); *ITC Chairman Newquist Says Approval Process for NAFTA May Be Difficult*, 9 Int'l Trade Rep. (BNA) 936, 936–37 (May 27, 1992) (citing congressional and environmental group fears that NAFTA will exacerbate existing environmental problems); Ranger, *supra* note 237, at 38 (quoting AFL-CIO Secretary Treasurer's statement that NAFTA ignores pollution in border communities). Some groups opposed to NAFTA on environmental grounds brought suit against the United States requesting an injunction requiring expeditious filing of an environmental impact statement on the NAFTA proposal. The district court dismissed for lack of standing. Public Citizen v. Office of United States Trade Representative, 789 F. Supp. 139 (D.D.C. 1992). The circuit court affirmed on different grounds. Public Citizen v. Office of United States Trade Representative, 970 F.2d 916 (D.C. Cir. 1992).

240. United States-Restrictions on Imports of Tuna (GATT Doc. DS21/R, Sept. 3, 1991). For a thorough discussion of the case, see Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477 (1991). The author concludes that the U.S. import bans were illegal under GATT. He also opines that GATT will be unable to "accommodate the emergence of a fully developed international environmental and conservation regime" because

controversy, the U.S. banned imports of tuna from Mexico because of Mexico's alleged breach of the U.S. Marine Mammal Protection Act.[241] A GATT dispute resolution panel ruled against the United States, reasoning that quotas were not justified under GATT health and environment provisions.[242] This caused environmental groups to mistrust GATT intensely.[243]

Given the explosive atmosphere created by the *Tuna-Dolphin* decision and the highly visible opposition to NAFTA by environmental groups, the "GATT-escape" clause appears to be an effort by NAFTA proponents to win over environmental advocates. At first glance, it looks as if the environmental community "wins" under the "GATT-escape" clause because it allows a country which is accused of environment-based protectionism to opt out of the forum that produced "*Tuna-Dolphin.*" However, environmental groups quickly took issue with NAFTA dispute resolution and the proposed "GATT-escape" clause.[244] The environmental groups charge, *inter alia*, that NAFTA requires Respondents to meet a higher standard of proof than does GATT to justify trade restrictions based on environmental measures.[245] More specifically,

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GATT dispute settlement emphasizes trade and not environmental concerns. *Id.* at 525. However, the article ends on a positive note, in light of GATT pragmatism when faced with new problems. *Id.*

241. 16 U.S.C. 1361–1407 (1988).

242. GATT, *supra* note 13, art. XX(b),(g).

243. *See, e.g.*, Smith & Whitney, *supra* note 12, at 582–83 (discussing the likelihood that U.S. environmental, health, and safety measures will be found illegal under GATT in the wake of "*Tuna-Dolphin*"); Stephen G. Hirsch, *Free Trade Pact Rapped Over Dispute Resolution*, RECORDER, Sept. 4, 1992, *available in* LEXIS, Genfed Library, RECRDR File (citing environmentalist dislike of GATT because it does not allow outside expert testimony and because defendants must prove an environmental measure is not a trade barrier); *U.S., Mexico and Canada Plan to Establish Trade Commission*, Int'l Env't Daily (BNA) (Aug. 4, 1992), *available in* LEXIS, Nexis Library, BNAIED File (citing Public Citizen's opposition to leaked draft of NAFTA DRM because there is a possibility of resort to GATT).

244. *See* Steven Greenhouse, *Trade Proposal Includes Import Bans*, N.Y. TIMES, July 8, 1992, at D2 (citing environmental groups' concern that NAFTA DRMs will strike down U.S. environmentally-motivated import bans because of a lack of scientific evidence); *Public Citizen Says NAFTA Summary Falls Short on Environmental Issues*, 9 Int'l Trade Rep. (BNA) 1502, 1503 (Aug. 26, 1992) (characterizing NAFTA environmental dispute resolution provisions as far short of meaningful). Other environmentalists' concerns with NAFTA's general DRM include its lack of provision for: environmental trade sanctions; upward harmonization of environmental standards; inclusion of environmental experts; public comment; and burdening Complainants with proving the existence of an equally effective, less restrictive mechanism. *See North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, 15 Int'l Env't Rep. (BNA) 561, 562 (Aug. 26, 1992).

245. GATT, although it produced the Tuna-Dolphin Case, does not require that all environmental or health-related measures have a sound scientific basis. A good example is the Beef Hormone Case, where an EC health regulation prohibited the sale of beef which had been subjected to artificial growth hormone. The United States protested that the artificial hormone method was safe. The EC replied that it did not need scientific justification for the regulation so long as it was applied equally to domestic and imported beef. For a discussion

their concern is that NAFTA DRMs will strike down U.S. environment or health-based import bans, unless they meet a demanding standard of scientific proof.[246] Thus, so the argument goes, the "GATT-escape" clause allows any environment-hostile Party to attack bothersome trade laws by demanding a high standard of scientific proof. Further, because these Parties control the introduction of any scientific input into the dispute resolution process, NAFTA "stacks the deck" against precautionary measures.[247]

To a large degree, the NAFTA text can be interpreted this way. It singles out environmental and health related disputes for special referral to NAFTA,[248] and it allows Parties to control the use of scientific review boards.[249] Disputing Parties must agree on whether and how to use a scientific board, and that use is limited to questions of fact.[250] Also, if a scientific committee is used, its results *must* be considered.[251] Moreover, NAFTA repeatedly requires that environmental and health standards be based on scientific evidence.[252] Finally, provisional environmental and

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of the case, see Jackson, *supra* note 237, at 1237–38. The article also mentions environmentalists' concerns about treaties requiring minimum standards of scientific justification. *Id.* at 1239.

246. *See, e.g., Groups Say Clause Would Permit Challenges to Environmental Laws*, 15 Int'l Env't Rep. (BNA) 657 (Oct. 7, 1992) (alleging that NAFTA exposes U.S. environmental and consumer laws to challenges as non-tariff barriers under chapters on sanitary, phytosanitary, and technical standards).

247. The root of this charge is NAFTA, *supra* note 1, art. 907(3), 32 I.L.M. at 388 (allowing only provisional technical regulations in the absence of scientific information and requiring completion of any scientific investigation within a "reasonable period."). *See also infra* notes 253–54 and accompanying text.

248. *See* NAFTA, *supra* note 1, arts. 2005 ¶¶ (1), (3)–(4), 32 I.L.M. at 694.

249. *See supra* note 71 and accompanying text. The control of input into environmental dispute procedures seems to be a particularly contentious issue. *See, e.g., Focus on Side Deals, Legislation NWF Official Advises Environmentalists*, 16 Int'l Env't Rep. (BNA) 88 (Feb. 10, 1993) (National Wildlife Federation calls for citizen input into dispute process); *Groups Say Clause Would Permit Challenges to Environmental Groups*, 15 Int'l Env't Rep. (BNA) 657 (Oct. 7, 1992) (environmentalists criticize NAFTA's "highly secretive" dispute resolution procedures); *North American Free Trade Agreement Greeted with Suspicion by Environmental Groups*, 15 Int'l Env't Rep. (BNA) 561, 562–63 (Aug. 26, 1992) (reporting concern of Canadian Member of Parliament on this issue). The author does not entirely reject this desire for transparency. In the context of national democratic processes it is the accepted, indeed the presumptively required, norm. However, international disputes are generally resolved secretly, in part to avoid heightening tension by increased scrutiny. Allowing much input, rather than complete transparency of process, may be the best solution. For a related discussion, see Jackson, *supra* note 237, at 1256–58.

250. *See* NAFTA, *supra* note 1, art. 2015(1)–(3), I.L.M. at 496–97.

251. *See id.* art. 2015(4), 32 I.L.M. at 697.

252. *See id.* art. 712(3), 32 I.L.M. at 378 (requiring that sanitary or phytosanitary measures be based on scientific principles and not be maintained in the absence of a scientific basis). Additionally, NAFTA requires the existence of a scientific basis for excluding imports on sanitary or phytosanitary grounds. *Id.* art. 714(2)(b), 32 I.L.M. at 378. It also requires the use of relevant scientific evidence in conducting sanitary or phytosanitary risk assessments.

health measures which may be valid but cannot be scientifically substantiated are subject to attack under NAFTA.[253]

These provisions allow a country with lower environment or health standards to challenge any other Party's similar laws which act as a trade barrier. Furthermore, because scientific inputs are limited to factual questions, the only issue will be if a regulation meets high scientific *fact* standards, not if the scientific board thinks the measure is advisable in the absence of firm scientific proof. Thus, if an importing Party challenges a U.S. environmental or health regulation and phrases the questions purely in terms of facts, it can avoid opinions and "soft science" policy questions. Moreover, despite the NAFTA provisions which allow higher standards of environmental protection than the international minimum, the "hard science" clauses make any environment or health measure vulnerable. In fact, NAFTA seems to require setting standards lower than international norms if such norms are insufficiently rooted in scientific proof. Also, because the dispute proceedings are confidential,[254] no citizen groups can force attention onto "soft-science" based policy. Finally, the outspoken distrust of U.S. environmental laws by some Mexican business leaders[255] makes a clash seem inevitable.[256]

Id. art. 715(1)(b), 32 I.L.M. at 378. In the absence of scientific information, the treaty allows only provisional sanitary or phytosanitary measures, and any scientific investigation must be completed in a "reasonable period." *Id.* art 715(4), 32 I.L.M. at 379. "Scientific basis" is defined as "a reason based on data or information derived using scientific methods," see *id.* art. 724, 32 I.L.M. at 382–83. The treaty also encourages use of available scientific evidence in assessing the risk of standards adopted in pursuance of "legitimate objectives," see *id.* art. 907(1), 32 I.L.M. at 387–88, allows only provisional technical regulations in the absence of scientific information, see *id.* art 907(3), 32 I.L.M. at 388, and defines "legitimate objectives" with reference to scientific justification. *See id.* art. 915, 32 I.L.M. at 391–92.

Related pertinent provisions are NAFTA, arts. 712(1), 713(3), 905(3), *id.* 32 I.L.M. at 377–78, 387, which allow higher standards of environmental and health protection than the international minimum.

253. *See id.* arts. 715(4), 32 I.L.M. at 379, 388 (allowing only provisional sanitary or phytosanitary measures and provisional technical regulations in the absence of scientific information and requiring a completion of scientific investigation in a "reasonable period.").

254. *See id.* art. 2012(1)(b), 32 I.L.M. at 696.

255. Carlos Sandoval, president of the Mexican National Council of Environmental Industrialists, forcefully criticized U.S. environmental laws, accusing them of being protectionist. *Mexican Official Denies Negotiations Under Way on NAFTA Environmental Accord*, 16 Int'l Env't Rep. (BNA) 44, 44–45 (Jan. 27, 1993).

256. Some environmental critics regards the "GATT-escape" clause as the Machiavellian triumph of industrialists and free-trade proponents. The argument is that governments pass precautionary environmental laws in order to placate their environmental constituents, knowing full well that they will be challenged under NAFTA for lack of a scientific basis. When preemptive measures are then struck down, the government in question can claim that it tried, thus allowing free-traders to have their cake and eat it too. The importance of the "GATT-escape" clause is that it ensures review under NAFTA's scientific justification regime, even if the challenging Party obtusely brings a GATT action. The country which originally imposed the measures can disingenuously claim to be avoiding GATT's environmentally hostile regime.

Whatever the intention of the NAFTA proponents who included the GATT-escape clause, it appears to have backfired. It helped focus environmental groups' attention onto dispute resolution and damaged the legitimacy of NAFTA within this very visible and activist segment of the public. These effects strengthen calls for special "environmental" trade sanctions and a special "environmental" dispute DRM[257] in two ways. First, they increase the perceived problems of handling environment and health disputes *via* NAFTA's general DRM. Second, the "GATT-escape" clause establishes a dangerous precedent of treating environment and health disputes differently, thus making a special DRM seem less objectionable. The movement for special environmental dispute resolution provisions in turn continues the trend towards a "balkanized" dispute resolution system, which is discussed *infra* Part II.A.3. Finally, it contributes to concerns caused by the non-integration of CUSFTA and NAFTA, a problem which is further discussed *infra* Part II.B.3. The "GATT-escape" clause is likely to cause more trouble than it is worth and should not have been included in NAFTA.

b. Changes to Rules on Retaliatory Suspension

NAFTA makes two changes affecting the use of retaliatory sanctions. First, it adds a "weak" rule that retaliatory suspensions be within the sector of the original breach when "effective" and "practicable."[258] Second, it eliminates the CUSFTA requirement that retaliation be used only if "fundamental interests" are harmed.[259] The language of both these provisions is more normative than prescriptive, and the impact upon parties' behavior of the NAFTA changes is weaker than it otherwise would be. This is also true because the relevant terms in both

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The author does not know if these beliefs are widely held. They were expressed in a discussion following a debate on "NAFTA and the Environment," organized in November 1992 by Professor John H. Jackson at the University of Michigan Law School.

257. *See, e.g., Baucus Outlines Safeguards He Says are Essential for Acceptable NAFTA*, 9 Int'l Trade Rep. (BNA) 1020–21 (June 10, 1992) (Sen. Baucus (Democrat-Mont.) calling for use of environmental experts as panelists, and for input by interested NGOs, in NAFTA environmental disputes); *Focus on Side Deals, Legislation NWF Official Advises Environmentalists*, 16 Int'l Env't Rep. (BNA) 88 (Feb. 10, 1993) (discussing the prospect of a proposed North American Commission on the Environment taking part in environmental dispute resolution); *Mexican Official Denies Negotiations Under Way on NAFTA Environmental Accord*, 16 Int'l Env't Rep. (BNA) 44, 44 (Jan. 27, 1993) (reporting the Mexican government's proposal to create a permanent tri-national environmental commission to help resolve environmental disputes).

258. *See* NAFTA, *supra* note 1, art. 2019(2), 32 I.L.M. at 697. The rule is "weak," because it allows cross-sectoral suspension, where sectoral suspension is not "practicable" or "effective." *See id.* This gives NAFTA members much leeway for cross-sectoral sanctions.

259. *Compare id.* art. 2019, 32 I.L.M. at 697–98 *with* CUSFTA, *supra* note 6, art. 1807(9), 27 I.L.M. at 386.

NAFTA and CUSFTA have no objective meaning. In other words, the Party using sanctions decides what is "effective and practicable" under NAFTA, as well as what constitutes a "fundamental interest" under CUSFTA. Taken together, however, the changes shift the emphasis from discouraging the use of sanctions for trivial infractions (in any event an unlikely occurrence) to discouraging cross-sectoral retaliation. This shift reflects a desire to contain trade problems to one sector in order to minimize chances of an expanding trade war.[260] Although these modifications positively affect dispute resolution to the extent that such goals are actually accomplished, they also create differences between CUSFTA and NAFTA dispute settlement systems which may add to the tension of non-integration, discussed *infra* Part II.B.3.

c. Miscellaneous Procedural Changes

NAFTA institutes a series of relatively minor procedural changes to the CUSFTA general dispute system which generally improve the dispute settlement system in small ways. They include: requiring more specific expertise of NAFTA panelists;[261] prohibiting selection of a Party's own citizens to serve on an arbitral panel;[262] allowing peremptory challenges of non-roster panelists;[263] providing standard terms of reference;[264] and including a requirement that "nullification or impairment" be specifically alleged.[265]

The changes affecting panelist qualification and selection improve the efficiency and precision of the process. The requirement of special expertise increases the corporate knowledge of panelists and makes them less dependent on outside advice. Prohibiting the choice of a Party's own citizens decreases the ability of disputing Parties to choose panelists who are prejudiced in their favor. Finally, allowing peremptory challenges of non-roster panelists forces Parties to agree on them. This in turn enhances the legitimacy of the system and its product by de-

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260. *Cf.* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 98 (characterizing cross-sector retaliation as a "potentially explosive issue" in the GATT reform context).

261. *Compare* NAFTA, *supra* note 1, art. 2009(2)(a), 32 I.L.M. at 695 *with* CUSFTA, *supra* note 6, art. 1807(1), 27 I.L.M. at 385.

262. *Compare* NAFTA, *supra* note 1, art. 2011, 32 I.L.M. at 696 *with* CUSFTA, *supra* note 6, art. 1807(3), 32 I.L.M. at 385.

263. *See* NAFTA, *supra* note 1, art. 2011(3), 32 I.L.M. at 696.

264. *See supra* notes 68–70, 101 and accompanying text; *see also* Hage, *supra* note 12, at 368–69 (noting similar problems with vague CUSFTA terms of reference procedure and recommending standard terms of reference modeled on GATT).

265. *Compare* NAFTA, *supra* note 1, art. 2012(5), 32 I.L.M. at 696 *with* CUSFTA, *supra* note 6, art. 1807(5), 27 I.L.M. at 385.

creasing even more the probability of introducing biased or incompetent panelists to the process.

Providing standard terms of reference and mandating their use unless otherwise agreed in twenty days increases the efficiency of the system by eliminating the possibility that parties will fray over the issue. Furthermore, standard terms of reference will help avoid problems of a Panel which interprets terms of reference differently than would the Parties.[266] Requiring that "nullification or impairment" be specifically alleged complicates a Panel's ability to rule on this cause of action. This requirement, when viewed in conjunction with the omission of "nullification" or "impairment" from the standard terms of reference, signifies that disputants must agree to use them. This further reduces the likelihood of using "nullification or impairment" as a cause of action, and for reasons discussed *infra* Part II.B.1.a, such a result would constitute a positive development. The improvements brought about by these changes must be weighed against the tensions caused by their creation of separate CUSFTA and NAFTA dispute resolution systems.[267]

2. Changes to the AD/CVD Dispute Resolution Provisions

NAFTA changed the CUSFTA AD/CVD DRM in a few ways. The important alterations[268] are the creation of special committee review[269] and the abandonment of the harmonization of AD/CVD laws.[270] Both of these changes arguably improve the system.

Special committee review, as a safeguard against tampering with a highly-regarded, effective DRM, incrementally improves NAFTA over CUSFTA. However, given the general confidence in the system,[271] its necessity is questionable.

The attempt to harmonize U.S. and Canadian AD/CVD laws has

266. *Cf.* Hage, *supra* note 12, at 368–69 (describing similar problems of interpretation for CUSFTA and GATT and GATT's solution of standard terms of reference).

267. *See infra* part II.B.3.

268. The lengthening of the extraordinary challenge period from 30 to 90 days, see *supra* notes 175–76 and accompanying text, is not of particular importance. However, it does give the Parties additional time to settle a dispute diplomatically, and gives panelists more time to review the evidence in complex cases. In this respect it provides some flexibility to the system.

269. *See supra* part I.B.2.d.

270. *See supra* note 184 and accompanying text.

271. *See supra* note 117 and accompanying text; *cf. supra* note 118 and accompanying text.

evidently floundered[272] and was probably never a realistic goal.[273] The entire NAFTA system, already much more complex than CUSFTA, is well rid of the extra strain. However, there is no clear abrogation in NAFTA of the CUSFTA harmonization attempt,[274] and the harmonization attempt between the U.S. and Canada is still theoretically valid.

Both the possibility of continued progress toward harmonized U.S.-Canadian AD/CVD laws and the special committee process create highly visible differences between the two systems. Whatever incremental improvement they provide could well be outweighed by their contribution to the misperceptions caused by non-integration.[275]

3. Changes to Special Dispute Resolution Provisions

NAFTA alters the special dispute resolution provisions of CUSFTA in several ways, described in detail *supra* Part II.C. Some highlights are that NAFTA develops two new special DRMs (financial services and investment); eliminates one special DRM (government grain support); and deformalizes but retains another ("escape clause"). It also creates one exclusion (competition laws) and expands another set (exclusions from "nullification or impairment"). Moreover, NAFTA adds the "GATT-escape" clause, which has contributed to calls for developing yet another special DRM.[276] Finally, it preserves and expands the network of specialized consultations, some of which may develop into formal DRMs of their own, as did financial services. Taken together, these changes indicate an ongoing willingness to splinter or "balkanize"

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272. *See Canada Set to Negotiate Antidumping Changes in Trilateral Free Trade Talks, Official Says*, 8 Int'l Trade Rep. (BNA) 441, 441–42 (Mar. 20, 1991) (citing a lack of U.S. political will and a Canadian consensus on moving ahead with AD harmonization); Bob White, *Average Canadian Won't Benefit from NAFTA*, FINANCIAL POST, Aug. 31, 1992, at S4, *available in* LEXIS, Nexis Library, FINPST File (documenting Canadian labor leader's belief that NAFTA cancels CUSFTA's subsidies law harmonization commitment).

273. In this case, interface rather than integration should be the goal of trade law. *Compare* JACKSON, *supra* note 9, at 218–21 (describing international trade law as a means of interface between different legal systems) *and* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 83–84 (advocating broad concept of "interface accommodation" even for very similar countries) *with* JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 724 (1986) [hereinafter JACKSON & DAVEY] (discussing irreconcilably opposing national views on the proper scope of subsidization). *But cf.* McDorman, *supra* note 12, at 320 (expressing continued Canadian concern over the vulnerability of social programs to U.S. CVD actions); Carlsen, *supra* note 12, at 320, 322 (doubting Canadian satisfaction with use of the AD/CVD dispute resolution system instead of AD/CVD harmonization).

274. *See supra* note 184 and accompanying text.

275. *See infra* part II.B.3.

276. *See supra* note 258 (noting call for special environmental dispute resolution arrangements).

dispute settlement procedures, much as GATT has in the past.[277]

All this ferment indicates increasing involvement of special interest groups in the dispute settlement process as each group attempts to carve out its own exception to the general rule.[278] This is not a thoroughly ominous development because specialization also brings expertise and relative sectoral efficiency.[279] However, such expertise could be provided just as well by an expert panel.[280]

A "balkanized" dispute settlement system may weaken the prospects of successful conflict resolution. It increases the chances of finding a biased forum, thus encouraging forum shopping. It duplicates effort and wastes valuable resources. It creates "special deals" and other perceived inequities[281] which detract from the legitimacy of the system. It leads to systems of "competing" procedures[282] which add extra strain to any dispute resolution structure. Furthermore, it increases the complexity of the system, making it more difficult to understand and use effectively and further delegitimizing its processes, especially in the eyes of smaller countries.[283] Because many potential WHFTA partners are smaller

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277. *See, e.g.*, JACKSON, RESTRUCTURING GATT, *supra* note 14, at 98 (discussing the phenomenon of GATT DRM specialization and expansion).

278. *See, e.g.*, NAFTA, *supra* note 1, annex 2004(1), 32 I.L.M. at 699 (partially exempting energy and automotive industries from nullification or impairment).

279. *See, e.g.*, Anderson & Fried, *supra* note 14, at 413 (opining that CUSFTA's many different DRMs have worked quite well); Leonard Bierman & Donald R. Fraser, *The Canada-United States Free Trade Agreement and U.S. Banking: Implications for Policy Reform*, 29 VA. J. INT'L L. 1, 29 (1988) (describing specialized DRMs as an important step in the development of "global banking"); Charles W. Levesque, Comment, *Chapter 13 of the United States-Canada Free Trade Agreement: Has It Created An Open and Effective Government Procurement Dispute Resolution System?*, 12 NW. J. INT'L L. & BUS. 187, 214–15 (1991) (concluding that certain specialized DRMs are transparent and effective).

280. *Cf.* NAFTA, *supra* note 1, art. 2014, 32 I.L.M. at 695 (allowing the use of experts to help NAFTA general dispute panels).

281. For example, it exempts the automotive and textile industries from "nullification or impairment." *See supra* note 278.

282. *Cf.* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 65 (describing disputes over which GATT resolution procedures involved parties should pursue).

283. JACKSON describes this problem in the context of the GATT system.

> There is . . . a considerable problem with the multitude of different dispute procedures now provided in [the GATT system]. Such a situation creates disputes about the appropriate forum, and confusion about the procedures and their complexity. This makes it more difficult for smaller countries to understand and use the procedure effectively. Thus, the new [GATT] organization should set up a unified procedure. . . . The W[orld] T[rade] O[rganization] chapter on disputes would set forth a common set of procedures for [bilateral consultation, mediation and conciliation, and an impartial panel ruling], and this would go a long way to avoid 'forum shopping' and forum disputes. It would provide a common set of detailed procedures and allow the experience and evolution of those procedures to develop naturally and centrally, so that such experience would apply to all future disputes (avoiding 'reinventing the wheel' in each treaty procedure).

countries, continued "balkanization" is a detrimental feature of NAFTA, in terms of providing a basis for WHFTA.

Moreover, the international trade community has recognized the flaws of specialization, as reflected in calls to streamline GATT's "balkanized" dispute settlement system.[284] This is an area where NAFTA negotiators ignored international experience to the detriment of the system as a whole. They should have listened to GATT reformers and created a stronger, more integrated dispute settlement system.

B. *Matters of Omission*

This section of the critique focuses on changes that should have been effected in NAFTA. It is more anticipatory than the last section because it attempts to detect problems which could hamper both the use and development of NAFTA's dispute resolution system.

1. Problems with the General Dispute Resolution System

The NAFTA general dispute system strongly resembles the CUSFTA expert panel process from which it is derived.[285] The CUSFTA expert panel system in turn is based on the GATT dispute resolution mechanism.[286] Although CUSFTA general DRM was an attempt to avoid the weaknesses of GATT,[287] both CUSFTA and NAFTA share two of GATT's primary weaknesses: "nullification or impairment" and the inability to produce a truly binding DRM.[288]

a. Nullification or Impairment

NAFTA inherited the concept of "nullification or impairment" from

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Id. at 98.

284. *See, e.g.*, Draft Text Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA, at 92 (Dec. 20, 1991) (proposing Integrated Dispute Settlement System for GATT); JACKSON, RESTRUCTURING GATT, *supra* note 14, at 97–98 (advocating a unified GATT DRM).

285. *See supra* part I.A.2.a–b.

286. *See, e.g.*, Horlick, *supra* note 117, at 9 (describing CUSFTA general DRM as "essentially a replica of GATT as it existed in 1987"); Smith & Whitney, *supra* note 12, at 569–70 (characterizing CUSFTA as based on GATT).

287. *See* Anderson & Fried, *supra* note 14, at 398–400 (claiming CUSFTA general DRM was negotiated to avoid some of the troubles of GATT).

288. To be fair, NAFTA and CUSFTA general DRMs have avoided some problems of GATT, such as long lag-times, poor-quality decisions, interference by uninvolved third countries, and lack of independent, informed panelists. *See* Anderson & Fried, *supra* note 14, at 402.

GATT.[289] Its exact meaning remains unclear,[290] but the landmark GATT "*Australian Sulphate*" case[291] determined that no breach of GATT had to occur for a GATT benefit to be nullified or impaired.[292] NAFTA has apparently accepted this definition, for it explicitly states that a Party may bring an arbitral panel action based on "nullification or impairment" by a measure "not inconsistent" with NAFTA.[293] This cause of action creates a situation in which a Party can fully observe its obligations under NAFTA and still have an action brought against it for trespassing on an unnegotiated, but nevertheless "reasonably expected," benefit.

It makes little sense to define a cause of action based on so ephemeral a concept because it creates uncertainty between trading partners about the possible effects of their actions.[294] A "reasonably expected" benefit should be based upon a text, not upon implicit expectations. If a Party thinks a trade benefit is important enough to protect, that Party should negotiate for it and put all Parties on notice that it is protected.[295] It is more sensible to hold that a Party can reasonably expect not to be held liable for unnegotiated items than to hold that a Party can reasonably expect compensation for infringement of unnegotiated implicit expectations.

Including "nullification or impairment" as a cause of action gives any Party which is displeased with the legal acts of its partners a chance to win compensation based upon implicit expectations. Frequent resort to this clause will detract from a system's legitimacy[296] by creating both uncertainty and perceived inequity. NAFTA negotiators should have taken the opportunity to jettison "nullification or impairment" and to insist that all actions be based upon inconsistency with the trade agreement. This is not the sort of legacy to pass on to WHFTA.

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289. *See* JACKSON & DAVEY, *supra* note 273, at 346 (describing the centrality of "nullification or impairment" to GATT dispute resolution); JACKSON, RESTRUCTURING GATT, *supra* note 14, at 62.

290. *See, e.g.*, JACKSON, RESTRUCTURING GATT, *supra* note 14, at 62, 98 (characterizing "nullification or impairment" as "ambiguous" and imprecise); McDorman, *supra* note 12, at 306 (exact meaning of "nullification or impairment" is unclear).

291. The Australian Subsidy on Ammonium Sulphate, Report adopted by the Contracting Parties on 3 April, 1950 (GATT/CP.4/39).

292. *Id.* at ¶¶ 11–13; JACKSON, RESTRUCTURING GATT, *supra* note 14, at 62.

293. NAFTA, *supra* note 1, annex 2004(1), 32 I.L.M. at 699.

294. *Cf.* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 98 (characterizing GATT "nullification or impairment" as working against stability and predictability).

295. *Cf. id.* (calling for elimination of "nullification or impairment" in favor of complaints based on "agreed (treaty) obligations which bind the defending nation.").

296. *But cf.* McDorman, *supra* note 12, at 306 (characterizing "nullification or impairment" as necessary to ensure the widest possible scope for general dispute settlement).

b. Failure to Produce a Binding DRM

At first glance, the NAFTA arbitral panel decision and the CUSFTA expert panel system on which it is based appear to be binding. After all, the agreements provide that resolution of a dispute will normally be based on an arbitral (or expert) Panel's decision, and gives a Complainant the right to suspend benefits if no resolution is reached.[297] Yet there is a widely held belief that the CUSFTA expert panel decision is not binding;[298] by analogy, neither is NAFTA's. The skepticism is due to several sources: the perceived ineffectiveness of the retaliatory sanctions;[299] a careful reading of the NAFTA (or CUSFTA) text; and comparison to the CUSFTA clause on *binding* arbitration.

The retaliatory sanctions provided by NAFTA are ineffective, at least against the United States, because of the size difference and relative trade dependence of Mexico and Canada on the United States.[300] A retaliatory suspension of benefits of "equivalent effect"[301] would hurt

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297. *See* NAFTA, *supra* note 1, art. 2019(1), 32 I.L.M. at 697; CUSFTA, *supra* note 6, art. 1807(9), 27 I.L.M. at 386.

298. *See, e.g.*, Hage, *supra* note 12, at 363–65, 375–76 (characterizing CUSFTA chapter 18 as non-binding and describing suspension of benefits "of equivalent effect" as difficult to apply because of lack of guidance on the issue); Horlick, *supra* note 117, at 9 (claiming CUSFTA expert panel process does not produce a binding result); Kevin C. Kennedy, *International Commercial Arbitration Legislation in the State of Michigan: A Proposal*, 4 DET. C. L. REV. 867, 920-21 (1990) (predicting any CUSFTA expert panel will be no different from GATT because it is up to the offending Party to accede to a panel decision, and because it provides an ineffective sanction); Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L.J. 578, 600 (1990–91) (contrasting non-binding "diplomatic" CUSFTA expert panel to binding "adjudicative" arbitration panel); Carlsen, *supra* note 12, at 321–22 (criticizing NAFTA DRMs as being of questionable binding power).

299. *See* Hage, *supra* note 12, at 375–76 (describing suspension of benefits "of equivalent effect" as difficult to apply, because of lack of guidance on the issue); Kennedy, *supra* note 298, at 920–21 (characterizing retaliatory suspension as an ineffective sanction).

300. For example, the United States exported goods worth $33.28 billion to Mexico and $85.1 billion to Canada in 1991. *See* UNITED STATES DEPARTMENT OF COMMERCE, U.S. FOREIGN TRADE HIGHLIGHTS 1991, at 11 (1992). During the same year, it imported $31.19 billion from Mexico, and $91.14 billion from Canada. *Id.* at 15. The U.S. total exports in 1991 were $422 billion, and imports were $488 billion. *Id.* at 3. Thus, Canada received 20% of U.S. exports and sent 18.6% of U.S. imports, while Mexico accounted for 7.1% of all U.S. trade.

During the same period, the United States received 75% of Canada's exports, and sent 70% of its imports. *See* Clyde H. Farnsworth, *U.S. Trade Pact a Spur to Canada*, N.Y. TIMES, July 22, 1992, at D1, D11. The United States accounted for 70% of all Mexican foreign trade in 1991. *See The U.S. International Trade Commission's Report on the NAFTA: The Verdict's in*, BUS. MEX., Mar. 1993, *available in* LEXIS, Nexis Library, CURRNT File.

301. Moreover, the definition of "equivalent effect" is unclear. It could mean equivalent in terms of "dollar" amount, percentage of trade affected, percentage of GNP affected, or something else. Regardless of the definition, it would be difficult and painful for countries smaller than the United States to levy effective sanctions.

Canada and Mexico proportionately more than the United States. The only hope that Canada and Mexico would have in levying sanctions is to bring sufficient pain to bear on a segment of the U.S. economy which has enough influence to pressure the government.

Careful reading of the NAFTA text reveals that it always stops short of calling the arbitral panel's decision "binding."[302] Thus, a panel's decision is more of a guideline than a mandate. Finally, analogy to CUSFTA's expert and *binding* arbitration panels reinforces a construction that the arbitral panel is a non-binding entity. Because CUSFTA specifies that its arbitration panel is binding and fails to so specify in the case of its expert panel, it is reasonable to believe that the CUSFTA expert panel decision is not binding. Furthermore, because the NAFTA arbitral panel is based on the CUSFTA expert panel, it is also reasonable to believe it is not strictly binding either.

As in the case of nullification or impairment, lack of a truly binding general DRM is a characteristic difficulty which will make NAFTA DRMs less effective and NAFTA's expansion less desirable. However, a solution to this problem is elusive given the likely inability of Canada, Mexico, or any potential WHFTA member to effectively sanction the United States as a whole.[303] Be that as it may, a helpful first step would be to make arbitral panel decisions (or the WHFTA equivalent) explicitly binding. At least this would put moral and *legal* pressure on a defiant losing Party by eliminating its ability to argue that a decision is not binding. In order to place some political restraint on a panel, decisions could be overruled by unanimous action of the FTC (or WHFTA equivalent). Although this solution does not address the problem of inadequate retaliation for non-U.S. countries, it makes obligations crystal clear. Thus, disregard of a panel decision would be a clear violation of international law.

2. Problems with the AD/CVD Dispute Resolution System

This problem with the AD/CVD dispiute resolution system are particularly legalistic and procedural. They are cumulation, proper use of

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302. *See* NAFTA, *supra* note 1, art. 2018, 32 I.L.M. at 697; *cf.* CUSFTA, *supra* note 6, art. 1802(8), 27 I.L.M. at 386.

303. Looking ahead to WHFTA, the author discussed this problem with several Latin American trade lawyers and students. They suggested that a solution might be to make retaliation optional (or compulsory) for non-disputing Parties. Thus, the defiant loser receives a concentrated injury, while the harm of levying sanctions is spread out widely. However, the political difficulties of this type of requirement seem insurmountable. Many countries would have to bear the cost of giving credibility to the system. Also, to the extent the other countries are dependent on U.S. trade, successful retaliation may still be a Pyrrhic victory, hurting the other countries as much as, or more than, the United States. The short-term costs to economies and inter-American relations seem too high.

domestic law, and a "cumbersome" selection process.

"Cumulation" is the required U.S. practice of combining all of an imported product found to be dumped or actionably subsidized, regardless of country of origin, in order for the International Trade Commission to make an AD or CVD injury determination.[304] This practice creates a jurisdictional problem in the event of an injury determination involving a NAFTA country and a non-NAFTA country. If the harm caused by the NAFTA country's products is not separable from that caused by a non-NAFTA country, and the case is brought simultaneously before the Court of International Trade (CIT) and a NAFTA AD/CVD panel, neither will have jurisdiction to hear the case.[305] In fact, the AD/CVD panel may be subject to extraordinary challenge if it does.[306] As NAFTA (or WHFTA) expands south to selected Latin American countries, this scenario will be ever more likely because of similar imports from member and non-member Latin countries. One possible solution is a statutory amendment, exempting NAFTA (and eventually WHFTA) members from U.S. cumulation laws.[307]

NAFTA requires an AD/CVD panel, in making its determination, to apply the law as would a court of the importing Party.[308] This includes using judicial precedent.[309] It remains unclear what the panel should do in the case of split decisions or in a case of first impression.[310] From a U.S. perspective, it is clearly not the intent of NAFTA to give an AD/CVD panel a free hand whenever conflicting CIT opinions apply to the matter before it or whenever new issues arise. Also, this possibility

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304. Cumulation is required by the 1984 Trade and Tariff Act, 19 U.S.C. §§ 1301, 1677(7)(C)(iv) (1982 & Supp. II 1984). *See* JACKSON & DAVEY, *supra* note 273, at 711-13 for a discussion of cumulation.

305. *Compare* NAFTA, *supra* note 1, art. 1904(11), 32 I.L.M. at 683 (prohibiting resort to a domestic court for a matter brought before a NAFTA AD/CVD panel) *with* art. 1904(10)(b), 32 I.L.M. at 683 (excluding cases appealed under judicial review of any Party from the jurisdiction of NAFTA).

306. *See id.* art. 1904 (13)(a)(iii), 32 I.L.M. at 683 (allowing extraordinary challenge if panel exceeds its jurisdiction).

307. *See* Kennedy, *supra* note 116, at 101-103 (discussing similar problem for CUSFTA and suggesting statutory exemption from cumulation as a solution).

308. *Compare* NAFTA, *supra* note 1, art. 1904(2), 32 I.L.M. at 683 (requiring AD/CVD panel to rely on an importing Party's law to the extent a court of the importing party would) *with id.* art. 1904(3), 32 I.L.M. at 683 (requiring panel to use a specified standard of review and the same general principles that a court of the importing party would use).

309. *Id.* art. 1904(2), 32 I.L.M. at 683.

310. *See* Murphy, *supra* note 14, at 610-11 (discussing parallel problem in CUSFTA). This problem is not theoretical. A paper by one scholar revealed that three of four disputes examined could not be decided by looking to existing precedent, because they either involved issues not yet decided or decided differently on similar issues. *See* Lowenfeld, *supra* note 116.

could become the basis of a protectionist attack on NAFTA, as a threat to national sovereignty.[311] One possible solution is to give the panel an expedited interlocutory appeal to the Court of Appeals for the Federal Circuit (CAFC). This, of course, ignores the costs of putting a heavier case load on the CAFC and of possibly lengthening the AD/CVD process. These costs are likely too high to justify, and a more pragmatic solution may be to continue to trust the good faith and judgment of the panelists.[312]

On a purely practical level, the "cumbersome" panel selection process is already a problem with CUSFTA.[313] This is exacerbated by the heavy workload under which the National Secretariats labor.[314] Moreover, because many roster members are prominent trade lawyers, they are frequently involved in multiple projects. Hence, they cannot serve as panelists while serving as counsel for another panel, which makes finding eligible panelists very difficult.[315] Moreover, the CUSFTA general dispute panel has a similar problem.[316] There is no reason to believe this will be different under NAFTA. A possible solution is expanding the roster to include non-lawyers but requiring the panel chair to be a lawyer.[317] Another is replacing temporary AD/CVD panels (and perhaps also the expert panel) with a permanent tribunal.

A permanent tribunal would relieve the Secretariat of having to find

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311. One can easily imagine protectionist factions raising the specter of Canadian, Mexican, or other WHFTA panelists "dictating" U.S. law as a ploy to stir up xenophobic national reaction.

312. For an intriguing, if occasionally far-fetched, discussion of this problem, see Kennedy, *supra* note 116, at 97–100. One prominent practitioner made the related observation that the United States got the short end of the stick on the matter of standard of review applied by CUSFTA AD/CVD panels. He claimed that the Canadian judicial standard for overturning administrative decisions is that they be "patently unreasonable." Hence, a panel reviewing a Canadian decision would have to apply this standard. By contrast, the U.S. standard is what he called "moderately searching." He blames the differing standard for the disparity between the number of Canadian requests to review U.S. decisions and U.S. requests to review Canadian decisions. *See* Horlick, *supra* note 117, at 12.

313. *See* Murphy, *supra* note 14, at 598–99 (detailing difficulties in administering CUSFTA AD/CVD panel selection process).

314. *See id.* at 602 (relating how CUSFTA National Secretariats are swamped with the administrative tasks of scheduling and administering panels). Moreover, the increased workloads of the FTC and its Secretariat will make the situation worse for NAFTA. *See supra* notes 28–36 and accompanying text (documenting increased workload).

315. Murphy, *supra* note 14, at 600-601; *cf.* NAFTA, *supra* note 1, annex 1901.2(11), 32 I.L.M. at 688 (prohibiting such conflicting appearances); *see also* Hage, *supra* note 12, at 370 (noting similar problems under CUSFTA general dispute resolution panels).

316. *See* Hage, *supra* note 12, at 370. GATT has also had difficulty finding suitable panelists. *See* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 65; Horlick, *supra* note 117, at 7.

317. *See* Murphy, *supra* note 14, at 600–601 (making same suggestion in a CUSFTA context).

eligible panelists. If handled correctly, it could become a prestigious assignment for trade law specialists. Moreover, it would create a body which could develop a special expertise in NAFTA/WHFTA law, increasing efficiency in the process. Also, tribunal members would become more familiar with the different legal systems of the other member countries than temporary panelists are likely to be. The jurisdiction of a permanent tribunal would have to be strictly limited to NAFTA/WHFTA matters. On issues of national law it would have to defer to national courts and perhaps have an expedited interlocutory appeal. However, this would also entail costs of delay and a burden on domestic court systems.

The Parties could also consider a more flexible private right of action than NAFTA allows in case the administrative trade barrier of choice shifts from AD/CVD to another issue such as environmental or health standards.[318] Of course, with expanded private actions, the tribunal risks being overwhelmed with claims. To deter frivolous claims, the winner should presumptively be awarded costs, unless some pressing question of public controversy were involved.

If such a tribunal's function were expanded to general dispute resolution as well, this would alleviate the problems of finding general dispute panelists.[319] The tribunal could still call on expert and scientific committees, as with the NAFTA arbitral panel. Its decisions affecting disputes between the Parties would be binding. Because a permanent tribunal could develop prestige over time and its opinions carry more inherent weight, it would create a more "binding" dispute resolution decision. Moreover, such a tribunal could act as the focal point of an integrated dispute resolution system and help reverse the "balkanizing" tendencies discussed *supra* Part II.A.3.[320] Finally, to keep some check on the permanent tribunal's power, it could be overruled by consensus of the FTC or equivalent WHFTA body.

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318. There is actually a growing movement for more private access to international trade dispute systems. *See, e.g.*, Horlick, *supra* note 117, at 14-15 (calling for rethinking the role of private parties in international trade disputes and suggesting that taking dispute resolution away from governments will make it easier to manage); Jackson, *supra* note 237, at 1257 (suggesting greater access to participatation in dispute resolution as a possible innovation to GATT); Lowenfeld, *supra* note 116, at 335 (advocating reconsideration of private party participation in intergovernmental economic disputes); *cf.* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 76-77 (suggesting eventual consideration of private access to GATT DRMs). *See also*, Leon E. Trakman, *Privatizing Dispute Resolution under the Free Trade Agreement: Truth or Fancy?*, 40 ME. L. REV. 349 (1988) (providing an interesting discussion of private dispute resolution with respect to international trade).

319. *See supra* note 316 and accompanying text.

320. *Cf.* JACKSON, RESTRUCTURING GATT, *supra* note 14, at 95, 97-99 (discussing how a strong World Trade Organization could help integrate disparate GATT DRMs).

Of course, any permanent institution would have its financial and political costs, but its potential to alleviate some of the weaknesses of the NAFTA system may well outweigh them. In any event, it deserves more consideration than it has received so far.

3. Systemic Problems

Perhaps the most troublesome flaw of the NAFTA dispute resolution system is the failure to fully integrate the NAFTA and CUSFTA dispute resolution structures. This creates a two-track system for which there is no apparent practical reason. Moreover, there is evidence that Mexico is dissatisfied with the separate CUSFTA dispute resolution system from which it may be excluded. This evidence includes leaked earlier draft texts of the NAFTA, in which Mexico pressed for referral to NAFTA of all disputes arising both under NAFTA and CUSFTA, while Canada and the United States wanted the option to resort solely to CUSFTA.[321] The compromise reached was to omit all reference to the relationship between CUSFTA and NAFTA dispute settlement systems in the final draft of the NAFTA.

This uneasy compromise may reflect the possibility that Canada and the United States are interested in preserving an Anglophone clique in which to settle their differences without interference by Latin American countries. To the extent that the systems differ,[322] CUSFTA can be seen to have "special provisions" which apply only to the United States and Canada. This increases the impression of unequal hemispheric integration.

A good example is the "escape clause" issue. In CUSFTA, the United States and Canada are willing to submit their differences on this issue to compulsory binding arbitration,[323] while "escape clause" actions are only given consultations in NAFTA, followed by unilateral action.[324] This difference may create a perception that Canada and the United

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321. *See Draft of NAFTA Dispute Resolution Text Dated June 17, 1992 and July 14, 1992*, 9 Int'l Trade Rep. (BNA) 1358, 1359 (Aug. 5, 1992) (reproducing leaked text art. 2306); *see also* Smith & Whitney, *supra* note 12, at 592 (reporting differing views of Canada, the United States and Mexico regarding the proper scope of NAFTA dispute settlement); *NAFTA Dispute Settlement Issues Discussed at Lawyer's Meeting*, 9 Int'l Trade Rep. (BNA) 639 (Apr. 8, 1992) (reporting that Canada wanted the option to resort to either forum but that the United States and Mexico want primary resort to NAFTA); *NAFTA Panel Review May Raise Mexican Constitutional Issues, Advisor Says*, 9 Int'l Trade Rep. (BNA) 683 (Apr. 15, 1992).

322. *See supra* parts II.A.1.a.i.–iii, II.A.1.b, II.A.2, II.B.3 (cataloging differences between NAFTA and CUSFTA).

323. *See* CUSFTA, *supra* note 6, art. 1103, 27 I.L.M. at 352.

324. *See* NAFTA, *supra* note 1, arts. 801(4), 802(6), 804, 32 I.L.M. at 383–84.

States believe that they can trust each other to settle such differences correctly but cannot trust the Latin Americans to do so. Moreover, the United States and Canada deal with each other in an adjudicatory, rule-governed setting, while reserving the option to deal with Mexico and other Latin American countries in a negotiations setting, where relative strength wins. Thus, the Anglophone countries treat each other as equals, but not Latin America. These problems of implication will multiply if NAFTA expands throughout Latin America, where there is still much residual mistrust of the United States, if not Canada.

This is not to say that Canada and the United States intended to slight Mexico or other future Latin American partners. There could well be valid reasons to keep the CUSFTA dispute resolution separate, such as wanting to avoid any clash between Latin American civil law and the common law system.[325] However, such interface problems will have to be solved in the NAFTA forum anyway, and a strong argument can be made that Canada and the United States should be willing to be exposed to the interface, especially if NAFTA does expand. Finally, any short-term practical gains of using CUSFTA instead of NAFTA may well be outweighed by the resentment it causes in Mexico and prospective WHFTA members. If NAFTA really is the next step to greater hemispheric cooperation, this is a flawed beginning to the journey.

One possible solution is to abrogate the CUSFTA dispute resolution system in favor of the NAFTA system. Another is to synthesize them into a third system that gets rid of all differences between the two. Still another is to jettison the panel system and instead create a permanent tribunal, as discussed *supra* Part II.B.2. A bonus of the permanent tribunal system is that it includes nationals of *all* members in the heart of the dispute resolution system. The sense of equality and inclusiveness this fosters would palliate any residual North-South ill-will.[326]

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325. *See, e.g.*, Smith and Whitney, *supra* note 12, at 598–601 (discussing problems of integrating Mexican civil and U.S.-Canadian common-law systems). However, the existence of this problem is not uniformly recognized. One prominent practitioner does not regard the common law-civil law interface as a problem at all. He points out that although a large portion of Canada (Quebec) has a civil law system, its interactions with Canada work smoothly. Moreover, Louisiana seems to have no overwhelming problems with the rest of the United States. Finally, Great Britain has managed quite well with the continental civil law system. *See* Horlick, *supra* note 117, at 13.

326. It is important to recognize that keeping the option to resort to GATT, see *supra* notes 47–52 and accompanying text, (indirectly) also preserves all of the faults of GATT (e.g., "nullification or impairment," non-binding decisions, "balkanized" dispute settlement, etc.) in the NAFTA system. One important consideration prevents the author from elaborating on the topic — the possibility of far-reaching GATT dispute resolution reforms in the ongoing Uruguay Round negotiations, which may possibly remedy these problems. For mention of some of these proposed GATT reforms, see *supra* notes 295–96, 283–85. In any event, the weaknesses NAFTA shares with GATT are subject to the same criticisms, and

CONCLUSION

NAFTA is intended to lead to a proposed WHFTA, yet a key component of NAFTA — the dispute resolution system — is seriously flawed from a variety of legal, practical, and systemic perspectives. It has retained some of the worst characteristics of CUSFTA and GATT: "nullification or impairment," a non-binding general DRM, and a system prone to "balkanization." Moreover, it has created a potentially volatile problem of its own: a two-track approach to hemispheric integration, which sustains and aggravates historical North-South perceptions of inequality. For the purposes of NAFTA dispute resolution, the system will probably be adequate. However, before considering the extension of the NAFTA system into a WHFTA, more thought and effort need to be invested in order to remedy these problems. Hemispheric integration requires a more thorough evaluation of trade dispute resolution systems and the world views behind them than NAFTA provides. Far-reaching restructuring is in order, not reliance on the institutions of the past.

In failing to design a more carefully crafted dispute resolution system, NAFTA has created the converse of the parable of the new wine poured into old wineskins.[327] NAFTA drafters have poured the dregs of old trade orders and old world views into an opportunity of great elasticity: the beginning of a new hemispheric trade order. NAFTA had the flexibility to contain new trade concepts and new visions of North-South equality. That elasticity was squandered on an old vintage. One hopes WHFTA will be a different wineskin with new contents.

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including them here would serve little purpose. However, if the GATT reforms are far-reaching and thorough, then resort to GATT may ironically end up salvaging NAFTA/WHFTA dispute resolution.

327. *Mark* 2:22 (recounting parable of old wineskins that burst because they could not stretch to accommodate the fermentation of new wine stored in them); *Matthew* 10:17.