Choice of Forum for NAFTA Governments between NAFTA Chapter 20 and the WTO Dispute Settlement Mechanisms

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ABSTRACT

NAFTA's Article 2005 prescribes that the NAFTA governments, being Canada, Mexico and the US, may choose either a multilateral or a regional forum within which to solve their trade disputes. Thus, they may choose between either the new WTO dispute settlement mechanism or the NAFTA Chapter 20 dispute settlement mechanism. Nevertheless, in order to have an effective choice of forum, there is one essential condition: the subject matter of the dispute must be similar or identical, and there must be some degree of subject matter overlap in both the NAFTA and WTO provisions. The relationship between NAFTA, the WTO and GATT is complex. The core problem is whether there is a legal distinction between the GATT 1947 and the GATT 1994, incorporated into the WTO Agreement, in order to establish either NAFTA or WTO primacy. The latter-in-time treaty general rule will decide the issue. Nevertheless, a decisive conclusion cannot be drawn, as this should be studied on a case-by-case basis.

RÉSUMÉ

Les Gouvernements de l'ALENA -- le Canada, le Mexique et les États-Unis -- peuvent choisir entre un forum multilatéral ou un forum régional pour résoudre leurs disputes commerciales, comme est confirmé par l'Article 2005 de l'ALENA. Par la suite, ils peuvent choisir entre le nouveau mécanisme de résolution des désaccords de l'OMC et le mécanisme de résolution des désaccords du Chapitre 20 de l'ALENA. Néanmoins, pour avoir un choix efficace de forum, il y a une condition essentielle à satisfaire: le sujet de la discussion doit être semblable ou identique dans l'ALENA et les accords de l'OMC. Le rapport entre l'ALENA, l'OMC et le GATT est complexe. L'essentiel est de se rappeler du fait qu'il y a une distinction légale entre le GATT 1947 et le GATT 1994, lequel a été incorporé dans l'Accord de l'OMC pour établir la primauté de l'ALENA ou de l'OMC. La disposition générale du dernier traité dans le temps va déterminer cette question. Toutefois, on ne réussit pas à trouver une conclusion adéquate, car cette question devrait être étudiée selon les faits uniques présentes dans chaque cause individuelle.

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CHOICE OF FORUM FOR NAFTA GOVERNMENTS BETWEEN NAFTA CHAPTER 20 AND THE WTO DISPUTE SETTLEMENT MECHANISMS

INTRODUCTION

Dispute settlement mechanisms have always constituted an essential part of economic and diplomatic relations. Governments have regularly employed diplomatic means to resolve disputes. Within the international trade field, the World Trade Organization (WTO) dispute settlement system has used not only conciliatory means but also the rule of law. Regionally speaking, within the North American free trade area we look to the North American Free Trade Agreement (NAFTA), which is based on the General Agreement on Tariffs and Trade (GATT), a rule-oriented dispute settlement mechanism, as opposed to diplomatically-oriented.

Canada, Mexico and the US (the NAFTA governments) have choice of forum alternatives, meaning they can choose between either a multilateral or a regional dispute settlement mechanism. This may be construed as forum shopping, which creates doubts as to whether or not there should be primacy of the multilateral trade agreement in the WTO, or if a regional trade agreement, such as the NAFTA, should prevail.

The scope of choice of forum for the three NAFTA governments lies in overlapping provisions foreseen in both trade agreements. Thus, disputes that can be solved in either forum might necessarily have a similar or identical subject matter in order to make a real discussion on choice of forum. Many questions therefore arise: Which mechanism offers the strictest enforcement of decisions? Which one is the timeliest and most convenient? Are there any limitations to consider in choosing a forum? NAFTA governments would like to clearly see which forum is the best choice for a stronger or weaker party, which forum has the ability to set precedents and finally, which forum will most effectively enforce decisions rendered?

Chapter I presents a thorough picture of the formation of the GATT as an international organization conceived to restore the world economic collapse which followed the two great world wars and marked the economic path of the world. The author will study the transition of the GATT into the WTO, still only in its tenth year. The author will also

discuss the transition of the old GATT diplomatic-oriented dispute settlement mechanism into the new WTO rule-oriented one within the Uruguay Round which concluded the process of reform in 1994. As well, the present author will study and analyze the main changes and the valuable significance for Member States of the abolition of consensus of the losing party. The Appellate Body will also be very well-studied, for it is one of the main revolutions of this new WTO dispute resolution system which grants the losing party the right to defend and argue its fundamental interests. Thus, the present work is focused on the new WTO mechanism, as opposed to the former one. In this context, the author will investigate its legal nature, the scope of its jurisdiction and how it became a rule-oriented mechanism. Chapter I will also provide an overview of the construction of the NAFTA as a regional trade agreement based on Article XXIV of the GATT.

Later on, the present author will turn her attention to a specific dispute settlement mechanism of the NAFTA, Chapter 20, which is its general dispute resolution system for interpretation and general application of the agreement. The author will scrutinize its legal nature and jurisdiction in order to establish what the proper subject matters of this dispute settlement mechanism are, with a view to limit its scope and avoid encroaching upon the jurisdiction of other dispute settlement procedures under NAFTA. Finally, the stages of proceedings of this dispute settlement mechanism will be studied before ultimately comparing both dispute settlement mechanisms in order to discover which one is more appropriate for use by NAFTA governments.

Chapter II is the backbone of this work, as it answers questions regarding the WTO Primacy over customs unions and free trade areas. In order to achieve this goal and to establish if GATT, Article XXIV has not been breached, the author will focus on two cases: *Turkey - India Textiles* and *Wheat Gluten.* The first case will show the relevance and precedents which it created within the multilateral trade field. The *Wheat Gluten* case reaches a similar conclusion as *Turkey – India Textiles*, for the Appellate Body based its decision on precedents created by the latter. Both cases also demonstrate the importance of the Appellate Body which may uphold, modify or reverse a Panel decision. Later on, the present author will analyze whether NAFTA has priority over the WTO. In this respect, the

following questions may be posed: Does the WTO not have primacy over customs unions and free trade areas? Instead, does the NAFTA have priority over the GATT or the WTO? Is there enough jurisprudence to allow these questions to be answered? These questions will be resolved based on NAFTA Articles 103 and 104, Article 30.3 of the Vienna Convention on the Law of the Treaties and Article II:4 of the WTO Agreement.

Further on, the legal argument within NAFTA Chapter 20 that establishes the conditions of choice of forum, its limitations and its exceptions will be assessed. This study will be based on NAFTA Article 2005. A conclusion will be drawn as to whether or not there is a NAFTA compulsory dispute settlement provision established in all the paragraphs of this Article.

Chapter III will trace a three-case study as a practical means of further investigating the above-mentioned theory. In order to do this, the present author will base her case study on a certain category of cases:

a) Non-effective choice of forum: *Certain Measures Concerning Periodicals between the U.S. and Canada.* This case represents the effectiveness of the WTO dispute settlement mechanism for cultural industries.

b) Effective choice of forum: *Safeguards on Brooms between Mexico and the U.S.* This case represents the effectiveness of choosing the most convenient and available forum.

c) Parallel fora: *Farm Products Blockade between Canada and the U.S.* This case represents the effectiveness of bringing different matters of the same dispute under both fora.

Finally, the author will carve out her own conclusions at the end of the present work.

Chapter I: The WTO's and NAFTA's Chapter 20 Dispute Settlement Mechanisms

I. The GATT and the New WTO Dispute Settlement Mechanisms

A. Overview of the General Agreement on Tariffs and Trade (GATT)

The current world trade situation has evolved throughout history. In fact, we must recognize the relationship between economic trends and armed conflict, since current international relations are determined by avoidance of armed conflict. Indeed, the two great World Wars have marked the economic road of the world, for their effects have influenced the global economy. The Great Depression of the 1930s was characterized by years of economic isolation, a consequence of mistakes made in post-World War I (1920-1940) economic policy. Later, World War II significantly influenced world economic trends.[1] These concerns led the Allies' political leaders to establish post-war economic institutions, in order to prevent such mistakes from happening again. This was achieved through the Bretton Woods Conference of 1944, New Hampshire, which established three core international organizations for the post-war years and contemporary times: the International Trade Organization (ITO), the International Bank for Reconstruction and Development – now known as the World Bank - and the International Monetary Fund (IMF). The United States proposed the formation of the International Trade Organization in 1945 in order to form an international economic institution that would promote post-war reconstruction and undertake the expansion of international trade.[2]

To this end, the US suggested the creation of an ITO within the United Nations by publishing the *Proposals for Expansion of World Trade and Employment*[3] in order to implement and establish compliance with rules regarding trade barriers, international commodity arrangements, restrictive business practices and international labor policies. The *Proposals* evolved into a draft charter, the *Geneva Draft*, which provided resolution of

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[1] See Jackson, J., *The World Trade Organization, Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998) at 15.

[2] See Stewart, T., ed., *Dispute Settlement Mechanisms,* (The Netherlands: Kluwer Law and Taxation Publishers, 1993) at 2.

[3] See *International Trade Organization, Hearings Before the Committee on Finance, United States Senate,* 80th Cong., 1st Sess. 885 (1947.

disputes in three phases: (1) consultation and negotiation between parties; (2) referral of the matter to the ITO for action, including arbitration; and (3) referral of the matter to the International Court of Justice (ICJ).[4]

In 1946, the United Nations Economic and Social Council (ECOSOC) decided to produce the first draft of the ITO Charter, which was negotiated from 1946 to 1948 in order to establish, through a series of meetings in London, New York, Geneva and Cuba, the *Havana Charter for an International Trade Organization*,[5] signed by fifty-seven governments.[6] At the same time, the *General Agreement on Tariffs and Trade (GATT)*[7] was being discussed in Geneva. It would operate under the auspices of the ITO as an interim agreement. The general clauses of the GATT were initially proposed as an element for discussing multilateral tariff reductions within the ITO structure.[8] The main objective of the GATT was to liberalize trade by restraining the governments of Member States from imposing measures that restricted international trade, such as tariffs, quotas, international taxes, subsidies, dumping practices or regulations that discriminated against imported

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[4] See Stewart, *supra* note 2 at 2.

[5] See *Havana Charter for an International Trade Organization in Final Act and Related Documents, United Nations Conference on Trade and Employment, Held at Havana Cuba,* U.N. Doc. No. E/Conf.2/78 (Nov. 21, 1947).

[6] See Stewart, *supra* note 2 at 4.
The *Havana Charter* in its Articles 92-97 considered a section entitled "Settlement of Differences" which are the following:
Art. 92: Members of the ITO are obliged to refrain from actions against other Members except through use of the Charter's dispute settlement procedures.
Art. 93: Members should give sympathetic consideration to claims raised by other Members and agree to resolve disputes between themselves or through arbitration.
Art. 94: Recourse could be made to the Executive Board, if bilateral consultations were unsuccessful, who would investigate the matter and issue a ruling.
Art. 95: A Member could request the Executive Board to refer the matter to the Conference of the Organization for appellate review within thirty days of the Board's ruling; the Conference could uphold, modify, or overrule the ruling. It could release the harmed Member from its obligations under the Charter, if nullification or impairment was found, permitting such Member to retaliate.
Art. 96: The International Court of Justice could issue binding advisory opinions in matters upon request by the Organization.
Art. 97: There is availability of other procedures for consultations and dispute resolution.

[7] See *The General Agreement on Tariffs and Trade,* opened for signature, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

[8] See Jackson, *supra* note 1 at 16 & 17. See also Stewart, *supra* note 2 at 4.

goods, measures that had been taken by nations as a form of post-war protectionism.[9] Governments sought to reduce tariffs and other trade restrictions within the GATT, basing their policies on the following trade liberalization principles:

a. preference for tariff protection over other forms of protection;
b. abolition of all quotas;
c. application of quotas only exceptionally and only with multilateral permission;
d. most-favored nation (MFN) treatment, subject to specific exceptions;
e. national treatment of products that are duly cleared of customs.[10]

Ultimately, the ITO never came into being, as the US Congress refused to approve it. Nevertheless, a portion of the ITO, the GATT, finally came into force and became the principal institution of international trade through the *Protocol of Provisional Application (PPA)*[11] for more than 50 years. This PPA was initially signed by eight countries, and later on by another twenty-three. It consisted of three parts: Part I contained the MFN and tariff concession obligations; Part II contained most substantive obligations, dealing with customs procedures, quotas, subsidies, anti-dumping duties and national treatment. This part consisted of Articles II through XXIII; and finally, Part III contained procedural items. The last formal amendment to the GATT was the 1965 protocol to include Part IV, which deals with developing countries.[12]

In September 1986, the GATT Ministers met in Punta del Este for the *Uruguay Round*,[13] the largest, longest and most contentious of all multilateral trade rounds ever to have taken

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[9] See Jackson, *supra* note 1 at 23.

[10] See Palmeter, D. & Mavroidis, P., *Dispute Settlement in the World Trade Organization,* (The Hague: Kluwer Law International, 1999) at 4.

[11] See *Protocol of Provisional Application to the General Agreement on Tariffs and Trade,* 30 October 1947, 61 Stat. A-2051, TIAS no. 1700, 55 UNTS 308.

[12] See Jackson, *supra* note 1 at 19. See also Palmeter. & Mavroidis, *supra* note 10 at 2.

[13] After the establishment of the GATT, there have been 10 world trade negotiation rounds in order to improve the world economic policy and to establish new measures according to the world's trade development:

World Round	Date	Number of countries
Geneva	1947	23 countries
Annecy	1949	33 countries

place, for it tried to solve some inherently problematic aspects of the GATT that had not yet been corrected in any prior negotiation round. The most important issues on the agenda consisted of non-tariff measures, tropical and natural resource-based products, textiles and clothing, agriculture, safeguards, subsidies and dispute settlement, as well as trade in goods and services, intellectual property rights and investment measures.[14] This round ended on January 1995, date on which the World Trade Organization (WTO), successor to the GATT, was officially established. This moment was defined by Mr. Peter Sutherland, director-general of the GATT, as essential to the current history of the world, for prosperity lies in strong multilateral trade rules and their enforcement, without which there would be an erosion of the rule of law in international trade, mounting protectionism and pressure for trade blocs.[15] The WTO is the basic institution of the international trading system, formally created by the *Marrakesh Agreement Establishing the World Trade Organization.*[16] Furthermore, the WTO is considered to be an international organization possessing an international legal personality to which Member States must grant legal capacity, privileges and immunities.

The WTO was also given the function of solving international trade disputes and of establishing principles and norms regarding world trade, as well as acting as a forum for negotiations aiming to guard the interests of producers and citizens of small, developed or developing countries. In other words, economically powerful countries should contribute

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Torquay	1950	34 countries
Geneva	1956	22 countries
Dilon	1960 – 1961	45 countries
Kennedy	1962 – 1967	48 countries
Tokyo	1973 – 1979	99 countries
Uruguay	1986 – 1994	120 countries
Seattle	1998	142 countries
Doha	2001	143 countries *

* With the newly accession of China and Chinese Taipei.
See Jackson, *supra* note 1 at 20.

[14] See Palmeter & Mavroidis, *supra* note 10 at 12 & 13.

[15] See Evans, P. & Walsh, J., *The EIU guide to the new GATT,* (London: The Economist Intelligence Unit Limited, 1994) at 1.

[16] See Palmeter & Mavroidis, ., *Dispute Settlement in the World Trade Organization,* (The Hague: Kluwer Law International, 1999) at 1.

to the economic and social development of small countries in order to develop the necessary trading relations to seek to improve the global economy.[17]

B. The WTO Dispute Settlement Mechanism

1. The Transition from the GATT to the new WTO Dispute Settlement Mechanism

Dispute settlement mechanisms have always formed an essential part of economic and diplomatic relations. Governments have invariably used diplomatic means to resolve disputes. Nevertheless, within the dispute settlement system of the WTO, governments have not only been able to employ diplomatic means but to choose the judicial route through panels and the Appellate Body of the organizations.[18] Thus, the strengthening of the WTO's dispute settlement mechanism has produced a reliable and successful means of dealing with disputes, as well as helping to resolve a considerable number of disputes at the consultation stage.[19]

The GATT dispute settlement system was initially known as a conciliation system, as opposed to a true dispute settlement system. This reflected its diplomatic origins, based less on legal analysis and focusing more on negotiation.[20] Gradually, the dispute settlement system evolved into a rule-oriented mechanism, basing its actions on the rule of law under which Member States solved their disputes using established rules and procedures.[21] Thus, with this rule-oriented approach, the WTO dispute settlement mechanism could offer certainty, predictability and legitimacy.[22]

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[17] See Van Dijck, P. & Faber, G., eds., *Challenges to the New World Trade Organization,* (The Hague: Kluwer Law International, 1996) at 80 & 81.

[18] See Cameron, J. & Campbell, K., eds., *Dispute Resolution in the World Trade Organization,* (London: Cameron May, 1998) at 57 &58. The Appellate Body was created by a decision of the Dispute Settlement Body on February 1, 1996, WT/DSB/1.

[19] See Jackson, *supra* note 1 at 59.

[20] See Palmeter & Mavroidis, *supra* note 10 at 7 & 8; see also Jackson, *supra* note 1 at 60.

[21] See Van Dijck, *supra* note 17 at 83.

[22] See Jackson, *supra* note 1 at 60 & 61. Legitimacy means lawfulness. See Garner, B.A., *Black's Law Dictionary*, 7th ed, *s.v.* "legitimacy" (Minneapolis: West Group, 1999) at 912.

From 1985 to 1994, special attention was paid to the dispute settlement mechanisms which had benefited from many reforms of the Uruguay Round. These reforms introduced a new, impartial and transparent means of solving trade disputes.[23] The GATT dispute settlement mechanism evolved from a diplomatic to a more legalistic one, but still one of limited effectiveness because the losing party had to accept the adoption of an adverse report. Today, through the *Understanding on Rules and Procedures Governing the Settlement of Disputes,*[24] the new WTO dispute settlement system has a more juridical nature, as consensus is no longer required to adopt the report but only to reject it.[25] The core problem was that the losing contracting parties could block the adoption of panel reports if they considered that the measure taken was adverse to their interests. The WTO changed this situation by establishing the negative consensus, which meant that the system did not require consensus to establish a panel.[26] An increasing number of governments bring their disputes before the WTO because it reflects more confidence by Member States in this new dispute settlement mechanism, rather than the former GATT mechanism, for the new system better guarantees compliance with obligations. [27]

The main objective of the dispute settlement mechanism is the settlement of disputes through a mutual understanding which should be consistent with relevant WTO agreements. WTO Members have agreed that recourse to the dispute settlement mechanism should not constitute a contentious act but instead a good-faith procedure aimed at resolution. If a settlement is not possible, either the dispute settlement mechanism should remove measures that are inconsistent with the provisions of the covered WTO agreements, or a WTO Member should pay compensatory adjustment. Finally, the *Dispute Settlement Understanding* grants the successful WTO Member the right to suspend

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[23] See Jackson, *supra* note 1 at 60.

[24] See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh: WTO, April 1994) [hereinafter DSU].

[25] See Palmeter & Mavroidis, *supra* note 10 at 61.

[26] See *ibid.* at 11.

[27] See Cameron & Campbell, *supra* note 18 at 57 &58.

concessions under the WTO agreements, prior to authorization of the Dispute Settlement Body (DSB), in a discriminatory basis towards the other WTO Member.[28]

2. Legal Nature

The 1947 GATT dispute settlement system combined aspects of conciliation and dispute settlement expressed in Articles XXII and XXIII of the GATT as well as other provisions contained in some Tokyo Round Codes.[29] Articles XXII and XXIII deal with consultations, which became a core part of the GATT's dispute settlement process, as well as with nullification and impairment. Article XXII:1 requires each contracting party to afford other parties adequate opportunity for consultation with respect to any matter affecting the operation of the Agreement. Article XXII:2 authorizes the contracting parties acting jointly to consult with other parties on matters not resolved through Article XXII:1 at the request of a contracting party. Article XXIII:1 establishes that if any contracting party considers that "any benefit directly or indirectly accruing to it under the Agreement was being nullified or impaired by another party, it can make written representations or proposals to that other party."[30] If no satisfactory agreement could be reached, the complaining party would be authorized to refer the matter to the contracting parties - through Article XXIII:2 - who were asked to recommend appropriately. Article XXIII:2 permitted the contracting parties to authorize the complaining one to suspend the application of tariff concessions or other GATT obligations to the inconsistent party.[31]

Article XXIII gave a very wide ability to the contracting parties to approve or to not approve any action or decision taken under GATT. Legally speaking, the GATT was a pure, multi-party contract, as all parties had to give their consent in order to decide upon

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[28] See DSU, *supra* note 24 at Articles 3(7) & (10).

[29] See Stewart, *supra* note 2 at 1. The Tokyo Round took place from 1973 to 1979 and was the most extensive round ever undertaken before the Uruguay Round which took place from 1986 to 1994.

[30] Palmeter & Mavroidis, *supra* note 10 at 8.

[31] See *ibid.* at 8. The draft GATT dispute settlement dropped provisions regarding arbitration or reviews by the International Court of Justice; simplified the consultation provisions of the Geneva Draft, as well as expanded its scope to cover matters concerning the operation of the Agreement.

any amendment, modification or interpretation required by a contract. This meant that the losing party could not only refuse the decision, but could block the adoption of an adverse report and the establishment of a panel.[32] Since a political consensus had to be made in order to accept the panel report, the losing party could then prevent it from being legally effective by simply blocking its adoption in the GATT Council, failing to implement the rulings of panels and the use of unilateral retaliatory measures by outside contractors.[33] A study shows that from 1947 to 1992, the losing party eventually accepted the results in about ninety per cent of cases.[34]

In order to solve this blockage of implementation of decisions, the *Montreal Rules* of 1988 were adopted by contracting parties in April, 1989 and consisted of the core of what later became the WTO's Dispute Settlement Understanding (DSU). "The Contracting Parties agreed to apply the Montreal Rules on a trial basis from May 1989 to the end of the Uruguay Round regarding complaints brought during that period under Articles XXII or XXIII".[35] These rules established time limits on consultations and the automatic establishment of a panel. Consequently, parties would reply to the request for consultations made under these two articles within ten days and would agree to enter into consultations in good faith in not more than thirty days. If there could be no agreement reached on the afore-mentioned consultations, the complaining party could request the establishment of a panel within sixty days of the request. Nevertheless, the unilateral power of the losing party to block adoption of a report had to await the completion of the Uruguay Round and the establishment of the WTO.[36] The Members of the WTO have established their compromise to comply with the DSU, based on Articles XXII and XXIII of GATT 1947. Actually, Article 3 of the DSU considers prior practice under Articles XXII and XXIII of

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[32] See *ibid.* at 9.

[33] See Cameron & Campbell, *supra* note 18 at 29 & 30.

[34] See Palmeter & Mavroidis, *supra* note 10 at 9.

[35] Palmeter & Mavroidis, *supra* note 10 at 10.

[36] See *ibid.* at 10 &11.

the GATT 1947, and recognizes the objective of settling the matter between the parties in accordance with their rights and obligations under the WTO Agreement.[37]

The new WTO dispute settlement mechanism is based on the reformed GATT 1994, whose essential trade liberalization principles are national treatment, most-favored nation treatment and elimination of quantitative restrictions, located in Articles III, I and XI of the GATT, respectively.[38] Every WTO Member must observe these GATT obligations, enclosed within trade liberalization principles. Nevertheless, according to GATT Article XXI, Member States are not obliged to follow these provisions when their national security regulations are in danger. In this way, every Member State has the right to protect its essential interests by not allowing other Member States to encroach upon its security policies.[39]

The relationship between Article XXI and Article XXIII of the GATT lies in the fact that parties retain rights established under the GATT when there is an action under Article XXI. Thus, the non-sanctioning state has the right to take action per Article XXIII and under the DSU against a sanctioning one if a security sanction nullifies or impairs benefits under GATT that otherwise would accrue to the non-sanctioning Member.[40]

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[37] See Cameron & Campbell, *supra* note 18 at 29.

[38] See Shrybman, S., *The World Trade Organization, A Citizen's Guide,* 2nd ed. (Toronto: Canadian Center for Policy Alternatives and James Lorime & Company Ltd., 2001) at 2 & 3.

[39] See Bhala, R. & Kennedy, K., *World Trade Law, the GATT-WTO System, Regional Arrangements, and U.S Law,* (Virginia: Lexis Law Publishing, 1999) at 220.

Article XXI of the GATT establishes the following, regarding *Security Exceptions:*
[n]othing in this Agreement shall be construed to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interest;

(a) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
  (i) relating to fissionable materials or the materials from which they are derived;
  (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  (iii) taken in time of war or other emergency in international relations; or
c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[40] See *ibid.* at 231.

3. Jurisdiction

The WTO Agreement establishes provisions for both trade in goods and trade in services through a set of four annexes which contain the "raison d'être" of the WTO. Annex 1 has three subparts: Annex 1A is comprised of thirteen Agreements that cover trade in goods:

1. General Agreement on Tariffs and Trade 1994
2. Agreement on Agriculture
3. Agreement on the Application of Sanitary and Phytosanitary Measures
4. Agreement on Textiles and Clothing
5. Agreement on Technical Barriers to Trade
6. Agreement on Trade-Related Investment Measures
7. Agreement on Implementation of Article VI of the GATT (Antidumping Agreement)
8. Agreement on Implementation of Article VII of the GATT (Customs Valuation Agreement)
9. Agreement on Preshipment Inspection
10. Agreement on Rules of Origin
11. Agreement on Import Licensing Procedures
12. Agreement on Subsidies and Countervailing Measures
13. Agreement on Safeguards

These thirteen *covered agreements*[41] refer to the sector of trade in goods. Annex 1B comprises the General Agreement on Trade in Services (GATS) for regulating trade in services, and Annex 1C comprises the Trade Related Intellectual Property Rights better known as TRIPS. Annex 2 consists of the *Understanding on Rules and Procedures Governing the Settlement of Disputes.*[42] Annex 3 contains the Trade Policy Review Mechanism which updates trade policies of its Members. Annex 4 contains the text of the

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[41] The term "covered agreements" is referred to all multilateral *WTO Agreements* annexed to the *Marrakesh WTO Agreement.* See Palmeter & Mavroidis, *supra* note 10 at 37.

All these covered agreements depend on the *DSU*, which involves a highly efficient dispute settlement mechanism ever made in international legal history and strengthens the rule under the WTO as the constitution of world trade. See Van Dijck, *supra* note 17 at 89.

[42] See Cameron & Campbell, *supra* note 18 at 19.

Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement, which are considered two plurilateral agreements.[43]

It is important to mention that obligations undertaken under these covered agreements concern only WTO Member States. Therefore, Non-Member States of the WTO are not subject to any WTO requirement. Nevertheless, in practice some Member States have acted on behalf of Non-Member States for which they had an international responsibility at a given time.[44]

The scope of jurisdiction of the WTO dispute settlement mechanism is found under Annex 1 of the WTO Agreement, in other words, the thirteen above-mentioned covered agreements. Some agreements contain certain dispute resolution rules and procedures, so in case there is an overlap of provisions of two or more covered agreements, Article 1.2 of the DSU establishes that the special or additional rules and procedures shall prevail.[45]

Schoenbaum, one commentator on international trade law, has wondered if the competence of the WTO dispute settlement mechanism is only circumscribed by the covered

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[43] These two plurilateral agreements are the only aspects of the WTO that Members may or may not join; therefore, they are called *a la carte* agreements, as they bound only those parties that adhere them. See Palmeter & Mavroidis, *supra* note 10 at 16.

[44] The United Kingdom once initiated dispute settlement proceedings against Norway on behalf of Hong Kong: *Norway - Restrictions on Imports of Certain Textile Products,* BISD 27s/119 (Adopted 18 June 1980); and the Netherlands on behalf of the Netherlands Antilles against the United States: *United States – Restrictions on Imports of Tuna,* DS33/1, 10 June 1994 33 I.L.M. 839 (1994) (Unadopted). See *ibid.* at 21.

[45] See *ibid.* at 20; see also Schoenbaum, T.J., "WTO Dispute Settlement: Praise and Suggestions for Reform" (1998) 47 I.C.L.Q. 647 at 652.
DSU, Article 1.2 reads as follows:
The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2, in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

agreements of Appendix 1 or if it may also accept matters of general public international law. After analyzing the Helms-Burton dispute between the European Community and the US concerning the US Helms-Burton legislation which imposed economic and diplomatic sanctions on persons and enterprises that traded with Cuban property, he concludes that this matter is answered by the implied powers clause that Art. 11 of the DSU grants to the Appellate Body and panels so that they can decide all aspects of an international trade dispute. This dispute involved matters of security exceptions that fall under Art. XXI of the GATT as well as public international law matters, such as the excess of US powers in economic coercion, jurisdiction and non-intervention.[46]

4. Judicialization

Judicialization of the WTO dispute settlement mechanism involves the development of a new appellate jurisdiction that is empowered to uphold, modify or set aside the decision for further action, in order to correct any wrong decision.[47]

An innovative feature of the WTO dispute settlement mechanism is the WTO's choice of the adjudicative model, for, under GATT processes, there were delays in the decision-making process as well as in the formation of panels, blockings of the adoption of panel reports by losing parties, as well as delays in the implementation of GATT Council recommendations. Therefore, in comparing the former GATT dispute settlement mechanism with the new one under the WTO Agreement, the old one was characterized by a negotiation model, rather than an adjudicative model as did the new one by granting compulsory jurisdiction, applying rules of law, having parties comply with decisions established in panel reports, and imposing sanctions if the decisions were not observed.[48]

International adjudication has highlighted the effectiveness of many constitutional principles of international trade law, such as *pacta sunt servanda,* institutional balance and

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[46] See *ibid.* at 652 & 653.

[47] See Cameron & Campbell, *supra* note 18 at 98 & 99.

[48] See Schoenbaum, *supra* note 45 at 648.

good faith; it has also provided the basis for the development and evolution of international trade law.[49] The legalization of international trade law through the WTO Agreement has brought its judicialization through the following provisions:

- Compulsory jurisdiction of the WTO Dispute Settlement Body (DSB) for the establishment of independent expert panels for the settlement of disputes over WTO law at the request of any WTO Member. (Article 6, DSU);
- Court-like procedures and stringent time-limits for the conclusion of the panel procedures within 6 to 9 months. (Article 9, DSU);
- Explicit recognition of the right to a panel (Article 6, DSU) and of subsequent access to the standing Appellate Body composed of 7 independent judges, which shall hear and decide on appeals from panel cases within 2 to 3 months. (Article 17, DSU);
- Automatic adoption of panel and Appellate Body reports by the DSB, except in the unlikely event of negative consensus not to adopt the report. (Articles 16 and 17, DSU);
- Expeditious arbitration within the WTO as an alternative means of dispute settlement (Article 25, DSU) subject to the condition that all solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements, and may otherwise be challenged in the DSB. (Article 3, DSU);
- Multilateral surveillance procedures to ensure prompt compliance with dispute settlement rulings and recommendations. (Article 21, DSU);
- Procedures for agreed compensation or authorized retaliation as temporary measures pending the withdrawal of illegal measures and the implementation of DSB findings. (Article 22, DSU);
- Obligations to have recourse to, and abide by, the DSU, when Members seek redress of a violation or impairment of WTO law, and to refrain from international law remedies inconsistent with the DSU, such as unilateral reprisals. (Article 23, DSU);
- A number of requirements to make available judicial, arbitral, or administrative tribunals and independent review procedures at the domestic level.[50]

The DSU grants Member States parties to the dispute, or a third party that has given a written notification of its substantial interests in the dispute and which finds a panel report inconsistent with its arguments and interests, the right to appeal where jurisdiction is limited to issues of law covered in the panel report and legal interpretations developed by the panel. The WTO Appellate Body exercises its confidential quasi-judicial powers of panels and the DSB, for its reports become legally binding upon their adoption by the DSB.[51]

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[49] See Cameron & Campbell, *supra* note 18 at 83. The Principle of *pacta sunt servanda* is established in Article 26 of the Vienna Convention on the Law of Treaties, which provides that: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

[50] *Ibid* at 84.

[51] See *ibid.* at 88 & 89.

The Appellate Body has taken an approach that tends towards interpretation, as can be appreciated by the adoption of panel jurisprudence. The Appellate Body has established that, as an international judicial organ, Articles 31 and 32 of the *Vienna Convention on the Law of Treaties,*[52] as well as the general principle of effectiveness, are its starting point in order to interpret international agreements and panels.[53]

5. Overview of Jurisprudence created by the WTO Dispute Settlement Mechanism

WTO dispute settlement mechanism cases involving North American Free Trade Agreement (NAFTA) Governments indicates, as of October 1998, only five requests for consultations, in which the US acted as moving party in three matters and as respondent in two; Canada acted as moving party in one and as respondent in two; and Mexico acted as moving party in one and as respondent in another:

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[52] *Vienna Convention on the Law of the Treaties,* UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679. *Entry Into Force*: 27 January 1980, online: http://www.greenpeace.org/~intlaw/vien- (date accessed: 22 March 2002).

[53] See Cameron & Campbell, *supra* note 18 at 108.

Article 31 of the Vienna Convention on the Law of Treaties talks about the *General rule of interpretation:*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preambles and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 talks about the *Supplementary means of interpretation:*
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

1. Mexican Tomatoes (Mexico vs. U.S.): Mexico requested consultations with the US, alleging violations of the WTO Antidumping Agreement. The dispute was solved based on a suspension agreement concluded under US antidumping laws (July 1996).

2. Split-Run Periodicals (U.S. vs. Canada): The US asked Canada for consultations regarding Canadian measures prohibiting the importation into Canada of split-run periodicals. As consultations failed, the parties submitted the dispute to both a Panel and Appellate Body reviews (March 1996).

3. Dairy Product Export Subsidies (U.S. vs. Canada): The US requested consultations with Canada regarding Canadian tariff rate quotas on milk and export subsidies on dairy products (October 1997).

4. High Fructose Corn Syrup (U.S. vs. Mexico): The US requested consultations with Mexico regarding the imposition of Mexican antidumping duties on US corn syrup. The US alleged that Mexico had violated the WTO Antidumping Agreement (September 1997).

5. Farm Products Blockade (Canada vs. U.S.): Canada requested consultations with the US regarding the blockade that South Dakota and Montana had imposed upon Canadian farm products in breach of both NAFTA and WTO provisions (September 1998).[54]

6. Stages of Proceedings of the WTO Dispute Settlement Mechanism

The following is a chart that explains schematically the WTO Dispute Settlement Mechanism stages of proceedings.[55]

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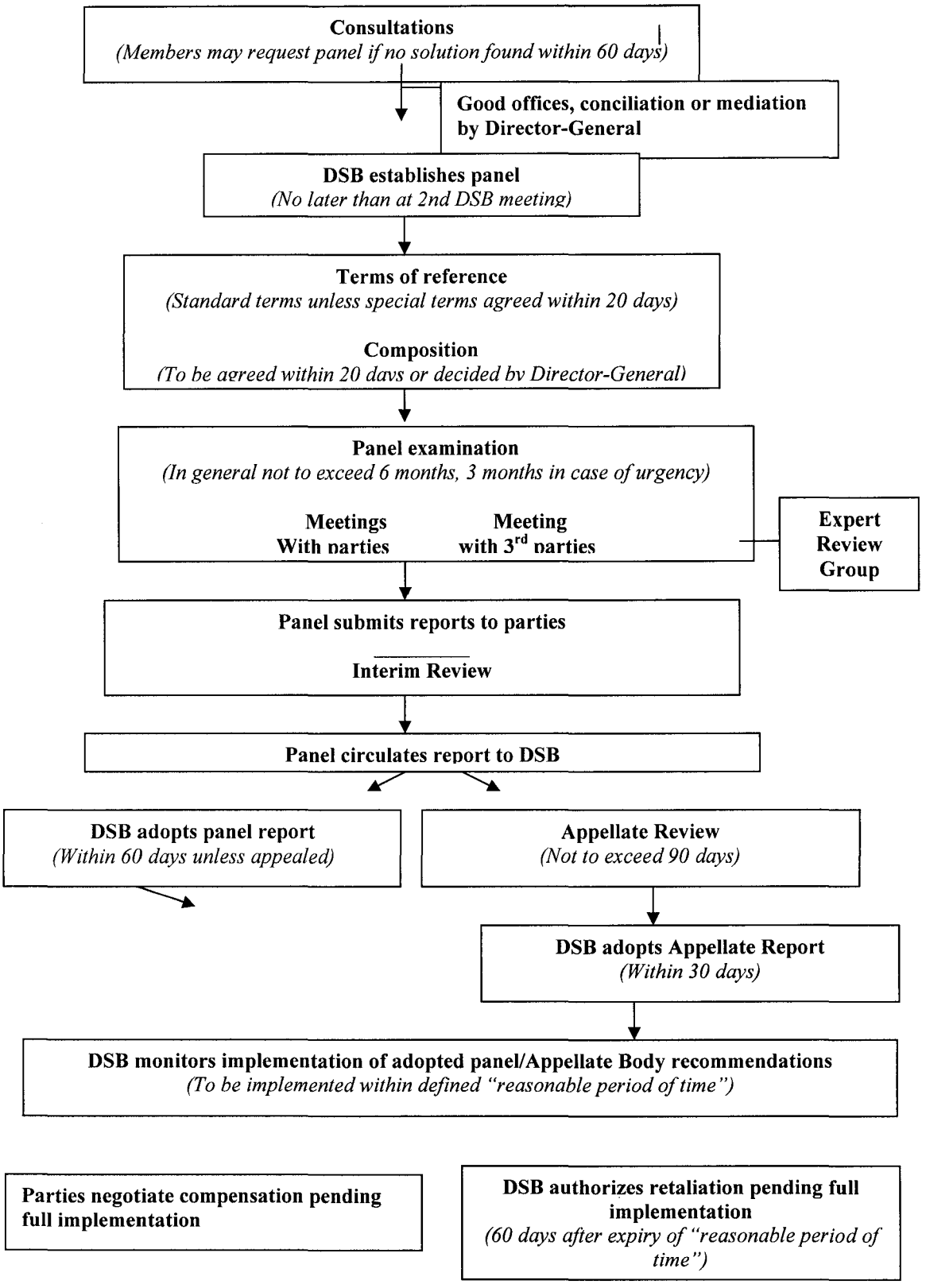
[54] See Gantz, D.A., "Dispute Settlement under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties" (1999) 14 Am. U. Int'l L. Rev. 1025 at 1076-1082.

[55] Chart was taken from Schoenbaum, *supra* note 45 at 649.

WTO Dispute Settlement Flow Chart



a. Consultations

The primary aim of consultations is to resolve a dispute in an amicable and mutually satisfactory manner. The complaining Member may request consultations regarding certain adopted measures in a covered agreement of the WTO Agreement to the requested Member, who shall reply within ten days and shall enter into good faith consultations within a period of thirty days after receiving the request for consultations. If the requested Member does not reply or does not enter into consultations within the prescribed period of time, the requesting Member may ask for the establishment of a panel. Likewise, the establishment of a panel may also be requested by the requesting Member if consultations – which are confidential - failed to solve the dispute within sixty days of receipt of the request. If the dispute involves perishable goods, then it is considered a case of urgency and thus shorter timelines are specified.[56]

b. Good Offices, Conciliation and Mediation

Good offices, conciliation and mediation – all confidential - are considered alternative dispute settlement mechanisms for trade disputes. They can be brought by the complaining Member at any time and can be suspended at any time as well, since they are measures taken under voluntary agreement of the disputing parties. If the complaining party considers the establishment of a panel convenient because there was no solution reached within the sixty-day period, it may create such a panel, and if it wishes, good offices, conciliation and mediation may run at the same time as the panel. It is important to mention that there are special provisions for good offices for developing countries.[57]

c. Request for a Panel

If there has been no solution to the dispute up to this point of the proceedings, the complaining party may ask for the establishment of a panel composed of three to five experts of international trade law that are citizens of the parties to the dispute. A panel may

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[56] See Dennin, J.F., ed., *Law and Practice of the World Trade Organization,* (New York: Oceana Publications, Inc., 2001)at 5, "Governing the settlement of disputes". The Consultations stage is regulated by DSU, Art. 4 and by GATT, Art. XXIII; see also Palmeter & Mavroidis, *supra* note 10 at 62-65.

[57] See *ibid.* at 5. Good Offices, Conciliation and Mediation are regulated by DSU, Article 5; see also Palmeter & Mavroidis, *supra* note 10 at 66.

also be established in case the time elements for consultations have elapsed from the date of the original request, or if both complaining parties agree that there would not be productive consultations.[58] The panel would work following the Working Procedures of Appendix 3 and could seek information and advice from expert groups within the panel examination for a period no longer than six months, or three months in cases relating to perishable goods, or nine months when the six month deadline cannot be met. An interim review panel phase may be established so that the disputing parties may comment on the descriptive part of the panel's findings and conclusions draft report and later on issue the interim report to them. Afterwards, the panel shall submit its findings to the DSB in a final report. One of the contrasts with the prior GATT Dispute Settlement Mechanism was the creation of the DSB, which has the authority to make decisions by consensus upon the information brought before it by the creation of panels, to adopt panel reports and Appellate Body reports, implement its rulings and to authorize retaliation measures, such as suspension of concessions. Article 11 establishes that the main function of a panel is to assist the DSB in supporting it with the release of responsibilities taken under the DSU and covered agreements.[59]

d. Adoption of Panel Reports

As mentioned throughout this work, one big step of the Understanding is the adoption and implementation of panel reports without consensus of the losing party in order not to block the adoption of the panel report. Thus, panel reports must be adopted by the DSB within sixty days of circulation, even if the new WTO Understanding allows the participation of the disputing parties in the DSB process. Nevertheless, the panel report might not be adopted by the DSB if a party to the dispute or a third party which has notified the DSB of its substantial interest decides to appeal –only when the appeal is completed, or if the DSB decides by consensus not to adopt the final report. Thus, in case of appeal, the period for adopting the DSB decisions shall be twelve months from the date of the establishment of the panel until the DSB considers adoption of either the panel or the appellate report. On

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[58] See Palmeter & Mavroidis, *supra* note 10 at 72.

[59] See Dennin, *supra* note 56 at 5. Panel Procedures are regulated by DSU, Articles 12 – 15.

the contrary, if there is no appeal, it shall be of nine months; an extension of time shall be provided in special circumstances. All panel deliberations are characterized by their confidentiality as well as by the anonymity of opinions of panelists.[60]

e. Appeal of Panel Reports

The scope of appeals, which try to withdraw measures that are inconsistent with a covered agreement, circumscribes itself only to issues of law included in the panel report and legal interpretations. The appeals must be presented before the Appellate Body (AB), which is formed by seven recognized and experienced persons in international trade law and in the subject matter of the covered agreements, and must be resolved within a period of sixty days and no longer than ninety days under special circumstances. After this AB has studied and analyzed the arguments of the appellant and has found an inconsistency in a panel report measure with a covered agreement, the AB issues a report - which dictates what action must be taken by the disputing party in order to make the measure conform with the agreement, either may uphold, modify or reverse the Panel Review decisions - to be adopted by the DSB as well as accepted with no conditions by the disputing parties within thirty days of its circulation to Members, unless the DSB decides by consensus not to adopt it. Confidentiality shall be observed in all the proceedings of the AB. Nevertheless, Article 18 of the DSU establishes that each party shall make public its own positions but may not disclose the contrary's.[61]

f. Compensation and Suspension of Concessions

In case withdrawal of the offending measure is impracticable and would take a long time to withdraw, compensation is used on a temporary basis. In other words, if the Member concerned does not implement recommendations and rulings, it may enter into negotiations with the disputing party in order to establish voluntary compensation. If within twenty days of the expiration of the reasonable period of time, the parties have reached no

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[60] See *ibid.* at 7. The Adoption of Panel Reports is regulated by DSU, Article 16.

[61] See *ibid* at 7. The Appellate Review is regulated by DSU, Article 17; Panel and Appellate Body Recommendations are regulated by DSU, Article 18; see also Palmeter. & Mavroidis, *supra* note 10 at Chapter 6 for more information about the Appellate Process.

compensation agreement, the DSB may dictate, as a last resort against the concerned Member, to suspend concessions under the covered agreement. The subject matter of concessions to be suspended should first be determined within the sector where the violation was found; it may even follow a set of rules and procedures that the disputing party may apply in order to establish which concessions are listed for suspension.[62] Suspension of concessions shall be temporary, lasting until the inconsistent measure with the covered agreement is removed, there is a solution to the nullification or impairment of benefits, or until there is found a mutually satisfactory solution.[63]

g. Arbitration

The matter shall be carried out through arbitration when the Member concerned does not agree with the level or amount of suspension, or argues that the principles and procedures for suspending concessions have not been followed by the complaining party. The original panel shall conduct the arbitration procedure – which shall be completed no later than sixty days after expiration of the reasonable time - or by an arbitrator established by the Director-General if the original panel cannot be reconstituted. Thus, the arbitrator will determine if the level of suspension of concessions is equivalent to the one of nullification or impairment, or if the suspension is foreseen as allowed under covered agreements. Furthermore, the parties shall accept the arbitral award as a final decision to the dispute for which there shall not be a second arbitration. The DSB shall learn about the decision and may allow the suspension of concessions where the request is consistent with the award, unless the DSB decides by consensus to reject the request. It is important to note that arbitration may also be used as an alternative dispute resolution mechanism within the WTO, on a voluntary basis from the disputing parties when there are matters that are clearly defined by them. The provisions on compensation, suspension of concessions and implementation of recommendations apply *mutatis mutandi* to arbitration awards.[64]

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[62] See Dennin, *supra* note 56 at 8. DSU, Article 22 establishes the principles and procedures to follow for suspending concessions to the Member concerned.

[63] See DSU, *supra* note 24 at Art. 22.8

[64] See Dennin, *supra* note 56 at 8.
The Arbitration guidelines are found in DSU, Arts. 22.6, 22.7, and 25. See also Weiss, F., *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and*

II. The North American Free Trade Agreement

A. Overview of the History of the Construction of the NAFTA[65]

Today, the most noteworthy characteristic of current international relations is the grouping of some countries into *regional trade agreements or customs unions,* which find their legal basis in *Article XXIV of the GATT*[66] and whose main objective is to remove further trade barriers and thereby create large regional markets which permit the producers of a certain region to profit from economies of scale by manufacturing for the regional marketplace.[67]

Regional agreements can either strengthen or weaken the multilateral principles of the WTO. Prof. Armand de Mestral considers that "the drafters of the GATT 1947 were aware of this danger and made provision for it in Article XXIV (12), but they did not expect that the phenomenon would assume the proportions it has."[68] Indeed, the customs unions or free trade agreements must cover *substantially all* trade that takes place between the parties in

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Tribunals, (London: Cameron May International Law & Policy, 2000) at Chapter 2, p. 27 for more information on Alternative Dispute Resolution.

[65] North American Free Trade Agreement among the Government of Canada, the Government of the United States, and the Government of Mexico, 17 December 1992, *Can. TS* 1994 No. 2, 32 *ILM* 289.
In the United States, NAFTA was enacted by the North American Free Trade Agreement Act, P.L. 103-182, 8 December 1993. In Mexico, NAFTA was ratified by the *Decreto de promulgación del Tratado de Libre Comercio de América del Norte*, (México, D.F.: Diario Oficial de la Federación, Diciembre 1993) (entered into force: 1 January 1994) [hereinafter NAFTA].

[66] Article XXIV of the GATT clearly establishes the right for Member States of the WTO to establish *free trade areas and custom unions*. Regarding the Most-Favored Nation principle (MFN), this article allows discriminatory preferences regarding duties and other commercial regulations followed by each Member of a Regional Trade Agreement (RTA). These preferential arrangements are limited to the elimination of intra-RTA tariffs and to discriminatory reduction. See Abbott, F. M., *Law and Policy of Regional Integration: The NAFTA and Western Hemispheric Integration in the World Trade Organization System,* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995) at 44. For more information on the MFN principle, see McRae, D.M., *The Contribution of InternationalTrade Law to the Development of International Law,* (The Hague: The Hague Academy of International Law, Recueil des Cours, 1996) at 159-166.

[67] See De Mestral, A.C., *NAFTA: A Comparative Analysis,* (The Hague: The Hague Academy of International Law, Recueil des Cours, 2000) at 240.
Economy of scale means a decline in a product's per-unit production cost resulting from increased output, usually due to increased production facilities; saving resulting from the greater efficiency of large-scale processes. Garner, *supra* note 22 at *s.v.* "economy of scale".

[68] *Ibid.* at 251.
GATT, Article XXIV.12 reads as follows:
12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories.

order to lead to the objectives of establishing either customs unions or free trade areas. There is evidence that shows that some regional agreements are redirecting trade within the region, rather than enhancing international trade. Therefore, the WTO examination may be stronger in coming years.[69]

Regional trade agreements (RTAs)[70] are agreements formed between nations that may or may not belong to the same geographical region. Within the North American region, the North American Free Trade Agreement (NAFTA) was founded based on Article XXIV of the GATT. This Agreement was established in order to strengthen cooperation among Canada, the US and Mexico by expanding international trade regarding goods, services and intellectual property rights developed in this regional free trade area within a legal and legitimate system. The Agreement aims to develop each country's respective rights and obligations derived from the GATT, guarantee investment through enterprises, offer employment opportunities and protection of labor rights in order to improve quality of life in the three countries, as well as to reinforce the maintenance of the environment through rigorous rules, all this in order to preserve the communal well-being.[71]

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[69] See *ibid.* at 251 [emphasis added].
GATT, Article XXIV.1 reads as follows:
1. The provisions of this Agreement shall apply to the metropolitan customs territories of the contracting parties and to any other customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application. Each such customs territory shall, exclusively for the purposes of the territorial application of this Agreement, be treated as though it were a contracting party; *Provided* that the provisions of this paragraph shall not be construed to create any rights or obligations as between two or more customs territories in respect of which this Agreement has been accepted under Article XXVI or is being applied under Article XXXIII or pursuant to the Protocol of Provisional Application by a single contracting party.

[70] For more information on Regional Trade Agreements, see *Regionalism: Regional Trade Agreements,* World Trade Organization, online: http://www.wto.org/english/tratop_e/region_e/scope_rta/e.htm (date accessed: 17 March 2002); *Regional Initiatives, Global Impact: Cooperation and the Multilateral System,* World Trade Organization, online: http://www.wto.org/english/news_e/sprr/e/rome2_e.htm; (date accessed: 17 March 2002); *Report (2000) of the Committee on Regional Trade Agreements to the General Council,* World Trade Organization, WT/REG/9, 22 November 2000.

[71] See NAFTA, *supra* note 65 at Preamble; see also Van Dijck, *supra* note 17 at 135 [emphasis added].
GATT, Article XXIV(4) reads as follows:
4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories. It is important to mention that NAFTA, Article 101 finds its legal argument on GATT, Article XXIV. Thus, Article 101 of the NAFTA establishes the following: The Parties to this

NAFTA finds its immediate precedent in the Canada-US Free Trade Agreement (CUSFTA)[72] which, based on Article XXIV of the GATT, began negotiations on June 17, 1986 in order to establish a free trade area that could:

- strengthen the unique and enduring friendship between their two nations;
- promote productivity, full employment, and a steady improvement of living standards in their respective countries;
- create an expanded and secure market for the goods and services produced in their territories;
- adopt clear and mutually advantageous rules governing trade;
- ensure a predictable commercial environment for business planning and investment;
- strengthen the competitiveness of United States and Canadian firms in global markets;
- reduce government-created trade distortions while preserving the Parties' flexibility to safeguard the public welfare;
- build on their mutual rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation;
- and contribute to the harmonious development and expansion of world trade and to provide a catalyst to broader international cooperation.[73]

On December 9, 1987, the US and Canada established the initial final text of the CUFSTA which finally entered into force on January 1, 1989. President Bush for the US, Prime Minister Brian Mulroney for Canada and President Salinas de Gortari for Mexico together wanted to create a North American free trade area and commenced negotiations on February 5, 1991, for the possible benefits that could accrue to all three countries seemed attractive.[74]

Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area.

[72] *Canada-United States Free Trade Agreement,* Jan. 2, 1988, Can.-U.S.A, 27 I.L.M. 281 (1988) [hereinafter CUSFTA].
The CUSFTA is currently suspended but not abrogated. In fact, it was suspended - when the NAFTA entered into force – through an Exchange of Notes between the U.S. and Canadian governments. Thus, the suspension will be kept as long as these two countries remain members of the NAFTA. For more information on the suspension of the NAFTA, see Note No. 134 of the Embassy of Canada to the Department of State of the United States of December 30, 1993 and Note 464 of the Embassy of the United States to the Department of External Affairs and International Trade of Canada of December 30, 1993 with reference to entry into force of the NAFTA and suspension of the Free Trade Agreement between Canada and the United States.

[73] *Ibid.* at Preamble.

[74] See Folsom, R.H. & Folsom, W.D., *NAFTA Law & Business,* (The Hague, 1998) at Chapter III-7.

In November 1992, President Bush notified Congress of his intention to sign the NAFTA on behalf of the US, but there was political opposition. The 1992 presidential elections were about to take place, thus allowing the NAFTA to be politically considered for acceptance or rejection. Whereas Ross Perot - an independent candidate for presidency - was entirely opposed to NAFTA, Bill Clinton – at that time governor of Arkansas - supported NAFTA for its provisions relating to labor and the environment.[75] The main interest for the US in entering into NAFTA negotiations was mainly economic, but there were other secondary goals, such as reducing illegal immigration from Mexico. Indeed, illegal immigration affects the economies of important states, such as California and Texas. The Bush Administration also argued that through NAFTA, Mexico could accelerate its political reform process.[76] Finally, President Bush signed the NAFTA on behalf of the US and negotiations for ratification reopened in early 1993 after Clinton became president. The two side agreements on labor conditions and environment, as well as the understanding on protective relief from import turbulences, were sent for fast track proceedings to Congress which opposed them. The House of Representatives' final vote was 234 in favor with 200 oppositions and a 61 to 38 affirmation in the Senate of the NAFTA Implementation Act of 1993.[77]

Canada was initially not so welcoming towards NAFTA, but later on realized that it offered many benefits. Thus, Canadian Prime Minister Brian Mulroney ensured NAFTA's approval before Canada's 1993 federal elections. However, when he stepped down, there remained much anti-NAFTA sentiment.[78] Canada had little interest in engaging in commercial relations with Mexico, for trade and investment opportunities with Mexico were not necessary for Canada. Nevertheless, Canada opted to enter into NAFTA negotiations, as it did not want to become isolated from future US plans for regionalization throughout the Western Hemisphere. Canada thereby prevented an imposition of long-term

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[75] See *ibid.*

[76] See Abbott, *supra* note 66 at 18.

[77] See Folsom, *supra* note 74 at Chapter III-7 .

[78] See *ibid.*

policy of hemispheric isolation which likely would have had an adverse impact on the Canadian economy.[79]

Mexico's Congress readily ratified the agreement, since NAFTA was a good opportunity for Mexico to recover from former crises and because there was no opposition from Congress; in other words, the PRI (Partido Revolucionario Institucional or the Institutional Revolutionary Party) retained all the power and essentially full control in Congress from 1928 to 2000, so President Salinas had no objection towards the ratification of NAFTA.[80] Indeed, Mexico was very interested in entering the NAFTA, as it would attract foreign direct investment from US enterprises. Mexico would offer US enterprises an opportunity to expand into an open market by granting an investment guarantee and preferential treatment to both imports and investment. Thus, following its signature by the three heads of state on December 17, 1992, NAFTA formally entered into force on January 1, 1994.[81]

The newly adopted NAFTA would follow the national treatment, most-favored-nation treatment and transparency principles of trade liberalization. Therefore, Canada, the US and Mexico established as the main objectives of the North American Free Trade Agreement the following points:

a. eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
b. promote conditions of fair competition in the free trade area;
c. increase substantially investment opportunities in the territories of the Parties;
d. provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory,
e. create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
f. establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.[82]

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[79] See Abbott, *supra* note 66 at 19 & 20.

[80] See Folsom, *supra* note 74 at Chapter III-7.
With NAFTA, Canada, U.S., and Mexico created the world's largest free trade area with 406 million people; see also Department of Foreign Affairs and International Trade / Ministère des Affaires Étrangères et du Commerce International, Canada, NAFTA at Seven, online: http://www.dfait-maeci.gc.ca/nafta-alena (date accessed: 22 November 2001) at 1.

[81] See Abbott, *supra* note 66 at 18 & 19.

[82] NAFTA, *supra* note 65 at Article 102.1

B. Overview of the Impact of the NAFTA on its Members

The application and implementation of the NAFTA would certainly have an impact on each Member, but it bears mentioning that the US economy is larger than Canada's and substantially larger than Mexico's, so the impact of NAFTA cannot be the same for each country.

Impact of the NAFTA in the United States

NAFTA has had a positive impact on the US' economy, which has experienced steady growth since its adoption. During the first three years unemployment was reduced, the national income grew, inflation was slight, productivity increased, wage increases were moderate and interest rates lowered. The growth of US trading partners' economies were slower, while the US economy continued to grow, with US consumption of imports rising faster than exports, causing a trade deficit expansion with both Canada and Mexico, and worldwide as well. Since the implementation of NAFTA, US exports have grown rapidly, so trade with NAFTA Partners has also grown. US trade with Canada has remained fairly steady, but trade with Mexico decreased significantly in 1995 because of the declination of the value of the Mexican peso and the 1995 Mexican Recession for which President Clinton had to allow a $20 billion loan package. In 1996 Mexico's share of US exports grew from 7.9 to 9.1%. The decision taken by Mexico regarding the raise of tariffs on textiles, apparel and footwear articles from countries with which Mexico did not have trade agreements from twenty to thirty-five per cent did not affect US exporters, for the NAFTA provisions on tariffs protected them from this Mexican decision.[83]

Impact of the NAFTA in Canada

The Canadian and US economies were significantly linked as a result of the Canada-US Free Trade Agreement, as they had already been trading partners for more than a hundred years. Before NAFTA, Canada was emerging from a recession which ended in 1991 and even though the economy expanded, there was high unemployment, as companies

[83] See Folsom, *supra* note 74 at Chapter XV-5. It is important to mention that the economy of the U.S. is 25 times the size of the Mexican economy. Thus, the difference had the greatest bargaining power in NAFTA negotiations.

restructured themselves in order to become more efficient. Whereas Canadian exports from 1994-1996 grew by twenty-five per cent, Canadian imports grew by thirteen per cent. Of the NAFTA Partners, the US is still Canada's main trading partner, and the trade between them has doubled from 1988 to 2001 to two billion US dollars a day. Canadian trade with Mexico grew to three per cent in 1995, up from two per cent of total trade of 1994. The Mexican peso crisis also affected Canada, since Canadian exports were reduced to Mexico in 1995. In early 1998, unemployment dropped below nine per cent, indicating that unemployment remains a persistent problem for Canada. Nevertheless, in the first three years of NAFTA, Canada has experienced a positive but declining increase in real GDP, an improvement in the administration of public debt and an inflation rate of less than two per cent annually. Canada has also experienced a relevant increase in foreign direct investment (FDI), especially in Mexico, with a twenty-one per cent increase during the first half of 1996.[84]

Impact of the NAFTA in Mexico

Discussing the impact of the NAFTA in Mexico is very complex, for Mexico faces a continuous struggle between its never-ending contradictions. Throughout its history, Mexico has experienced many economic crises, dating from its independence to today, yet the current discussion will not go back as far as the Colonial period, but rather up to some few decades ago in order to best understand the impact of NAFTA on Mexico. It is important to start talking about the Import-Substitution Industrialization (ISI), a nationalistic, economic policy implemented in the 1930s after the Great Depression in order to protect all domestic industries from foreign competition by closing borders. Under the ISI program, there were limited investment transactions, and this seemed to work for Mexico from the 1940s to the 1960s, a period of time known as the Mexican Economic Miracle, when the Mexican economy grew by six per cent annually. Mexico's closing off of foreign investment, new technology and entrance of foreign products led Mexico to inferior quality standards as compared with larger liberalized countries. By the 1970s, Mexico realized that the ISI program was no longer contributing to economic growth and

[84] See *ibid.* at Chapter XV-6.

entered into a financial crisis in 1976 in which the IMF had to intervene with an austerity plan and the peso devaluation, an intervention that lasted just one year, as Mexico declared it was economically sufficient thanks to new oil deposits found in the Southeast. Nevertheless, Mexico fell again into a series of financial crises – including peso devaluations and high rates of inflation - as oil prices decreased and the country did not want to liberalize its economy. Thus, Mexico's movement toward NAFTA started in the 1970s with the end of the ISI. This led to important reforms in the 1980s, such as its reduction of the restriction on foreign investment and its entrance into the GATT in 1986, whereupon Mexico adopted trade liberalization principles and became open to international trade. In the 1990s, Mexico implemented new rules for investment and for *maquiladoras*, assembly factories along the US border, as well as for selling state-owned enterprises.[85]

In 1993 the Mexican economy was inactive, with slow employment growth, a low GDP growth, high labor costs and many concerns of Mexico's involvement with NAFTA. There was political anxiety due to the 1994 federal elections, a large trade deficit, low foreign exchange reserves and the deepest peso crisis and recession since the 1930s. In 1996, inflation began to decrease (from thirty-five to twenty-six per cent), there was a growth of four per cent in the GDP, interest rates started to lower (from thirty to -four per cent) and the peso stabilized at around seven to eight pesos per dollar. Thus, some observers comment that certain NAFTA policies contributed to the peso crisis, but there are others who think that Mexico's slow recovery of 1996 was thanks to NAFTA and the increased competitiveness of certain trade sectors due to the trade liberalization principles. Indeed, many analysts consider a big step for Mexico to have liberalized its economy in order not to return to the same protectionist regime after the peso crisis.[86]

Mexico is fearful of the NAFTA dispute settlement mechanisms, for it is a weak disputant and may face trouble solving its disputes. One could say that there may be a parallel comparison of the difficulties that Mexico had in solving its disputes in the Guadalupe-

[85] See *ibid.* at Chapter I 22 - 27.

[86] See *ibid.* at Chapter XV-7 & 8.

Hidalgo Treaty signed with the US in 1848 with the difficulties that it may have with the newly-signed NAFTA. The Guadalupe-Hidalgo Treaty failed to protect the rights of Mexican-Americans when they sought dispute resolution for their land property rights, as three-fourths of the lands owned by Mexicans were not valid under American courts.[87]

Moreover, Mexico fears that the NAFTA may be an opportunity for the US to Americanize Mexico by promoting a legal, political and economic system that would resemble that of the US. This was not declared openly when NAFTA was negotiated, but it may be part of the US' agenda. On the other hand, Mexico had to negotiate the NAFTA in the face of both internal and external pressures: internal pressures to maintain the PRI in power by creating more jobs and more benefits to society with the aperture of Mexico's borders and thus keep power for an economic and political elite; external pressures to be within the globalized economy and more easily repay its debts to the IMF and the US. American and Canadian investors were very interested in negotiating the NAFTA, for they would face low-level rules in relation to labor and environment.[88]

C. The NAFTA Chapter 20 Dispute Settlement Mechanism

1. Legal nature

The NAFTA Chapter 20 Dispute Settlement Mechanism bases its legal origins in the former CUSFTA Chapter 18 Dispute Settlement Mechanism which followed three stages: bilateral consultations, Trade Commission review and binding arbitration. According to this chapter, if there were disputes which fell within the jurisdiction of both the CUSFTA and the GATT, they could be resolved in either forum, at the discretion of the complaining party. Chapter 18 of the CUSFTA perfectly allowed forum shopping, according to Article

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[87] The Treaty of Guadalupe Hidalgo symbolizes the end of the Texas War in 1848 by the sale that Mexico did to the U.S. of a huge portion of land for $15 million, as Mexico needed desperately money to survive and pay its debts to British banks. In other words, Mexico needed to defend its sovereignty by not ceding all its territory to the U.S. which pointed out that Mexicans should abandon their origins, their language, as well as their culture and become Americans. The Whigs, an opposition political party, declared the sale of the Mexican territory as unethical to propose to sell its territory to a defeated country.
There was a notable racial discrimination towards Mexican-Americans, as they did not have the same rights as the "whites", so this resulted into an unfair treatment.
See Martinez, G.A., "Dispute Resolution and the Treaty of Guadalupe Hidalgo: Parallels and Possible Lessons for Dispute Resolution under NAFTA" (1998) 5 Sw. J. of L. & Trade Am. 147 at 147, 152 & 158.

[88] See *ibid.* at 168.

1801, but once the complainant had chosen a forum, the matter had to be solved within the scope of the chosen forum and not divided.[89] Thus, Article 1801 of the CUSFTA is the immediate legal precedent and argument to the new Article 2005 of the NAFTA, which talks about choice of forum for NAFTA governments between the WTO DSM and Chapter 20 of the NAFTA.

Hence, the jurisdiction of Chapter 18 referred to matters of interpretation or application of the CUSFTA, matters of a measure inconsistent with CUSFTA, as well as nullification or impairment – in the sense of Article 2011 of the CUSFTA - of benefits expected under the CUSFTA.[90] Chapter 18 did not deal with matters of financial services nor with binational dispute settlement in antidumping and countervailing duty cases but rather provided for the following:

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[89] See Folsom, *supra* note 74 at Chapter II-32; see also Castel, J.G., "Current Development: The Settlement of Disputes under the 1988 Canada-United States Free Trade Agreement" (1989) 83 A.J.I.L. 118 at 120.

[90] See Folsom, *supra* note 74 at Chapter II-32. CUSFTA, Article 1801 established the following:

1. Except for the matters covered in Chapter Seventeen (Financial Services) and Chapter Nineteen (Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases), the provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes regarding the interpretation or application of this Agreement or whenever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Article 2011, unless the Parties agree to use another procedure in any particular case.
2. Disputes arising under both this Agreement and the General Agreement on Tariffs and Trade, and agreements negotiated there under (GATT), may be settled on either forum, according to the rules of that forum, at the discretion of the complaining Party.
3. Once the dispute settlement provisions of this Agreement or the GATT have been initiated pursuant to Article 1805 or the GATT with respect to any matter, the procedure initiated shall be used to the exclusion of any other.

The CUSFTA had several dispute settlement mechanisms with distinctive characteristics that differentiated them from solving either a legal or a political dispute. See also Petersmann, E. & Jaenicke, G., *Adjudication of International Trade Disputes in International and National Economic Law,* (Switzerland: University Press Fribourg Switzerland, 1992) at 263.

CUSFTA, Article 2011 established the following regarding Nullification and Impairment:

1. If a Party considers that the application of any measure, whether or not such measure conflicts with the provisions of this Agreement, causes nullification or impairment of any benefit reasonably expected to accrue to that Party, directly or indirectly under the provisions of this Agreement, that Party may, with a view to the satisfactory resolution of the matter, invoke the consultation provisions of Article 1804 and, if it considers it appropriate, proceed to dispute settlement pursuant to Articles 1805 and 1807 or, with the consent of the other Party, proceed to arbitration pursuant to Article 1806.
2. The provisions of paragraph 1 shall not apply to Chapter Nineteen and Article 2005 [cultural industries].

1. the mandatory notification by each country of any proposed or actual measure that it considered might materially affect the operation of the FTA;
2. the obligation to give information and respond to questions pertaining to any actual or proposed measure, whether or not previously notified;
3. consultation at the request of either party concerning any measure or any other matter that affected the operation of the FTA, with a view to arriving at a mutually satisfactory resolution;
4. referral to the Canada-US Trade Commission should resolution through consultation fail; and
5. resort to procedures for the settlement of disputes should the Commission fail to arrive at a mutually satisfactory resolution.[91]

Chapter 18 of the CUSFTA dealt with matters of public international law and NAFTA inter-state disputes, and Chapter 20 DSM of the NAFTA deals with the same kind of matters, excluding all private resolution of disputes; in fact, Chapter 18 contained the GATT panel process and inherited it the current Chapter 20. Chapter 20 is only marginally different from the previous Chapter 18 of CUSFTA. For instance, under this latter one, whereas the chair of the panel was chosen last, under Chapter 20 of the NAFTA it is chosen first. Nevertheless, both of them are not a court or a similar tribunal; they are *ad hoc* and probably were intended to be so.[92] Besides the resemblance of Chapter 20 of the NAFTA

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[91] Castel, *supra* note 89 at 120.
It is important to mention that CUSFTA, Article 1802 regulated the functions of the Commission, Article 1803 regulated Notification, Article 1804 regulated Consultations, Article 1805 regulated Initiation of Procedures, Article 1806 regulated Arbitration, and Article 1807 regulated the Panel Procedures.

[92] See Picker, S. Jr., "Preceding of the Canada-United States Law Institute Conference: NAFTA Revisited: the NAFTA Chapter 20 Dispute Resolution Process: A View from the Inside" (1997) 23 Can.-U.S. L.J. 525 at 466, 526, 530 & 535.

There were only five arbitration panel decisions under Chapter 18 of the CUSFTA which were the following:

1. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring,* (1989), CDA-89-1807-01, (Ch. 18 Panel). U.S. complained against Canada regarding Canadian landing requirements for salmon caught in their waters. The arbitration panel decided that the Canadian requirements augmented the trouble of Canadian salmon exports, so it ruled in favor of the U.S.
2. *In the Matter of Lobsters from Canada,* (1990), USA-89-1807-01, (Ch. 18 Panel). Chapter 18 sustained the limits of the U.S. on the sale of underdeveloped lobsters. Since both Canadian and American lobsters were affected, the panel found there was no discrimination.
3. *Treatment of Non-Mortgage Interest Under Article 304,* (1993), USA-92-1807-01, (Ch. 18 Panel). Canada's policy of including interest payments in the costs of automobile production was sustained.
4. *In the Matter of: The Interpretation of Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales,* (1993), CDA-92-1807-01, (Ch. 18 Pane). The arbitration panel agreed with Canada regarding the minimum pricing of durum wheat for sale in the U.S.
5. *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec,* (1993), USA-93-1807-01, (Ch. 18 Panel). The arbitration panel decided that Canada could take compensatory action against the U.S., regarding Quebec long-life milk, as Puerto Rico did not review the standards in order to determine the equivalency.

See Folsom, *supra* note 74 at Chapter II - 34.

with its predecessor Chapter 18 of the CUSFTA as well as with the GATT panel process, the Joint Working Group on the Settlement of Disputes - formed by both the American and Canadian Bar Associations - proposed certain dispute settlement provisions that would regulate the dispute resolution processes of CUSFTA which were, therefore, included in the NAFTA text. Later on, when negotiations with Mexico started to form the NAFTA, the Barra Mexicana consented to dispute settlement proposals for NAFTA which included three recommendations: "an effective and flexible system for the identification and management of disputes; the allowing of private parties to have broad alternative to the dispute settlement mechanisms with respect to trade disputes with which they are concerned; and the establishment of a panel to decide disputes concerning the interpretation and application of NAFTA."[93]

It is important to draw a comparison between Chapter 18 of the CUSFTA and the GATT procedures of dispute settlement from which we can arrive at the following conclusions:

- Whereas compulsory or agreed binding arbitration is found in the CUSFTA, they are not found under the GATT.
- Prior notification is a good step under the CUSFTA, as there is no previous notification under the GATT.
- Compensation, suspension of benefits are similar to the ones of the GATT, but retaliation would not be effective against the US, as the majority of Canadian exports go the US. Therefore, the only solution Canada had was to trust in the good faith of its partner.
- There might still exist a kind of blockage under the FTA, as the Commission still needs to agree upon a satisfactory mutual solution that conforms with the recommendation of the panel. The CUSFTA does not need authorization before retaliation, unlike the GATT. Consequently, the blockage of the adoption of panel decisions is an asset of the CUSFTA procedures of dispute settlement.
- Time limits are shorter than those found under GATT; for instance, for the appointment of panelists and for the presentation of the initial report to the parties, three months is too short for the panelists to establish fact-finding as well as consider the arguments of the parties.
- Reduction of delays in the adoption of reports by the Commission and panels.
- The panelists' qualifications are more exacting than those of the GATT.
- Under the CUSFTA, there is no requirement of consent of the defendant before the Commission establishes a panel, situation that is different under GATT.[94]

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[93] Sohn, L.B., "Symposium: An Abundance of Riches: GATT and NAFTA Provisions for the Settlement of Disputes" (1993) 1 U.S. Mexico L.J. 3 at 12 & 13.

[94] Castel, *supra* note 89 at 122.

Hence, we can say that unlike GATT, the CUSFTA Chapter 18 dispute settlement mechanism emphasized the rights and obligations of the parties, instead of their political or economic power; whereas the GATT is focused on resolving disputes, the CUSFTA emphasized the enforcement of obligations. Finally, it could be said that, since the GATT lacked a formal mechanism for dispute settlement, trade disputes between Canada and the US were more efficiently processed under CUSFTA, whose procedures achieved an effective balance between negotiation and adjudication.[95]

2. Jurisdiction

NAFTA Chapter 20 is its main dispute settlement procedure. The majority of the NAFTA is subject to the principle of *compulsory dispute settlement*: "the applicable procedure may vary, but the principle is almost invariable."[96] This principle of compulsory dispute settlement is a guarantee that disputes can be resolved, especially by negotiation. Thus, this principle is a source of strength for the NAFTA.[97]

The objective of NAFTA's Chapter 20 dispute settlement mechanism is the prevention and settlement of disputes regarding its interpretation and application. It is also applied in case a measure of another Party is inconsistent with the NAFTA and may therefore cause nullification or impairment in the sense of Annex 2004. [98]

In general, a dispute under the NAFTA occurs when a Party has behaved or is about to behave in a manner that is inconsistent with the instrument or, as in the GATT, in case a measure does not contravene the agreement but causes nullification or impairment of the benefits that another NAFTA Party should obtain. Thus, Annex 2004 of the NAFTA clearly establishes that there might be nullification or impairment in disputes that involve

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[95] See *ibid.* at 128.

[96] De Mestral, *supra* note 67 at 321. The exceptions to this principle are found in Chapter 8 regarding emergency actions, Chapter 15 regarding competition, and Chapter 16 regarding decisions to deny temporary access to a provider of a service.

[97] See *ibid.* at 334.

[98] See *ibid.* at 321.

goods, intellectual property rights and services, but excludes cross-border services or intellectual property rights covered by the general exceptions of the NAFTA in Article 2101.[99]

Generally speaking, NAFTA's main dispute settlement mechanisms are found in Chapters 11, 14, 19 and 20. Investment disputes are referred to Chapter 11, Antidumping and Countervailing Duties (AD & CVD) disputes are settled under Chapter 19. The main scope of dispute settlement provisions under Chapter 20 comprises the interpretation or application of the NAFTA, as well as disputes of financial services covered under NAFTA Chapter 14.[100]

It is important to note that the scope of the NAFTA Chapter 20 Dispute Settlement Mechanism involves inter-state disputes among its members – that is, disputes among Canada, the US and Mexico. Therefore, in disputes that involve enterprises of NAFTA Parties, state and provincial governments, as well as nationals, they must convince their own governments to initiate a proceeding against another party in case there are some adverse effects.[101] It should also be noted that one reason why these countries included dispute settlement mechanisms within the NAFTA is in order to "prevent pre-agreement bargaining power from becoming post-agreement bargaining power and one way to evaluate whether the NAFTA dispute settlement procedures have prevented the pre-agreement bargaining power of the U.S. from becoming post-agreement bargaining power."[102] Consequently, we can say that NAFTA dispute settlement mechanisms have helped to equalize the post-agreement bargaining power between the US and Mexico, for

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[99] See Appleton, B., *Navigating NAFTA: a Concise User's Guide to the North American Free Trade Agreement,* (Ontario: Carswell, 1994) at 146 & 147. It has been mentioned in Chapter I of the present work that Article XXIII of the GATT talks about nullification and impairment besides of being the main legal argument for the DSU.

[100] See *NAFTA Secretariat, online*: http://www.nafta-sec-alena.org (date accessed: 22 November 2001).

[101] See Trakman, L.E., *Dispute Settlement under the NAFTA,* (New York: Transnational Publishers, Inc., 1997) at 7.

[102] Martinez, *supra* note 87 at 173.

Mexico has had a victory regarding Chapter 20 DSM in the 1996 Broom Corn Brooms Case.[103]

When Canada, the US and Mexico signed the NAFTA, they agreed that the North American free trade area must have a clear set of established rules in order to solve emerging disputes amicably among the three governments regarding the interpretation or application of the NAFTA, except for matters covered in Chapters 11, 14 and 19, which relate to matters of investment, financial services, antidumping and countervailing duty final determinations, respectively. Therefore, the three governments have considered Chapter 20, which treats the interpretation and application of the agreement when either of the three countries consider an actual or proposed measure from either one of them to be inconsistent with its NAFTA obligations or, even if it is consistent with them, may nullify or impair the benefits expected under NAFTA, as the core and most important element of this agreement.[104]

The matters that would need to be resolved under Chapter 20 are as follows:

- Trade in goods provided under NAFTA Chapters 3 to 8, 9, 12 and 27 (excluding automotive provisions under Annex 300 – A);
- Energy investments under NAFTA Chapter 6;
- NAFTA Chapters 10, 11, 13, 14, 15 and 16, only where the actual or proposed measures are inconsistent with the provisions of the NAFTA.[105]

Chapter 20 may also be applied, depending on what the NAFTA disputing parties elect, to the following provisions of the NAFTA:

- Chapter 5 regarding issues of determination of origin;
- Chapter 8 regarding emergency action;
- Chapter 10 regarding government procurement;

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[103] See *ibid.* at 173.

[104] See *NAFTA Secretariat, supra* note 100; see also Trakman, *supra* note 101 at 5-7. The objectives of NAFTA's Chapter 20 are based on the WTO provisions and are, therefore, similar to them.

[105] See Trakman, *supra* note 101 at 5.

- ❖ Chapter 11 regarding the provisions for investors to access remedies;
- ❖ Chapter 14 regarding the modification of procedures involving financial services;
- ❖ Chapter 16 regarding temporary entry;
- ❖ Chapter 20 regarding private commercial disputes;
- ❖ Labor and environmental disputes.[106]

However, Competition Law as well as Antidumping and Countervailing Duties are two fields in which Chapter 20 would definitely not be applied.[107]

The NAFTA Parties agreed to interpret it according to the rules of international law and the agreement's objectives. The legal framework that embodies the rules on interpretation and application of international treaties, conventions and international agreements is the *Vienna Convention on the Law of the Treaties*.[108]

3. Overview of the Jurisprudence created by the NAFTA Chapter 20 Dispute Settlement Mechanism

There is limited jurisprudence created by the NAFTA Chapter 20 Dispute Settlement Mechanism. The three following disputes are the only ones considered complete under this chapter:

1. Tariffs Applied by Canada to Certain US-Origin Agricultural Products, requested by the US Government. A Unanimous Panel issued the report on December 2, 1996.

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[106] See *ibid.* at 6.

[107] See *ibid.*

[108] See Folsom, *supra* note 74 at Chapter III-7 & 8. The legal basis for this is set on NAFTA, Article 102.2 which says the following:
2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.
In order to study the objectives of the NAFTA, see NAFTA, Article 102.1

2. US Safeguard Action Taken on Broomcorn Brooms from Mexico, requested by the Government of Mexico. A Unanimous Panel issued the report on January 30, 1998. It is important to mention that throughout the present work, the author will analyze this case in order to scrutinize it under the NAFTA light as well as to clarify the reasons why the Government of Mexico chose the NAFTA Chapter 20 forum, rather than the one established by the WTO.
3. Cross-Border Services and Investment in the Trucking Sector, requested by the Government of Mexico. A Unanimous Panel issued the report on February 6, 2001.[109]

The following cases represent disputes in which NAFTA Governments were involved as Parties to the disputes and which reached the consultations stage under this dispute settlement mechanism:

1. Uranium Exports (Canada vs. United States). Canada was concerned regarding an amendment to an agreement between Russia and the US of exports and imports of uranium. (March, 1994)
2. Agricultural Products Tariffication (United States vs. Canada). The US declared that the new tariffs applied by Canada on imports of dairy, poultry and egg products were extremely high and thus inconsistent with NAFTA. (February, 1995)
3. Import Restrictions on Sugar (Canada vs. United States). In response to the case on agricultural products, Canada requested consultations regarding tariffs on Canadian exports of sugar products. (February, 1995)
4. Restrictions on Small Package Delivery – "Small Package Delivery" (United States vs. Mexico). The US claimed that Mexico did not allow small-package delivery

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[109] See *NAFTA Secretariat, supra* note 100 at CDA-95-2008-01, USA-97-2008-01, and USA-98-2008-01, respectively.
It is important to mention that the *Agricultural Products Tariffication* case between United States and Canada was the first case brought before a NAFTA Chapter 20 dispute settlement panel and which was devoted to solve a NAFTA-WTO relational issue. The second case that used this dispute settlement mechanism and that analyzed a NAFTA-WTO relational issue that was extensively argued was the case of *Safeguards on Brooms* between Mexico and the United States. See Weiler, J.H.H., ed., *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?*, (New York: Oxford University Press, Inc., 2000) for more information on these two cases.

firms, such as United Parcel Service, to use delivery trucks and failed to give US trucks national treatment. (April, 1995)

5. Truck Transport (Mexico vs. United States). Mexican trucking companies were not allowed to cross the four border states with the US because of a lack of safeguards that would guarantee Mexican compliance with US safety standards. This was contrary to what NAFTA had established. (January, 1996)
6. Restrictions on Tomato Imports – "Mexican Tomatoes" (Mexico vs. United States). Mexico requested consultations, as it was being imposed tariffs into its imported tomatoes. It seems that this dispute was solved in October 1996, for the US Department of Commerce and Mexican tomato producers agreed on setting prices that would not cause injury to the US tomato industry. (August, 1996)
7. Helms-Burton Act (Mexico and Canada vs. United States). Both Canada and Mexico requested consultations, as they were concerned about the implementation of the Cuban Liberty and Democratic Solidarity Act of 1996 –Helms Burton Act-, which restricted entry into the US of business people and granted certain American citizens the right of action against foreign executives. (March, 1996)
8. Safeguards on Brooms (Mexico vs. United States). Mexico requested consultations regarding the safeguard measures imposed by the US on broom corn brooms imports from Mexico. (August, 1996).
9. Restrictions on Sugar (Mexico vs. United States). Mexico requested consultations with the US regarding access conditions and quotas for sugar entering the US. Whereas Mexico claimed that NAFTA allowed the entrance of 575,000 tons of sugar a year as of October 1, 1998, the US argued that the exact quantity that NAFTA allowed was from 110,000 to 120,000 tons. (March, 1998)
10. Farm Products Blockade (Canada vs. United States). Canada requested consultations to the US, for the states of South Dakota and Montana were blocking the entrance of Canadian farm products, contrary to NAFTA provisions. (September, 1998)

11. Bus Service (Mexico vs. United States). Mexico claimed the refusal of the US Department of Transportation for Mexican scheduled bus service between Mexico and the US (August, 1998)[110]

Whereas the US has been party to all of the afore-mentioned eleven disputes, three as moving party and eight as respondent, Canada has played the role of moving party in four cases and in one as a respondent, and finally Mexico has been a moving party in five and a respondent in two cases. Thus, there had at that time been no trade disputes within the North American free trade area between Canada and Mexico.[111] Probably the presence of the US in all the cases is due to the hegemony that they wish to impose over both Canada and Mexico.

4. Stages of Proceedings

Before discussing the stages of proceedings of the Chapter 20 dispute settlement mechanism, it bears mentioning that there are two main NAFTA institutions that intervene in the process: the Free Trade Commission (FTC) and the Secretariat. The role of the FTC is to supervise NAFTA's implementation as well as to resolve trade disputes that arise among the Member States concerning the interpretation or application of the agreement. Besides, the FTC, which is formed by cabinet-level representatives of Canada (the Canadian Minister of International Trade), the US (US Trade Representative) and Mexico (Secretary of the Secretariat of Economy), meets at least once a year basing all its decisions on consensus. The Secretariat, which has a National Bureau Section in each country, is in charge of granting administrative support to the FTC as well as to committees and dispute settlement panels.[112]

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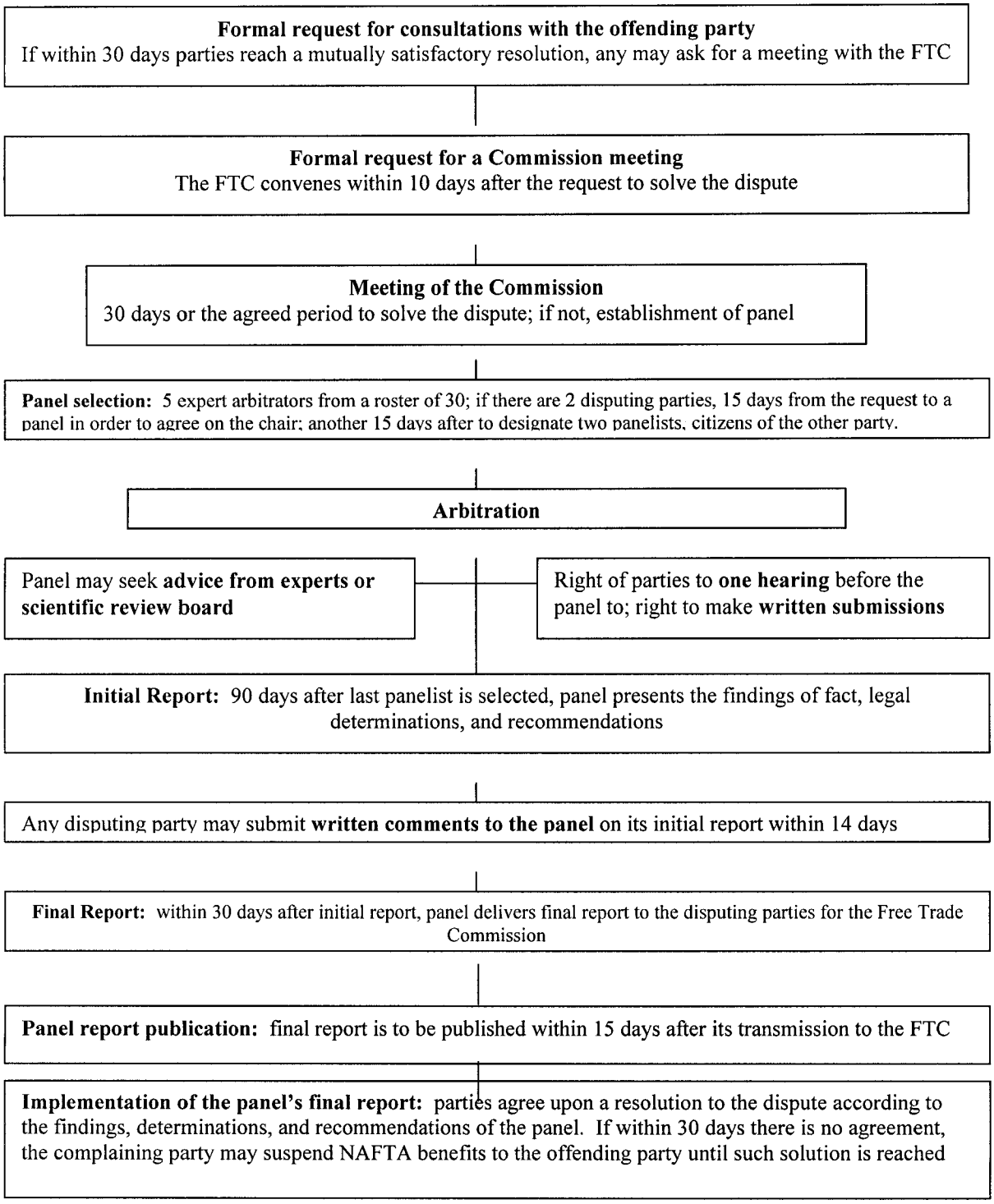
[110] See Gantz, *supra* note 54 at 1059-1076. In at least four of the Chapter XX requests - Restrictions on Sugar, Safeguards on Brooms, Uranium Exports, and the Helms-Burton Act - the Parties had to decide the forum under which they considered best fit the situation; see also López, D., "Dispute Resolution under NAFTA: Lessons from the Early Experience" (1997) 32 Tex. Int'l L.J. 163 at 170.

[111] See Gantz, *supra* note 54 at 1059.

[112] See López, *supra* note 110 at 166; see also *NAFTA*, *supra* note 65 at Section A, Articles 2001 and 2002 which talk about the Free Trade Commission and Secretariat, respectively; see also Appleton, *supra* note 99 at 8.
It is important to mention that the NAFTA has established eight Committees and six Working Groups listed under Annex 2001.2

The following chart[113] illustrates the stages of proceedings and a time-line:

NAFTA Chapter 20 Dispute Settlement Process



[113] Chart was taken from Folsom, *supra* note 74 at 5.

Ideal Timeline for NAFTA Chapter 20 Arbitral Panel[114]

(Two Disputing Parties)

Article 2008	Request for Arbitral Panel by Party filed on	Day 0
Article 2011.1(b)	Selection of Chair to be completed by	within 15 days after request for AP
Rule 5 & Art.2012(3)	Terms of Reference may be filed by	20 days after filing of request
Article 2011.1c)	Panel Selection to be completed by	15 days after selection of Chair
Rule 7	Initial Written Submission (Complaining Party) to be filed by	10 days after Panel selection is completed
Rule 7	Written Counter-Submission (Party Complained Against) to be filed by	20 days after Initial Written Submission
Rule 7	Initial Written Submission (3rd Party) To be filed by	20 days after Initial Written Submission
Rule 26	List of deliberators and others attending The hearing to be delivered by	5 days before the hearing
Rule 21	Hearing to be held by	Hearing (to be determined by Chair)
Rule 32	Supplementary Written Submission To be filed by	within 10 days of hearing
Rule 38	Request for Scientific Review Board To be filed by	not later than 15 days after the hearing
Article 2016(2)	Initial Report to be filed by	within 90 days after Panel Selection is completed

[114] See *ibid.* at 23 & 24. It is important to mention that these *Model Rules of Procedure for Chapter Twenty*, established by the Free Trade Commission on January 1, 1994, find their legal argument on the NAFTA, Article 2012(1). This set of rules studies and analyzes the case submitted to the FTC in order to emit the conclusions, findings, and recommendations of NAFTA, Article 2016(2). This timeline is based on an ideal case; see also *NAFTA Secretariat, supra* note 100.

Article 2016(4)	Comments on Initial Report to be Filed by	within 14 days after presentation of Initial Report
Article 2017(1)	FINAL REPORT DUE BY	within 30 days after Initial Report

The procedures for the NAFTA Chapter 20 Dispute Settlement Mechanism are found under Section B of the same chapter. The following are the stages for settling disputes under Chapter 20 of the NAFTA:

a. Consultations

The dispute settlement mechanism of NAFTA Chapter 20 formally starts when a NAFTA Party requests consultations to the Secretariat and the other NAFTA Parties regarding a dispute that involves the scope of application or interpretation of disputes under Chapter 20 relating to a measure that is inconsistent with the NAFTA. A third Party may participate only when it proves it has a *substantial interest*[115] in the matter and when its interests may be affected. The NAFTA Parties are required to arrive at an amicable solution to the dispute for which they are required to provide all the necessary information within thirty days of the date of delivery of the request, forty-five days of the date of delivery of the request in case a Third NAFTA Party participates in this stage, or fifteen days of the date of delivery of the request regarding perishable agricultural products, or within a different agreed-upon period among the Parties. If it is not possible to arrive at a mutual solution, any Party may ask for a meeting with the FTC.[116]

[115] Substantial interest in the matter of the dispute is regulated by NAFTA, Article 2006(3) and Article 2008(3), regarding a substantial interest within the Consultations or Panel stages, respectively.

[116] See Trakman, *supra* note 101 at 12 & 13; see also NAFTA, *supra* note 65 at Article 2006 which regulates the Consultations stage of NAFTA Chapter 20 dispute settlement mechanism.
It is important to mention that Consultations under Articles 513 regarding rules of origin, 723 regarding sanitary and phytosanitary standards, and 914 regarding standards are alluded to as formal consultations. See De Mestral, *supra* note 67 at 322.

b. Review by the Free Trade Commission

The role of the FTC is to assist the NAFTA Parties in negotiating a solution to the dispute within thirty days - or another agreed-upon period among the parties - of the request of its intervention, instead of acting as a third-party arbiter of the dispute. Moreover, the FTC may use alternative methods of dispute resolution (ADR) such as good offices, conciliation, or mediation, as well as advice from experts, working groups or arbitration. Nevertheless, comparing the ADR NAFTA provisions with the ADR GATT provisions, it may be said that the NAFTA ones may not be requested at any time by a NAFTA Party, which differs strongly with the GATT.[117] It is important to mention that the FTC's consultations are replaced by technical bodies in cases regarding rules of origin, sanitary and phytosanitary standards, and standards-related measures. Scientific Review Boards, which may provide reports concerning health, safety, environmental or other scientific matters, may be very helpful for solving environmental disputes.[118]

c. Referral to an Arbitral Panel

Any NAFTA disputing Party, including a Third Party that has shown substantial interest and has been authorized by the Secretariat to participate as a complaining Party, may request the establishment of an arbitral panel to the FTC, which follows the *Model Rules of Procedure for Arbitral Panels*, through a written application. The panel, which is similar to the dispute settlement mechanism under the GATT, must work with terms of reference, such as findings, determinations and recommendations. The panel is formed by five members chosen from a trilateral roster of thirty panelists with expertise in law and international trade through a process of reverse selection - if there are only two countries

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[117] See Trakman, *supra* note 101 at 14 & 15. NAFTA, Article 2007 regulates Good Offices, Conciliation , and Mediation as Alternative Dispute Resolution methods.

[118] See Appleton, *supra* note 99 at 147; see also Glick, L.A., *Understanding the North American Free Trade Agreement,* (The Netherlands: Kluwer Law and Taxation Publishers, 1994) at 10.
Appendix I of the *Model Rules of Procedure for Chapter Twenty* mentions the Scientific Bodies for each country:

- Canada: The Royal Society of Canada
- Mexico: El Colegio Nacional
- United States: The National Research Council of the National Academy of Sciences, The National Academy of Engineering, and The Institute of Medicine.

See *NAFTA Secretariat, supra* note 100.

involved in the dispute - in order to ensure impartiality which consists in the selection that the defending country makes from the complaining one by choosing two panelists, and by the selection from this latter of two panelists from the defending country; the chair is selected by agreement within fifteen days of the delivery of a request for a panel, or by lot within five days if they did not agree in the selection. In case there are three countries party to the dispute, the two complaining parties would choose two panelists from the defending country, the defendant one would choose one panelist from each complaining country and the chair would be chosen through agreement.[119]

After the panelists have studied and evaluated the NAFTA dispute, they issue an initial, confidential report which bases its findings, determinations and recommendations on the arguments and submissions of the Parties as well as on the advice and reports of experts, in order to see if the measure was inconsistent with the NAFTA obligations and suggests a solution, or there is nullification or impairment. The initial report shall be issued ninety days after the last panelist is selected, as well as granting fourteen days to NAFTA Parties in order to comment on it. The final report is issued within thirty days of the initial report and it shall include separate opinions regarding matters that were not unanimously agreed upon and may not disclose the panelists that gave separate opinions. The disputing Parties transmit to the FTC the final report which may include any scientific report or written comments that a Party would like to append to it. If the FTC agrees with it, it shall be published within fifteen days of transmission.[120]

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[119] See Trakman, *supra* note 101 at 15-17. See also Canada, *NAFTA What's it all about?,* (Ottawa: External Affairs and International Trade Canada, 1993) at 96.
It is important to mention that panelists must follow the *Code of Conduct for Dispute Settlement Procedures under Chapters 19 & 20 of the NAFTA,* which establishes their responsibilities, duties, and obligations during the arbitration process in order to guarantee the integrity and impartiality of proceedings. The legal argument for this stage can be found at NAFTA, Article 2008: Request for an Arbitral Panel, Article 2009: Roster, Article 2010: Qualifications of Panelists, Article 2011: Panel Selection, Article 2012: Rules of Procedure which is the basis of the *Model Rules of Procedure for Chapter Twenty of the NAFTA*, Article 2013: Third Party Participation, Article 2014: Role of Experts, and Article 2015: Scientific Review Boards.

[120] See *ibid.* at 18. See NAFTA, *supra* note 65 at Article 2016: Initial Report & Article 2017: Final Report.

d. Post-Panel Proceedings

The implementation of the final report is the last step of Chapter 20's dispute settlement mechanism. Thus, as soon as the final report is received by the FTC, the NAFTA Parties try to agree on a resolution of the dispute, known as determination, which usually consists of the removal or non-implementation of the offending measure, or the measure causing nullification or impairment, based on the determinations and recommendations of the panel. In case of non-compliance of such determination, the nonconforming NAFTA Party may pay compensation instead. Furthermore, NAFTA benefits which belong to the same trade sector as the one affected by the dispute may be suspended to the nonconforming NAFTA Party if within thirty days of the receipt of the final report no agreement on the determination has been reached. If suspension of benefits of the same trade sector of the dispute is not effective, benefits relating to another sector may be suspended. Nonetheless, if the level of the suspended benefits is excessive, the FTC may establish a panel to determine, within sixty days or within other agreed period of time after the last panelist is selected, the scope of suspended benefits. Thus, this provision establishes a limit upon unilateral retaliation. It is important to mention that even if there is no legal argument establishing that final determinations of a NAFTA panel are binding, nor can they be enforced by domestic courts or affect a NAFTA Party's domestic law, they are always implemented.[121]

III. Comparison of the WTO's and the NAFTA's Chapter 20 Dispute Settlement Mechanisms

A. Similarities

Both dispute settlement mechanisms share similar procedural provisions influenced by GATT 1947, as the GATT 1947 influenced CUSFTA Chapter 18, the immediate precedent of NAFTA Chapter 20. These two chapters carry within them GATT Articles XXII and XXIII provisions. The NAFTA, in turn, has influenced the enlargement of the dispute

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[121] See *ibid.* See also Appleton, *supra* note 99 at 14. See NAFTA, *supra* note 65 at Article 2018: Implementation of Final Report and Article 2019: Non-Implementation and Suspension of Benefits. It is important to mention that special rules apply to the financial services trade sector.

settlement mechanism of the WTO which improved the jurisdictional system established under GATT 1947.[122]

Both the NAFTA Chapter 20 and WTO dispute settlement mechanisms are rule-oriented and incorporate an adjudicatory decision-making process and efficient systems of enforcement. This makes them different from former diplomatic negotiations which used political power to solve conflicts of application and interpretation of international agreements. The formal, legalistic approach of these dispute resolution mechanisms substitutes the non-conciliation-oriented and consensus-based approach that was established in the GATT dispute settlement mechanism prior 1995. Thus, both dispute settlement mechanisms grant rule-based decisions designed to provide efficiency and predictability.[123]

Both dispute settlement mechanisms involve only government-to-government processes, as their provisions are addressed exclusively to disputes among states. Nevertheless, under the WTO, "since the *Semi-Conductor Panel Report*[124], government measures regulated by GATT disciplines have been interpreted to include non-mandatory measures followed by private firms when the government has put into place a system of sufficient incentives related to the non-mandatory measures."[125] NAFTA Chapter 20 does not foresee any provision for solving disputes of private parties, which is consistent with the principles of international law. Nevertheless, environmentalists and other interest groups have been demanding some role for private parties through proposing that private parties should have a right to complain. This happened for the first time in the dispute over *The Matter of*

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[122] See Loungnarath, V. & Stehly, C., "The General Dispute Settlement Mechanism in the North American Free Trade Agreement and the World Trade Organization System: Is North American Regionalism Really Preferable to Multilateralism?" (2000) 39 J.W.T.L. 71 at 41.

[123] See Gantz, *supra* note 54 at 1031.

[124] See *Japan – Trade in Semi-conductors,* adopted on 4 May 1988, BISD 35S/116.

[125] Marceau, G., "NAFTA and WTO Dispute Settlement Rules: A Thematic Comparison" (1997) 31 J.W.T. 2 at 40.

Canada's Landing Requirements for Pacific Coast Salmon and Herring[126] in which the panel allowed representatives of interested groups to be there at the oral hearing stage. Consequently, it was concluded that parties are free to consult with interested groups during the course of a dispute but the preparation of the written pleadings is the sole prerogative of the involved Governments.[127]

As some NAFTA provisions are similar in scope and jurisdiction to the GATT provisions, the contending NAFTA Parties may claim that obligations have been considered under both agreements.[128] Both NAFTA and GATT have some overlapping subject matters, so their jurisdiction may be found parallel under NAFTA and the WTO dispute settlement mechanisms. Both agreements include provisions regarding agricultural trade, safeguards, sanitary and phytosanitary measures, trade in textiles and clothing, trade in services, investment measures, technical barriers to trade and the national security exception under Articles 2102 and XXI, respectively, whose language expresses a great deal of similarity.[129]

The panel proceedings of both dispute settlement mechanisms are similar, as the parties may present their arguments in written and oral forms; all proceedings are confidential in order to guarantee the non-exposure of panels to outside influence. The panel issues initial and final reports under both dispute settlement mechanisms.[130] Again, under both agreements, the imposition of sanctions for not implementing the final reports or for not agreeing upon a solution is similar, as both agreements allow the suspension of benefits such as voluntary compensation.[131]

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[126] See *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring,* (1989), CDA-89-1807-01, (Ch. 18 Panel).

[127] De Mestral, *supra* note 67 at 325.

[128] See Palmeter & Mavroidis, *supra* note 10 at 53.

[129] See Gantz, *supra* note 54 at 1037 & 1083.

[130] Specht, P., "The Dispute Settlement Systems of WTO and NAFTA – Analysis and Comparison" (1998) 27 Ga. J. Int'l & Comp. L. 57 at 122.

[131] See Specht, P., "The Dispute Settlement Systems of WTO and NAFTA – Analysis and Comparison" (1998) 27 Ga. J. Int'l & Comp. L. 57 at 123.

B. Differences

These two mechanisms for solving disputes differ in their execution. Whereas the Dispute Settlement Body – which constitutes thorough membership of the WTO - manages the WTO dispute settlement mechanism, the Free Trade Commission and Secretariat – created by the disputing parties - administer dispute settlement procedures. Within the NAFTA FTC, at least two members must be officials of the disputing parties' governments. On the contrary, as within the WTO DSB only two or a few WTO Member States are parties to a dispute, the DSB involves less impartial implementations of the dispute settlement mechanism under the WTO.[132] If consultations have failed, under the WTO dispute settlement mechanism the parties to the dispute may ask the DSB to establish a panel, whereas under the NAFTA Chapter 20 dispute settlement mechanism the parties ask for a meeting of the FTC ; thus, a request for a panel will only be made if they fail to arrive at a solution.[133]

Both dispute settlement mechanisms are different in handling the acceptance and implementation of reports. Chapter 20 panel reports request the parties to apply them just as suggestions for reaching a mutual solution. Under the DSU of the WTO, the DSB - and not the parties - is the one in charge of adopting the report by negative consensus and may not alter it; hence, the losing party may not block the adoption of such report.[134]

The time frames that run from the initiation of the dispute settlement mechanism until the release of the final report are different. NAFTA Chapter 20 encourages the panel to issue its report after not more than 255 days. The winning party is allowed to suspend benefits after another thirty days. Under the WTO, the standard time involved within the procedure is that of six months, with a maximum of nine, plus another sixty days for adopting the report. If there were an appeal, the whole mechanism would last fifteen months at most,

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[132] See Gantz, *supra* note 54 at 1049.

[133] See Specht, *supra* note 130 at 120.

[134] See *ibid.* at 122.

plus another maximum of thirty days for adopting the report of the Appellate Body.[135] Finally, "with up to nearly 16 months, the period until sanctions can be applied is comparatively long."[136] The WTO dispute settlement mechanism appears to be more automatic than that of NAFTA Chapter 20.[137]

Under both dispute settlement mechanisms, the parties may alter the given time limits, subject to some limitations, as under the WTO parties may establish the panel's terms of reference, but all other time provisions must be applied as stipulated. Under NAFTA Chapter 20, parties may change most of the stipulations, except those that establish the panel and application of sanctions.[138]

Another difference is that the NAFTA alternative dispute resolution provisions may not be requested at any time by a NAFTA Party. This differs strongly with the WTO, where mandatory consultations, voluntary good offices, conciliation and mediation may be requested at any time.[139] NAFTA Chapter 20 offers good offices, conciliation and mediation to help parties find a mutual solution to their dispute, for NAFTA is in favor of settling disputes amicably through the use of alternative dispute settlement mechanisms. The WTO goes further by establishing that good offices, conciliation or mediation may be requested by any party to the dispute at any time, even if the parties to the dispute have agreed upon a solution.[140]

Whereas NAFTA Chapter 20 allows the addition of nationals of the disputing NAFTA parties within the arbitral panels, which required five panelists of legal and non-legal proficiency in order to acquire a more reasonable evaluation of the matters, the WTO

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[135] See *ibid.* at 124.

[136] *Ibid.*

[137] See Marceau, *supra* note 125 at 44.

[138] See Specht, *supra* note 130 at 124.

[139] See Trakman, *supra* note 101 at 14 & 15; see also Gantz, *supra* note 54 at 1083

[140] See Marceau, *supra* note 125 at 52.

dispute resolution mechanism allows it up to the appeal stage. This could be advantageous, as national panelists may be familiar with the domestic laws of the NAFTA parties and may have a wider knowledge of GATT law. Whereas the Secretariat is in charge of selecting panelists within the WTO jurisdiction, the NAFTA parties exercise more control regarding selection of panelists. Hence, there have been significant delays in the selection of panelists in both WTO and NAFTA Chapter 20 dispute settlement mechanisms, since the disputing parties did not agree with the rosters of panelists, which could easily slow down the whole dispute resolution system.[141] Thus, it can be concluded that the method of selection is different between the two dispute settlement mechanisms, for whereas NAFTA Chapter 20 uses a reverse selection by agreeing upon the chair of the panel at first and later on upon two citizens of the other party, the DSU of the WTO establishes that the disputing parties should agree regarding the panelists proposed by the WTO Secretariat. Each dispute settlement mechanism, though, includes a safety hatch that would avoid obstruction of the process.[142]

In addition, there is *no appeal stage within NAFTA Chapter 20.* On the contrary, the *WTO DSU provides an appeal through its Appellate Body* whose purpose is to review panel decisions and whose creation "is the most definitive move in the direction of legalism."[143] The AB determines the inconsistency of an action of a Member State towards a covered trade agreement, recommending the non-complying Member to remove its violation by changing some provisions of its domestic law. In case of non-compliance of such determination, the non-conforming party may agree upon compensation, and, if no compensation is reached, the injured WTO Member may retaliate against the violating Member by suspending tariff concessions or other obligations. Finally, the injured Member may insist on formal DSU arbitration when it does not agree with the level or amount of

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[141] See Gantz, *supra* note 54 at 1084, 1087 & 1088. There are two significant cases under NAFTA Chapter 20 dispute settlement mechanism: *Agricultural Products Tariffication* and *Broom Corn Brooms.* One significant case under WTO is the *Dairy Product Export Subsidies.*

[142] See Specht, *supra* note 130 at 121.

[143] *Ibid.* at 80.

suspension, or argues that the principles and procedures for suspending concessions have not been followed by the complaining party.[144]

Indeed, there is no appeal within the NAFTA Chapter 20 dispute settlement mechanism, so the implementation of the final report is the last step. The NAFTA parties try to agree upon a resolution of the dispute, known as determination, which consists of the removal or non-implementation of the measure that violates the agreement or that causes nullification or impairment of benefits. In case of non-compliance of such determination, the non-conforming NAFTA party may pay compensation and, moreover, the NAFTA prevailing party may take non-manifestly excessive retaliation. NAFTA benefits within the same trade sector or within a trade sector unrelated to the dispute may be suspended. Thus, it can be concluded that NAFTA panel final determinations are binding, as they should always be implemented as well as exempt from appeal.[145] We consider NAFTA final determinations as *res judicata*[146] or *thing adjudged* for which there can be no appeal, as they have been already decided upon, even if they are only suggestions for a mutually agreed-upon solution.[147] Nevertheless, even if NAFTA panel decisions are binding, there is *stronger pressure for observance under the WTO,* as established by Article 21.1 of the DSU which recognizes that the timely observance of rulings or recommendations dictated by the DSB is crucial in order to guarantee effectiveness in the solution of disputes and benefit all WTO

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[144] See Gantz, *supra* note 54 at 1054-1057[emphasis added]. It is important to mention that the WTO panel decisions are not considered as *things adjudged* nor constitute *res judicata,* as they accept recourse against them.
Res judicata, matter decided, thing decided by a court which has issued a final decision against which has issued a final decision against which there is virtually no recourse. In order for the Decision to have effect in other actions, the parties, thing, cause of action, and capacity of the parties must be the same in both actions. Cabanellas, G. & Hoague, E.C., *Diccionario Jurídico Español-Inglés Butterworths/Buttewrworths Spanish-English Legal Dictionary,* at *s.v.* "res judicata" (Toronto: Butterworth Legal Publishers, 1991).

[145] See Trakman, *supra* note 101at 18; see also Appleton, *supra* note 99 at 14.

[146] *Res judicata* is defined as thing adjudged of what has been decided by a final judgment from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on the appeal. The doctrine of *res judicata* precludes the litigation of a claim which was litigated and adjudicated or could have been litigated or adjudicated in a former suit between the same parties and involving the same cause of action. Dahl, H.S. & Marull, H.M., *Dahl's Law Dictionary/Diccionario Jurídico,* at *s.v.* "res judicata" (Buffalo: William S. Hein & Co., Inc., 1992).

[147] See Specht, *supra* note 130 at 122.
NAFTA Chapter 20 is a more diplomatic and negotiating dispute settlement mechanism than that of the WTO. See Loungnarath, *supra* note 122 at 43.

Members.[148] It might be possible that NAFTA Chapter 20 does not foresee an appeal stage because of the large influence of the parties within the process, as they may delay a solution, or they may find another solution different from that dictated by the panel.[149]

An important point to note is the jurisprudence created by the WTO on a case-by-case basis, as prior WTO panel decisions create legitimate expectations and precedents among WTO Member States where they are applicable to a specific dispute. Thus, these decisions are valuable to both future WTO and Chapter 20 panels. Indeed, even if trade disputes are brought before the NAFTA Chapter 20 panels, they may rely on pre-1995 GATT and WTO panel decisions which are not intended to make law but may become the "dominant body of international trade decisional law, except where purely NAFTA questions are at issue."[150] Thus, if NAFTA parties do not want to create a WTO precedent, they would be better to bring a case before the NAFTA Chapter 20 dispute settlement mechanism, as it would be more difficult if the WTO were to base its decisions on precedents created by NAFTA Chapter 20 decisions.[151]

The WTO dispute settlement mechanism will offer special and differential consideration to the least-developed countries[152] at all stages of the dispute, according to Art. 24.1 of the DSU. In other words, one peculiar characteristic of the WTO dispute settlement

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[148] See Gantz, *supra* note 54 at 1084 [emphasis added].

[149] See Specht, *supra* note 130 at 123.

[150] Gantz, *supra* note 54 at 1090.
See also *United States-Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, (1996), WTO Doc. No. WT/DS33/AB/R at 14 which establishes that the AB does not consider that "law making" is the intention of DSU Article 3.2 which establishes the following:
2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation or public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

[151] See *ibid.* at 1090.

[152] Article XVIII of the GATT defines developing countries as: "those contracting parties the economies of which can only support low standards of living and are in the early stages of development." See Cameron & Campbell, *supra* note 18 at 252.

mechanism is the preferential treatment it shows towards less-developed countries for solving trade disputes, mainly if their disputing party is a developed country. On the other hand, NAFTA grants the treatment of reciprocity to its three Members, so it would be disadvantageous for Mexico to solve its disputes under NAFTA, as Canada and the US, both developed countries, would not give Mexico a preferential and special treatment of least-developed country for solving disputes.[153] Since developing nations have the right to a panel, the fact that a panel will be established and that it will dictate its decision generates confidence in the dispute settlement mechanism of the WTO.[154]

Another thing to consider is the amount of political influence surrounding these agreements. Whereas under the WTO there is limited political influence because of the stipulation of negative consensus, under NAFTA Chapter 20 there is much more political influence, for there may be interventions at any time. This political influence may reflect, therefore, the continuing subordination of law to politics.[155] A case heard before the WTO may increase the support of more non-NAFTA nations, as the WTO involves 143 Member States, whereas NAFTA involves only 3 WTO Member States. Thus, a WTO case may involve many interested and concerned WTO Member States with the subject matter in dispute that may enhance the political pressure on the defending party. Thus, the participation of many parties makes the settlement less costly. "One NAFTA party may reach agreement with another NAFTA party if the undertakings apply only to the other NAFTA party, and not to a larger group of WTO member nations."[156] A country in a politically inferior position may opt for the WTO dispute settlement mechanism, which seems to better protect the interests of a weak party to the dispute. Hence, the weaker party

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[153] See Van Dijck, *supra* note 17 at 85.

[154] See Cameron & Campbell, *supra* note 18 at 263.

[155] See Specht, *supra* note 130 at 125.

[156] Gantz, *supra* note 54 at 1088.
An example within this context is the *Bananas* dispute, in which many WTO Member States, which were non-parties to the dispute, criticized the U.S. because of the taken retaliation prior to the completion of WTO proceedings. For more information, see *Bananas: At WTO Meeting, Members Blast U.S., Urge Settlement of Dispute,* Int'l Trade Daily (BNA) (9 March 1999).

may feel protected by the multilateral dispute settlement mechanism which offers a reinforcement of its jurisdictional nature.[157]

[157] See Loungnarath, *supra* note 122 at 40.

Chapter II: Choice of Forum for Trade Disputes within the North American Free Trade Area: WTO vs. NAFTA's Chapter 20

I. NAFTA Rules as to Choice of Procedure

A. Article 2005 of the NAFTA (Chapter 20)

It is important to note that the GATT does not establish measures of choice of forum in case of disparity between its provisions and another free trade agreement. On the contrary, since NAFTA was negotiated after GATT, NAFTA does establish provisions as to what would happen in case Canada, the US and Mexico were able to settle disputes in both fora. As it stands, the NAFTA Parties may elect either WTO/GATT or NAFTA dispute settlement mechanisms to solve disputes that arise under both agreements, and once the selection of forum has been made the decision is final, for the choice of one forum excludes the use of the other one.[158] Many trade disputes among Canada, the US and Mexico may take place under both GATT and NAFTA provisions, and there may be some overlap. If that is the case, the dispute may be settled in either forum at the complaining party's discretion.[159]

1. NAFTA, Article 2005, paragraph 1

The present author shall analyze, paragraph by paragraph, what NAFTA Article 2005 establishes. Paragraph 1 sets out the following:

> Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining party.[160]

This paragraph establishes the complaining party's discretional faculty in relation to solving trade disputes that arise between NAFTA and GATT, as well as between NAFTA and any agreement negotiated under GATT provisions. It is important to mention that many

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[158] See Folsom, *supra* note 74 at Chapter VII-13 & 14; see also NAFTA, *supra* note 65 at Article 2005(6); see also Abbott, *supra* note 66 at 3.

[159] See Sohn, *supra* note 93 at 3.

[160] NAFTA, *supra* note 65 at Article 2005(1).

provisions established under GATT may also be established under NAFTA; therefore, the complaining party may argue that obligations under both agreements have been violated. Nevertheless, one must consider certain exceptions to this general rule which are provided in paragraphs 2, 3 and 4, to be analyzed as follows.[161]

2. NAFTA, Article 2005, paragraph 2

Paragraph 2 states the following:

> Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement.[162]

This paragraph considers the option of settling the dispute of the NAFTA complainant party against another NAFTA Party under GATT in matters that are considerably similar to those established by NAFTA. Thus, the most important point here is the notification of intention that the complainant party has to deliver to the third NAFTA party that is not involved in the dispute, so that this third party may consult with the complainant NAFTA party as to which forum they would like to use. *If neither the complainant nor the third NAFTA party can agree upon which forum to use, the dispute shall be solved under NAFTA dispute settlement procedures.*[163] The present author believes that this provision establishes *compulsory dispute settlement under NAFTA procedures*, in case the complaining and the third parties cannot agree upon choice of forum. Yet, it should be emphasized that this

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[161] See Trakman, *supra* note 101 at 19.
It is important to define what discretion means in order to better understand how the complaining party settles disputes discretionarily. Thus, *discretionary power* is a public official's power or right to act in certain circumstances according to personal judgment and conscience. Garner, *supra* note 22 at s.v. "discretionary power".

[162] NAFTA, *supra* note 65 at Article 2005(2). See Kalas, P.R., "International Environmental Dispute Resolution and the Need for Access by Non-State Entities" (2001) 12 Colo. J. Int'l Envtl. L. & Pol'y 191 at 227; see also Winham, G.R., *Dispute Settlement in NAFTA and the FTA, in Assessing NAFTA: A Trinational Analysis,* 251 The Fraser Institute 1992, online http://www.fraserinstitute.ca/publications/books/asses<uscore>nafta/dispute.html for more information on this topic.

[163] See Trakman, *supra* note 101 at 20 [emphasis added].

provision treats issues that are considerably similar to the available provisions for the complaining party under NAFTA.

3. NAFTA, Article 2005, paragraph 3

The following is prescribed by paragraph 3:

> In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.[164]

This paragraph gives the right to the responding NAFTA party to propose to the complaining NAFTA party, through written means, a solution to its dispute – between NAFTA and GATT or between NAFTA and any agreement negotiated under GATT provisions - under NAFTA regarding environmental and conservation agreement issues foreseen under NAFTA Article 104. Thus, regarding that matter, the complaining NAFTA party may solve the dispute exclusively under NAFTA. The two terms of the present paragraph are a bit confusing: on one hand it establishes that the complaining NAFTA party *may* have recourse to dispute settlement procedures solely under NAFTA; on the other hand, it establishes that the complaining NAFTA party may do so *solely or exclusively* under NAFTA. Hence, the present author considers this provision to be somewhat paradoxical, for whereas NAFTA does not grant the complaining NAFTA party an obligation but rather a right to solve the dispute under NAFTA, the paragraph at issue imposes the obligation of bringing the dispute absolutely under NAFTA. However, the author believes that the spirit of the law was to grant the responding NAFTA party in issues of environment and conservation the faculty of settling those matters under NAFTA and therefore impose upon the complaining party the obligation to use *compulsory dispute settlement under NAFTA procedures.*[165]

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[164] NAFTA, *supra* note 65 at Article 2005(3).

[165] NAFTA, *supra* note 65 at Article 104 establishes the following regarding environmental and conservation agreements:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

4. NAFTA, Article 2005, paragraph 4

The following is set out in paragraph 4:

> In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures);
>
> a. concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
>
> b. that arises factual issues concerning the environment, health, safety or conservation including directly related scientific matters,
>
> where the responding Party requests in writing that the matter be considered under this Agreement the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.[166]

This provision foresees that the responding NAFTA party has the right to insist, through a written petition, that a dispute referring to sanitary and phytosanitary measures and standard related-measures, either between NAFTA and GATT or between NAFTA and any agreement negotiated under GATT provisions, be solved through NAFTA dispute settlement procedures in case both complainant NAFTA parties choose the GATT forum.[167]

> a. the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979,
>
> b. the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,
>
> c. the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or
>
> d. the agreements set out in Annex 104.1,
>
> such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.
>
> 2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

It is important to mention that the word "may" within paragraphs 3 and 4 of NAFTA Article 2005 involve what is called *soft law*, which is defined as the following: 1. Collectively, rules that are neither strictly binding nor completely lacking in legal significance. 2. Int'l law. Guidelines, policy declarations, or codes of conduct that set standards of conduct but are not directly enforceable. Garner, B.A., *Black's Law Dictionary*, 7th ed. (Minneapolis: West Group, 1999) at 1397. On the other hand, the word "solely" within the same paragraphs 3 and 4 of the same article involve what is called *hard law* which is considered as binding and compulsory.

[166] NAFTA, *supra* note 65 at Article 2005(4).

[167] See Trakman, *supra* note 101 at 20.

We can appreciate that this provision seeks to give priority to the environment, life, health, safety, conservation and standardization under NAFTA. Consequently, the author believes that the term s*olely* establishes that the spirit of the law was to determine the obligation of the complainant NAFTA party to bring the dispute under NAFTA, thereby establishing *compulsory dispute settlement under NAFTA procedures*, even if this provision establishes that the complainant NAFTA party *may* solve the dispute under NAFTA.

5. NAFTA, Article 2005, paragraph 5

Paragraph 5 states the following:

> The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or 4 to the other Parties and to its Section of the Secretariat. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.[168]

It is the duty of the complaining NAFTA party to initiate the NAFTA Chapter 20 dispute settlement mechanism before the Free Trade Commission - for settling disputes between NAFTA and GATT, or between NAFTA and any agreement negotiated under GATT provisions that have arisen from environmental and conservation agreements as well as from sanitary and phytosanitary measures or standards-related measures concerning life, health, safety, environment and conservation - once the responding party has delivered a replica of such request to its national section of the Secretariat as well as to the other NAFTA parties within fifteen days.

The present author is of the view that this paragraph should be reformed to save time and favor judicial economy, for there is no need to start dispute settlement procedures regarding sanitary and phytosanitary measures or standards-related measures concerning life, health, safety, environment and conservation until the complaining party is sure that the respondent one has delivered its copy of request of settlement of the dispute under NAFTA before expiry of the fifteen-day period.

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[168] NAFTA, *supra* note 65 at Article 2005(5).

6. NAFTA, Article 2005, paragraph 6

The following is prescribed by paragraph 6:

> Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.[169]

The general rule set up for NAFTA Governments regarding choice of forum recognizes that once the NAFTA Chapter 20 dispute settlement mechanism has started before the Free Trade Commission, or once the dispute has been initiated under GATT, the chosen forum necessarily excludes recourse to the other one, except for disputes between NAFTA and GATT, or between NAFTA and any agreement negotiated under GATT provisions that has arisen from environmental and conservation agreements as well as from sanitary and phytosanitary measures or standards-related measures concerning life, health, safety, environment and conservation.

The author considers that, depending on the subject matter of the dispute, there may or may not be NAFTA priority over the WTO. Hence, the author cannot pronounce a general rule as to whether or not there will be exclusion of the WTO, as each case must be considered separately.

7. NAFTA, Article 2005, paragraph 7

Paragraph 7 establishes the following:

> For purposes of this Article, dispute settlement proceedings under the GATT are deemed to be initiated by a Party's request for a panel, such as under Article XXIII:2 of the General Agreement on Tariffs and Trade 1947, or for a committee investigation, such as under Article 20.1 of the Customs Valuation Code.[170]

This paragraph sets up what is necessary to begin a dispute settlement mechanism under GATT after it has been chosen as the appropriate forum to solve the dispute. Thus, it is

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[169] NAFTA, *supra* note 65 at Article 2005(6).

[170] NAFTA, *supra* note 65 at Article 2005(7).
It is important to mention that GATT, Article XXIII:2 deals with nullification and impairment and that Article 20.1 of the Customs Valuation Code deals with special and differential treatment for developing country Members regarding customs valuation.

essential for a party to the dispute to ask for a panel or for a committee investigation, based on GATT Article XXIII:2 and Article 20.1 of the Customs Valuation Code.

B. Article 104 of the NAFTA

This article sets out an exception to the general rule included in Article 103(2), so in case there is a dispute regarding an inconsistency between the obligations taken under NAFTA and the obligations taken under some specific environmental and conservation agreements, the obligations taken under the latter environmental and conservation agreements shall prevail and would therefore have supremacy over NAFTA. However, in case a party can choose from among the same effectual accessible means for complying with those obligations in the same equal and reasonable manner, the party may choose the option that may be the least inconsistent with the other provisions of NAFTA.[171] The environmental and conservation agreements which may prevail over NAFTA are the following:

1. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979.
2. *Montreal Protocol on Substances that Deplete the Ozone Layer,* done at Montreal, September 16, 1987, as amended June 29, 1990.
3. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States.
4. *Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, October 28, 1986.
5. *Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, August 14, 1983.[172]

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[171] See Sohn, *supra* note 93 at 4.

[172] See Weiler, *supra* note 109 at 179; see also NAFTA, *supra* note 65 at Article 104(1) & Annex 104.1. There are other NAFTA provisions that define the relationship of NAFTA with GATT, such as Article 301(1) of the NAFTA, which reads as follows regarding National Treatment:
Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the GATT, including its interpretative notes, and to this end Article III of the GATT and its interpretative notes,

Article 104 permits a party to impose trade restrictions in order to achieve international environmental goals regarding specific international environmental agreements, meaning that those agreements take precedence over NAFTA to the extent of the inconsistency.[173]

II. Relationship between the NAFTA and the GATT

A. NAFTA Rules on Priority[174]

The relationship between the NAFTA and the GATT/WTO is quite complex. The uncertainty of this relationship might reflect the political tensions that NAFTA negotiators had to face, because on one hand NAFTA was viewed as a means of speeding up the regional North American integration, and on the other hand NAFTA negotiators were conscious of some worries of GATT/WTO Members regarding attempts by certain regions to increase the benefits they could obtain by extending regional predilections.[175]

It appears as though NAFTA negotiators were uncertain whether or not to agree upon legal priority of NAFTA or the WTO, as this would entail the choice of granting a superior degree of consideration and concern to regional as opposed to multilateral interests. Even

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or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.

Another provision that makes reference to the relationship of NAFTA and GATT is Article 710 of the NAFTA which establishes a rule that displaces Article 301 of the NAFTA and its subsequent incorporation of Article III of the GATT regarding NAFTA sanitary and phytosanitary measures (SPS), so we can conclude that these measures are not regulated by neither NAFTA Article 301 nor by GATT Article XX(b), which allows WTO Members to adopt discriminatory measures that are necessary to protect plant, animal, and human life and health. NAFTA Article 710 does not apply Article XX(b) of the GATT; this means that the parties consider that greater flexibility is needed in the adoption of SPS measures, in light of the WTO decision of the Shrimp – Turtle case. See Kalas, *supra* note 162 at 227 for more information.

NAFTA, Article 710 reads as follows:
Articles 301 (National Treatment) and 309 (Import and Export Restrictions), and the provisions of Article XX(b) of the GATT as incorporated into Article 2101(1) (General Exceptions), do not apply to any sanitary or phytosanitary measure.

[173] See Kalas, *supra* note 162 at 227.

[174] *Priority* means 1. The status of being earlier in time or higher in degree or rank; precedence. 2. An established right to such precedence. Garner, *supra* note 22 at *s.v.* "priority".

[175] See Weiler, *supra* note 109 at 178.

if NAFTA negotiators had been subject to determining the hierarchy of these interests, they seem not to have determined the level of importance of these two trade agreements, or if they did, it was executed uncertainly.[176]

Since NAFTA was conceived as a means of regional integration in North America, negotiators thought it should be consistent with its continental political and social interests. Then, if NAFTA were placed below the WTO Agreement rules, regional specific interests could be endangered by the superiority or supremacy of the multilateral trade rules of the WTO. Therefore, there are *political and social reasons for supporting priority of the NAFTA*. Even though NAFTA negotiators were conscious that some GATT/WTO Members were worried about the intentions of certain countries of broadening regional preferences, they did not clearly establish a multilateral legal preference within the NAFTA, as this would be objected to by social and political interest groups, and therefore the conclusion of the NAFTA would have been jeopardized.[177]

Hence, the NAFTA/WTO hierarchy of norms is uncertain and unknown, and it may be some time before anyone arrives at a definitive answer to this relationship. Abbott has clearly established this fact by declaring the following:

> [B]ecause of the number of contextual factors involved in defining this relationship, *it may be some years before an authoritative definition of the relationship emerges,* whether through action taken by the NAFTA Parties to expressly establish the relationship, or through an accumulation of dispute settlement panel opinions that may establish a common law of interpretation.[178]

1. Article 103 of the NAFTA

a. NAFTA, Article 103, paragraph 1

NAFTA Article 103 in its first paragraph establishes the following:

> 1. The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party. [179]

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[176] See *ibid.* at 177.

[177] See *ibid.* at 177 & 178 [emphasis added].

[178] Abbott, *supra* note 66 at 107 [emphasis added].

[179] NAFTA, *supra* note 65 at Article 103(1).

This article states that, even though NAFTA confirms obligations among NAFTA Parties under GATT, NAFTA shall prevail over GATT to the extent of any inconsistency.[180] So, whereas NAFTA recognizes and confirms each country's rights and obligations under GATT 1947 and other international agreements, it creates a general rule of NAFTA supremacy.[181] Indeed, *NAFTA takes priority over GATT* and has a larger scope of coverage, as it "reflects a political bias favoring more direct regional concerns over more diffuse global concerns; in NAFTA Article 103, the parties affirm their existing rights and obligations to each other under GATT, but provide that NAFTA prevails over GATT to the extent that there are inconsistencies between the two agreements."[182] The NAFTA is more detailed than the GATT and has a broader scope of coverage, such as within the investment measures sector. It seems that the NAFTA negotiators decided to give priority to NAFTA over GATT due to the fact that NAFTA's rules would be more simply applied to actual circumstances. Therefore, it might be reasonable to think that the hierarchy of norms determined by NAFTA reveals a political bias which may favor regional over global concerns.[183]

NAFTA Article 103 is not an optional, discretionary provision but mandatory between parties. Hence, as the Parties have agreed upon giving priority to NAFTA, they are restricted from bringing claims against each other within the GATT because of GATT rules that conflict with NAFTA rules.[184] "The Parties should interpret the NAFTA priority rule so as not to require them to apply NAFTA rules to third countries in the event of a conflict with GATT rules concerning the same subject matter."[185] It seems that the NAFTA Parties

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[180] See Weiler, *supra* note 109 at 180.

[181] See Folsom, *supra* note 74 at Chapter III-8. This rule of supremacy is reinforced by Annex 300-B of the NAFTA which deals with Textile and Apparel Goods, in case there are inconsistencies with the Multifiber Arrangement Regarding International Trade in Textiles. Annex 608.2 of the NAFTA establishes that there is no supremacy of NAFTA over the Agreement on an International Energy Program.

[182] Kalas, *supra* note 162 at 226 [emphasis added].
[183] See Abbott, *supra* note 66 at 25.
[184] See *ibid.* at 3 [emphasis added].

[185] *Ibid.* at 26. It should be mentioned that the NAFTA parties should interpret the NAFTA rule on priority to the extent that they would not require the application of NAFTA rules to third countries in case there is a conflict with GATT rules regarding the same subject matter. This is based on Article 30 of the *Vienna*

agreed that the regional NAFTA rules would take precedence over GATT rules as between themselves, and that this priority rule would extend totally or partially towards WTO rules. However, it would be interesting to find out whether or not NAFTA Parties have breached the GATT by having accorded the NAFTA priority over GATT through Article 103 of NAFTA.[186]

It is clear that this article sets up NAFTA's priority over existing agreements between the parties. Nevertheless, it is very complex to determine whether or not NAFTA prevails over the new WTO Agreement, which came into force after NAFTA. Abbot has commented that "establishing the legal priority of the substantive rules of NAFTA and those of the new WTO is a matter of considerable complexity. A number of contextual factors are involved in defining this relationship, and it may be some years before an authoritative definition of the relationship emerges."[187]

The problem of NAFTA priority lies in whether or not there is a legal distinction between GATT 1994, incorporated as a Multilateral Trade Agreement in the WTO Agreement which is binding on all WTO Members, and GATT 1947. There may be two possibilities:

1) If we consider *GATT 1994 as identical to GATT 1947*, the WTO Agreement would incorporate GATT 1947 into its legal framework, and would therefore have a connection and continuity between GATT 1947 and GATT 1994. Thus, as the GATT 1994 was in force when the NAFTA Parties signed the NAFTA, we can conclude that the latter-in-time treaty is the NAFTA and accordingly has priority over GATT 1994.[188]

Convention on the Law of the Treaties which establishes that when a state enters the same subject matter, the prior treaty continues to govern as between that state and states which are not parties to the later treaty.

[186] See *ibid.* at 25.

[187] *Ibid.* at 26.

[188] See Weiler, *supra* note 109 at 180 [emphasis added].

2) If we consider *GATT 1994 as legally distinct from GATT 1947*, as established in the *WTO Agreement in Article II:4*, the GATT 1994, being part of the WTO Agreement and which entered into force on January 1995, there would be no NAFTA priority rule with respect to former agreements, as the latter-in-time treaty lies in GATT 1994 and not in GATT 1947. In fact, the *legal distinction* that is made between GATT 1994 and GATT 1947 lies not in splitting the connection and continuity between the rights and obligations of the parties of the two agreements, but in helping the institutional transition between the GATT and the WTO, as some nations may choose to continue as parties only to the GATT 1947 – at least for a temporary period in which two legally distinct agreements might have been needed – and they may choose not to become parties either to the WTO or to the GATT 1994.[189]

For the above-mentioned reasons, it is essential to know what Article II: 4 of the Agreement Establishing the World Trade Organization establishes the following regarding the legal distinction between GATT 1947 and GATT 1994:

> 4. The General Agreement on Tariffs and Trade 1994 as specified in Annex 1A (hereinafter referred to as "GATT 1994") is *legally distinct* from the General Agreement on Tariffs and Trade, dated 30 October 1947, annexed to the Final Act Adopted at the Conclusion of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, as subsequently rectified, amended or modified (hereinafter referred to as "GATT 1947").[190]

It can be concluded that it is possible that the parties to the WTO Agreement have decided to pursue the prior practices of GATT 1947, and only parties to the GATT 1947 may become original Members of the WTO. Hence, from a *contextual point of view*, GATT 1994 is a continuity of the GATT 1947. GATT 1994 is a successor agreement that could displace the GATT 1947. Nevertheless, from a *technical point of view*, that succession may not be interpreted in such a way as to consider GATT 1994 an innovative and diverse

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[189] See *ibid.* at 180 & 181.

[190] *Agreement Establishing the World Trade Organization,* (Marrakesh: WTO, April 1994) [herinafter WTO Agreement], at Article II:4 of the online: http://www.wto.org (date accessed: 27 March 2002) [emphasis added].

agreement from GATT 1947 for NAFTA Article 103 intentions. [191] Therefore, NAFTA would continue to have priority over GATT 1994 rules and WTO rules, including the new area agreements of the GATS and TRIPS, technical standards and agriculture, but there may still be difficulties within the WTO rules unforeseen within the scope of GATT 1947 and that constitute non-continuous extensions of GATT 1994 and Tokyo Round rules. In other words, as supplemental agreements embody, in some cases, practices of GATT 1947 and Tokyo Round Agreement rules, in other cases there are difficult, gray areas surrounding some WTO agreements that complement the GATT 1994. Therefore, these agreements that include new areas may become a strong argument for not applying the NAFTA rule on priority of Article 103. The present author shall conclude, finally, that a definite deduction on the NAFTA-WTO/GATT priority may be made based on a set of cases, but this may take a long time to achieve.[192]

b. NAFTA, Article 103, paragraph 2

Paragraph 2 of the same NAFTA Article 103 states the following:

> In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.[193]

This paragraph is difficult to interpret in seeking to establish whether or not the GATT is included within the term *other* agreements, or if it makes reference to other agreements that Canada, the US and Mexico may have signed or may yet sign. It is important to mention that some commentators say it is unclear whether the GATT is included within those agreements, or if paragraph 2 has only included the rest of the agreements that do not

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[191] The three NAFTA Parties, that is, Canada, the U.S., and Mexico, are parties to the WTO(GATT 1994). See Abbott, *supra* note 66 at 27 & 28 [emphasis added].

[192] See Weiler, *supra* note 109 at 181.
It is important to mention that some WTO Agreements, such as the Agreement on Technical Barriers to Trade (TBT) may contain improvements of the Tokyo Round Agreements, such as the Technical Standards Code, so regarding matters of legal priority, the latter-in-time agreement general rule will prevail: that is, the successor agreement continues the earlier one, and they should be analyzed in the same basis as the GATT 1947 and GATT 1994. See Abbott, *supra* note 66 at 106.

[193] NAFTA, *supra* note 65 at Article 103(2).

include the GATT.[194] Nevertheless, the present author does consider that the intention of legislators was likely to include the GATT within the term *such other agreements,* and so in case any dispute arises from an inconsistency between NAFTA and GATT or between NAFTA and other agreements Canada, Mexico and the US have signed or may eventually sign, the provisions of NAFTA shall prevail, except where otherwise established under NAFTA. The present author notes that this term *except* is found in NAFTA Article 104 and Article 2005. Once again, one can perceive a hierarchical power of NAFTA over GATT, as the "overarching principle of NAFTA is that the Parties must submit to compulsory dispute settlement."[195]

The uncertainty of the NAFTA-WTO/GATT priority has not yet been solved by contexts outside Article 103 rules of priority. Considering NAFTA Article 301(1), it can be said that the express incorporation by the Parties of GATT Article III involves the provision of a GATT successor agreement.[196] Nevertheless, it should be noted that NAFTA Article 301(1) does not clearly nor expressly establish that NAFTA would prevail over any latter-in-time agreements, but expressly alludes to a *successor agreement* to the GATT, which reads as follows:

> 1. Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade (GATT), including its interpretative notes, and to this end Article III of the GATT and its interpretative notes, or any equivalent provision of a *successor agreement* to which all Parties are party, are incorporated into and made part of this Agreement.[197]

Thus, it is possible that NAFTA negotiators had meant to give priority to the NAFTA over other Uruguay Round agreements, for they had alluded to such *successor agreements* in NAFTA Articles 301(1) and 103. It might be that NAFTA negotiators drafted Article

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[194] See Sohn, *supra* note 93 at 3.

[195] De Mestral, *supra* note 67 at 321 [emphasis added].

[196] See Weiler, *supra* note 109 at 181.

[197] NAFTA, *supra* note 65 Article 301.1 [emphasis added].

301(1) to also clarify and establish the NAFTA rules on priority over the GATT 1994, but this did not resolve the ambiguity of NAFTA Article 103.[198]

Canadian Agricultural Tariffs case[199]

This case is the first dispute solved under NAFTA Chapter 20, involving a NAFTA/WTO conflict between Canada and the US regarding precedence of NAFTA over WTO Agreements. The dispute arose because of the imposition of tariffs by Canada towards some US agricultural products, since Canada was on the one hand required by the WTO Agreement on Agriculture to eliminate its agricultural quotas by tariffication so that tariffs replaced quotas, prior the entry into force of the NAFTA. On the other hand, the NAFTA, which entered into force on January 1994, required its parties *not* to raise tariffs even on agricultural products. The US therefore objected Canada's new tariffs imposition on agricultural products originating from the US. Canada alleged that the WTO Agreement on Agriculture required tariffication of quotas and that it was not permitted to do so under NAFTA, as it *retained some rights* to control agricultural imports negotiated under GATT. The US alleged that the WTO Agreement authorized tariffication exclusively and that it did not comply with quotas tariffication. Thus, the US added that Canada could have eliminated its quotas without imposing tariffs that violated both the NAFTA and the WTO Agreement on Agriculture.[200] "The US further argued that the rights that Canada retained under the GATT were limited to those that had been exercised when the NAFTA entered into force, and that Canada could not thereafter adopt new measures that were inconsistent with the NAFTA".[201]

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[198] See Weiler, *supra* note 109 at 180, 181, & 182.

[199] *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (Canada v. United States)* (1996), CDA-95-2008-01 (Ch. 20 Panel), online: http://www.sice.oas.org/DISPUTE/nafta/english/ca95081a.asp (date accessed: 18 March 2002) [hereinafter Canadian Tariffs NAFTA Panel Report].

[200] See De Mestral, *supra* note 67 at 367; see also Weiler, *supra* note 109 at 184 & 185 [emphasis added].

[201] Weiler, *supra* note 109 at 184.

The NAFTA Panel had to decide if Canada's retention of rights under the GATT granted the right to take action under an old GATT rule. The NAFTA Panel established the following:

> [T]he interpretation of these agreements is complicated by a number of factors. The NAFTA incorporates obligations from other agreements including both the CUSFTA and the GATT. The terminology used in the drafting of the various provisions, both within and across these agreements, is not marked by uniformity or consistency. Words like existing, retain, or successor agreements, appear in some contexts yet do not appear in others where their presence may have been thought apposite. As a result, the Panel has been faced not only with the task of determining meaning from the presence of certain words, but also with the more difficult task of discovering meaning from the absence of particular words.[202]

The panel finally determined that the word "retain" within NAFTA does not mean a provisional limitation over Canada's exercise or rights, since a retained right may be exercised in the future. Thus, Canada's retained rights under GATT could include other future rights and not only those exercised prior to NAFTA; therefore, Canada could tarifficate its agricultural quotas, for Canada retained its rights under GATT in order to impose agricultural restraints. The Panel also observed that it is hard to interpret NAFTA's terminology, which tries to clarify that the guidelines of GATT 1994 are to be included into the NAFTA. To this end, NAFTA refers to the term *successor agreement.*[203]

One cannot decisively conclude that the above case reflects NAFTA's precedence over the GATT 1994, as "the Panel effectively confirms that this matter will require further sorting out in the context of specific cases."[204] The importance of this panel report lies in the possibility that "the relationship of NAFTA and the WTO agreements will depend on the context and the nature of the obligations undertaken in that context. The latter-in-time rule may be dispositive but it is clearly not enough to determine each case."[205]

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[202] Canadian Tariffs NAFTA Panel Report at para. 123.

[203] See Weiler, *supra* note 109 at 185 [emphasis added].

[204] *Ibid.* at 186.

[205] De Mestral, *supra* note 67 at 367.

B. General Rule of Priority Regarding Treaties that Regulate the Same Subject Matter

1. Article 30.3 of the Vienna Convention on the Law of Treaties

While both NAFTA and the WTO Agreements are arrangements among states, and since their relationships are governed by international law, they are considered treaties within the scope of the *Vienna Convention on the Law of Treaties.*[206] Even though the relationship between them is uncertain, it can be said that, from a legal point of view, their relationship may be analyzed by the circumstances in which both treaties were made, their texts and the rules of international law that regulate the *relationship between treaties that foresee identical or similar subject matter.*[207] The rule that may mark this relationship is the rule that is based on the later-in-time principle.[208]

An essential legal basis for establishing the juridical relationship between the NAFTA and WTO Agreements is found in Article 30.3 of the *Vienna Convention on the Law of Treaties*, which states that

> when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.[209]

This provision grants the rule on primacy, superiority or *precedence of the latter-in-time treaty over the earlier-in-time one regarding treaties that regulate the same subject matter.* Canada, the US and Mexico, referred to as the NAFTA Parties, are each original Members

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[206] The definition of "treaty" under the *Vienna Convention on the Law of the Treaties* (VCLT) is found in its Article 2.1(a) which reads as follows:
(a) 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.
It is important to mention that both Canada and Mexico are parties to this convention. The U.S. accepts that this convention reflects customary international law even if it has not yet ratified it. According to Article 2.1(b) of the VCLT, ratification means "the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty". See Weiler, *supra* note 109 at 179.

[207] See *ibid.* at 179; see also Riesenfeld, S.A. & Abbott, F.M., eds., *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study,* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1994) for information regarding the relationship among treaty norms [emphasis added].

[208] See De Mestral, *supra* note 67 at 258.

[209] See *Vienna Convention on the Law of the Treaties, supra* note 53.

of the WTO. The WTO Agreement entered into force on January 1995, and NAFTA on January 1994. According to these dates, and according to the latter-in-time principle, one could assert that the WTO Agreement prevails over NAFTA. Nevertheless, *there are other factors* – such as the NAFTA text, which includes general and concrete provisions regarding its relationship with other international agreements, as well as the context in which both agreements were negotiated - *that may remove hesitations about this general rule.*[210]

The WTO Agreements deal with many of the same topics as NAFTA. However, they also concentrate on some topics not contemplated by NAFTA, such as customs valuation and pre-shipment inspection. On the other hand, the Uruguay Round Agreements do not address the topics of state-trading and competition policy. In case of overlaps between the agreements, NAFTA regulations have a further and faster scope than their Uruguay Round counterparts, especially in terms of market access, investment and most services. In the services area, NAFTA's disciplines are wider than those in the Uruguay Round General Agreement on Trade in Services (GATS). Some disciplines, such as sanitary and phytosanitary measures, standards and government procurement, although mainly the same in both agreements, vary in coverage. There are some NAFTA innovations within the intellectual property area that were incorporated into the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS). NAFTA disciplines on investment cover a series of issues that affect foreign direct investment, which is opposite to the narrow coverage of the WTO Agreement on Trade-Related Investment measures (TRIMS). The Uruguay Round went beyond NAFTA in the areas of services, agriculture, antidumping and subsidies, as well as tariffs.[211]

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[210] See Weiler, *supra* note 109 at 179 [emphasis added].
The NAFTA was being negotiated and implemented earlier the final conclusion of the Uruguay Round of GATT negotiations and the creation of the WTO in 1995. For more information on the relationship between NAFTA and the Uruguay Round, see the analysis prepared by the United States International Trade Commission on *NAFTA's Interaction with the Uruguay Round,* USITC Pub. 332-381 (June 1997), cited by Folsom, *supra* note 74 at Chapter III-9.
NAFTA, Articles 103, 104, 301, and 710 are some provisions that regulate the relationship between the NAFTA and the GATT.

[211] See Folsom, *supra* note 74 at Chapter III-10, 11, & 12.

III. Relationship between the WTO and Customs Unions/Regional Trade Agreements

The relationship between Article XXIV of GATT, the legal basis for the establishment of customs unions and free-trade areas within international trade relations, and the MFN[212] principle has been viewed as positive, as there has been compatibility between them. As trade liberalization under GATT from 1948 to 1994 took place, 107 regional trade agreements (RTAs) were notified to the GATT under Article XXIV.4, and after 1 January 1995 more than sixty RTAs – most of which are currently in force - were notified to the GATT as well. Thus, on February 1996, the WTO General Council launched the Committee on Regional Trade Agreements (CRTA) in order to examine all RTAs that were notified to the Council for Trade in Goods (CTG) under Article XXIV.11. It is important to note that the CRTA is assigned the inspection of all notified RTAs under the 1979 Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries as well as under Article V of the GATS, and brought up to it by the Committee on Trade and Development (CTD) and the Council for Trade in Services (CTS), respectively.[213]

Therefore, as progressive trade liberalization is taking place throughout the world and more RTAs are being signed by either developed or developing and transition economies, the WTO Membership reaffirms the primacy of the WTO multilateral trading system which

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[212] GATT, Article XXIV allows discriminatory preferences regarding duties and other commercial regulations which are kept in each of the countries that form a regional trade agreement. See Abbott, *supra* note 66 at 43 for more information on this topic.

[213] See *Turkey – Restrictions on Imports of Textile and Clothing Products,* (1999) WTO, Doc. WT/DS34/R, (Panel Report) [hereinafter Turkish QRs Panel Report] at paras. 2.2, 2.3, 2.6 & 2.7.

GATT, Article XXIV.4 reads as follows:
4. The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

GATT, Article XXIV.11 reads as follows:
11. Taking into account the exceptional circumstances arising out of the establishment of India and Pakistan as independent States and recognizing the fact that they have long constituted an economic unit, the contracting parties agree that the provisions of this Agreement shall not prevent the two countries from entering into special arrangements with respect to the trade between them, pending the establishment of their mutual trade relations on a definitive basis.

incorporates a development framework for RTAs as well as their complementary function and consistency with it and its rules.[214] The increasing number of FTAs (free trade areas) among WTO Members has garnered the attention of the WTO Secretariat and the WTO Director General, as the multilateral trading system may be broken down into a system of preferential political and economic coalitions. A reform of the review mechanisms is needed, as current review systems are not intended to restrain regional integration of the world trading system.[215]

The GATT 1947, through its Article XXIV, incorporated a system that would ease the burden on members of customs unions and free trade areas of extending preferential treatment to non-members of the CU or FTA. If members of the CU or FTA have decided to remove all tariffs and substantially all trade commerce restrictive guidelines between members, Article XXIV would be able to determine if a CU or a FTA would keep its preferential character. Another criterion established by Article XXIV is that the members of a CU shall not establish external tariffs higher than those created prior to the establishment of the CU, and that there would be no individual raise in external tariffs by any member of a FTA. Hence, these principles were set to control the number of customs unions or free trade areas, for Article XXIV tried to prevent GATT members from using this article as a means of getting rid of tariffs on certain goods.[216]

The following two cases reflect the relationship of the WTO and customs unions/free trade areas:

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[214] See *World Trade Organization Singapur 1996 Ministerial Declaration*, WT/MIN(96)/DEC at paragraph 7.

[215] See Weiler, *supra* note 109 at 176. See also Renato Ruggiero (WTO Director General), *Regional Initiatives, Global Impact: Cooperation and the Multilateral System,* 7 Nov. 1997, speech to the 3rd Conference of the Transatlantic Business Dialogue, Rome for more information on this topic.

[216] See Weiler, *supra* note 109 at 174 & 175.
In 1994, the WTO Agreement published the Understanding on the Interpretation of GATT 1994 Article XXIV which explains some elements of the GATT 1994 Article XXIV review and which establishes that a non-member of a CU or a FTA may bring a dispute settlement action regarding the application of this article. This Understanding also addresses technical matters that have surfaced the application of Article XXIV of the GATT and does not change the approach of the GATT towards free trade areas and customs unions.
Trade in services within the General Agreement on Trade in Services (GATS) sets up another system for reviewing regional services arrangements (RSAs). GATS Article V allows the removal of barriers on trade only to members of RSAs without being able to extend this right to non-members of the RSAs.

A. Turkey-India Clothing & Textiles Case[217]

1. Overview of the Dispute

Turkey had tried to enter the European Economic Community, now the European Union (EU), through the remaining possibility established in Article 28 of the 1963 Ankara Agreement between Turkey and the EEC relating to entry into the EEC. It would be easier for Turkey to establish contact with the EEC through the formation of a Customs Union. After years of negotiations, Turkey finally established a CU with the European Communities on December 1995 under Article XXIV of the GATT.[218]

Within the CU, Turkey was asked to apply the same commercial guidelines in relation to countries that were not members of the EEC through Article 12.2 of Decision 1/952. So, in 1996 Turkey set up quantitative restrictions (QRs) on nineteen classes of clothing and textile imports from India, arguing that the legal basis for this action was found under Article XXIV of the GATT, as Turkey claimed that this article provided an exemption for such action.[219]

India presented its complaint to be resolved by a WTO Panel. Turkey argued that the Panel had no jurisdiction for inspecting actions within Customs Unions. The Panel determined that the actions taken by Turkey with respect to nineteen categories of textile and clothing products were inconsistent with the provisions of Articles XI and XIII of the GATT and consequently with those of Article 2.4 of the WTO Agreement on Textiles and Clothing (ATC). The Panel also found that the imposition of quantitative restrictions is not allowed by Article XXIV of the GATT. Therefore, Turkey has acted inconsistently with the legal framework of the covered agreements and has consequently nullified or impaired benefits

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[217] See Turkish QRs Panel Report, *supra* note 213; see also *India – Restrictions on Imports of Textile and Clothing Products,* (1999), WTO Doc. WT/DS34/AB, (Appellate Body Report) [hereinafter Turkish QRs AB Report] .

[218] See *ibid.* at para. 2.17. See also GATT, *supra* note 7 at Article XXIV.

[219] See *European Journal of International Law,* Current Developments, Decisions of the Appellate Body of the World Trade Organization written by Trachtman, J.P., *Survey of the Turkey – Restrictions on Imports of Textile and Clothing Products,* AB-1999-5, WT/DS34/AB/R, (99-4546), online: www.ejil.org/journal/curdevs/AB.html (date accessed: 15 March 2002) [hereinafter Survey Turkey] at 1.

to which the plaintiff is entitled pursuant to those covered agreements. Finally, the Panel recommended that the DSB ask Turkey to conduct itself in a manner consistent with its obligations under the WTO.[220]

Turkey filed an appeal regarding the legal findings and conclusions of the Panel Report by arguing that the Panel had incorrectly interpreted the text of Article XXIV.5 of GATT 1994. In fact, Turkey argued that this legal provision conferred upon WTO Members the "right to enter into a Customs Union, and to *derogate from their GATT obligations,* including, but not limited to, their obligations under Article I."[221] Turkey reaffirmed its right to form a Customs Union or a Free Trade Area as a Member of the WTO under Article XXIV. Moreover, Turkey argued that the scope of Article XXIV.5 permitted derogations from all obligations of GATT 1994 and not only Article I. The Panel, on the other hand, established that Article XXIV would never authorize the introduction of GATT/WTO inconsistent actions upon the creation of a Customs Union.[222]

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[220] See Turkish QRs Report, *supra* note213 at X. GATT, Article XI establishes the provisions for General Elimination for Quantitative Restrictions; GATT, Article XIII establishes the provisions for Non-discriminatory Administration for Quantitative Restrictions.

ATC, Art. 2.4 reads as follows:
The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions. Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith.

[221] *Ibid.* at para. 10 [emphasis added].

[222] See *ibid.* at paras. 11, 12 & 20.
GATT, Article XXIV.5 reads as follows:
Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
(a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

Turkey also claimed that the Panel was wrong for not considering a conflict between, on the one hand, Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC and on the other hand, Article XXIV of the GATT 1994, as the Panel assumed the non-compatibility of Turkey's quantitative restrictions within the framework of its Customs Union with the EEC and Turkey's WTO obligations.[223] Turkey added that the EEC would exclude forty per cent of Turkey's exports from the CU should Turkey not be permitted to impose quantitative restrictions on textile and clothing products and would fall to an inconsistency with Article XXIV.8(a)(i).[224]

India filed a respondent's submission arguing that the Panel's conclusion of Article XXIV of the GATT 1994 is duly constrained by the principles of interpretation established in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties. Thus, the provisions of Article XXIV.5 are exclusive of GATT 1994 obligations only if the procedures are *inherent to the creation of the Customs Union.* Consequently, CUs are not necessarily required to conform to quantitative restrictions on imports that are inconsistent with Article XI of the GATT 1994. This argument is supported by Article XXI.5, as there cannot be any legal provision that justifies the raising of barriers *vis-à-vis* other WTO Members.[225] India added that the requisites of Article XXIV.5 and Article XXIV.8 "applied to the import regimes of the WTO Members forming the Customs Union as a whole, not to individual measures."[226]

(c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

[223] See *ibid.* at para. 7.

[224] See *ibid.* at para. 17.
GATT, Article XXIV.8(a)(i) reads as follows:
8. For the purposes of this Agreement:
(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories

[225] See *ibid.* at para. 21 [emphasis added].

[226] *Ibid.* at para. 23.

India declared that there is no conflict between Article XXIV on the one hand, and Articles XI and XII of the GATT and Article 2.4 of the ATC on the other. India argued that the claim Turkey made over the Panel's finding regarding the interpretation of Article XXIV.8(a)(ii) does not grant the authorization to Members of a Customs Union to breach the provisions contained in Articles XI and XIII of the GATT 1994 or Article 2.4 of the ATC. With this, India affirmed that the Panel could not prevent Turkey from forming a Customs Union with the EEC.[227]

The Appellate Body found that Article XXIV does not grant an exception from the rules against quantitative restrictions contained in Articles XI and XIII of GATT 1994.[228] The AB determined that "Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed."[229] The AB also found that the Panel did not entirely examine the scope of Article XXIV.5 and sustained that Turkey did not have any right, neither upon the formation of a CU with the EEC nor under Article XXIV, to impose quantitative restrictions on India's imports of nineteen classes of textile and clothing products, measures found to be inconsistent with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC. Nevertheless, the Appellate Body decided to make no finding on the inconsistency of QRs with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC; the AB only found they were not justified under Article XXIV. Finally, the AB recommended that the DSB ask Turkey to bring the inconsistent measures into conformity with Articles XI and XIII of the GATT 1994 and Article 2.4 of the ATC.[230]

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[227] See *ibid.* at para. 30.

[228] See *ibid.* at para. 64.

[229] Survey Turkey, *supra* note 219 at 1.

[230] See Turkish QRs AB Report, *supra* note 217 at paras. 64, 65 & 66.

2. The Relevance of this Case: WTO Primacy over Customs Unions

The relevance of this case lies in its interpretation of Article XXIV of GATT 1994 and its related Understanding on the Interpretation of Article XXIV of the GATT 1994 by the AB for the first time.[231] The AB noticed that even though legal researchers have believed that Article XXIV constitutes an exemption or defense towards violations of GATT terms, the *chapeau* of Article XXIV.5 speaks exclusively of GATT 1994 provisions but not the provisions of other WTO Agreements. Thus, as "the AB viewed Article 2.4 of the ATC as incorporating Article XXIV of the GATT 1994 into that Agreement, it noted that Article XXIV may be invoked as a defense to a claim of inconsistency with Article 2.4 of the ATC provided that the conditions set forth in Article XXIV for the availability of this defense are met."[232]

Turkey challenged the WTO priority over CUs by alleging the justification of imposing quantitative restrictions to India based on the formation of a CU with the EC under Article XXIV of the GATT 1994. Nevertheless, the AB found that Article XXIV does not grant an exception from the rules against quantitative restrictions contained in Articles XI and XIII of GATT 1994.[233] Therefore, based on the AB's decision, the priority of the multilateral trade system of the WTO over CUs may be perceived, for the AB decided that quantitative restrictions did not qualify for an exemption under Article XXIV and thus breached Articles XI and XIII of GATT 1994 as well as Article 2.4 of the ATC.[234]

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[231] See Survey Turkey, *supra* note 219 at 1.
It is important to mention that both India and Turkey accorded the "Agreed Procedures between India and Turkey under Articles 21 and 22 of the DSU in the follow-up to the dispute in Turkey – Restrictions on Imports of Textile and Clothing Products (WT/DS34)" on 8 March 2001.

[232] See *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* (2000), WTO Doc. WT/DS166/R, (Panel Report) [hereinafter Wheat Gluten Panel Report] at para. 8.180 & footnote 176.

[233] See Turkish QRs AB Report, *supra* note 217 at para. 64.

[234] See Survey Turkey, *supra* note 219 at 1.

B. U.S. – European Communities Wheat Gluten Case[235]

1. Overview of the Dispute

As is well-known, the main legal basis for the foundation of the North American Free Trade Agreement is Article XXIV of GATT, which clearly explains the right of WTO Member States to establish FTAs and CUs. NAFTA was established as a FTA and its immediate precedent is the CUSFTA, which itself was based on Article XXIV of the GATT in order to establish a FTA.[236] NAFTA takes part in the regionalization trend that has been growing since the end of World War II. Indeed, NAFTA is a RTA that was mainly foreseen to function as a means of competing with Japan and the EU.[237]

The US imposed safeguard measures on wheat gluten imports from the EC in the form of quantitative restrictions, for, according to the investigation conducted by the US International Trade Commission (USITC),[238] imports from the EU in 1996 and 1997 as well as an underselling from EU producers were causing serious injury to the domestic US wheat gluten industry.[239] The EC claimed the imposition of these definitive safeguard measures to their wheat gluten imports and the exclusion of Canada – as a US partner within NAFTA - from the application of safeguard measures based on the origin of the imports within some perspectives under Articles XIX.1 of GATT 1994 as well as Articles 2.1 and 4 of the WTO Agreement on Safeguards (SA) regarding increased imports, serious injury and causation.[240]

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[235] See Wheat Gluten Panel Report, *supra* note 232; see also *European Communities - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* (2000), WTO Doc. WT/DS166/R, [hereinafter Wheat Gluten AB Report] .

[236] See Van Dijck, *supra* note 17 at 135.

[237] Abbott, *supra* note 66 at 13 & 14.

[238] USITC Investigation No. TA-201-67. See Wheat Gluten Report, *supra* note232 at para. 2.2.

[239] See Wheat Gluten Report, *supra* note 232 at para. 2.1 & 8.157.

[240] See Wheat Gluten AB Report, *supra* note 235 at para. 1& 8.155.

GATT, Article XIX.1, regarding Emergency Action on Imports of Particular Products, reads as follows:
1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party

The EC argued that there is no provision within Article 4.2 SA that permits any WTO Member to examine separately a serious injury based on the origin of the involved imported products. The EC alleged that neither Article 2.1 SA nor its footnote 1 sustains the arguments of the US and Canada, as "the generic reservation contained in footnote 1 to Article 2.1 concerning the interpretation of the relationship between Articles XXIV and XIX of GATT 1994 has no bearing on the interpretation of Article 4.2 SA."[241]

The European Communities took their complaint to be solved by a WTO Panel pursuant to Article 4 of the DSU, Article XXII.1 of the GATT 1994, Article 14 of the SA and Article 19 of the Agreement on Agriculture regarding the imposition of definitive safeguards measures imposed by the US on wheat gluten imports.[242] The Panel found that the imposition of definitive safeguard measures by the US on certain imports of wheat gluten was inconsistent with Articles 2.1 and 4.2 of the SA regarding, on the one hand, the exclusion of these measures to imports from Canada – a NAFTA partner – after investigating all kinds of imports in order to determine a serious injury caused by increased imports and, on the other, the non-attribution of the injury to imports.[243] In fact, the Panel

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shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

[241] Wheat Gluten Report, *supra* note232 at para. 8.156.

[242] See *ibid.* at para. 1.1.

[243] See *ibid.* at paras. 9.2 & 8.182.
SA, Art. 2.1 reads as follows:
A Member (fn.1) may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

(fn.1): 1 A customs union may apply a safeguard measure as a single unit or on behalf of a member State. When a customs union applies a safeguard measure as a single unit, all the requirements for the determination of serious injury or threat thereof under this Agreement shall be based on the conditions existing in the customs union as a whole. When a safeguard measure is applied on behalf of a member State, all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member State and the measure shall be limited to that

concluded that "the US was not justified in departing from the explicit provisions of Articles 2.1 and 4.2 SA by excluding from the application of its safeguard measure imports from Canada after having included such imports for the purposes of reaching its overall finding of serious injury caused by increased imports of the product concerned."[244]

Both the US and the EC appealed some matters of law and legal interpretations derived from the Panel Report. The US alleged that the Panel did not pay attention to the right that partner countries of a free trade area have, under Article XXIV of the GATT 1994 and footnote 1 of the Agreement on Safeguards, in order not to receive impositions of safeguard measures on imports.[245] The EC alleged that Article XXIV of the GATT 1994 was inappropriate for the case at hand, as the US failed to ascertain that it had satisfied the

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member State. Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.

SA, Art. 4, regarding a Determination of Serious Injury or Threat Thereof, reads as follows:
1. For the purposes of this Agreement:
(a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;
(b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and
(c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.
2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.
(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.
c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

[244] *Ibid.* at para. 8.182.

[245] See *ibid.* at para. 13.

requirements set up in the AB Report of the *Turkey – Restrictions on Imports of Textile and Clothing Products* case in order to use this article as a defense.[246]

In its capacity as a third participant, Canada argued that the Panel had incorrectly concluded that the US had acted erroneously per Articles 2.1 and 4.2 of the SA by excluding imports from Canada from the imposition of safeguard measures.[247] Canada also contended that the non-imposition of safeguard measures to imports of a partner of a free-trade area is not inconsistent with Article 2.2 of the SA, for a separate investigation established that wheat gluten imports did not cause serious injury to the US domestic industry. Finally, Canada proved that the Panel should have studied the importance of Articles XIX and XXIV of the GATT 1994.[248]

The AB required coherence between investigations taken under Article 2.1 and measures taken under Article 2.2 of the SA, due to the fact that imports from Canada must be subject to inclusion in the safeguard measures should they be included in the investigation. Thus, the AB agreed with the Panel that the US did not comply with Articles 2.1 and 4.2 of the AS.[249] The AB determined that since the Panel had not been solicited to clear the meaning of the provision established in Article 2.2, it seems it had eluded the matter; in fact, it seems "to be due to continuing contention regarding the scope of Article XXIV(8)(a)(i) and XXIV(8)(b) which seem to contemplate that safeguards measures would not be applied within customs unions and free trade areas."[250]

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[246] See Wheat Gluten AB Report, *supra* note 235 at para. 20. It is relevant to mention that the case of Turkey, which we analyzed before, created a precedent and can be referred to as part of jurisprudence of the WTO, as it is mentioned within this dispute.

[247] See *ibid.* at para. 39.

[248] See *ibid.* at para. 39.

[249] See *European Journal of International Law,* Current Developments, Decisions of the Appellate Body of the World Trade Organization written by Trachtman, J.P., *Survey of the United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* AB-2000-10, WT/DS166/AB/R, (00-5593), online: www.ejil.org/journal/curdevs/AB.html (date accessed: 15 March 2002) [hereinafter Survey Wheat Gluten] at 1, 3 & 4. According to Joel P. Trachtman, there is still some dispute as to whether or not Article 2.2 entails the application of safeguard measures to other members of customs unions or free trade areas.

[250] *Ibid.* at 3.
Article XXIV.8(b) reads as follows:

2. The Relevance of this Case: WTO Primacy over Free Trade Areas

Throughout this case, there are two main aspects that can be examined regarding safeguards. On the one hand, the extent of the selective imposition of safeguard measures regarding the exclusion of members of a customs union or a free trade area, which is found as opposed to the MFN principle and, on the other, the extent of the causation of serious injury due to excessive imports that may affect the domestic industry of a certain sector of trade of the importer country.[251]

Regarding the extent of the selective imposition of safeguards measures in relation to the exclusion of members of a free trade area, one can fully perceive the *primacy of the WTO over free trade areas*, in this case the North American free trade area, as the AB found that the US could not exclude Canada from imposing definitive safeguard measures due to the fact that the USITC included Canadian imports in its investigations of causation of serious injury.[252]

It is essential to note that *the dispute was not between the US and Canada*; it was mainly between the US and the EC regarding safeguard measures on imports of wheat gluten from the EC. Canada was excluded from the imposition of these measures because it formed a free trade area with the US and Mexico through NAFTA as of 1994. Nevertheless, the present author considers that *in order to have a true vision of the WTO primacy over NAFTA, the dispute should have included two NAFTA parties as complaining and responding parties,* and in this case Canada was a third party excluded from the imposition of safeguard measures. Thus, it should be mentioned that in order to have a real WTO primacy over free trade areas, *the dispute should include WTO Members that are parties to both the WTO and a certain free trade agreement.* Moreover, the latter-in-time treaty

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(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

[251] *Ibid.* at 1.

[252] See *ibid.* at 1, 3 & 4 [emphasis added].

general rule should also be observed in each case in order to draw conclusions as to whether or not there is WTO Primacy over all or only certain free trade areas.

Chapter III: Case Studies of Choice of Forum

I. A WTO Dispute Settlement Mechanism Case: "Certain Measures Concerning Periodicals – Canada vs. United States of America"

A. Factual Background for the Periodicals Case[253]

The cultural relationship between Canada and the United States has always been complex. Canada has allowed the presence of cultural products originating from the US, such as videos, movies, magazines and television programs, as these products easily enter the Canadian marketplace thanks to geographic proximity, the common language – with the exception of the thirty per cent francophone population- the economy and similar historical origins. Since the US objective is business, money-making and expansion of its cultural market abroad, Canada has had to accord national protection to its cultural industries by asking Canadian producers to access their own market and by dictating policies regarding import controls, subsidies and tax measures in an attempt to preserve Canadian national unity and political identity.[254]

The Royal Commission on Publications concluded that the most important factor of the Canadian magazine industry was advertising revenue, because the larger a periodical's circulation, the more advertising it could attract; the greater its advertising revenue, the more it could afford to spend on editorial content and the better its chances of increasing circulation. After analyzing the advertising revenue in so-called split-run periodicals,[255] this commission determined that Canadian editions of *Time* and *Reader's Digest* were absorbing more than forty per cent of the total amount of advertising money in Canada, and therefore concluded that this was unfair for Canadian publishers who had to reduce advertisement costs in their national periodicals which could threaten their financial

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[253] *Canada - Certain Measures Concerning Periodicals*, (1997), WTO Doc. WT/DS31/R [hereinafter Periodicals Panel Report].

[254] See Cameron & Campbell, *supra* note 18 at 148, 149 & 150.

[255] A "split-run periodical" is done by splitting or separating the editorial content from the advertising content and, thus, by issuing more than two or three different editions throughout the world, depending on the geographic area the periodical was directed to. See Matheny, R. L., "Comment: in the Wake of the Flood: Like Products and Cultural Products after the World Trade Organization's Decision in Canada – Certain Measures concerning Periodicals" (1998) 147 U. Pa. L. Rev. 245 at 255.

viability. Consequently, the Royal Commission was put in a position where it had to prevent foreign magazines, which contained domestic advertising, from entering Canada. Thus, the *Income Tax Act* was amended to limit tax deductions for advertisements in Canadian magazines within the Canadian market, and *Tariff Code 9958* established the non-entrance of split-run Canadian editions whose editorial content was directed to Canadian citizens. In addition, the federal government continued to offer a postal subsidy for Canadian periodicals.[256] Both the *Income Tax Act* and the *Excise Tax Act* were amended by *Bill C-103* which tried to recover the loophole in Canadian legislation by imposing an eighty per cent tax on the value of advertisements located in split-run editions.[257]

An important fact to mention in order to understand the essence of the problem is the evolution of technology, clearly present in the transmission of editorial content from US publisher Time Warner Inc. to a Canadian printing firm via satellite in order to publish the Canadian edition of *Sports Illustrated Magazine* and, with this, the eluding of the import-ban established by *Tariff Code 9958* through the evasion of border measures which had not

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[256] See Cameron & Campbell, *supra* note 18 at 151.
A "periodical" was defined by § 35 (1) [105-370e], which was repealed by S.C. 2000, c. 30, § 10(1) –and which came into force on October 30, 1998- of Part V.1 of the *Excise Tax Act* as follows:
"periodical" means printed material that is published in a series of issues, bound or unbound, that appear regularly not less than twice in a year and, excluding special issues, not more than once in a week, whether the period between the issues is constant or varies from issue to issue, but does not include a catalogue all or substantially all of which is made up of advertisements.

Furthermore, a "split-run edition" was defined by § 35 (1)[105-370i], which was repealed by S.C. 2000, c. 30, § 10(1) and which came into force on October 30, 1938 and which regulates the tax on split-run periodicals of Part V.1 of the *Excise Tax Act* as follows:
"split-run edition" of a periodical means an edition of an issue of the periodical

a) that is distributed in Canada
b) in which more than 20% of the editorial material is the same or substantially the same as editorial material that appears in one or more excluded editions of one or more issues of one or more periodicals, and
c) that contains an advertisement that does not appear in identical form in all those excluded editions.

Customs Tariff Code 9958 can be found in Schedule VII of the *Customs Tariff*, and is executed through Article 114 of the *Customs Tariff*, R.S.C. 1985, c. 41 (3rd Supp'), as amended to 30 April 1996, updated to *Canada Gazette*, Part I, Vol. 135, No. 19, September 12, 2001, cited by Cameron, & Campbell, *supra* note 18 at 152.

[257] See Matheny, *supra* note 255 at 259.

allowed the entrance of split-run periodicals into Canada for more than thirty years.[258] Time Warner's digital editorial content sent through satellite transmission was then printed in Canada without being subject to the import ban of *Tariff Code 9958* and had thus been deemed "legally printed in Canada."[259] Indeed, split-run periodicals were again present in Canada; hence, in 1993 the federal government, through a Task Force, had to review cultural policies and legislate certain measures in order to prevent technological change to allow the entrance of split-run periodicals. Consequently, an excise tax of eighty per cent of the total advertising budget of split-run periodicals was levied on magazines whose content included more than twenty per cent of re-used editorial material directed to Canadians.[260] Besides the excise tax, non-deductibility provisions under the Income Tax Act, the non-entrance of split-run periodicals and the postal subsidies, which were important factors for the growth and development of Canadian cultural industries, were imposed by the federal government as a means of further protecting the industry.[261]

The Canadian Task Force proposed this excise tax because it would not violate either the GATT or the NAFTA national treatment provisions for goods. This tax would be imposed, without making distinctions or exemptions, to either foreign or domestic publications containing re-used editorial content and advertising directed specifically to Canadian audiences.[262]

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[258] See Eberschlag, R., "Culture Clash: Canadian Periodical Policies and the World Trade Organization" (1998) 26 Man. L.J. 65 at 69.

[259] Matheny, *supra* note 255 at 256.

[260] See Cameron & Campbell, *supra* note 18 at 154. "Editorial material" was defined by § 35 (1) [105-370a], which was repealed by S.C. 2000, c. 30, § 10(1) –and which came into force on October 30, 1998- of Part V.1 of the *Excise Tax Act* as follows:
"editorial material" means printed material other than advertisements.

[261] See Atkey, R.G., "The Impact of Technological Change and Canada/U.S. Regulatory Models for Information, Communications, and Entertainment" (1999) 25 Can.-U.S. L.J. 359 at 365.

[262] See Cameron & Campbell, *supra* note 18 at 154. It is important to mention that the Canadian Task Force established that the split-run periodicals that were already in Canada would not be imposed such tax. Thus, *Sports Illustrated Magazine* would be exempted of the excise tax. There were arguments between the Task Force and the U.S. Trade Representative, Mickey Kantor, as to whether or not Time Warner should've been imposed retroactively this tax, since it was in 1993 when Time Warner Inc. published the seven issues, and it was in 1994 when the Task Force issued its report. Finally, the Canadian Government decided not to impose this tax to Time Warner, Inc.

B. Legal Claims Regarding the Case

The US requested consultations with Canada under the DSU. These consultations failed because there was no agreement, negotiation or amicable composition between the disputing parties. Therefore, the US asked for a panel review under the DSB, comprised of citizens of Sweden, Brazil and Austria. These consultations were based on the following issues:

a. Canadian measures that did not allow the importation of certain periodicals into Canada. These periodicals, which were directed to the Canadian market, were forbidden because they contained advertising material that was not distributed in the country of origin.
b. Canadian assessment of an eighty per cent excise tax on the so-called "split-run periodicals" when there is more than twenty per cent of the same content as in issues in circulation in the country of origin.
c. Canadian postal rates charged for Canadian periodicals but not to imported ones.[263]

1. Legal Claims as in the Panel

a. The US claimed that the *Canadian Tariff Code 9958* violated Article XI:I of the GATT regarding the like-products trade-liberalization principle. Besides, this *Tariff Code 9958* violated Article III of the GATT regarding quantitative restrictions, so Canada had contravened its quantitative restrictions commitments under GATT 1994 by dictating measures that prohibited and restricted the importation of certain periodicals into Canada. Canada established that the *Tariff Code 9958* must be applied in order to secure compliance with Section 19 of the *Income Tax Act*, and was thus justifiable under Article XX(d) of the GATT.[264]

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[263] See Gantz, *supra* note 54 at 1077.

[264] See Eberschlag, *supra* note 258 at 75.
Article XI:1 of the GATT 1994 establishes the following:
1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Article XX(d), classified under General Exceptions of the GATT 1994, reads as follows:

b. The US claimed that Part V.I of the Canadian *Excise Tax Act* violated Article III:2 of the GATT regarding the national treatment trade-liberalization principle. Canada answered by saying that Article III does not apply to Part V.I of the *Excise Tax Act* and that even if it did, this article would not be violated.[265]

c. The US claimed that Article III:4 and Article III:8(b) were violated by Canadian Postal Subsidies. Canada said that Article III:4 does not apply to Postal Subsidies. The US claimed that Canada's tax treatment of the "split-run" periodicals and the application of favorable postage rates to certain Canadian periodicals were inconsistent with the national treatment provisions of the GATT.[266]

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(d) necessary to secure compliance with laws or regulations which are not consistent with the provisions of this Agreement ...

The Panel found out that the import ban violated Article XI of the GATT. It also rejected Canada's argument by saying that Canada interpreted too broadly Art. XX(d) and that the GATT meant only to enforce obligations under laws and obligations. Besides, both measures Tariff Code 9958 and S. 19 of the Income Tax Act were different, even if both tried to sustain the periodical industry of Canada. The first one imposed an import-ban on foreign periodicals and the second one imposed to place advertisements not in foreign periodicals but in Canadians. See Cameron & Campbell, *supra* note 18 at 158.

[265] See *ibid.* at 76.
Article III:2 of the GATT 1994 establishes the following regarding national treatment:
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

The Panel concluded that split-run periodicals and domestic non-split-run periodicals were considered as like products and therefore, should not be subject to any tax imposition; the Panel rejected the imposition of the excise tax only on split-run periodicals. It established it violated Article III:4 of the GATT 1994. See Cameron & Campbell, *supra* note 18 at 159 & 160; see also Gantz, *supra* note 54 at 1078 for more information.

[266] See *ibid.* at 78.
Article III:4 establishes the following:
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

The DSB set the following legal findings and conclusions in the Panel Report:

a. Tariff Code 9958 is inconsistent with Article XI:1 of the GATT 1994 and cannot be justified under Article XX(d) of GATT 1994
b. Part V.1 of the Excise Tax Act is inconsistent with Article III:2, first sentence of GATT 1994.
c. The application by Canada Post of lower commercial Canadian postal rates to domestically-produced periodicals than to imported periodicals, including additional discount options available only to domestic periodicals, is inconsistent with Article III:4 of GATT 1994, but
d. The maintenance of the funded rate scheme is justified under Article III:8(b) of GATT 1994.[267]

2. Legal Claims as in the Appeal

a. Canada claimed that Part V.1 of the *Excise Tax Act* affects trade in services to which the GATS applies. Therefore, Article III:2 of GATT 1994 did not come into play because it applied only to trade in goods and the split-run periodicals were considered to be services. Thus, since Canada had not made any commitment under GATS, it was not obliged to provide national treatment to advertising services of WTO Members.[268]

b. In case Article III:2 of GATT 1994 did apply to Part V.1 of the *Excise Tax Act*, Canada wondered if split-run periodicals could be considered as like products regarding the

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Article III:8(b) reads as follows:
8.(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

The Panel found out that the pricing policies of Canada Post should be regarded as governmental regulations within Article III:4 GATT. It also found out that Canada protected its domestic industry by providing lower postal rates through Canada Post Subsidy Program, thus, this was against the provisions of Art. III:4 of GATT. The Panel, nevertheless, found out that the differential postal rate scheme was justified by Art. III:8(b) which obliged both domestic or foreign periodicals of paying subsidies. Therefore, the U.S. should pay subsidies. See Cameron, J. & Campbell, K., eds., *Dispute Resolution in the World Trade Organization,* (London: Cameron May, 1998) at 160.

[267] Periodicals Panel Report, *supra* note 253 at 92.

[268] See "Split-run Magazines: USA and WTO Diminish Distinctly Canadian Industry", *Trade winds, the Newsletter of the National Trade and Tariff Service*, 8: 3 (1997) [hereinafter Split-run Magazines] at 16.
The appeal was heard by the Japanese, German, and Uruguayan members of the Appellate Body which found out that a periodical was a good even if it contains editorial and advertising content It also found out that even if periodicals were a service, the obligations under GATT 1994 and GATS could co-exist and that the existence of GATS does not reduce the scope of GATT 1994. Moreover, the panel found out precedents that may allow considering trade and services, including advertising services, under GATT. See Atkey, *supra* note 261 at 188.

domestic non-split periodicals. Should that be the case, Canada claimed that Part V.1 of the *Excise Tax Act* did not discriminate against imported products.[269]

c. The US claimed that Canada's funded postal rates programme did not qualify as a payment of subsidies exclusively to domestic producers as established by Article III: 8(b) of GATT 1994.[270]

The AB set the following legal findings and conclusions in its Report:

a. Upholds the Panel's findings and conclusions on the applicability of the GATT 1994 to Part V.1 of the Excise Tax Act.
b. Reverses the Panel's findings and conclusions on Part V.1 of the Excise Tax Act relating to "like products" within the context of Article III:2, first sentence, thereby reversing the Panel's conclusions on Article III:2, first sentence, of the GATT 1994.
c. Modifies the Panel's findings and conclusions on Article III:2 of the GATT 1994, by concluding that Part V.1 of the Excise Tax Act is inconsistent with Canada's obligations under Article III:2, second sentence, of the GATT 1994; and
d. Reverses the Panel's findings and conclusions that the maintenance by Canada Post of the "funded" postal rates scheme is justified by Article III: 8(b) of the GATT 1994, and concludes that the "funded" postal rates scheme is not justified by Article III:8(b) of the GATT 1994.[271]

C. Main Reasons Why this Case was Solved under the WTO Dispute Settlement Mechanism

The US knew that so-called cultural industries[272] were exempt from the provisions of NAFTA based on the former exemption contained in Article 2005 of the CUSFTA, which

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[269] See *ibid.* at 16 & 17.
The Appellate Body found out that the Panel had made incorrect legal reasonings concerning like products, so it decided to reverse the Panel's finding of "like products". The AB concluded that the objective of Part V.1 of the Excise Tax Act was protectionist towards the Canadian industry.

[270] See *ibid.*
The Appellate Body found out that Art. III:8(b) could not exempt a Canadian subsidy applied indirectly by the Canadian Department of Heritage to Canada Post to benefit domestic products, so the AB granted the appeal to the U.S. See Cameron & Campbell, *supra* note 18 at 162.

[271] *Canada – Certain Measures Concerning Periodicals,*(1997), WTO Doc. No. WT/DS31/AB/R [hereinafter Periodicals AB Report] at 25.

[272] CUSFTA, Art. 2012 reads as follows:
Cultural industry means an enterprise engaged in any of the following activities:
the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.
a. The production, distribution, sale or exhibition of film or video recordings,

later evolved into NAFTA Article 2106. Indeed, Canada chose special treatment for these industries, due to past social and political difficulty.[273] Thus, whereas discrimination against foreign periodicals was allowed under the NAFTA, it was strictly forbidden by the GATT 1994 because it violated national treatment. Therefore, had the US chosen the NAFTA Chapter 20 Dispute Settlement Mechanism, it would clearly have had no legal argument upon which to rely to resolve this dispute.[274]

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b. The production, distribution, sale or exhibition of audio or video music recordings,
c. The publication, distribution, or sale of music in print or machine readable form, or
d. Radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.

NAFTA, Art. 2107 reads as follows:
Cultural industries means persons engaged in any of the following activities:

a. The publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.
b. The production, distribution, sale or exhibition of film or video recordings;
c. The production, distribution, sale or exhibition of audio or video music recordings;
d. The publication, distribution or sale of music in print or machine readable form; or
e. Radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television and cable broadcasting undertakings and all satellite programming and broadcast network services.

[273] See Matheny, *supra* note 255 at 270.
FTA at Article 2005, established under Chapter 20 regarding cultural industries reads as follows:

a. Cultural industries are exempt from the provisions of this Agreement, except as specifically provided in Article 401 (Tariff Elimination), paragraph 4 of Article 1607 (divestiture of an indirect acquisition) and Articles 2006 and 2007 of this Chapter.
b. Notwithstanding any other provision of this Agreement, a Party may take measures of equivalent commercial effect in response to actions that would have been inconsistent with this Agreement but for paragraph 1.

NAFTA, at Art. 2106, established under Chapter XXI: Exceptions, said that Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.
Annex 2106 establishes the following regarding Cultural Industries :
Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access-Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the Canada – United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the U.S.
See Folsom, *supra* note 74 at Appendix I-155 & 157.

[274] See Gantz, *supra* note 54 at 1077.
NAFTA, Article 2106 does not grant any right to Mexico, as the Mexican Government did not show any interest regarding cultural industries. It seems Mexico declared that Mexican culture was well protected by the Spanish language. See De Mestral, *supra* note 67 at 392.

It is valuable to mention also that Article 2005 of the CUSFTA permitted "retaliation - which requires commercial parity in terms of the dollar value of the trade or investment affected or likely to be affected by the inconsistency – or measures of equivalent commercial effect in response to actions that would have been inconsistent with the FTA but for cultural industries."[275] In other words, the cultural exemption under NAFTA takes into account every policy that would violate the compromises of a NAFTA Government. The US could have therefore retaliated in *Periodicals* under other sectors not necessarily related to the periodical industry, as Canada would have protected it.[276] Moreover, based on NAFTA's provisions, Canada was confident that it would be able to avoid litigation, for it assumed that it could have its domestic magazine industry exempted from trade obligations.[277]

The WTO dispute settlement mechanism forum offered the US a series of advantages, as it was aware of the existence of a community in the US Congress critical of the WTO dispute settlement system, so "a favorable ruling could be heralded by the US Administration as a win to skeptics of the WTO in Congress and could demonstrate that the US win/loss record at the WTO is positive."[278] Thus, the US Trade Representative declared that it was important to set a precedent for the world to show that the US can defeat any Member State that attempts to discriminate against its goods or services. For Canada, the WTO seemed to be a preferable forum, as cultural industries are treated differently under NAFTA and the WTO.[279]

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[275] Atkey, *supra* note 261at 177. Both Canada and the U.S. have agreed that any taken retaliatory measures do not limit their scope to the same industry subject of the inconsistent treatment under the rules of free trade.

[276] See Dennin, *supra* note 56 at 156.

[277] See Matheny, *supra* note 255 at 269.

[278] Dennin, *supra* note56 at 156.

[279] See Folsom, *supra* note 74 at Chapter III-13.

D. The Aftermath of the Periodicals Dispute

Canada's intent to comply with both reports was clearly notified to the DSB and agreed for compliance with the US in a term of fifteen months.[280] Thus, "International Trade Minister Sergio Marci and Canadian Heritage Minister Sheila Coops set the measures by which Canada would adopt to comply with the WTO AB Report."[281] The *Periodicals* dispute reveals the difficulty inherent in protecting Canadian culture in an era of trade liberalization. It can therefore be said that culture has a dual nature; whereas the main objective for the US for trading with culture is business, Canada's cultural aim is the informational aspect towards its domestic population.[282]

The definite decision did not only impact the Canadian magazine industry but perhaps all of Canada's industries, making the federal government even more committed to assisting the magazine industry.[283] In July 1998, Canada tried to prohibit Canadian companies from advertising in split-run editions of foreign magazines through proposed legislation that was inconsistent with the WTO, so the Office of the US Trade Representative requested consultations.[284] The new proposed legislation would require that:

> a. Only Canadian publishers be permitted to sell advertising directed at the Canadian market.
> b. Canadian publishers be determined on the basis of nationality of ownership and based on definitions similar to those contained in the *Income Tax Act*; and
> c. Foreign publishers that violate the ban be subject to fines of up to $250,000.00[285]

In January 1999, the US found these proposals to be a means of discrimination against the US and therefore an illegal trade practice. The US Trade Representative, Charlene

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[280] See Gantz, 54 at 1078.

[281] "Canada Responds to WTO Decision on Canadian Periodicals", *Trade winds, the Newsletter of the National Trade and Tariff Service*, 9: 3 (1998) [hereinafter Canada Responds] at 15.

[282] See Knight, T., "The Dual Nature of Cultural Products: An Analysis of the World Trade Organization's Decisions Regarding Canadian Periodicals" (1999) 57 U.T. Fac. L. Rev. 165 at 186. Thus, it is considered that sometimes cultural industries are more economical than cultural. See Matheny, *supra* note 255 at 270.

[283] See Split-run Magazines, *supra* note 268 at 15.

[284] See Gantz, *supra* note 54 at 1080.

[285] Canada Responds, *supra* note 281 at 16.

Barshefsky, said that if the proposed legislation were approved by the Canadian Parliament, the US would in turn retaliate against Canadian steel, wood and textiles, thereby denying Canada numerous trade benefits, as the cultural industries exception incorporated into NAFTA might allow the US to retaliate against a NAFTA Party through measures of equivalent effect.[286] The proposed legislation was also challenged by the Association of Canadian Advertisers, which said that advertisers would be the ones to bear the great responsibility of the publishing industry if a new tax were applied.[287]

Finally, on June 4, 1999, both Canada and the US agreed to end the long dispute regarding foreign periodicals by establishing that the US would take no action under any WTO Agreement, the NAFTA, or section 301 of the *Trade Act* of 1974, as amended, in response to *Bill C-55*. The US thereby recognized Canada's right to refer to its own population by including more Canadian content in its cultural instruments. Canada agreed to make some changes to the *Foreign Publishers Advertising Services Act,* to the *Income Tax Act*, to *Bill C-55* as well as to its foreign investment policy.[288] Bill C-55 aims to protect Canadian periodical publishers by ensuring that they "will be able to sell advertising services that are aimed primarily at the Canadian market to Canadian advertisers."[289]

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[286] See Gantz, *supra* note 54 at 1080. For more information, see CUSFTA, *supra* note 72 at Art. 2005.2 and NAFTA, *supra* note 65 at Art. 2016.

[287] See Canada Responds, *supra* note 281 at 17.

[288] See "Canada and the United States End Long-Term Dispute Over Periodicals", *Trade winds, the Newsletter of the National Trade and Tariff Service*, Vol. 10, No. 1 (June, 1999) [hereinafter Long-Term Dispute] at 1. See the same source at page 2 for more information about the changes made to the *Foreign Publishers Advertising Services Act.*

[289] Knight, *supra* note 282 at 167.

II. A NAFTA Chapter 20 Dispute Settlement Mechanism Case: "Safeguards on Brooms – Mexico vs. United States of America"

A. Factual Background of the Broom Corn Brooms Case[290]

The US MFN tariffs towards broom corn brooms since 1965 have always depended on the quantity that entered the US. Thus, it has been established that for imports of 121,478 dozen broom corn brooms, a duty of eight per cent *ad valorem* would be imposed. For imports that went beyond 121,478 units valued at not more than ninety-six cents each, a duty of thirty-two cents would be imposed and a duty of thirty-two per cent *ad valorem* for units valued over ninety-six cents each. Separate tariff quotas were applied to whisk brooms.[291]

As of January 1994, the US under NAFTA granted a preferential duty-free tariff treatment to Mexican whisk and broom corn brooms valued at not more than ninety-six cents each, a duty-free tariff over the first 100,000 dozen broom corn brooms valued at more than ninety-six cents each, and special duty of 22.4% *ad valorem* for the calendar years 1994 through 1999 for more than 100,000 imports, a sixteen per cent duty through 2004 and a zero per cent duty thereafter.[292]

It is important to note that NAFTA Article 302 establishes an exception to the elimination of the tariffs plan of the NAFTA Parties, referred to as NAFTA Safeguards or Safety Measures established in NAFTA Chapter 8, allowing NAFTA Governments to apply tariff

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[290] *In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico (United States v. Mexico)* (1998) USA-97-2008-01 (Ch. 20 Panel) [hereinafter Final Panel Report Broom Corn Brooms].

[291] See *ibid.* at 1. These tariff-rate quotas are based on Items 9603.10.40, 9603.10.50, and 9603.10.60 of the *United States Harmonized Tariff Schedule (USHTS).*

[292] See *ibid.* at 2. U.S. Schedule to Annex 302.2 of NAFTA Chapter 3 contains these tariff rates. It is important to mention that preferential duty treatment or duty-free treatment is available only for goods that are considered originating goods or of NAFTA origin. For this, there are rules of origin under NAFTA imposed to import-sensitive goods in order to be considered of North American origin. See Gantz, D.A., "The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer? (1997) 14 Ariz. J. Int'l & Comp. Law 381 at 383 & 390.

The rules of origin are contained within NAFTA, Article 401(b), Annex 401 as the following:
(b) each of the non-originating materials used in the production of the good undertakes the required tariff change as a result of production taking place entirely in the territory of one or more of the NAFTA parties, or otherwise meets the rules of origin in Annex 401.

increases on excessive imports of goods that could cause or threaten to cause injury to domestic industries. Thus, emergency actions, which are opposite to the obligations of national treatment of goods established in NAFTA Chapter 3, are allowed by Chapter 8 in case there is a dangerous risk of damaging a specific domestic industry of a NAFTA Party.[293]

Consequently, the escape clause action is permitted in case there is a threat of injury toward a domestic industry until 2003. The provisions on Emergency Actions under NAFTA Chapter 8 are divided into three mechanisms contained in Articles 801, 802, and 803. Article 801 deals with Bilateral Actions in which a NAFTA Party can remove a temporary allowance for elimination of tariffs towards excessive quantities of imported goods from another NAFTA Party that may seriously injure the domestic industry concerned, as like and competitive goods may consequently be produced. Hence, within Article 801 bilateral relief may be reached for a maximum of four years for Schedule C plus goods that would be duty-free in 2008. Article 802 deals with Global Actions regarding the safeguard measures established under Article XIX of the GATT and the WTO Agreement on Safeguards. Article XIX of the GATT allows WTO Member States to suspend obligations or concessions on a multilateral basis in case of dangerous and excessive imports that may adversely affect the domestic industry producing like and competitive goods. Article 802, which includes the escape clause procedures, is applied to the NAFTA Governments in case their imports are in the top five supplier nations and in case third parties are involved

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[293] See *ibid.* at 2.
NAFTA, Article 302 establishes the following regarding Tariff Elimination:

1. Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.
2. Except as otherwise provided in this Agreement, each Party shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 302.2.
3. On the request of any Party, the Parties shall consult to consider accelerating the elimination of customs duties set out in their Schedules. An agreement between two or more Parties to accelerate the elimination of a customs duty on a good shall supersede any duty rate or staging category determined pursuant to their Schedules for such good when approved by each such Party in accordance with its applicable legal procedures.
4. Each Party may adopt or maintain import measures to allocate in-quota imports made pursuant to a tariff rate quota set out in Annex 302.2, provided that such measures do not have trade restrictive effects on imports additional to those caused by the imposition of the tariff rate quota.
5. On written request of any Party, a Party applying or intending to apply measures pursuant to paragraph 4 shall consult to review the administration of those measures.

or have a substantial interest. Article 803 deals with the compliance of requirements that NAFTA Parties must observe for both bilateral and global actions in order to ensure clear, objective and reasonable treatment. Article 803 and Annex 803.3 of the NAFTA are similar to the US law as applied by the US International Trade Commission (ITC), an independent, quasi-judicial fact-finding agency of the US government established in 1916 whose function is to regulate the impact of imports on US domestic industries based on its safeguards laws, *section 202 of the Trade Act of 1974*, as well as antidumping and countervailing duty laws and to advise the Congress or the US President on tariff trade issues.[294]

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[294] See *ibid.* at 2. Chapter 8 of NAFTA reproduces the CUSFTA provisions on emergency action protection. See also Folsom, *supra* note 74 at Chapter III - 52.
GATT, Article XIX establishes the following regarding Emergency Actions on Imports of Particular Products:
1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
(b) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (a) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.
2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the Contracting Parties as far in advance as may be practicable and shall afford the Contracting Parties and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.
3. (a) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the Contracting Parties, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1 (b) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the Contracting Parties do not disapprove.
(b) Notwithstanding the provisions of sub-paragraph (a) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and

The broom corn brooms dispute was started on March 1996 by a petition that the US Corn Broom Task Force, a group of broom corn brooms producers that represented more than fifty per cent of that domestic industry, under *section 202 of the U.S. Trade Act of 1974*, alleged before the ITC regarding the serious injury or threat to cause serious injury to the domestic industry of broom corn brooms by the increased quantities of imported Mexican units. The same Task Force launched another petition under *section 302(b) of the NAFTA Implementation Act,* the US legislation that authorized bilateral safeguards provided for in NAFTA Article 801, regarding the risk of sustaining injuries within the broom corn brooms industry due to the elimination of tariff provisions established by NAFTA. These petitions were filed jointly.[295]

The ITC determined, under *section 302 of the NAFTA Implementation Act*, that the US Corn Broom Task Force was indeed suffering an injury in its domestic industry and were thus allowed - through a vote of four to two in the global safeguard case and through a vote of five to one in the NAFTA bilateral case - to suspend the tariff eliminations on Mexican broom corn brooms. In other words, the ITC recommended an increase in US tariffs for three years on Mexican brooms to the MFN level. Later on, the ITC presented its recommendations to then-US President Bill Clinton on August 1996, date on which he would take action in the global safeguard case but not in the bilateral one. Yet, he would first try to negotiate a solution through the US Trade Representative with Mexico and third-party countries that could demonstrate an interest in the issue within a period of ninety days. The Departments of Agriculture, Commerce and Labor would develop a program of measures designed to facilitate the broom corn brooms domestic industry in adjusting to Mexican competition under *Section 203 of the 1974 Trade Act.*[296]

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throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

[295] See *ibid.* at 3 & 4.

[296] See *ibid.* at 5. See also Folsom, *supra* note 74 at Chapter III - 53. Within the global procedures of the escape clause, the ITC made recommendations regarding Mexican brooms and from other nations, except from Canada and Israel through No. TA-201-65, ITC Pub. 2984. Aug. 1996.

Mexico requested formal consultations pursuant to the proceedings of NAFTA Chapter 20 under Article 2006(4). As there was no successful amicable solution arrived at through consultations, Mexico requested that the Free Trade Commission meet on November 25, 1996. Since there was no agreement reached with appropriate foreign countries, on November 28, 1996, Clinton published *Proclamation 6961,* which allowed the President to grant temporary import relief to a domestic industry injured by excessive imports, adopting the following safeguard measures for a three-year period:

1. Mexican broom corn brooms valued at no more than ninety-six cents each and classified under item 9603.10.50 of the *United States Harmonized Tariff Schedule (USHTS),* would remain free of duty if the quantity of imported units did not exceed 121,478 dozen. Nevertheless, if imports went beyond 121,478 dozen units, an over-quota tariff rate of thirty-three cents in the first year reduced to 32.5 cents in the second year, to 32.1 cents in the third year, and finally to zero cents would be applied to the imported broom corn brooms.
2. In the same sense, Mexican broom corn brooms valued at more than ninety-six cents each, classified under item 9603.10.60 of the *United States Harmonized Tariff Schedule (USHTS),* would remain duty-free if the quantity of imported units would not exceed 100,000 dozen, but would be subject to an over-quota tariff of thirty-three per cent in the first year, to 32.5% in the second year, 32.1% in the third year and ultimately to a sixteen per cent rate, according to the obligations of the NAFTA US Schedule, if the imported units went beyond 100,000 dozen.[297]

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[297] See *ibid.* at 4 & 5. The whisk brooms wholly or in part of broom corn did not suffer any change. The criteria for import relief that is established in § 201 of the 1974 Trade Act is based on Article XIX of the GATT and in the WTO Agreement on Safeguards. This criterion is known as the "escape clause". See *United States Trade Representative,* online: http://www.ustr.gov/html/1997tpa_part8.html (date accessed: 3 February, 2002). See also *Proclamation No. 6961*, 61 Fed. Reg. 64,431, 64,432 (Dec. 4, 1996).

It is important to make reference to what domestic industry, emergency action, serious injury, and threat of serious injury mean according to NAFTA, Article 805:

- Domestic industry means the producers as a whole of the like or directly competitive good operating in the territory of a Party.
- Emergency action does not include any emergency action pursuant to a proceeding instituted prior to January 1, 1994.
- Serious injury means a significant overall impairment of a domestic industry.
- Threat of serious injury means serious injury that, on the basis of facts and not merely on allegation, conjecture or remote possibility, is clearly imminent.

In reaction to the imposition of substantial tariffs and tariff-rate quotas on imported Mexican broom corn brooms, on December 12, 1996, Mexico retaliated in a substantial equivalent way by increasing preferential-import duties on the following US-imported products: fructose, chemically-pure sugar and syrup products, telephone agendas or notebooks, flat glass, wood office and bedroom furniture, Tennessee whiskey, bourbon, brandy and wine. The Mexican government knew that the Clinton administration wanted fast tariff reductions, further than those allowed under NAFTA, and that Mexico considered these products to be politically sensitive and influential. The US viewed this action as excessive, for it penalized US exports in a way that could not be considered equivalent to the action taken *vis-à-vis* Mexican broom corn brooms. For this reason, the US requested consultations under the DSM (dispute settlement mechanism) of NAFTA regarding Mexico's retaliatory actions. Meanwhile, Mexico asked for the establishment of a panel to review the safeguard measures imposed by the US under Article 2008 of the NAFTA on January 14, 1997.[298]

B. Legal Claims Regarding the Case

1. Legal Claims as for the United States

The ITC's findings of what *serious injury* meant as a result of the increased imports of Mexican broom corn brooms was based on what they understood to be *domestic industry.* For the US, domestic industry was only focused on the group of production facilities of broom corn brooms and not on the production facilities of plastic brooms. Thus, for the US, "section 302 c) of the *NAFTA Implementation Act* makes applicable to section 302(b) determinations the definition of domestic industry and factors to be considered that are set out in section 202 c) of the *Trade Act.*"[299]

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[298] See *United States Trade Representative,* online: http://www.ustr.gov/pdf/1998_mexico.pdf (date accessed: February 3, 2002); see also Folsom, *supra* note 74 at Chapter III – 53; see also Gantz, *supra* note 292 at 390.

[299] Final Panel Report Broom Corn Brooms, *supra* note 290 at 8.
§ 202 c) (6) (A) (i) defines domestic industry as the following:
With respect to an article, the producers as a whole of the like or directly competitive article or those producers whose collective production of the like or directly competitive article constitutes a major proportion of the total domestic production of such article.
It is important to mention that this definition was added by the Uruguay Round Agreements Act and is based on Article 4 (1) c) of the WTO Agreement on Safeguards. See Final Panel Report Broom Corn Brooms at 8.

The ITC has emphasized the product-line approach, which takes into account the physical properties of the good, the material the good is made of, its uses, where and how it was made, the customs treatment and marketing channels. Consequently, only imported broom corn brooms and domestic broom corn brooms were like products and interchangeable, as plastic brooms involved other production processes and could not be part of the broom corn brooms domestic industry.[300] The ITC established that since broom corn brooms involved different production processes, were made of different materials, and were trailed using different financial records, they could not be considered interchangeable with plastic brooms.[301]

The US objected to the Panel's jurisdiction to arbitrate the consistency of global safeguard measures with the legal requirements of GATT Article XIX and the WTO Agreement on Safeguards, since the Panel was created under the provisions of NAFTA Chapter 20 and was therefore only based on NAFTA obligations. The US argued that NAFTA Article 802 did not incorporate the legal obligations of GATT Article XIX nor of the WTO Agreement on Safeguards, so the Panel could not consider GATT obligations.[302]

Another legal claim to which the US objected was the Panel's being banned from considering Mexico's claim regarding the legal violations of NAFTA Articles 803 and

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[300] See *ibid.* at 9.

[301] See *ibid.* at 14.
The U.S. insisted that the concepts "like" and "directly competitive" are separate concepts. The ITC explained this by making reference to a statement of its legal history by establishing the following: The words "like" and "directly competitive" are not to be regarded as synonymous or explanatory of each other, but rather to distinguish between "like" articles and articles which, although not "like", are nevertheless "directly competitive". In such context, "like" articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.), and "directly competitive" articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefore. See *ibid.* at 18. United States International Trade Commission, *Broom Corn Brooms,* Investigation No. NAFTA-302-1 (Provisional Relief Phase), USITC Publication 2963 (May 1996) at I-13 to I-14, citing H.R. Rep. No. 571, 93rd Cong., 1st Sess. 45 (1973) and S. Rep. No. 1298, 93rd Cong., 2nd Sess., at pages 121-122 (1974).

[302] See *ibid.* at 10.

Annex 803.3 by the ITC, as Mexico did not give notice in time of the claim. For this reason, these legal claims could not fall within the Panel's agenda.[303]

2. Legal Claims as for Mexico

Mexico argued that the USITC's definition of *like product* was inconsistent with both NAFTA and GATT provisions and therefore the US' action emerged under both.[304] The definition of domestic industry by the ITC involved only the production of broom corn brooms and not the production of plastic brooms as well, and was legally inconsistent with the definitions established in the GATT/WTO and NAFTA Agreements. Hence, Mexico argued that the relevant domestic industry should have taken into account the production of plastic brooms in order to talk about *serious injury* caused to the US domestic industry by the Mexican imported broom corn brooms. Mexico established that the determination of *serious injury* was legally incorrect, as it was partially focused on broom corn brooms and did not deal with another type of broom that were *like or competitive products.* On that account, as the global safeguard measures under NAFTA Chapter 8 are regulated by the WTO rules on safeguards, especially the WTO Agreement on Safeguards, the legal violations alleged by Mexico were Articles 801(1), 802 and 805 of the NAFTA as well as Article 4(1)c of the SA. Therefore, the Mexican government concluded that the supposed injury was incompatible with the requirements of NAFTA, especially Chapter 8. Both the GATT/WTO and NAFTA define *domestic industry* as the industrials that produce goods that are *like or directly competitive* with the imported good. Mexico established that in order to be considered *like product*, it was not necessary for the goods at issue to be identical to the domestic ones, but similar in all aspects and therefore interchangeable. In this respect, Mexico also argued that the ITC should take into account the *likeness and direct competitiveness* of a product, rather than *likeness* by itself.[305]

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[303] See *ibid. at* 11.

[304] See Gantz, *supra* note 54 at 30.

[305] See Final Panel Report Broom Corn Brooms, *supra* note 290 at 5, 6, 7, 13 & 17.
NAFTA, Article 801(1) establishes the following regarding Bilateral Actions within Emergency Actions:
1. Subject to paragraphs 2 through 4 and Annex 801.1, and during the transition period only, if a good originating in the territory of a Party, as a result of the reduction or elimination of a duty provided for in this Agreement, is being imported into the territory of another Party in such increased quantities, in absolute terms, and under such conditions that the imports of the good from that Party alone constitute a substantial

Mexico argued that "since NAFTA Chapter 8 and GATT Article XIX are exceptions to the basic free trade obligations of NAFTA, under Rules 33 and 34 of the *Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement*, the burden is on the U.S. to establish compliance with the requirements of those exceptions."[306] Later on, Mexico claimed that the ITC determination of domestic industry failed to comply with

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cause of serious injury, or threat thereof, to a domestic industry producing a like or directly competitive good, the Party into whose territory the good is being imported may, to the minimum extent necessary to remedy or prevent the injury:

a. suspend the further reduction of any rate of duty provided for under this Agreement on the good;
b. increase the rate of duty on the good to a level not to exceed the lesser of
   i) the most-favored-nation (MFN) applied rate of duty in effect at the time the action is taken, and
   ii) the MFN applied rate of duty in effect on the day immediately preceding the date of entry into force of this Agreement; or
c. in the case of a duty applied to a good on a seasonal basis, increase the rate of duty to a level not to exceed the MFN applied rate of duty that was in effect on the good for the corresponding season immediately preceding the date of entry into force of this Agreement.

NAFTA, Article 805 establishes that "domestic industry" means the producers as a whole of the like or directly competitive good operating in the territory of a Party.

WTO SA, Article 4 establishes the following regarding the determination of Serious Injury or Threat thereof:

1. For the purposes of this Agreement:

(a) "serious injury" shall be understood to mean a significant overall impairment in the position of a domestic industry;

(b) "threat of serious injury" shall be understood to mean serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility; and

(c) in determining injury or threat thereof, a "domestic industry" shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.

2. (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

(b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. When factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.

(c) The competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined.

[306] *Ibid.* at 15; see also *Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement* [hereinafter Model Rules] at Rules 33 & 34.

Rule 33: A Party asserting that a measure of another Party is inconsistent with the provisions of the Agreement shall have the burden of establishing such inconsistency.

Rule 34: A Party asserting that a measure is subject to an exception under the Agreement shall have the burden of establishing that the exception applies.

NAFTA Article 803 and Annex 803.3 regarding the requirements of transparency, completeness and consistency as the national investigation of factual and legal issues. Thus, there were ambiguities in the *like product* concept which led to legal errors.[307]

C. Legal Findings and Conclusions of the Arbitral Panel Final Report

On February 11, 1998, the final report of the arbitral panel was published, establishing that the ITC did not support that plastic brooms were not directly competitive and not considered as *like products* within the broom corn broom industry, according to what is set out in NAFTA Chapter 3 regarding the national treatment. Hence, the arbitral panel decision ruled in Mexico's favor based on the technical fault of defining domestic industry and on the inconsistency of US safeguard measures towards NAFTA.[308] In order to reach this decision, the Panel based its analysis upon prior GATT/WTO decisions, such as the *Japan-Taxes on Alcoholic Beverages* case in which the WTO Panel unanimously agreed that the term *like product* has to be established on a case-by-case basis, as previous panels had not set a particular assessment that had to be followed for defining *likeness*, but some have agreed that it referred to nature, quality, properties and uses of the product as well as to tastes and habits of consumers and the classification of the product in nomenclatures.[309]

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[307] See *ibid.* at 10.

NAFTA, Article 803 establishes the following regarding Administration of Emergency Action Proceedings:

a. Each Party shall ensure the consistent, impartial and reasonable administration of its laws, regulations, decisions and rulings governing all emergency action proceedings.

b. Each Party shall entrust determinations of serious injury, or threat thereof, in emergency action proceedings to a competent investigating authority, subject to review by judicial or administrative tribunals, to the extent provided by domestic law. Negative injury determinations shall not be subject to modification, except by such review. The competent investigating authority empowered under domestic law to conduct such proceedings should be provided with the necessary resources to enable it to fulfill its duties.

c. Each Party shall adopt or maintain equitable, timely, transparent and effective procedures for emergency action proceedings, in accordance with the requirements set out in Annex 803.3.

d. This Article does not apply to emergency actions taken under Annex 300-B (Textile and Apparel Goods).

[308] See Folsom, *supra* note 74 at 53-Chapter III; see also *United States Trade Representative, supra* note 297.

[309] See Final Panel Report Broom Corn Brooms, *supra* note 290 at 25; see also *Japan-Taxes on Alcoholic Beverages,* WTO Doc. WT/DS8/R (1996) (Panel Report) at paragraph 6.21.

The Panel's final conclusion was that the arguments of the ITC were neither legally incorrect nor were they correct regarding the *like product* concept, but rather inadequate to allow review of the matter.[310]

Regarding the preclusion of the right towards Mexico to bring before the Panel its legal claims under NAFTA Article 803 and Annex 803.3, the Panel *found* itself authorized to hear the case and disregarded the claim that the US presented about the out-of-time presentations notices of claims and lack of jurisdiction to hear the case.[311] Thus, the Panel decided that it was possible to study the matter under NAFTA alone, as "the NAFTA and WTO versions of the rule are substantively identical and the application of the WTO version of the rule would have in no way changed the legal conclusion reached under NAFTA 803.3(12). Accordingly, the panel chose to base its decision entirely on NAFTA Annex 803.3(12), without relying on Article 3.1 of the WTO Safeguards Code."[312] The Panel also determined the definition of the ITC regarding *domestic industry* as inconsistent with the obligations that the US acquired under NAFTA Annex 803.3(12).[313]

The final legal conclusion and recommendation of the Arbitral Panel was as follows:

> The safeguard measures currently in force pursuant to Proclamation 6961, having been based on an ITC determination that fails to provide reasoned conclusions on all pertinent issues of law and fact, constitutes a continuing violation of United States obligations under NAFTA. This measure has already been in force for two years. The Panel therefore

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[310] See *ibid.* at 26.

[311] See *ibid.* at 22.

[312] Gantz, *supra* note 54 at 1071.

[313] See Final Panel Report Broom Corn Brooms, *supra* note 290 at 27. NAFTA, Annex 803.3(12) establishes the following:
12. The competent investigating authority shall publish promptly a report, including a summary thereof in the official journal of the Party, setting out its findings and reasoned conclusions on all pertinent issues of law and fact. The report shall describe the imported good and its tariff item number, the standard applied and the finding made. The statement of reasons shall set out the basis for the determination, including a description of:
a) the domestic industry seriously injured or threatened with serious injury;
b) information supporting a finding that imports are increasing, the domestic industry is seriously injured or threatened with serious injury, and increasing imports are causing or threatening serious injury; and
c) if provided for by domestic law, any finding or recommendation regarding the appropriate remedy and the basis therefor.

> recommends that the United States brings its conduct into compliance with the NAFTA at the earliest possible time.[314]

Finally, US President Bill Clinton nullified the safeguard measures through *Proclamation 7164* on December 3, 1998, but complied with it nine months after the publication of the Final Report, a year before the safeguards were scheduled to expire.[315] As for Mexico, it implemented its retaliatory measures on January 1999.[316]

D. Main Reasons Why this Case was Solved under NAFTA Chapter 20

Mexico realized that buried within the ITC's definition of *domestic industry*[317] was an issue regarding US compliance with NAFTA, based on the additional conditions established in NAFTA Article 802. The definition of domestic industry found in NAFTA Article 805 belongs to the additional conditions of NAFTA Article 802, meaning the US must also comply with the process requirements set forth in NAFTA Article 803 and Annex 803.[318]

An important point to consider is that there was no incorporation of GATT obligations into NAFTA Article 802, so the dispute had to be settled under the NAFTA Chapter 20 dispute settlement mechanism as opposed to the WTO dispute settlement mechanism. Thus, unless

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[314] *Ibid.* at 29. The Final Report was signed by Paul O'Connor (Chair), John H. Barton, Raymundo Enriquez, Robert E. Hudec, and Dionisio Kaye. It was submitted to the disputing parties on January 30, 1998.
The present author can conclude that the Arbitral Panel did not decide as to whether or not it was allowed to adjudicate GATT legal claims. It found that the U.S. failed to comply with procedural regulations that were common to NAFTA and GATT. It also found that Mexico's claim could be dealt with by application of NAFTA alone. See Weiler, *supra* note 109 at 186.

The Panel conclusion was against both GATT law and NAFTA Annex 803.3 (12). See De Mestral, *supra* note 67 at 334.

[315] See Gantz, *supra* note 54 at 1072. See *Proclamation No. 7154*, 63 Fed. Reg. 67,761, 67,762 (stating that *Section 204 of the Trade Act of 1974* authorizes the President to terminate a safeguard action (Dec. 8, 1998).

[316] See *United States Trade Representative, supra* note 297.

[317] An important factor that might have been considered by the U.S. International Trade Commission for defining the term *domestic industry* was that it took into account that section 302 c) of the *NAFTA Implementation Act* makes applicable to section 302 b) determinations, the definition of domestic industry and factors to be considered that are set out in section 202 c) of the *Trade Act of 1974;* thus, regarding this matter, the content of the *NAFTA Implementation Act* was related to the content of the *Trade Act of 1974.* See Final Panel Report Broom Corn Brooms, *supra* note 290 at 8.

[318] See *ibid.* at 11; see also Gantz, *supra* note 54 at 1070.

GATT obligations had been adopted into the NAFTA Agreement, the Panel could then consider them, otherwise the case might have been solved by the WTO dispute settlement mechanism.[319]

The author considers that the US asked for safeguard measures under NAFTA because there is preferential treatment towards developing countries under GATT. Whereas Article 24.1 of the DSU establishes special consideration towards least-developed countries, NAFTA prescribes reciprocal treatment towards developing nations. The US preferred to claim safeguard measures for imported Mexican broom corn brooms under NAFTA Chapter 8, for the US Government found the exception for elimination of the tariffs plan under NAFTA Article 302, which is referred to as NAFTA Safeguards or Safety Measures on NAFTA Chapter 8, allowing NAFTA Governments the application of the escape clause action of tariff increases on excessive imports of goods that could cause or threaten to cause injury to domestic industries.[320]

It is possible that both Mexico and the US agreed during the panel process to accept a decision under NAFTA, maybe because whereas a decision based on GATT Article XIX or the WTO Agreement on Safeguards would be subject to the creation of precedents for future WTO panel decisions, a decision taken under NAFTA Chapter 8 could create consequences on emergency actions disputes under NAFTA.[321]

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[319] See *ibid.* at 11. It is important to mention that for the Broom Corn Brooms Case, the U.S. differed the language of NAFTA Article 802 with the direct language of incorporation of GATT obligations of NAFTA Articles 301(1) and 309(1) as follows:
NAFTA, Article 802 established: "Each party retains its rights and obligations under Article XIX of GATT..."
NAFTA, Articles 309(1) and 309(1) established: "Article [III and XI] of the GATT and its interpretative notes . . . are incorporated into and made part of this Agreement".

[320] It is important to mention what GATT, Article IX(1) establishes towards safeguards on goods for developing countries:
1. Safeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned.

[321] See Gantz, *supra* note 54 at 1071.

III. A Parallel Fora Case: "Farm Products Blockade – Canada vs. United States of America"

A. Factual Background for the Farms Products Blockade Case

It is essential to note that a very important step of the Uruguay Round was to bring agriculture within the GATT. The US and many other countries insisted that other trade sectors would not be completed until there was an agreement to liberalize agriculture. In fact, some non-agricultural sectors did not conclude an agreement until an agreement on agriculture had been set up. Indeed, after years of state intervention in the agricultural domain, the Uruguay Round in 1994 achieved the liberalization of agriculture by completing the *Uruguay Round Agreement on Agriculture* (URAA), which contains sanitary and phytosanitary measures, state trading, reduction of export subsidies, domestic support and import duties on agricultural products.[322] Both Canada and the US, as WTO Member States, signed the URAA and committed themselves to follow its provisions.

The present author shall provide a thorough picture of Canada's and the US' relations in the agricultural sector in order to introduce the disputes they have encountered. To this end, the author shall begin by saying that Canada has always been a US trading partner. In fact, after Japan, Canada is the second largest US market for agricultural products. As well, the US is Canada's largest trading partner. Nevertheless, a series of disputes have arisen between the two countries, as important differences in national agricultural programs have come to light since the lowering of trade barriers. In 1994 there was a grain dispute, stemming from the elimination of Canadian transport subsidies, US export subsidies and bad weather. A new dispute arose in 1995 regarding C*anadian Agricultural Products Tariffication,*[323] including dairy, poultry, eggs, barley and margarine, when both countries substituted severe import quotas on dairy products with tariff-rate quotas (TRQs) in order

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[322] See *Agriculture & the WTO: The Road Ahead,* online: http://www.ers.usda.gov/Briefing/WTO/genuraa.htm (date accessed: February 18, 2002) at 18 & 22. See also *WTO Agricultural Negotiations. The Issues and Where We Are Now,* text updated January 25, 2002, online: http://www.wto.org (date accessed: February 17, 2002) at 11. It is important to mention that in the Doha, Qatar Ministerial Conference, the WTO Member States declared that agriculture is now a great responsibility for which negotiations shall end by January 1, 2005.

[323] See Canadian Tariffs Panel Report, *supra* note199. This case was the first one solved under NAFTA Chapter 20 dispute settlement mechanism.

to comply with the Uruguay Round Agreement. Moreover, it seems that Canada opposed its trade obligations under NAFTA by observing the Uruguay Agreement, as implementation of the TRQs limited the US' entry into Canadian markets due to high over-quota rates. The US alleged that under NAFTA both Canada and the US would not impose higher tariffs on imports from any of them, but the tariffs agreed under CUSFTA Article 710, which is incorporated into NAFTA Annex 702.1; thus, each country would eliminate tariffs and non-tariff barriers according to CUSFTA. Besides, Canada established that it had the faculty to translate non-tariff barriers into TRQs under the WTO as well as to apply the latter ones to the US and to all WTO members. As a result, the US requested consultations under the NAFTA Chapter 20 forum through a panel which determined in its final panel report that Canada had not violated its NAFTA obligations by applying the new tariffs to US goods. Ever since the panel decision, the access of the US to dairy, poultry, eggs, margarine and barley products in Canadian markets has not changed; there was only a suspension of barley import restrictions.[324]

There was another dispute within the agricultural trade sector between the US and Canada from 1997 to 2000, regarding dairy products for which the WTO dispute settlement mechanism was used. The US requested consultations, alleging that Canada supplied export subsidies for dairy products, which affected US' sales, as well as violation of the WTO Agreement on Subsidies, for Canada did not allow access to an in-quota quantity for commercial import shipments for fluid milk. The *Final Panel Report*[325] found that Canada financed exports of dairy products under classes of milk 5(d) and 5(e). It also found that Canadian limitations on imports under the TRQ were not sustained by the Canadian tariff schedule linked to annual cross-border acquisitions by Canadians. Later on, the panel established that the TRQ should be unlocked to imports and cross-border consumers. For this, Canada appealed the panel decision before the WTO Appellate Body which confirmed that Canada financed exports of dairy products under classes of milk 5(d) and 5(e), but it

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[324] See *Canada: Issues and Analysis,* online: http://www.ers.usda.gov/briefing/canada/history.htm [hereinafter Analysis] (date accessed: February 18, 2002) at 1; see also Gantz, *supra* note 54 at 1061.

[325] *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* Request for Consultations, (1997), WTO Doc. No. WT/DS103/1.

reversed the panel's decision on the TRQ on fluid milk. Canada implemented the decisions imposed by the AB.[326]

B. Legal Claims Regarding the Case

Today, the US considers agriculture to represent a very important field for American farmers and ranchers. The states of South Dakota and Montana alleged that Canadian farm products increased health and safety concerns that violated NAFTA and WTO provisions. Indeed, the US was concerned about America's health, quality and safety in relation to imported farm products - grain, swine and cattle - originating from Canada. The US alleged that Canadian livestock had drugs and fungus in it. For this reason, the US established technical trade barriers in respect of these Canadian products, claiming they violated the international agreed-upon standards of health and safety to safeguard human and plant life.[327]

Canada alleged that the states of South Dakota and Montana did not allow entrance of farm products based on false declarations relating to health and safety. Canada claimed US obligations under both WTO and NAFTA concerning US measures that affected Canadian imports of grain, swine and cattle into the US.[328] Canada claimed that the US, through South Dakota's measures on Canadian farm products, was inconsistent with its obligations under NAFTA, as these measures would nullify or impair benefits to Canada whether or

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[326] See Analysis, *supra* note 324 at 2.

[327] See *International Trade of the National Livestock Producers Association,* online: http://www.nlpa.org/Industry%20Infor/Issue%20 Papers/ForeignTrade.htm (date accessed: 18 February 2002) at 1. See also *Agriculture & the WTO: The Road Ahead,* online: http://www.ers.usda.gov/Briefing/WTO/genuraa.htm (date accessed: February 18, 2002) at 20.

It is important to mention that within NAFTA there has been an increase of importance on solving conflicts related to SPS (Sanitary and Phytosanitary Measures) through the NAFTA Committee on SPS Measures. Nevertheless, solving SPS disputes may be a bit more complicated, as there are three regulatory frameworks regarding disease and pests. See *International Agriculture and Trade Reports: NAFTA* (Washington, D.C.: U.S. Department of Agriculture, 1999) at 4 & 20.

[328] See "Canada Requests WTO, NAFTA Consultations over Farm Blockade", *Inside U.S. Trade,* (September 25, 1998) [hereinafter Canadian Request] at 4.

not they were inconsistent with NAFTA.[329] The US obligations under NAFTA that were being violated were as follows:

- Article105 regarding extent of obligations;
- Article 301 regarding national treatment;
- Article 309 regarding import and export restrictions on non-tariff measures;
- Article 712 regarding basic rights and obligations on sanitary and phytosanitary measures;
- Article 904 regarding basic rights and obligations on standards-related measures;
- Article 1202 regarding cross-border trade in services;
- Article 1203 regarding most-favored nation treatment on cross-border trade in services;
- Article 1204 regarding standard of treatment on cross-border trade in services;
- Annex 204.[330]

Canada claimed that the US was acting in a manner inconsistent with its obligations under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade and the GATT 1994, by not allowing the importation of Canadian cattle, swine and grain, based on the following provisions:

- Articles 2, 3, 4, 5, 6, 13 and Annexes B and C of the Agreement on the Application of Sanitary and Phytosanitary Measures.
- Articles 2, 3, 5, and 7 of the Agreement on Technical Barriers to Trade.
- Article 4 of the Agreement on Agriculture.
- Articles I, III, V, XI, and XXIV: 12 of the GATT 1994.[331]

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[329] See "Canadian Request for NAFTA Consultations", *Americas Trade,* (October, 1998) at 24.

[330] See Gantz, *supra* note 54 at 1074 & 1075. See NAFTA, *supra* note 65 at Articles 105, 301, 309, 712, 904, 1202, 1203, 1204, and Annex 204 for more information about the content of these articles.

[331] See *United States - Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, Request for Consultations from Canada (1998), WTO Doc. WT/DS144/1, G/L/260, G/SPS/W/90, G/TBT/D/18, G/AG/GEN/27, online: http://www.wto.org (date accessed: 18 February 2002) [hereinafter US Measures Affecting Canadian Farm Products] at 1; see also GATT, *supra* note 7 at Articles I, III, V, XI, and XXIV:12; Agreement on the Application of Sanitary and Phytosanitary Measures, Articles 2, 3, 4, 5, 6, 13, and Annexes B and C; Agreement on Technical Barriers, Articles 2, 3, 5, and 7; Agreement on Agriculture, Article 4 for more information regarding their content.

Canada filed its claims under the both NAFTA Chapter 20 and WTO dispute settlement mechanisms. Canada presented its request for consultations under the WTO DSM on September 25, 1998, to the Chairman of the Dispute Settlement Body based on the following legal basis: Article XXIII of the GATT 1994, Article 11 of the Agreement on the Application of Sanitary and Phytosanitary Measures, Article 14 of the Agreement on Technical Barriers to Trade, Article 19 of the Agreement on Agriculture and Article 4 of the DSU concerning the prohibition of entry or transit imposed by the state of South Dakota and some other US states towards Canadian trucks that contained grain, swine and cattle, for these actions nullified and impaired the benefits that Canada could obtain under the alleged violated agreements either directly or indirectly. Also of note is the fact that Canada requested consultations with the objective of reaching a satisfactory agreement.[332]

C. Main Reasons Why there Were Parallel Fora for this Case

As the present author is treating different matters of the same dispute which may not overlap with one another, the rule of NAFTA priority does not apply. The author places Canada's action under NAFTA on Article 2005, paragraph 4, which states that disputes arising under NAFTA and GATT, which involve Sanitary and Phytosanitary Measures relating to a measure adopted or maintained by a party – in this case the US - to look after its human, animal or plant life or health, or to protect its environment, the complaining party – in this case Canada – may opt for dispute settlement procedures under NAFTA.

In this case, even though the US did not ask through a written request that the matter be considered under NAFTA, Canada discretionarily viewed that - for matters related to the extent of obligations of NAFTA Parties, national treatment, import and export restrictions on non-tariff measures, basic rights and obligations on sanitary and phytosanitary measures and on standards-related measures, cross-border trade in services, most-favored nation treatment on cross-border trade in services and standard of treatment on cross-border trade

[332] See US Measures Affecting Canadian Farm Products at 1 & 2: see also Canadian Request at 24 & 25.

in services - it should bring these matters of the dispute under NAFTA's Chapter 20 dispute settlement mechanism.

Finally, concerning NAFTA Article 2005 paragraph 6, the author believes that although this article establishes that once the dispute settlement process has begun under NAFTA Chapter 20 through Consultations established by NAFTA Article 2007 or under GATT, the one chosen forum will exclude the other, except in relation to issues set out in either paragraph 3 or 4 of NAFTA Article 2005. For matters that involve parallel fora, this provision does not apply, as we are talking about different subject matters of the same dispute and it would be illogical to conclude that the forum that does not foresee certain subject matters of one dispute may be excluded from the other. Besides, the author recognizes that paragraph 4, which talks about sanitary and phytosanitary and standards-related measures, is an exception to this general rule of exclusion of forum, so this rule does not apply to this case.

The main reason why Canada was able to file parallel actions under the NAFTA and the WTO dispute settlement mechanisms was that Canada wisely sought solutions to different matters regarding the same dispute, likely in response to political pressure. This is why Canada could file separately certain violated provisions under WTO and certain other provisions under NAFTA. Thus, *Canada planned to solve under NAFTA its Sanitary and Phytosanitary Measures provisions regarding the health and safety matters, and to solve under WTO the blockade for entry under GATT Article XI regarding quantitative restrictions.* In other words, whereas the WTO would only solve violations regarding WTO obligations, NAFTA Chapter 20 would only solve violations regarding NAFTA obligations.[333]

D. Agreement on the Dispute

Disputes that arise under NAFTA need not necessarily reach the panel stage to be solved. Indeed, they can be solved through government negotiations and thereby reach amicable

[333] See Gantz, *supra* note 54 at 1075 & 1082 [emphasis added].

composition as a means of resolution of international disputes.[334] The dispute on *Farm Products Blockade* did not reach further stages of proceedings under both NAFTA Chapter 20 and WTO dispute settlement mechanisms, as the US announced an agreement with Canada on a primary group of measures to "open Canadian markets to American farm and ranch products."[335] Hence, both governments concluded that actions which disrupted trade between them should be avoided. They also established a Consultative Committee on Agriculture and agreed upon certain actions regarding the following Canadian agricultural trade sectors:[336]

- Import of US Slaughter Swine
- Expansion of Northwest Cattle Project for Restricted Feeder Cattle
- Animal Health Regionalization
- Other Animal Health Issues
- Exchange of Cattle Data
- In-Transit Movement of Grain by Rail
- Wheat Access Facilitation Program
- Phytosanitary Requirements for the Importation of US Wheat
- Other Grain Related Issues
- Seed Trade
- Export Subsidies (Oats)
- Veterinary Drugs
- Pest Control Products
- Horticulture
- Joint Cooperation on Biotechnology
- Labeling

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[334] See *International Agriculture and Trade Reports: Agriculture in the WTO* (Washington, D.C.: U.S. Department of Agriculture, 1998) at 5.

[335] *USTR, USDA Announce Series of New Measures to Open Canadian Farm Markets*, (Office of the U.S. Trade Representative: Washington, D.C., December 4, 1998), online: http://www.ers.usda.gov (date accessed: February 18, 2002) [hereinafter USTR, USDA Announcements] at 1.

[336] See *ibid.* at 1; see also *Canada: Issues and Analysis,* online: http://www.ers.usda.gov/briefing/canada/history.htm (date accessed: February 18, 2002) at 2.

Current statistics of agricultural trade between the U.S. and Canada show the following:
Canada's total agricultural exports in 2000: US$15.6 billion
U.S. agricultural imports from Canada: US$ 8.7 billion (cattle and calves, swine, beef and veal, pork, wheat, vegetable and prep., sugar and products, beverages, oilseeds, cocoa and prods., barley, red meat, biscuits and wafers).
U.S. agricultural exports to Canada: US$ 7.6 billion (animals and products, fruit juices, grains and feeds, nuts and prep., fruits and prep., vegetables and prep, beverages excluding juice, oilseeds and prods, sugar and tropical products). The lower exchange value of the Canadian dollar relative to the U.S. dollar has increased the amount of exports in the U.S.
See *Canada: basic information, key statistics*, online: http://www.ers.usda.gov/briefing/canada/keystatistics.htm (date accessed: February 18, 2002) at 1. See also *Canada: Trade,* online: http://www.ers.usda.gov/briefing/canada/trade.htm (date accessed: February 18, 2002) at 1-3.

- Sugar-Containing Products[337]

The US felt that removing barriers to North American agricultural trade would increase its competitiveness in many sectors of agriculture, since open trade would diminish the probable local falls in case of bad weather and many consumers of the three NAFTA countries would have better access to products.[338] In this way, the US on the one hand emphasized the parallel importance of NAFTA Chapter 7 - regarding agriculture as well as sanitary and phytosanitary measures – and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, and on the other hand, the parallel importance of NAFTA Chapter 9 on Standards-Related Measures including its annexes and the WTO Agreement on Technical Barriers to Trade.[339] Both Canada and the US expressed their commitment to the solution of issues that may not be consistent with rights and obligations under NAFTA and WTO Agreements and declared their willingness to meet at least once a year in order to evaluate their bilateral agricultural trade. Finally, they concluded that they "agree to improve the management of bilateral agricultural trade relations by establishing a comprehensive early-warning and consultation process to resolve problems at an early stage in their development."[340]

IV. Categories of Case Studies:

It is of great interest that NAFTA Governments, as WTO Member States, have the right of forum alternatives or forum-shopping for solving their trade disputes. This means they may choose between NAFTA Chapter 20 or the WTO based on the DSU to solve their

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[337] *Record of Understanding between the Governments of the United States of America and Canada regarding Areas of Agricultural Trade* (December 4, 1998), online: http://www.ers.usda.gov/briefing/canada/history.htm (date accessed February 18, 2002) [hereinafter Agricultural Understanding between the US and Canada] at 4.

[338] See *North American Free Trade Agreement (NAFTA),* online: http://www.ers.usda.gov/briefing/nafta/ (date accessed: February 18, 2002) at 1.

[339] See Agricultural Understanding between the US and Canada, *supra* note 337 at 2.

[340] *Ibid.* at 2 & 3.

trade disputes discretionarily under one dispute settlement mechanism, but not under both of them.[341]

There cannot be a general rule as to whether or not NAFTA governments may use one forum or the other. Indeed, the explanation of choice of forum should be made based on a body of jurisprudence or on a case-by-case basis influenced by legal, jurisdictional, and political considerations, as each case must be analyzed separately. Thus, it is important to mention that this case-by-case basis can be divided into three categories, depending on the factors that may influence the choice of forum of NAFTA parties.[342]

A. No Effective Choice of Forum: Through this category, certain provisions regarding a specific subject matter are not foreseen in either NAFTA or GATT. Therefore, the case necessarily has to be heard before one forum or the other. If no allegation of violation could be claimed under the WTO dispute settlement mechanism, the case should be solved under the NAFTA Chapter 20 dispute settlement mechanism. If no allegation of violation could be claimed under Chapter 20 dispute settlement mechanism, the case should be solved under the WTO dispute settlement mechanism. Hence, regarding this type of case, it can be said that there is no effective choice of forum for NAFTA governments in case the subject matter of the dispute is not foreseen in either NAFTA or GATT/WTO provisions, as NAFTA parties do not have a real choice. For example, in *Certain Measures Concerning Periodicals* there was no effective choice of forum for the US, as the WTO dispute settlement mechanism was the only way to settle the dispute due to the fact that cultural industries are considered an exemption under NAFTA based on the former exemption of CUSFTA Article 2005, which later on evolved into Article 2106 of the NAFTA.[343]

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[341] See Gantz, *supra* note 54 at 1026; see also Trakman, *supra* note 101 at 19.

[342] See *ibid.* at 1091.

[343] See *ibid.* at 1076 & 1092.
The following NAFTA cases resemble the "no effective choice of forum" trend for NAFTA parties, as no allegation of violation could be claimed under the WTO dispute settlement mechanism and were, thus, solved through the NAFTA Chapter 20 dispute settlement mechanism:

- *Restrictions on Small Package Delivery* (U.S. vs. Mexico). There was no basis for settling the dispute under the WTO dispute settlement mechanism, as this dispute was referred exclusively to

Both the WTO Agreements and NAFTA may deal with many of the same topics, but they may not deal with many others. For this reason, there will be a non-effective choice of the NAFTA forum in cases of state-trading and competition policy, which are not dealt with in any WTO Agreement, yet are very important for Mexico's market access since Mexico has lacked, throughout its history, antitrust enforcement, privatization of key sectors and a persistent government role in such fields. Alternatively, there will be a non-effective choice of the WTO forum in the areas of customs valuation and preshipment inspection, which are not foreseen anywhere throughout the NAFTA and which are not terribly relevant, as they are not key matters in terms of market access in North America.[344] Therefore, it can be concluded that in this category of case studies there is no overlap of

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NAFTA Chapter 19. See *USTR Asks Mexico For Consultations Over Treatment of Express Delivery Firm,* Int'l Trade Daily (BNA) (Apr. 27, 1995) for more information on this dispute.

- *Truck Transport* (Mexico vs. U.S.). The subject matter of the dispute was only related to an interpretation of NAFTA obligations. Therefore, Mexico had no fundaments to seek resolution of the dispute under the WTO. See *NAFTA Arbitration Panel on U.S. Resistance to Mexican Truckers,* Int'l Trade Daily (BNA) (Sept. 25, 1998) for more information on this dispute.
- *Agricultural Products Tariffication* (U.S. vs. Canada). As the U.S. could not argue that Canada had violated the WTO Agreement on Agriculture, the U.S. had no choice to settle this dispute under the WTO but under the NAFTA Chapter 20 dispute settlement mechanism. See *U.S. Requests Panel to Settle Canada Dairy Dispute,* U.S.-Mex. Free Trade Rep., Aug. 21, 1995; *NAFTA Chapter 20 Panel Selected in Farm Tariff Flap with Canada,* 13 Int'l Trade Rep. (BNA) 104, (Jan. 24, 1996) for more information on this dispute.
- *Bus Service* (Mexico vs. U.S.). As there were no cross-border bus service provisions in any WTO agreement, Mexico had no choice but to settle the dispute under NAFTA Chapter 20. See *Mexico Seeks NAFTA Arbitration Panel on U.S. Resistance to Mexican Bus Service,* Int'l Trade Daily (BNA) (Nov. 3, 1998); Nagel, J., *NAFTA: Mexico Calls NAFTA Trade Minister Meeting to Gain Cross-Border Access for Its Trucks,* Int'l Trade Daily (BNA) (July 28, 1998).

The following NAFTA cases resemble the "no effective choice of forum" trend for NAFTA parties, as no allegation of violation could be claimed under NAFTA Chapter 20 dispute settlement mechanism and were, thus, solved through the WTO dispute settlement mechanism:

- *Split-Run Periodicals* (U.S. vs. Canada). The U.S. was aware of the exception that cultural industries had under NAFTA, so discrimination against foreign periodicals was permitted. Thus, the U.S. could argue under the WTO dispute settlement mechanism breach of the national treatment principle and the provisions that forbid quantitative restraints. See *Canada - Certain Measures Concerning Periodicals,* (1997), WTO Doc. No. WT/DS31/R (Panel Report); *Canada – Certain Measures Concerning Periodicals,* (1997), WTO Doc. No. WT/DS31/AB/R (Appellate Body Report) for more information about this dispute.
- *Dairy Products Exports Subsidies* (U.S. vs. Canada). As no NAFTA issues were raised from this dispute but from the WTO Agreement on Subsidies, the U.S. used the WTO dispute settlement mechanism. Many non-NAFTA WTO governments encouraged the U.S. in using the WTO forum. See *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Request for Consultations,* (1997), WTO Doc. No. WT/DS103/1 for more information on this dispute.

[344] See Folsom, *supra* note 74 at Chapter III-9.

subject matter in either NAFTA or GATT 1994; consequently, the NAFTA rule of priority will not apply.

B. Effective Choice of Forum: Through this category, NAFTA parties make a clear and effective choice between NAFTA Chapter 20 and the WTO dispute settlement mechanisms, for there is a jurisdiction that includes the same matters in each treaty and may cause overlap. NAFTA parties may decide if they would like to produce binding precedents for future panels by choosing either the WTO forum to solve their dispute or the NAFTA Chapter 20 mechanism which lacks a reasonable period of time for compliance as well as an implementation system. This does not mean that NAFTA Chapter 20 panels do not create precedents; they do, but it is unlikely that a WTO panel decision would cite decisions under NAFTA Chapter 20 forum, and in fact this has never happened. Furthermore, *NAFTA parties may even choose NAFTA Chapter 20 forum considering that there was no incorporation of GATT obligations into NAFTA, and therefore the dispute could not be settled under the WTO dispute settlement mechanism.* [345]

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[345] See Gantz, *supra* note 54 at 1094 & 1103 [emphasis added].
The following case was brought before the WTO dispute settlement mechanism within the "effective choice of forum" trend:

- *Helms-Burton.* Canada and Mexico chose the NAFTA Chapter 20 dispute settlement mechanism because any of the WTO agreements contained provisions relating to immigration and because the immigration provisions of the Helms-Burton Act were a breach of NAFTA provisions. Both Canada and Mexico were disqualified of raising the same issues of the dispute under the WTO dispute settlement mechanism. See *NAFTA: Canada Files Formal NAFTA Challenge of U.S. Law Blocking Trade with Cuba,* Int'l Trade Daily (BNA) (Mar. 14, 1996) for more information on this dispute.

The following cases were presented before the NAFTA Chapter 20 dispute settlement mechanism within the "effective choice of forum" trend:

- *Safeguards on Brooms* (Mexico vs. U.S.). It is possible that the two governments agreed to accept a decision under NAFTA at some point during the panel process, as a decision based on the WTO Safeguards Agreement would create precedents for future reference. On the other hand, a decision based only on the Safeguards provisions under NAFTA Chapter 8 would create only precedents for future NAFTA disputes. See *In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico* (1998), USA-97-2008-01 (Ch. 20 Panel).
- *Import Restrictions on Sugar* (Canada vs. U.S.). It seems that the NAFTA Chapter 20 forum was chosen for the perception of the solution was political because sugar was linked to the U.S. concerns over Canadian policies on agricultural products. See *Canadian Government Seeks NAFTA Talks on U.S. Restrictions on Sugar Exports,* Int'l Trade Daily (BNA) (Feb. 14, 1995) for more information on this dispute.
- *Uranium Exports* (Canada vs. U.S.). As NAFTA Chapter 20 dispute settlement provisions seemed to be more promising, Canada chose this dispute settlement mechanism, even though it could have chosen the WTO dispute resolution system under GATT, Article XXIII and the 1979 Antidumping Code. See *Canada Seeks NAFTA Consultations on U.S. – Russia Uranium Agreement,* Int'l Trade Daily (BNA) (Mar. 29, 1994) for more information.

In fact, within this category of cases, one must be very careful to consider which version of the GATT is being referred to, whether one is referring the case to GATT 1947 or to GATT 1994, in order to decide whether the NAFTA Priority rule applies.

Within the *Broom Corn Brooms* case, Mexico realized it was an issue regarding US compliance towards NAFTA, based on the additional conditions that were established in NAFTA Article 802. Thus, as the definition of domestic industry found in NAFTA Article 805 belongs to the additional conditions of NAFTA Article 802, the US shall also comply with the process requirements established in NAFTA Article 803 and Annex 803. Moreover, Mexico and the US realized that if they had chosen the WTO dispute settlement mechanism, they may have created a precedent that could be unpleasant for future reference. Besides, some NAFTA safeguard provisions related to global safeguard actions as well as to the emergency action increased procedures that did not exist under WTO Safeguards Agreement.[346]

C. Parallel Fora: Through this category, NAFTA parties *may simultaneously present different subject matters regarding the same dispute* before both NAFTA Chapter 20 and WTO fora. Thus, depending on the jurisdiction of the subject matter of the dispute, there may be some issues of the same dispute that must necessarily be solved under NAFTA's Chapter 20 forum and issues of the same dispute that must necessarily be solved under the WTO dispute settlement mechanism. Some commentators have considered that filing different issues of the same dispute through parallel fora may be disadvantageous, for there may be a double risk of inefficiency and redundancy, as well as considerable cost associated to litigation expenses.[347] Nevertheless, it is almost inevitable that occasionally

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[346] See *ibid.* at 1093 & 1103.

[347] See *ibid.* at 1095 & 1105 [emphasis added].
The following cases have involved the trend of "parallel fora":

- *Farm Products Blockade* (Canada vs. U.S.). Canada could file different issues of the same dispute under the two different fora. See "Canada Requests WTO, NAFTA Consultations over Farm Blockade", *Inside U.S. Trade,* (September 25, 1998); "Canadian Request for NAFTA Consultations", *Americas Trade,* (October 1, 1998); "Canadian Request for WTO Consultations", *Americas Trade,* (October 1, 1998); *United States - Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada*, Request for Consultations from Canada (1998) WTO Doc. WT/DS144/1, G/L/260, G/SPS/W/90, G/TBT/D/18, G/AG/GEN/27; *USTR, USDA Announce Series*

NAFTA Chapter 20 is required to deal with GATT/WTO legal matters due to the fact that there is a broad subject matter of GATT provisions in NAFTA, a broad jurisdictional scope in NAFTA Chapter 20 and a large incorporation by reference of GATT/WTO provisions into NAFTA. Hence, peripheral decisions may be referred to a WTO dispute panel regarding NAFTA issues brought before the panel.[348] Within this category, the present author chose to analyze the *Blockade of Farm Products* parallel fora case study between Canada and the US.

Finally, it is important to note that concerning NAFTA Article 2005 paragraph 6, the author believes that this provision does not apply to matters involving parallel fora, as the author is dealing with different subject matters and it would be illogical to conclude that the forum that does not foresee a certain subject matter of the dispute may be excluded from the other.[349]

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of New Measures to Open Canadian Farm Markets, (Office of the U.S. Trade Representative: Washington, D.C., December 4, 1998) for more information.

- *High Fructose Corn Syrup* (U.S. vs. Mexico). This case involved antidumping and countervailing duties (ADCV) provisions. Multiple fora can be used for antidumping and countervailing duties. Whereas an interested party in ADCV proceeding may ask for review of a national administrative decision under NAFTA Chapter 19, the government may simultaneously wonder about the validity of the decision before a WTO panel under the WTO Antidumping or Subsidies Agreements. See *USTR Launches Investigation Against Mexican Corn Syrup Practices,* Int'l Trade Daily (BNA) (May 19, 1998); *Mexico-Antidumping Investigation of High Fructose Corn Syrup (HFCS)* from the United States, Request for Consultations, (1997), WTO Doc. No. WT/DS101/1; *Mexico Takes Next Step in Sugar Dispute as U.S. Fights HFCS Duties,* Americas Trade, Nov. 26, 1998 for more information on this dispute.
- *Mexican Tomatoes* (Mexico vs. U.S.). Mexico filed request under both WTO and NAFTA Chapter 20 consultations regarding the implementation of a tariff-rate quota on tomatoes from Mexico. Mexican tomato growers agreed under NAFTA to raise prices in order to remove the injury that dumping had caused. Mexico alleged the violation from the U.S. of the WTO Antidumping Agreement. See *U.S. – Mexico Consultations to Continue on Trucking, Tomato Quota, SECOFI Says,* 13 Int'l Trade Rep. (BNA) 102, (Jan. 24, 1996); *Antidumping Investigation: Fresh Tomatoes from Mexico,* 61 Fed. Reg. 56,618, 56,619 (1996) (reporting the U.S. Commerce Department's suspension of antidumping investigation involving fresh tomatoes from Mexico); *United States – Antidumping Investigation Regarding Imports of Fresh or Chilled Tomatoes from Mexico, Request for Consultations,* (1996), WTO Doc. No. WT/DS49/1 for more information on the dispute.

[348] See *ibid.* at 1038.

[349] Note that the only exception lies on paragraphs 3 and 4 of the same NAFTA article.

Having analyzed the choice of forum case-by-case basis categories, it is worthwhile mentioning that the US has established that if there are NAFTA provisions whose content was incorporated from the GATT or from a WTO Agreement through direct language of incorporation to the NAFTA, the establishment of a panel could be considered. Yet, the panel established under NAFTA could not consider GATT obligations unless they had been incorporated into the NAFTA.[350] For instance, the GATT petroleum products provisions are incorporated by reference into the NAFTA in Article 603.1; GATT provisions on safeguards are incorporated in NAFTA under Article 802 by establishing that each party keeps its rights and obligations under GATT Article XIX or any safeguard agreement pursuant thereto. GATT also incorporates into NAFTA its provisions regarding the exception towards prohibitions and restrictions on imports, exports or sales of goods and the general exceptions established in GATT Article XX. As well, some provisions may be reaffirmed but not incorporated by reference into NAFTA, such as agricultural domestic support programs and technical barriers to trade.[351]

It may be concluded that within this category of case study, the rule of NAFTA priority does not apply, for we are dealing with different matters of the same dispute, not with the same subject matter that may cause overlap and confusion as to which forum to choose.

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[350] See Final Panel Report Broom Corn Brooms, *supra* note 290 at 11.

[351] See Gantz, *supra* note 54 at 1037.

CONCLUSIONS

Conclusion Regarding the NAFTA Provision on Choice of Forum

The choice of forum provision is only established by NAFTA Article 2005, paragraph 1, which grants the complaining party the discretionary right of choosing the forum under which it would like to solve the dispute. The present author believes it is difficult to pronounce a general rule as to whether or not NAFTA governments may use one forum or the other, as there should be a case-by-case study. The author shares the idea of David Gantz, who suggests dividing this study into three categories that may influence the choice of forum of NAFTA parties. Regarding these categories, there are some important observations the author would like to point out:

a) There is no effective choice of forum for disputes that, due to their unforeseen subject matter either in the NAFTA or in the GATT, must be necessarily heard before one forum or the other, since NAFTA parties do not have a real choice. The *Certain Measures Concerning Periodicals* case resembles this category of cases, as the WTO dispute settlement mechanism was the only way to solve the dispute of cultural industries, which are considered an exemption under NAFTA. It can be concluded that there is no overlap of subject matter established in either the NAFTA or the GATT. Therefore, within this category of cases, the NAFTA Priority rule does not apply. Finally, the author asserts that the compulsory dispute settlement provisions under NAFTA are found in this category, as it is impossible to have an effective choice of forum when there are cases, such as per NAFTA Article 2005, paragraphs 2, 3 and 4, which necessarily have to be solved under NAFTA.

b) The author concludes that the effective choice of forum category is the real and effective one whose legal argument is found in NAFTA Article 2005, paragraph 1, which establishes the discretionary faculty of the complaining NAFTA Party for choosing the forum. Nevertheless, the importance of the subject matter, which must be identical or similar in both NAFTA and GATT in order to have a real and effective choice of forum, should be emphasized. The complaining NAFTA Party may decide if it would like to produce binding precedents for future panels, and once it has made a choice of forum, it may not

later use the other one. It is essential to know which version of the GATT is being used to solve the dispute, either GATT 1947 or GATT 1994, in order to determine if the NAFTA Priority rule applies or not.

Within the *Safeguards on Brooms* case, Mexico realized it was an issue regarding US compliance towards NAFTA. In fact, Mexico recognized that if it had chosen the WTO dispute settlement mechanism, it might have created a precedent that could turn out to be unpleasant for future reference. After all, a decision taken under NAFTA Chapter 8 could create consequences for emergency actions disputes only under NAFTA. Another possible reason for having chosen NAFTA may be that both Mexico and the US during the panel process agreed to accept a decision under NAFTA.

c) The present author considers that in relation to the parallel fora category, there is not a real and effective choice of forum and the NAFTA Priority rule does not apply, as we are dealing with different matters of the same dispute, not with the same subject matter that may cause overlap and confusion as to choice of forum. Thus, as the subject matter of the dispute is different, the author thinks that it would be illogical to conclude that the forum that does not foresee certain subject matters of the dispute may be excluded from the other. Within this category of cases, both dispute settlement mechanisms may be used regarding different subject matters of the same dispute.

It must be noted that paragraphs 2, 3 and 4 of NAFTA Article 2005 cannot fall within the parallel fora category, for they establish the compulsory dispute settlement under NAFTA. In the *Farm Products Blockade* case, Canada looked for solutions to different matters regarding the same dispute. Thus, Canada planned to solve the health and safety matters under NAFTA and the quantitative restrictions under the WTO. The fact that Canada and the US resolved this dispute amicably, without reaching the panel stage, is a very positive thing.

Conclusions Regarding NAFTA Compulsory Dispute Settlement Provisions

The present author concludes that there are some other provisions within NAFTA that enlighten the NAFTA compulsory dispute settlement provision provided by NAFTA Article 103. These provisions are found in paragraphs 2, 3 and 4 of NAFTA Article 2005, which will be analyzed as follows:

a) The author is convinced that NAFTA Article 2005, paragraph 2 establishes compulsory dispute settlement under NAFTA procedures, for - in case the complaining and the third parties cannot agree upon which forum to use - the dispute will be solved under NAFTA.

b) NAFTA Article 2005, paragraph 3 establishes that the responding NAFTA Party will have the right of proposing to the complaining NAFTA party by written means the solution of its dispute – between NAFTA and GATT or between NAFTA and any agreement negotiated under GATT provisions – exclusively under NAFTA regarding environmental and conservation agreement issues foreseen under NAFTA Article 104.

c) It is evident that NAFTA Article 2005, paragraph 4 establishes compulsory dispute settlement under NAFTA. Once more, NAFTA negotiators mark the priority that the environment, life, health, safety, conservation and standardization have under NAFTA, as this provision foresees the right of the responding NAFTA party to ask through a written petition that a dispute referring to sanitary and phytosanitary measures and standard related-measures - between NAFTA and GATT, or between NAFTA and any agreement negotiated under GATT provisions - be solved under NAFTA dispute settlement procedures.

Finally, it may be concluded that the compulsory dispute settlement provisions are not discretionary. These provisions are opposed to what NAFTA Article 2005, paragraph 1, establishes. This particular provision sets up a special discretionary faculty for the complaining party to decide under which forum the dispute that arises between NAFTA and GATT or between NAFTA and any agreement negotiated under GATT provisions will be solved.

Conclusion Regarding NAFTA, Article 104

The present author considers it correct that the Parties to NAFTA give such priority to the conservation and protection of the environment through multilateral environmental agreements. This can be seen through Article 104 of the NAFTA, which is an exception to the NAFTA priority rule established in Article 103, paragraph 2, as it establishes that in case there is a dispute regarding an inconsistency between the obligations taken under NAFTA and the obligations taken under some specific environmental and conservation agreements, the environmental agreement prevails.

Conclusion Regarding a Successful Choice of Forum

The present author concludes that in order to legitimately discuss a successful choice of forum for disputes that involve identical or similar subject matter, one must take into account the important latter-in-time treaty general rule expressed in Article 30.3 of the *Vienna Convention on the Law of the Treaties.* Nevertheless, the context in which both the NAFTA and the WTO Agreement were negotiated and the text of the NAFTA, which includes general and concrete provisions regarding its relationship with other international agreements, may raise hesitations about this general rule.

The author insists that, in order to have an effective choice of forum, there must be an overlap of identical or similar subject matter in both NAFTA and GATT. In other words, a dispute may arise if there are NAFTA provisions whose content had been incorporated from the GATT or from a WTO Agreement through direct language of incorporation into the NAFTA. One must, however, be cautious with the coverage of some disciplines which may appear to be the same under both agreements.

Conclusions Regarding WTO Primacy over Customs Unions and Free Trade Areas

Regarding the WTO Primacy over Customs Unions and Free Trade Areas, the present author considers the *Turkey – India Textiles* case to be highly relevant, for it resembles the interpretation of Article XXIV of the GATT 1994 by the Appellate Body which concluded in its Final Report the priority of the multilateral trade system of the WTO over Customs Unions. Indeed, the WTO confirms its primacy over Customs Unions and Free Trade

Areas. Nevertheless, the explosion of both CUs and FTAs may collapse the multilateral trading system into a system of privileged political and economic coalitions. The relevance of this case is that it creates a precedent and can be referred to as part of the jurisprudence of the WTO.

The present author also perceives the primacy of the WTO over Free Trade Areas - in this case the North American free trade area – in the *Wheat Gluten* case, where the Appellate Body found that the US could not exclude Canada from imposing definitive safeguards measures due to the fact that the USITC included Canadian imports in its investigations of causation of serious injury. Nevertheless, the author is of the view that in order to have a clear picture of WTO primacy over NAFTA in this case, the dispute should have been between the US and Canada as complaining and responding parties to the dispute, yet under this case Canada was a third party. Nevertheless, the author deems correct the findings and conclusions of the Appellate Body, as the exclusion of members of a CU or a FTA from the application of safeguard measures is opposed to the MFN principle.

Conclusion Regarding NAFTA Priority Rules: NAFTA, Article 103, Paragraph 1

In this sense, if there is any discrepancy between the NAFTA and the GATT, NAFTA's Article 103, paragraph 1 creates a general rule of NAFTA supremacy, even if NAFTA recognizes obligations among NAFTA Parties under GATT. The present author believes that it may be possible that the hierarchy of norms determined by NAFTA reveals a political bias which may favor regional over global concerns, and which may give a superior degree of consideration and concern to regional as opposed to multilateral interests, since the NAFTA has a broader scope of coverage and is more detailed than the GATT. It may also be possible that NAFTA negotiators agreed upon giving priority to NAFTA over GATT due to the fact that NAFTA's rules would be more simply applied to actual circumstances. By doing this, NAFTA negotiators created a compulsory dispute settlement provision and probably breached the GATT by according the NAFTA priority through Article 103. Indeed, the author shares the opinion of Abbot, who established that the conclusion of the NAFTA would have been in danger had it not been granted a

superiority level over the multilateral trade rules, as there were regional political and social interests that may have been jeopardized.

Conclusion Regarding NAFTA, Article 103, Paragraph 2

Even though NAFTA Article 103, paragraph 2 employs in an ambiguous manner the term *successor agreements*, it may be contended that the intention of legislators was to include the GATT within the term *such other agreements,* and hence, in case any discrepancy arises between NAFTA and GATT or between NAFTA and other agreements Canada, Mexico, and the US have signed or may sign, the provisions of NAFTA shall prevail, *except* as otherwise established under NAFTA. The present author thinks that this term *except* is found in NAFTA Article 104 and Article 2005. In this sense, it is possible that NAFTA negotiators wanted to give priority to the NAFTA over the Uruguay Round agreements, as is reflected in NAFTA Articles 301(1) and 103 by mentioning the NAFTA rules on priority over other *successor agreements.*

Conclusions Regarding the NAFTA/WTO/GATT Relationship

It is very complex and difficult to determine whether NAFTA prevails over the new WTO Agreement, which came into force after NAFTA and which is binding on all WTO Members. The multilateral community needs time to give a definitive answer to the NAFTA/WTO hierarchy of norms, as the relationship between NAFTA, the WTO and GATT needs to be analyzed through a case-by-case study. Nevertheless, the author echoes Abbot's view that the NAFTA priority rules are applied irrespective of whether there is a legal distinction between GATT 1947 and GATT 1994. The present author has divided the problem into the following two issues:

a) If we consider there to be no legal distinction between GATT 1994 and GATT 1947, the WTO Agreement would incorporate GATT 1947 into its legal framework and would therefore have a connection and continuity between GATT 1947 and GATT 1994, since GATT 1994 might be considered a successor agreement, and both texts would be identical from a contextual point of view. If the succession of GATT 1994 were not deemed an innovative departure from GATT 1947 from a technical point of view, NAFTA would

continue to have priority over GATT 1994 rules and WTO rules. Nevertheless, there may be some not unforeseen areas within the scope of GATT 1947 that may not represent continuous extensions of GATT 1994 but rather a strong argument for not applying the NAFTA rule on priority of Article 103.

b) If we consider GATT 1994 to be legally distinct from GATT 1947, as provided by the WTO Agreement, Article II:4, there would be no NAFTA priority rule over GATT 1994 as incorporated into the WTO Agreement, for the WTO Agreement entered into force on January 1995. Therefore, the latter-in-time treaty general rule lies in GATT 1994, not in GATT 1947. The present author again affirms Abbot's conclusion, who pointed out that the legal distinction between GATT 1994 and GATT 1947 was only made with the purpose of helping the institutional transition between the GATT and the WTO, not with the purpose of tearing apart the connection and continuity between the rights and obligations of the parties to the two agreements.

Conclusion Regarding Convenience of Each Forum

The present author deems the WTO dispute settlement mechanism more formal than that of NAFTA Chapter 20, for it better enforces its resolutions, considers an appealing stage and exhibits more impartiality regarding panelists. If one compares the two most important facets of both dispute settlement mechanisms, it can be determined that the NAFTA Chapter 20 dispute settlement mechanism is shorter in terms of time frames, but does not offer an appeal option. If the decisions of the NAFTA Arbitral Panel are considered as *res judicata,* they must be enforced. The losing party would then have to comply with an order as soon as possible, not whenever it would like to, as happened in the *Safeguards on Brooms* case with the US. The author strongly recommends that even though Arbitral Panel decisions are binding, NAFTA Parties should take them more seriously in order to assure effectiveness in the resolution of disputes and benefit the NAFTA Chapter 20 dispute settlement mechanism.

The lack of an appeal process may also prove to be a disadvantage for the defending party, as the defending party may not have the opportunity to think legally and critically in

response to the decision of the Arbitral Panel or present valuable comments and arguments that could change the course of the dispute. The author contends that the NAFTA Chapter 20 dispute settlement mechanism is less impartial than that of the WTO, as there is a significant influence of parties within the process, and this pressure may delay finding a solution. The present author believes that the creation of the Appellate Body under the WTO dispute settlement mechanism renders this dispute resolution system more legalistic than ever, as it gives the losing party the opportunity to review Panel decisions.

Conclusion Regarding the Creation of Precedents

The present author considers as very important the faculty of the WTO, as a multilateral trade organization, to create precedents and thereby generate jurisprudence that may affect future cases regarding international trade disputes. Therefore, should NAFTA governments be in the position of choosing an effective forum, they shall consider the expectations and precedents that the WTO Panel decisions may create for future reference. Thus, if the complaining party decides not to create precedents, it may choose the NAFTA Chapter 20 dispute settlement mechanism, as it would be unlikely for the WTO to base its decisions on precedents created by NAFTA Chapter 20 decisions.

Conclusion Regarding the Choice of Forum for a Weaker NAFTA Party

In case of an effective choice of forum circumstance, the present author contends that a weaker NAFTA Party might choose the WTO dispute settlement mechanism, as it seems to better protect the interests of the weaker party. Thus, the weaker party may benefit from the protection of the multilateral community of the WTO, since the new multilateral dispute settlement mechanism offers a reinforcement of its jurisdictional nature. In fact, non-NAFTA nations may support a weak NAFTA country in a dispute, as a case heard before the WTO will involve 143 Member States, as opposed to only three under NAFTA. It is true that a WTO case may involve many worried WTO Member States, all interested in the subject matter of the dispute, which may increase political pressure on the defending party.

Conclusion Regarding the Reform of the GATT Dispute Settlement Mechanism

The present author asserts that the reform of the GATT dispute settlement system is most positive and important for a liberalized world economy. In fact, the GATT dispute settlement mechanism was more conciliatory and diplomatic-oriented than rule-oriented, as it did not base its analysis on the rule of law. An asset of the new WTO dispute settlement mechanism is that the losing contracting party can no longer block the adoption of panel reports if they consider a measure adverse to their interests. Today, with the reform of the GATT dispute settlement mechanism, one can say with confidence that the new WTO dispute settlement mechanism is rule-oriented, for it issues rule-based decisions designed to assure efficiency and predictability.

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