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## **The Robert E. Hudec Article on Global Trade**

### **Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?**

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## INTRODUCTION

The General Agreement on Tariffs and Trade (GATT),<sup>1</sup> reformulated and institutionalized as the World Trade Organization (WTO)<sup>2</sup> in 1994, has provided much of the

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1. The General Agreement on Tariffs and Trade, signed in 1947, was created by the Bretton Woods meetings that took place in Bretton Woods, New Hampshire (U.S.), in 1944, setting out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. The GATT is one of the three mechanisms for global economic governance established at Bretton Woods, the other two being the International Monetary Fund (IMF) and the World Bank. The GATT was a collection of rules applied temporarily, without an institutional basis, unlike the WTO, which is a permanent organization with a permanent framework and its own Secretariat. Compare GATT, *supra*, art. XXIX with Agreement Establishing the World Trade Organization, art II, April 15, 1994, 33 I.L.M. 13 [hereinafter WTO Agreement]. For almost fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set the terms for countries who wanted to trade with each other. The GATT signatories were called "contracting parties." See GATT, *supra*, art. II ("Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement."). The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. See WTO Agreement, *supra*, art. I. The GATT has now become one of the eighteen agreements enforced by the WTO.

2. The World Trade Organization (WTO) is a global trade agency that was

framework through which international trade has flourished for over fifty years. The post-war philosophy of trade liberalization has also paved the way to the creation of regional trade agreements.<sup>3</sup>

Regional and multilateral<sup>4</sup> trade arrangements have

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established through the GATT Uruguay Round Agreement signed in 1994. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act]. The WTO provides dispute resolution, administration, and continuing negotiations for the seventeen substantive agreements that it enforces. WTO Agreement, *supra* note 1, art. III. The WTO and its underlying agreements set a system of comprehensive governance that goes far beyond trade rules. It is argued by some commentators (Lori Wallach being one of the most relevant activists in the public domain) that the WTO system, rules, and procedures are undemocratic and non-transparent. See, e.g., Lori Wallach, *Transparency in WTO Dispute Resolution*, 31 LAW & POL'Y INT'L BUS. 773, 774 (2000). The WTO's substantive rules systematically prioritize trade over all other goals and values. Each WTO member is required to ensure "the conformity of its laws, regulations and administrative procedures" to the WTO's substantive rules. WTO Agreement, *supra* note 1, art. XVI(4). National policies and laws found to violate WTO rules must be eliminated or changed; otherwise, the violating country faces trade sanctions. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994); 1869 U.N.T.S. 401. [hereinafter DSU]. The economic, social and environmental upheaval being suffered by many countries that have lived under the WTO regime since 1995 means that business-as-usual at the WTO is over. It remains to be seen whether the handful of powerful WTO members who have dictated WTO policy since 1995 will adapt to the new reality. By the same token, it is also unclear whether countries demanding changes to the WTO's current system of rules that are damaging their national interests may begin to withdraw if those changes do not take place. Regarding withdrawal from the WTO Agreement, although Article XV (1) is clear and reads that "Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this Agreement and the Multilateral Trade Agreements and shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General" of the WTO, the withdrawal from certain rules or agreements is not entirely clear. WTO Agreement, *supra* note 1, art. XV(1).

3. Regional trade agreements under GATT Article XXIV have effects of trade creation as well as of trade diversion. GATT, *supra* note 1, art. XXIV. Trade creation has resulted from the expansion of trade with efficient suppliers within the free trade or customs union area while trade diversion could be found as there might be a shift in trade from efficient suppliers outside the RTA to those inside just to get the benefit from the trade preferences. But, I would argue that the creation of regional trade agreements can have a significantly positive effect on the growth of world trade and the willingness of countries to subsequently make the concessions they have already done through their regional trade arrangement multilaterally. As entities, regional trade areas can be constructive to liberal principles if they do not turn inwards and do not place undue restrictions on trade with other WTO nations.

4. In the WTO context, multilateral negotiations, as opposed to plurilateral negotiations, imply the participation of all WTO members. See WTO Agreement, *supra* note 1, art. II(3). The nature of the consequent multilateral agreements from these multilateral negotiations implies that commitments are taken by all the WTO

promoted this growth in trade with the creation of institutions and procedures, particularly dispute settlement systems, through which signatories can ensure and enforce predictable and stable business environments for their citizens. During negotiations, state actors formulate institutions and structures within the agreements to enable the dispute settlement processes which may be most effective in resolving these disputes. The primary purpose of dispute settlement systems in international trade agreements is to "guarantee respect for the agreement(s), in responding to violations and legitimate expectations under such agreements."<sup>5</sup> The existence of rules, however, is not the only factor determining whether a dispute settlement system is effective.

The political will, a calculus of the numerous domestic and international interests, of states to undertake the legal obligations of a trading system determines the effectiveness of the institutions created. Furthermore, although the political will of the states may support the institutional framework that has been negotiated, the political will to resolve any particular dispute determines whether and how it will be resolved. The available data thus seems to support Robert Hudec's proposition regarding the importance of political will in determining the effectiveness of international legal systems derived from the GATT experience.<sup>6</sup> He has stated that "political will is really more important than rigorously binding procedures – that strong procedures by themselves are not likely to make a legal system very effective if they do not have sufficient political will behind them."<sup>7</sup>

The importance of political will to the effectiveness of the dispute settlement rules of the WTO and Chapter 20 of the North American Free Trade Agreement (NAFTA)<sup>8</sup> will be

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members. The GATT was a multilateral instrument as well, but a series of new agreements were adopted during the Tokyo Round on a multilateral (selective) basis, which caused a fragmentation of the multilateral trading system. See Statement of the GATT Director-General on the Tokyo Round, Apr. 12, 1979, 18 I.L.M. 553.

5. Gabrielle Marceau, *The Dispute Settlement Rules of the North American Free Trade Agreement: A Thematic Comparison with the Dispute Settlement Rules of the World Trade Organization*, in *INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 489, 491 (Ernst-Ulrich Petersmann ed., 1997).

6. Robert E. Hudec, *The New Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 14 (1999).

7. *Id.* at 11.

8. The *North American Free Trade Agreement* (NAFTA) was a radical experiment in rapid deregulation of trade and investment among the United States,

examined in this article.<sup>9</sup> In the WTO, where the dispute settlement procedures appear to be rule-oriented,<sup>10</sup> as displayed in the *Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)*,<sup>11</sup> there has been an effective compliance record overall. However, in politically sensitive cases, compliance has been slow or nonexistent, and there has

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Mexico, and Canada. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]. Since 1995, NAFTA is considered the symbol of the failed corporate globalization model because its results for most people in all three countries have been negative: real wages are lower and millions of jobs have been lost; farm income is down and farm bankruptcies are up; environmental and health conditions along the U.S.-Mexico boarder have declined; and a series of environmental and other public interest standards have been attacked under NAFTA. NAFTA's agricultural provisions have been so extreme that Mexican family farmers are demanding a re-negotiation or nullification of the treaty, after its first phase of initial implementation led to displacement of millions of Mexican farmers. NAFTA represents the gold standard of corporate rights in trade and investment agreements because it includes hitherto unheard of corporate privileges, including investor-to-state dispute resolutions, which is the right to sue governments for cash compensation in closed trade tribunals over regulatory costs. This right, contained in NAFTA's Chapter 11 on investment, has been used by numerous multinational corporations to seek financial compensation for public health and safety, or environmental regulations that corporations argue amount to expropriation of their current or future lost profits. NAFTA, *supra*, ch. 11. NAFTA Chapter 11 corporate suits have resulted in the lifting of a Canadian ban on a toxic chemical as well as an attack on a similar California state toxic chemical ban, and the payout of U.S. \$16 million by waste dump to be built on ecologically protected land.

9. As we will see later, the principal dispute settlement mechanisms of the NAFTA are found in Chapter 11, Chapter 19, and Chapter 20. NAFTA, *supra* note 8.

10. For discussion on rule-oriented as opposed to power-oriented diplomacy, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 109-11 (2nd ed., 1997).

11. DSU, *supra* note 2. The Dispute Settlement Understanding (DSU) is one of the most important new features of the WTO. The DSU established a system of review and procedures for when one of the WTO members complains that the actions or policies of another member have harmed it through a violation of WTO rules. *Id.* Typically, a complaint would be followed by consultations, possible arbitration, then the formation of a panel of experts, the panel ruling, possible appeal to the Appellate Body, and, based on the outcome of the case, either compliance, compensation to the complaining country, or eventual retaliation. The WTO's system of settling disputes provides for specific deadlines, and is therefore quicker than the old GATT system. Its type of functioning is more automatic, which reduces the number of blockages compared to the GATT system. The rules concerning the establishment of the findings process are more detailed than they were under the GATT system. Panel reports and Appellate Body rulings can be overturned only by a unanimous vote of the Dispute Settlement Body (DSB), which is a WTO body that rules on dispute settlement cases under the DSU. The DSB consists of all members of the WTO General Council, that is to say, all WTO members' representatives in Geneva, who oversee the operation of all of the constituent WTO Agreements in general. The DSB rules on actions taken under the DSU.

been a growing use of Article 21.5<sup>12</sup> Panels.<sup>13</sup> The NAFTA Chapter 20, the sole government-to-government dispute settlement mechanism in the NAFTA, is geared to bilateral, negotiated resolutions, as there are fewer detailed rules governing the procedures and implementations of rulings.<sup>14</sup>

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12. The locution "Article 21.5 Panel" refers to Article 21.5 of the Dispute Settlement Understanding, which reads:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

DSU, *supra* note 2, art. 21.5.

13. As an overview of the WTO disputes resolved by the DSB rulings and recommendations, we acknowledge that there were a total of 52 matters and 68 complaints in the DSB between 1995 and 2001. Among other categories, apart from the cases which had negative rulings or the time-period for implementation had not been determined or had not yet expired, 27 matters and 38 complaints had expired time periods for implementation. Ten matters and 18 complaints had completed implementation, but the remaining disputes had had some implementation problems, such as extensive resorts to 21.5 Panels. The following cases used 21.5 proceedings: Panel Report, *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R (May 25, 1999); Appellate Body Report, *Brazil - Export Financing Programme for Aircraft*, WT/DS46/RW (May 9, 2000); Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/RW (May 9, 2000); Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or Above from Korea*, WT/DS99/RW (Nov. 7, 2000); Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products - Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW (July 11, 2001); Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas - Recourse to Article 21.5 by the European Communities*, WT/DS27/RW/EEC (Apr. 12, 1999); Panel Report, *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R (Jan. 28, 2000); Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998); Appellate Body Report, *United States - Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R (Feb. 24, 2000); and Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998). *United States - Continued Suspension of Obligations in the European Communities - Hormones Dispute* went to a 22.6 Panel because there had been non-implementation. WT/DS320.

14. NAFTA, *supra* note 8, ch. 20. The dispute settlement provisions of Chapter 20 are applicable to all disputes regarding the interpretation or application of the NAFTA. The steps set out in Chapter 20 are intended to resolve disputes by

Until 2001, there were only three completed cases pursuant to the NAFTA Chapter 20,<sup>15</sup> (a fourth had begun soon thereafter<sup>16</sup>), two of which required compliance measures.<sup>17</sup> Those two cases involved politically sensitive issues and have had some compliance difficulties.<sup>18</sup> While the empirical data on the success of both dispute settlement systems is limited due to their relatively short period of existence, both the NAFTA Chapter 20 and the WTO dispute settlement systems illustrate that, in cases where there are politically sensitive issues, the effectiveness of the systems is dependent on the political will of the losing party to comply rather than on the complexity of the existing rules.

Within this political framework, there are cases that could be brought in either the WTO or the NAFTA Chapter 20 *forum*. The NAFTA party will of course choose the *forum* in which it calculates it has the best chance to win and compel the other side to change or remove its injurious measures. This article will argue that, in cases where forum shopping is possible, there are no set, determinative factors that dictate the proper *forum* for any particular dispute, despite the differences in complexity of the rules. Instead, each dispute has to be dealt with on a case-by-case basis. However, this article will make recommendations

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agreement, if at all possible. The process begins with government-to-government (the Parties) consultations. If the dispute is not resolved, a Party may request a meeting of the NAFTA Free Trade Commission (comprised of the Trade Ministers of the Parties). If the Commission is unable to resolve the dispute, a consulting Party may call for the establishment of a five-member arbitral panel.

Chapter 20 also provides for scientific review boards which may be selected by a panel, in consultation with the disputing Party, to provide a written report on any factual issue concerning environmental, health, safety or other scientific matters to assist panels in rendering their decisions. As well, disputes relating to the following chapters may be referred to dispute settlement procedures under Chapter 20: Chapter 7 (Agriculture and Sanitary and Phytosanitary Measures); Chapter 10 (Government Procurement); Chapter 11 (Non-compliance of a Party with a final award); and Chapter 14 (Financial Services).

NAFTA, *supra* note 8.

15. Panel Report, *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01 (Dec. 2, 1996) (hereinafter *Canadian Agricultural Products*); Panel Report, *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, USA-97-2008-01 (Jan. 30, 1998) (hereinafter *Broomcorn*); Panel Report, *Cross-Border Trucking Services*, USA-MEX-98-2008-01 (Feb. 6, 2001) (hereinafter *Trucking*).

16. *Cross-Border Bus Services* (Mexico v. United States, 1998) case no. USA-98-2008-02.

17. The U.S. unsuccessfully challenged Canadian tariffs in *Canadian Agricultural Products*. *Supra* note 15.

18. *Broomcorn*, *supra* note 15; *Trucking*, *supra* note 15.



on the factors that the parties should take into account to decide on the proper *forum*. First, in order to make this comparison, Part I will look at the background, institutional structures, and record of the WTO and the NAFTA dispute settlement systems. Second, Part II will present a comparison of the advantages and disadvantages of each system from the perspective of complaining and respondent parties. Finally, on the basis of the discussion in the previous two sections, the article will conclude with suggestions of specific factors that might affect the choice of *forum* in which forum shopping is possible.

## I. AN OVERVIEW OF THE WTO AND THE NAFTA

### A. BACKGROUND

The WTO Dispute Settlement system has its roots in the 1947 General Agreement on Tariffs and Trade (GATT), which provided a procedural platform for dispute settlement and established guiding principles for periodic multilateral negotiations on a product-by-product basis.<sup>19</sup> The NAFTA, on the other hand, was a far more ambitious project that, in many ways, had the benefit of over 40 years of GATT dispute settlement, as well as the example of regional integration and dispute settlement in the European Community. Whereas the GATT was prototypical and evolved piecemeal over time, the NAFTA's drafters were concerned about the potential for a regional dispute settlement system to intrude on national sovereignty and sought to limit its extent. For this reason, the NAFTA Articles 2017<sup>20</sup> and 2018<sup>21</sup> are considered to provide a

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19. See discussion *supra*, note 1.

20. NAFTA Article 2017 reads:

1. The panel shall present to the disputing Parties a final report, including any separate opinions on matters not unanimously agreed, within 30 days of presentation of the initial report, unless the disputing Parties otherwise agree.

2. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.

3. The disputing Parties shall transmit to the Commission the final report of the panel, including any report of a scientific review board established under Article 2015, as well as any written views that a disputing Party desires to be appended, on a confidential basis within a reasonable period of time after it is presented to them.

4. Unless the Commission decides otherwise, the final report of the

soft resolution to disputes, a fair contrast even to the definitive language of GATT Article XXIII:2,<sup>22</sup> as later elaborated upon by the DSU. This section will look at the background of both systems and then compare their institutional structures.

As mentioned above, GATT Articles XXII<sup>23</sup> and XXIII<sup>24</sup> have

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panel shall be published 15 days after it is transmitted to the Commission.

NAFTA, *supra* note 8, art. 2017.

21. NAFTA Article 2018 reads:

1. On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute.
2. Wherever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation.

*Id.* art. 2018.

22. GATT Article XXIII:2 reads:

If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary [Director-General] to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

GATT, *supra* note 1, art. XXIII(2).

23. GATT Article XXII reads:

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.
2. The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in

provided the basis for the WTO Dispute Settlement system which exists today. In 1947, the treaty text, however, stipulated only a loosely-structured organization through which the parties were to address their conflicts.<sup>25</sup> Instead, the Contracting Parties developed their processes and practices for dispute

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respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

*Id.* art. XXII.

24. GATT Article XXIII reads:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

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

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1 (c) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary<sup>24</sup> to the Contracting Parties of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

*Id.* art. XXIII.

25. Hudec, *supra* note 6, at 2.

resolution over the years.<sup>26</sup>

From 1948 to 1978, the GATT dispute settlement procedures were primarily diplomatically based, comprising of few standardized procedures, vague legal rulings, and negotiated outcomes.<sup>27</sup> At first, the Contracting Parties had their disputes considered during their plenary semiannual meetings.<sup>28</sup> Later, *ad hoc* working parties were set up to look at all the disputes or particular disputes brought to the GATT.<sup>29</sup> The working parties in the GATT, by definition, were comprised of contracting parties, so each contracting party had to send a representative for the meeting. The process became slightly more formalized in the 1950s under the GATT Director General Eric Wyndham-White, where panels of experts were used to decide disputes.<sup>30</sup> These panels, unlike the working parties, were made up of individuals acting on their own accord and not as representatives of their governments—although the choice of panelists was usually among the national representatives to the GATT. John H. Jackson argues that this shift signified an attempt by the contracting parties to make the GATT dispute settlement system a rule-oriented system rather than one more based on power and negotiated settlement by the parties.<sup>31</sup> However, once a panel decided a matter, the losing party could essentially veto and prevent the adoption of the panel decision because the report needed to be adopted through consensus. Despite the blocking possibilities, the early GATT adjudication system worked very well because the GATT member governments wanted it to work.<sup>32</sup> Hudec argues that this is because the early GATT was made up of a small group of like-minded trade policy officials who themselves had written the GATT language and did not require an elaborate decision-making procedure to generate a consensus.<sup>33</sup>

Despite the successes of the 1950s, the GATT dispute settlement procedures were not used again until the 1970s.<sup>34</sup> During this period, there were fundamental changes in the GATT membership with the creation of the European

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26. JACKSON, *supra* note 10, at 114–15.

27. Hudec, *supra* note 6, at 4.

28. JACKSON, *supra* note 10, at 115.

29. *Id.* at 109–11.

30. *Id.* at 115–16.

31. *Id.*

32. Hudec, *supra* note 6, at 6.

33. *Id.*

34. *Id.*

Community and the inclusion of many developing countries: “[s]uddenly, the conventional wisdom of GATT was that lawsuits were a nonproductive way to approach any problem.”<sup>35</sup> There was only a slow return to the system in the 1970s in the attempt to address non-tariff barriers.<sup>36</sup> However, it was only in 1979, through the efforts of the United States, that the system was truly brought back into operation, and the basic operating procedures were written down in the 1979 Tokyo Round Understanding.<sup>37</sup>

Despite the problems with the system in the early 1980s due to the dramatic increase in the GATT membership and the politicization of many politically sensitive disputes, increases in the Secretariat staff and growing faith in the integrity of the system promoted a very successful system by the end of the 1980s.<sup>38</sup> It should be noted that this system was effective despite the fact that there were few concrete procedures and that the whole system was voluntary. Hudec argues that the procedural weaknesses had little impact on the overall success of the GATT because of the political will of the governments to have working legal order:

Although the procedure was not compulsory, defendant governments almost always decided to cooperate with it. They did so under the pressure of a strong community consensus that every GATT member should have a right to have its legal claims heard by an impartial third-party decision-maker. . . . Although compliance was not always forthcoming, the pressure to comply was almost always there once the community arrived at a consensus that the ruling was correct. As for the power to veto the authorization of trade sanctions, that hardly mattered at all, because there were almost no requests for permission to employ trade sanctions. As in the 1950s, the ruling seemed to be enough.<sup>39</sup>

Thus by the Uruguay Round negotiations, the GATT dispute settlement system had become one “built solidly on the authority of legally binding obligations.”<sup>40</sup> And, many of the new DSU procedures were a codification of the processes already established in the GATT.<sup>41</sup> After forty-seven years, the dispute

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35. *Id.*

36. *Id.*

37. *Id.*

38. Hudec suggests that there was over an 80% success rate in disposing of disputes. He does not give the compliance rate for those decisions, however. Hudec, *supra* note 6, at 8.

39. *Id.* at 9–10.

40. *Id.* at 10–11.

41. *Id.* at 11; Annex 1A Multilateral Agreements on Trade in Goods,

settlement system was fully integrated into the text of the GATT 1994 treaty as a mandatory treaty obligation, not as interpretations or understandings of practices of GATT Articles XXII and XXIII.<sup>42</sup>

While keeping many facets of the previous system, the DSU has brought to bear several fundamental institutional changes in the dispute settlement system to provide "security and predictability to the multilateral trading system."<sup>43</sup> First, the new dispute mechanism, comprising twenty-seven sections with a total of 147 paragraphs and four appendices, is more detailed than the GATT procedures.<sup>44</sup> Second, the WTO system remedied the fragmentation of the GATT and forum shopping possibilities for those contracting parties signatory to the plurilateral codes of the GATT.<sup>45</sup> Marceau argues that the creation of the integrated system of dispute settlement in the WTO was one of the best success stories of the Uruguay Round negotiations.<sup>46</sup> Third, the GATT Council was replaced with the Dispute Settlement Body (DSB), which is essentially the General Council (GC) in a different guise. Comprised of representatives from each Member, the DSB has the responsibility of administering the dispute settlement system.<sup>47</sup> Fourth, there has been a change to a negative consensus system, which ensures that the losing party cannot block the formation of a panel.<sup>48</sup> Fifth, an Appellate Body now provides for appeal from the panel decisions.<sup>49</sup> Finally, the complaining party can seek

Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

42. JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS § 7.2, at 340 (3d ed. 1995).

43. DSU, *supra* note 2, art. 3(2).

44. AN ANATOMY OF THE WORLD TRADE ORGANIZATION 59 (Konstantinos Adamantopoulos ed., Kluwer Law International Ltd 1997).

45. Marceau, *supra* note 5, at 495–96.

46. *Id.*

47. AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 44, at 61.

48. A dispute settlement panel in the WTO is a body established *ad hoc* to give a ruling in a trade-related dispute between two trading nations of the WTO. In the WTO Dispute Settlement Mechanism, panels consist of three experts who examine and issue recommendations (Panel Report) on a particular dispute in the light of WTO provisions. The Report is then adopted by the DSB, and may be appealed to the Appellate Body. DSU, *supra* note 2.

49. The Appellate Body (AB) is the seven-person body established by the WTO's Dispute Settlement Body to hear and resolve appeals made by WTO Members from recommendations in dispute settlement cases made by dispute settlement panels. The members of the AB are appointed for four years (renewable once) and are experts in international trade law. *Id.* art. 17.

authorization to take retaliatory action should the losing party fail to implement the panel recommendation within a reasonable period of time.<sup>50</sup>

The NAFTA is a comprehensive free trade agreement created under Article XXIV<sup>51</sup> of the GATT.<sup>52</sup> The NAFTA came

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50. AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 44, at 59.

51. GATT, *supra* note 1, art. XXIV. GATT Article XXIV reads:

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.

2. For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories.

3. The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

(b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.

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.

5. 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

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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 of 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

(c) any interim agreement referred to in subparagraphs (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.

6. If, in fulfilling the requirements of subparagraph 5 (a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reduction brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

(b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

(c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES, which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

8. For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of



into being in 1994, and replaced the Canada-U.S. Free Trade

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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, and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(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.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected.\* This procedure of negotiations with affected contracting parties shall, in particular, apply to the elimination of preferences required to conform with the provisions of paragraph 8 (a)(i) and paragraph 8 (b).

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article.

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.\*

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.

52. NAFTA, *supra* note 8, Article 101. The Agreement covers trade in goods, the phased-out elimination of tariffs within a decade-long period (mostly within five years, and some in fifteen years), the elimination of quotas and licensing requirements, detailed rules of origin, customs procedures, energy, agriculture, emergency safeguards, technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), government procurement, telecommunications, financial services, competition policy, intellectual property, and, as mentioned above, three side agreements on imports and "trade and" issues.

Agreement (CUSFTA),<sup>53</sup> which had been formed in 1989, by expanding the scope of the Agreement and adding an additional member, Mexico.

The dispute settlement procedures in the NAFTA and its predecessor, the CUSFTA, have themselves had a limited caseload,<sup>54</sup> but they have benefited from the hindsight of the fifty years of GATT procedures. Indeed the North American regional trading system has “borrowed from practices developed in the GATT forum.”<sup>55</sup> Marceau states that “[the FTA] dispute settlement provisions were, by and large, the same as the WTO/GATT procedures as they emerged from the Uruguay Round. Indeed some Uruguay Round innovations in the GATT/WTO procedures were first implemented in the [CUSFTA].”<sup>56</sup>

A main difference between the WTO and NAFTA dispute settlement systems is the NAFTA’s definite reliance on diplomatic solutions. Despite the similarities with the WTO procedures which will be examined below, the NAFTA dispute settlement procedures are based on “cooperation and consultation”<sup>57</sup> between the NAFTA countries, and focus on

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53. The 1989 Canada-United States Free Trade Agreement was the model for NAFTA. See Canada-United States: Free Trade Agreement, Dec. 22, 1987–Jan. 2, 1988, 27 I.L.M. 281 (1988) [hereinafter CUSFTA]. The Free Trade Agreement (FTA) was a trade agreement reached by Canada and the United States in October 1987. The FTA provided for the gradual elimination of tariffs and reductions in non-tariff trade barriers on goods. On January 1, 1998, all tariffs on Canada and U.S. origin goods were eliminated, with the exception of a limited number of over-quota tariffs associated with tariff quotas on some agricultural products. These tariff quotas replaced earlier non-tariff measures and were implemented by both the U.S. and Canada in 1995 as part of the outcome of the Uruguay Round of multilateral trade negotiations. The Agreement also incorporated more effective dispute settlement processes. The Agreement removed several trade restrictions in stages over a ten year period, and resulted in a great increase in cross-border trade. A few years later, it was superseded by the NAFTA, which included Mexico as well. It was fought vigorously by Canadian citizens’ groups as a massive instrument of environmental deregulation, downward pressure on wages and labor standards, as well as weakening of social programs. This Agreement was the first of the comprehensive international commercial agreements that have replaced traditional trade agreements.

54. As of 2001, the total caseload for the NAFTA dispute settlement systems was 80 disputes. There were 76 panel reviews under Chapter 19 (26 active) and 4 arbitral panels under Chapter 20 (1 active). *NAFTA Secretariat Status Report of Active and Completed NAFTA Panels*, NAFTA Secretariat, U.S. Section, July 17, 2001.

55. Marceau, *supra* note 5, at 489.

56. *Id.*

57. *Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) of the North American Free Trade Agreement (NAFTA)*, Exporter’s

bilateral, negotiated solutions to disputes. The dispute procedures, contained in 19 Articles in Chapter 20, on which this article will focus, are less complicated than those of the WTO and are, in theory, supposed to be quicker. While the empirical evidence does not show automatic compliance, it does show political impetus to resolve disputes in a timeframe practicable to the losing party, as we will see below.

Unlike the WTO, which has an integrated dispute settlement system, the NAFTA's enforcement mechanisms are contained in five separate dispute settlement mechanisms:<sup>58</sup> 1) the government-to-government dispute settlement system, under Chapter 20; 2) the bi-national panels for adjudication of anti-dumping and countervailing duty measures, under Chapter 19; 3) various sector-specific measures, such as Chapter 11 for investment, for arbitration and/or dispute resolution, including more specific consultation for processes; 4) the use of national adjudication systems, especially for intellectual property and government procurement disputes; and 5) dispute resolution for the side agreements on labor and environmental issues.

For adequate comparison with the parallel WTO dispute settlement measures, this article will focus on the sole dispute settlement mechanism within the NAFTA that consists of government-to-government disputes, and which pertains to the "avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement . . . ."<sup>59</sup> The other dispute settlement mechanisms—for example, under Chapter 19<sup>60</sup> and Chapter 11,<sup>61</sup> pertaining to anti-

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Guides to U.S. Trade Agreements (Trade Compliance Ctr., U.S. Dept of Commerce), [http://www.mac.doc.gov/Tcc/e-guides/eg\\_naf20.html](http://www.mac.doc.gov/Tcc/e-guides/eg_naf20.html) (11/14/2001).

58. Marceau, *supra* note 5, at 495.

59. NAFTA *supra* note 8, art. 2004. For the jurisdiction of the Chapter 20 dispute settlement mechanism, please see Annex 2004 following in the text. *Id.*

60. Chapter 19, Article 1904 (Review of Final Antidumping and Countervailing Duty Determinations) establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent bi-national panels. A Panel is established when a Request for Panel Review is filed with the NAFTA Secretariat by an industry asking for a review of an investigating authority's decision involving imports from a NAFTA country. *Id.* art. 1904.

In Canada, it is the Canada Border Services Agency (CBSA), which makes dumping and subsidy determinations, while the Canadian International Trade Tribunal (CITT) conducts injury inquiries as to whether or not the dumping or subsidy has caused injury or retardation (material retardation of the establishment of a domestic industry) or is threatening to cause injury to the domestic industry. In the United States of America, it is the Department of Commerce, International Trade Administration, which makes dumping and subsidy determinations, while the

dumping and countervailing duties, and investment measures, respectively—allow the involvement of private parties from the NAFTA countries to be party to the dispute settlement proceedings. Therefore, the focus will be on Chapter 20 disputes.

The Chapter 20 dispute settlement mechanism is similar to its predecessor, Chapter 18 under CUSFTA, with few modifications.<sup>62</sup> The Parties can bring a dispute under Chapter 20:

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of: (a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment, (b) Part Three (Technical Barriers to Trade), (c) Chapter Twelve (Cross-Border Trade in Services), or (d) Part Six (Intellectual Property), is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the party may have recourse to dispute settlement under this Chapter.

2. A Party may not invoke: (a) paragraph 1(a) or (b), to the extent that the benefit arises from any cross-border trade in services provision of Part Two, or (b) paragraph 1(c) or (d), with respect to any measure subject to an exception under Article 2101 (General Exceptions).<sup>63</sup>

Under this Chapter, disputes arising under the NAFTA and the GATT obligations or “any successor agreement,” such as the

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United States International Trade Commission conducts injury inquiries.

In Mexico, it is the *Secretaría de Economía, Unidad de Prácticas Comerciales Internacionales* that makes both the dumping/subsidy and injury determinations.

These agencies are referred to as investigating authorities. The dumping, subsidy and injury determinations of the investigating authorities can also be appealed, in Canada to the Federal Court of Canada, in the United States to the Court of International Trade, and in Mexico to the *Tribunal Fiscal de la Federación*.

61. Chapter 11, Section B (Settlement of Disputes between a Party and an Investor of Another Party) establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal. A NAFTA investor who alleges that a host government has breached its investment obligations under Chapter 11 may, at its option, have recourse to one of the following arbitral mechanisms: 1) the World Bank's International Centre for the Settlement of Investment Disputes (ICSID); 2) ICSID's Additional Facility Rules; and 3) the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).

Alternatively, the investor may choose the remedies available in the host country's domestic courts. An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals. *Id.* ch. 11.

62. GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *NAFTA: AN ASSESSMENT* 102 (1993).

63. *NAFTA*, *supra* note 8, Annex 2004.

WTO, "may be settled in either forum at the discretion of the complaining Party."<sup>64</sup> However, if the Third NAFTA Party requests it, or if the dispute involves specified environmental agreements, SPS measures, or environment, health, safety, or conservation standards, the dispute must be resolved through the NAFTA dispute settlement mechanism.<sup>65</sup> Once a proceeding has begun under NAFTA Chapter 20 or the WTO, unless the Party can appeal to any of the exceptions which are NAFTA-specific, the "forum selected shall be used to the exclusion of the other."<sup>66</sup>

## B. INSTITUTIONAL SCENE

A comparison of the actual procedures for bringing cases before the WTO and the NAFTA displays the difference in complexity of the rules between the systems. In the WTO, when one member believes that its rights under the WTO or other listed trade agreements have been breached, it "undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation" with the offending member which "shall" be notified to the DSB.<sup>67</sup> In the NAFTA, when a party believes that any existing or proposed measure or any other measure enacted by the other party may affect the operation of NAFTA, the complaining party "may" request consultations with the other party.<sup>68</sup> The "may" perhaps suggests sovereignty

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64. *Id.* art. 2005(1).

65. *Id.* art. 2005(2)-(4); FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION: THE NAFTA AND WESTERN HEMISPHERIC INTEGRATION IN THE WORLD TRADE ORGANIZATION SYSTEM 100 (1995).

66. NAFTA, *supra* note 8, art. 2005(6).

67. DSU, *supra* note 2, art. 4.2-4.3. The offending Member must reply within 10 days (or if mutually agreed otherwise) and consultations must be held within 30 days of the original request (or 10 days if the goods involved are perishable). *Id.*

68. NAFTA, *supra* note 8, art. 2006(1). With regards to third parties during the consultations, if a WTO Member believes it has a substantial trade interest as a third party, it may notify the DSB and the parties to the dispute of its desire to join the proceedings. DSU, *supra* note 2, art. 4.11. The decision as to whether the third party has a sufficiently large trade interest rests upon the respondent party (for the purposes of consultations). *Id.* Where the Third Party deems *itself* to have a substantial interest in the proceedings between the other Parties, it "shall be entitled" to be a part of the consultations on delivery of written notice to the other Parties and its Section of the NAFTA Secretariat. NAFTA, *supra* note 8, art. 2006(3). Note the difference with the WTO DSU Article 4.11 where the inclusion of the third party Member is contingent upon the respondent party finding that the "claim of substantial interest is well-founded." In the WTO, if the Party is not allowed to join the proceeding already initiated it has the ability to initiate its own case. DSU, *supra* note 2, art. 4.11. In NAFTA, on the other hand, the Third Party

concerns and leaves room for the parties to pursue other possible options.

While the NAFTA's "may" appears weaker than the DSU language, it is in fact the NAFTA that places more emphasis on resolving a dispute at the consultation phase. In the DSU, the text states that a "mutually acceptable" solution "is clearly to be preferred."<sup>69</sup> Also, where the parties fail to reach a solution through consultations, they have an additional *voluntary* option to resolve their differences. The Director General may act in an *ex officio* capacity and provide "good offices, conciliation or mediation" which may begin at any point in the dispute.<sup>70</sup> In reality, over 30% of the disputes brought to the WTO from 1995 to 2001 have been resolved bilaterally, and another 14% have been resolved in other ways.<sup>71</sup> Until 2001, the "good offices" option had never been used, and in all of the remaining disputes either the original party had not received a response to the request for consultation within ten days of the original request or the consultations had failed to accomplish a solution within sixty days; thus the complaining party had asked the DSB to establish a panel.<sup>72</sup>

The NAFTA language is stronger. The parties "should make every attempt" to come to a resolution of the matter between them in a mutually acceptable manner by a) providing sufficient information to each other regarding their rights which have been harmed under NAFTA, b) treating confidential or proprietary information with the same level of care as the other party, and c) trying to avoid a solution that adversely affects any other party.<sup>73</sup> And, the equivalent of the DSU's "good offices" is mandatory in the NAFTA, which requires an additional step of consultations with the NAFTA Free Trade

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has the ability to join at the Panel stage and if it does not do so "shall refrain" from initiating a similar dispute under NAFTA or at the WTO. NAFTA, *supra* note 8, art. 2008(3)-(4). A Third Party under NAFTA (the sole NAFTA party not a party to the case already) can join a dispute if it follows the stipulated procedures, whereas in the WTO the inclusion of a third party is dependent on the assent of the respondent, probably for the sake of efficient administration.

69. DSU, *supra* note 2, art. 3.7.

70. *Id.* art. 5.6. This has never been used in any dispute to date.

71. 36 out of 121 disputes were resolved bilaterally (DSU Article 3.6) and 17 out of 112 were resolved through other means (DSU Articles 3.1, 12.12, and others).

72. *Id.* art. 4.3, 4.5, 4.7. If more than one Member requests the establishment of a Panel on the same matter, the same Panel will hear the claims of all the parties. *Id.* art. 9.

73. NAFTA, *supra* note 8, art. 2006(5).

Commission if initial bilateral consultations fail.<sup>74</sup> The NAFTA Free Trade Commission, which is comprised of cabinet-level representatives of the parties and oversees many aspects of the proper functioning of NAFTA, must convene within ten days of the delivery of the request and try to resolve the dispute.<sup>75</sup> The Commission has the power to consult with experts or create working groups or expert groups to gather more information; to have recourse to good offices, conciliation, meditation, or such other dispute resolution procedures; or make recommendations whereby the parties may resolve their dispute in a satisfactory manner.<sup>76</sup> It is only if the Commission is unsuccessful in resolving the dispute within thirty days, or another period of time agreed upon by the Parties, that any of the parties may request in writing the establishment of an arbitral panel which the Commission will then establish.<sup>77</sup>

The differences between the WTO and the NAFTA Chapter 20 in the consultation and panel establishment phase should be considered. While the language of the DSU's rules on consultations seems less geared to achieving a diplomatic solution, over 44% of the disputes in which consultations are requested never reach a panel. While it is not possible to assess the success of the consultation phase of the NAFTA Chapter 20 because of the limited number of cases that have been decided, it could be argued that this two-step consultation phase might give the parties more opportunities to discuss solutions and avoid legal proceedings. If all these consultations fail, however, both systems have recourse to a panel. In the WTO, because of the negative consensus-rule, a judicial-type panel is automatically adopted within twenty days of the DSB's decision to establish it.<sup>78</sup> In the NAFTA, the Free Trade Commission, at the behest of the parties, establishes an "arbitral" panel.<sup>79</sup> While

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74. The disputing Parties are to request in writing a meeting with the NAFTA Free Trade Commission within 30 days of the initial consultation request, 45 days if there has been the inclusion of another Party, 15 days if the matter was regarding perishable goods, or any period of time agreed on by the Parties. *Id.* art. 2007(1).

75. Under NAFTA Article 2001.2, the Commission is to (a) supervise the implementation of [NAFTA]; (b) oversee its further elaboration, (c) resolves disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.21 and (e) consider any other matter that may affect the operation of this Agreement. *Id.* 2001(2).

76. *Id.* art. 2007(5).

77. *Id.* art. 2008(1)-(2).

78. DSU, *supra* note 2, art. 7.

79. NAFTA, *supra* note 8, art. 2008.

a NAFTA panel functions in a similar fashion to one in the WTO, by calling it an *arbitral panel*, the NAFTA countries seem to have intended more of an arbitration-style approach to be taken in the proceedings.

The first step to forming a panel in both systems is the choosing of the panelists. WTO panels are composed of three independent panelists who, among other stipulated qualifications, have a “sufficiently diverse background and a wide spectrum of experience.”<sup>80</sup> While the WTO Secretariat keeps a record of potential panelists on file, the members are free to choose any panelists who meet the requirements.<sup>81</sup> However, if panelists are not chosen by the members within twenty days, the Director General, together with the Chairman of the relevant Council/Committee, will make the choice.<sup>82</sup> In the NAFTA, five panelists are selected by the parties from a roster, established by consensus among the NAFTA parties, containing a list of individuals who each have three-year terms.<sup>83</sup> When two parties are involved, they need to agree on the chair of the panel within fifteen days of the request to establish the panel; if they cannot agree, the Party chosen by lot shall within five days select a chair who is not a citizen of that party.<sup>84</sup> Within fifteen days of the selection of the chair, each party must select two additional panelists who are citizens of the other party and, again, if there is a lack of agreement, the parties use a system of lots.<sup>85</sup> When all three NAFTA parties are involved, the procedures for choosing the chair are quite similar; with the panelists, however, the party complained against has to select two panelists, who each must be a citizen of the complaining parties, respectively.<sup>86</sup> The complaining parties then choose two panelists from the party against whom they are complaining. Again, a system of lots is used if there is any dispute.<sup>87</sup> Unlike the WTO, where most panelists come from a wide array of countries, the NAFTA has predominantly NAFTA citizens as panelists (as assumed by the detailed rules) and has thus devised a more complex system to ensure fairness.<sup>88</sup>

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80. DSU, *supra* note 2, art. 8.2.

81. *Id.* art. 8.7.

82. *Id.*

83. NAFTA, *supra* note 8, art. 2009(1).

84. *Id.* art. 2011.1(a)–(b).

85. *Id.* art. 2011.1(c).

86. *Id.* art. 2011.2(a)–(c).

87. *Id.* art. 2011.2(d).

88. When a dispute arises under Chapter 19, a panel of five members is



After the panelists are chosen under the DSU rules, under the agreed upon terms of reference, the panel is supposed to complete its examination and report within six months, consulting with both parties at least twice and seeking information from any source it deems appropriate, including consultation with an Expert Review Group.<sup>89</sup> The NAFTA panel has a similar information gathering system. Once the panelists are chosen, the arbitral panel receives written and oral testimony from the parties. In addition, on request by one of the parties or by the panel's initiative, the panel may seek information from outside experts "provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree."<sup>90</sup>

In the WTO, after the panel has examined the written and oral evidence of the parties to the dispute as well as third parties that have been granted permission to make oral and written submissions by the DSB and all multiple complainants, it distributes the fact and argument sections of the report to the parties for comments, and then subsequently issues the entire

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selected from the national Roster lists. Each government in the dispute (through its trade minister) appoints two panelists, in consultation with the other involved government (Chapter 19 panels are always bi-national in composition). The fifth panelist is from one of the two countries and generally alternates with each dispute. Under Chapter 20, an arbitral panel is established using a reverse selection process. Under this process, each disputing Party selects two panelists who are citizens of the other disputing Party. The chair of the panel is selected by the disputing Parties and may be a citizen of a NAFTA Party or any other country.

To serve on a specific panel, roster candidates must complete Disclosure Statements pursuant to a NAFTA Code of Conduct. The Code is fundamental to the process. The governing principle is that a roster candidate and panel member must disclose any interest, relationship or matter that is likely to affect his/her independence or impartiality or that might create an appearance of impropriety or bias. NAFTA panelists and committee members are not permanent arbitrators, but are established on *ad hoc* basis.

89. DSU, *supra* note 2, arts. 12, 13; App. 4. The Panel has nine months at the longest to issue its report. *Id.* art. 12.9. And, it must complete its examination in three months if the dispute relates to perishable goods. *Id.* art. 12.8.

90. NAFTA, *supra* note 8, art. 2014; ABBOT, *supra* note 65, at 101. Note that the DSU Article 13 provides that "[e]ach panel shall have the right to seek information and technical advice from any individual or body which *it deems appropriate*." DSU, *supra* note 2, art. 13 (Emphasis added). The Panel only needs to "inform the authorities of [the] Member" if it is seeking information within the Member's boundaries. *Id.* Otherwise, unlike under NAFTA, the Panels have a free hand to seek information from whomever the Panelists wish without seeking the consent of the Members. A similar consent system is used for Scientific Review Boards which the panel or disputing party can request. NAFTA, *supra* note 8, art. 2015.

interim report to the parties for comments once again.<sup>91</sup> The panel then issues a final report to the DSB, which then circulates the report to all of the members and must adopt the report within sixty days of issuance, unless one of the parties indicates its intention to appeal or a consensus against adoption is reached in the DSB.<sup>92</sup> If the panel report is not appealed or contested, the DSB adopts the panel report. If there is an appeal, which either party can make, the case goes to the standing Appellate Body (AB), which has seven permanent members, three of whom sit on each case. The AB makes its determinations purely on matters of law and must report its findings to the DSB within sixty days, and in no case more than ninety days.<sup>93</sup> The DSB must adopt the AB report within thirty days contingent upon consensus in the DSB and both parties must unconditionally accept the recommendations of the AB or panel (where it is not appealed).<sup>94</sup>

In contrast, the NAFTA text sets different parameters for the panel reports, provides for no formal adoption proceedings, and has no provisions for appeal. Upon compiling the information provided by the parties and any outside expert advice, the panel must issue an initial report within ninety days of the panel creation in which it must stipulate: a) findings of fact, b) a determination on whether the measure at issue causes nullification or impairment in the sections subject to Chapter 20's jurisdiction, and c) "recommendations, *if any*, for the resolution of the dispute."<sup>95</sup> The parties have the opportunity to submit written comments within fourteen days of the issuance of the report and the panel, having the opportunity to consider the views of the parties or reconsider its report, shall issue the final report within thirty days of the initial report, unless the disputing parties agree otherwise.<sup>96</sup>

The parties may not appeal the final report because Chapter 20 does not provide for appellate review, and the panel does not issue a binding remedy on procedures through which to

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91. DSU, *supra* note 2, arts. 15, 10.2, 9.2. With regards to multiple complainants and third party complainants, they also have the right to receive copies made by the other parties to the dispute. And, with multiple complainants, they can request that the Panel present separate reports at the completion of the investigation.

92. *Id.* art. 16.

93. *Id.* art. 17.

94. *Id.* arts. 16, 17.

95. NAFTA, *supra* note 8, 2016(2) (emphasis added).

96. *Id.* arts. 2016(4)-(5); 2017(1).

solve the dispute. Instead, the parties, on the receipt of the final report, are to “agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the Panel”<sup>97</sup> and have to notify the secretariat of their agreed upon solution. The panel cannot enforce its recommendations, nor does the Secretariat oversee the implementation. In this respect, Abbot argues, “it is of cardinal significance to the institutional structure of the NAFTA that the Parties must agree on a resolution of a dispute after the panel renders its decision.”<sup>98</sup> Unlike in the WTO, the parties bear the onus of negotiating a mutually acceptable solution based on the panel report with minimal guidance from the institutional structure, perhaps once again in deference to sovereignty concerns.

The limited involvement of the NAFTA institutional structure in determining the nature of the resolution of the dispute is also reflected in the NAFTA post-adjudication proceedings. While the NAFTA language lacks detail, the DSU has very specific rules that the parties are required to follow.

At the DSB meeting held within thirty days of the adoption of the AB/panel report, the party concerned must state its intentions with regards to the implementation of the report.<sup>99</sup> If it is “impracticable to comply immediately,” the Member “shall have a reasonable period of time [RPT] in which to do so.”<sup>100</sup> The RPT is defined in DSU Article 21.3 as:

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

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. In such arbitration, a guideline for the arbitrator should be that the [RPT] to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

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97. *Id.* art. 2018(1).

98. Abbot, *supra* note 65, at 101.

99. DSU, *supra* note 2, art. 21.

100. *Id.*

In cases where “there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings,” the complaining party has recourse to what is referred to as a “21.5 Panel,” whereby the proposed implementation is referred to the original panel for adjudication.<sup>101</sup> And, even though the DSU is silent on appealing 21.5 Panel reports, the right was first identified in *Brazil – Export Financing Programme for Aircraft*.<sup>102</sup> As there is no independent policing body responsible for enforcing the panel and AB decisions, the DSB, composed of all WTO members, is the supervisory body for surveillance and implementation; and, the DSU provides that the “issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the [RPT]. . . and shall remain on the DSB’s agenda until the issue is resolved.”<sup>103</sup>

In cases of non-implementation, the complaining party must negotiate with the responding party in order to establish a “mutually acceptable” level of compensation, typically conceived of in terms of trade concessions.<sup>104</sup> If no satisfactory level has been set within twenty days after the expiry of the RPT, the complaining party may request authorization from the DSB to suspend concessions<sup>105</sup> or obligations<sup>106</sup> to the other party under

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101. *Id.* art. 21.5.

102. Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R (Apr. 14, 1999).

103. Marceau, *supra* note 5, at 531; DSU, *supra* note 2, art. 21.6.

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

105. “WTO negotiations produce general rules that apply to all members, and specific commitments made by individual member governments. The specific commitments are listed in documents called ‘schedules of concessions.’ The schedules reflect the ‘concessions’ a member has given in trade negotiations.” WTO, Schedules on Concessions of Goods, [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm) (last visited Sept. 24, 2006). For more information, see World Trade Organization, “Members’ Commitments,” [http://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm) (last visited March 28, 2005).

106. In the framework of trade in services, for example, obligations contained in the GATS may be categorized into two groups: 1) general obligations which apply directly and automatically to all Members, regardless of the existence of sectoral commitments; and 2) specific commitments whose scope is limited to the sectors and activities where a Member has decided to assume market access and national treatment obligations. See General Agreement on Trade in Services, art. IX, 1869 U.N.T.S. 183 (1995)[hereinafter GATS]; GATS, *supra*, art. XVI. Obligations can also be divided into unconditional and conditional obligations. Unconditional obligations apply to all services except those not subject to coverage by the GATS. Examples of

the agreement in question.<sup>107</sup> And, the DSB should grant this request within thirty days of the expiry of the RPT unless there is a lack of consensus.<sup>108</sup> If the party causing the injury disputes the level of suspension granted by the DSB, it can request arbitration either to be carried out by the original panel or by an arbitrator appointed by the Director General: the "Article 22.6"<sup>109</sup> arbitration should produce a final report within sixty days of the expiry of the RPT.<sup>110</sup> The DSB shall then, on request by the complainant, authorize the suspension of concessions at the level determined by the arbitrator, unless the DSB rejects the request by consensus.<sup>111</sup> While the DSB/arbitrator should authorize the suspension of concessions in the same sector as the issue in question, there are possibilities for cross-relation with other sectors or other covered agreements if the suspension is not "practicable or effective" in the same sector.<sup>112</sup>

It must be pointed out that the DSU specifically stipulates that compensation and suspension of concessions must be "temporary," and are methods not preferred to "full implementation of a recommendation to bring a measure into

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unconditional obligations are the most-favored-nation treatment (except for those listed in the Annex on Article II Exemptions) and certain transparency obligations, whereas conditional obligations are Member-specific and contained in individual Members' schedules of specific commitments. *Id.* arts. II, III. Conditional obligations are assumed in a "bottom-up" or positive list approach. *See id.* appendix (containing the schedules of specific commitments for each member country).

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

108. *Id.* art. 22.6.

109. DSU Article 22.6 reads:

When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator [the expression "arbitrator" shall be interpreted as referring either to an individual or a group] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

*Id.*

110. *Id.*

111. *Id.* art. 22.7.

112. *Id.* art. 22.3.

conformity with the covered agreements.”<sup>113</sup> Most importantly, “[c]ompensation [by the losing party] is voluntary, and, if granted, shall be consistent with the covered agreements.”<sup>114</sup> Although the WTO does not have legal powers *per se* to enforce the rulings, the sanction possibilities seek to chastise the Members breaching the WTO or other covered agreements.<sup>115</sup> The compliance power of the WTO rests on the moral force of its rulings, the strength of the Member adopting the retaliation, and the diplomatic pressure exerted by the parties to the case as well as the WTO Members compositely.<sup>116</sup> Drawing from the history of the WTO dispute settlement system discussed above, while the political will to undertake the WTO legal obligations might be very strong for the losing party, whether the Member will ultimately comply with the ruling depends on its political will in the dispute at hand.

The NAFTA post-arbitral proceedings reflect the bilateral, negotiation-based underpinnings of the Chapter 20. NAFTA Article 2018 states that the best possible resolution is non-implementation or removal of a measure which the panel has determined has caused nullification or impairment of the complaining Party’s NAFTA obligations, or “failing such a resolution, compensation.”<sup>117</sup> However, if:

the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 2018(1) *within 30 days* of receiving the final report, such complaining party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.<sup>118</sup>

Unlike the WTO system of RPT for compliance, NAFTA provides thirty days for the losing party to implement a solution. However, thirty days is an impracticable period of time for implementation. The idea is to get together with the other side to work things out if the other side is acting in good faith. The NAFTA system shifts the burden to the losing defendant and it depends on that party’s good faith. Since retaliation is not good for both countries, it does not make sense to retaliate if there is no implementation even if, within thirty days, the other

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113. *Id.* art. 22.1.

114. DSU, *supra* note 2, art. 22.1

115. AN ANATOMY OF THE WORLD TRADE ORGANIZATION, *supra* note 43, at 68-69.

116. *Id.* at 69.

117. NAFTA, *supra* note 8, art. 2018.

118. *Id.* art. 2019(1) (emphasis added).

side is trying to comply in good faith.

If the losing respondent fails to comply or make an adequate showing of good faith, the aggrieved party can suspend concessions in the same sector as the trade measure at issue or “a complaining party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.”<sup>119</sup> The NAFTA, like the DSU, provides for cross-sector retaliation, but the guidelines provided for the parties to implement the retaliation contain little detail. And, finally, if any of the disputing parties believe that the level of benefits suspended is “manifestly excessive,”<sup>120</sup> the party has the right to request the Commission to establish a panel which needs to present its determination within sixty days after the last panelist is selected or by which time the parties stipulate. The NAFTA text provides no further guidance to the parties, suggesting that the parties may need to pursue diplomatic channels if the dispute is not resolved by that point.

### C. DIAGNOSIS

Part I began with an examination of the evolution of the WTO dispute settlement system from one of the loose rules under the GATT, which nevertheless functioned effectively, to the detailed, rule-based system now present. Hudec underplays the novelty of the new system, suggesting that the political will behind the institution, and not the rules themselves, ensures that an organization functions well. The NAFTA system, also discussed above, perhaps can be compared with the old negotiation-, diplomatic-based GATT system supported by the political will of the United States, Canada, and Mexico to have a strong legal system in a regional context. Does the empirical evidence support these arguments?

According to Hudec:

[I]f it is true that the key ingredient of international legal systems is the political will of member governments to comply with them, and if it is also true that the WTO legal reforms do not signal a sudden improvement in the less-than-perfect political will that caused the GATT legal system to suffer occasional failures, it follows that the new WTO legal system cannot expect to have one hundred percent compliance, even with its new and more rigorous procedures. To the contrary, it must be anticipated that there will be defeats when governments cannot, or will not, comply with some legal rulings – just

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119. *Id.* art. 2019(2)(b).

120. *Id.* art. 2019(3).

as they did under GATT.<sup>121</sup>

The empirical evidence seems to suggest the accuracy of Hudec's assertion. Of the sixty-eight complaints resolved through panel or Appellate Body reports from 1995 to 2001, roughly thirteen cases have entered DSU Articles 21<sup>122</sup> or 22<sup>123</sup>

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121. Hudec, *supra* note 6, at 14.

122. DSU Article 21 reads:

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

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

3. At a DSB meeting held within 30 days [If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

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

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings [If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties]. In such arbitration, a guideline for the arbitrator [The expression "arbitrator" shall be interpreted as referring either to an individual or a group] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.

4. Except where the panel or the Appellate Body has extended, pursuant to paragraph 9 of Article 12 or paragraph 5 of Article 17, the time of providing its report, the period from the date of establishment of the panel by the DSB until the date of determination of the reasonable period of time shall not exceed 15 months unless the parties to the dispute agree otherwise. Where either the panel or the Appellate Body has acted to extend the time of providing its report, the additional time taken shall be added to the 15-month period; provided that unless the parties to the dispute agree that there are



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exceptional circumstances, the total time shall not exceed 18 months.

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report.

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved. At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

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

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

DSU, *supra* note 2, art. 21.

123. DSU Article 22 reads:

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

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having

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invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

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

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

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

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

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

(i) with respect to goods, all goods;

(ii) with respect to services, a principal sector as identified in the current "Services Sectoral Classification List" which identifies such sectors; [The list in document MTN.GNS/W/120 identifies eleven sectors]

(iii) with respect to trade-related intellectual property rights, each of the categories of intellectual property rights covered in Section 1, or Section 2, or Section 3, or Section 4, or Section 5, or Section 6, or Section 7 of Part II, or the obligations under Part III, or Part IV of the Agreement on TRIPS;

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

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(i) with respect to goods, the agreements listed in Annex 1A of the WTO Agreement, taken as a whole as well as the Plurilateral Trade Agreements in so far as the relevant parties to the dispute are parties to these agreements;

(ii) with respect to services, the GATS;

(iii) with respect to intellectual property rights, the Agreement on TRIPS.

4. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.

5. The DSB shall not authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator [the expression "arbitrator" shall be interpreted as referring either to an individual or a group] appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration.

7. The arbitrator [the expression "arbitrator" shall be interpreted as referring either to an individual or a group or to the members of the original panel when serving in the capacity of arbitrator] acting pursuant to paragraph 6 shall not examine the nature of the concessions or other obligations to be suspended but shall determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim. In the event the arbitrator determines that those principles and procedures have not been followed, the complaining party shall apply them consistent with paragraph 3. The parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration. The DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure

proceedings. Two of the most prominent of such cases have been *European Communities – Regime for the Importation, Sale, and Distribution of Bananas (Bananas)*<sup>124</sup> and *European Communities – Measures Concerning Meat and Meat Products (Hormones)*.<sup>125</sup> In *Bananas*, the United States, Ecuador, Guatemala, and Honduras successfully challenged the EC-wide regime for bananas created in 1993.<sup>126</sup> The regime discriminated against Latin American bananas (and, thus, U.S. companies) and instead favored bananas from EC domestic producers and from the ACP, given special trade preferences under the traditional preferential arrangement, the Lomé Convention.<sup>127</sup> Because of the political sensitivity of the issue, the EC failed to comply with the WTO panel decision recommending that it bring its regime into compliance with WTO rules, and instead faced \$191.4 million worth of 100% *ad valorem* duties by the

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found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

9. The dispute settlement provisions of the covered agreements may be invoked in respect of measures affecting their observance taken by regional or local governments or authorities within the territory of a Member. When the DSB has ruled that a provision of a covered agreement has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions of the covered agreements and this Understanding relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance. [Where the provisions of any covered agreement concerning measures taken by regional or local governments or authorities within the territory of a Member contain provisions different from the provisions of this paragraph, the provisions of such covered agreement shall prevail]

*Id.* art. 22, at 126-128

124. WT/DS27 (5 Feb. 1996).

125. WT/DS26 (26 Jan. 1996).

126. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU (12 April 1999).

127. The Lomé Convention links African, Caribbean, and Pacific (ACP) developing countries to the EC. See generally *European Economic Community—African, Caribbean, and Pacific Countries: Documents from Lomé Meeting*, Feb. 28, 1975, 14 I.L.M. 595.

United States on products such as handbags and electric coffee makers. It was not until April 2001 that the United States and the EC agreed to a settlement whereby the EC would bring its regime into compliance by 2006. Assuming that the EC does follow through on the agreement, this dispute, rife with noncompliance, will have lasted over thirteen years.

The *Hormones* case, which began in 1998 and still has not been resolved,<sup>128</sup> concerns public health and agriculture policy issues. The dispute, over the use of growth hormones in the U.S. and Canadian beef industry, has seen no efforts by the EC to open its market to U.S. and Canadian beef, despite a successful challenge of the EC hormone-ban at the WTO. Again, due to the political sensitivity of the issue in Europe, the EC has had to bear \$116.8 million of U.S. retaliatory tariffs as its price for noncompliance.

Until 2001, in the North American context, there had been two cases of compliance difficulties. The first is *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*.<sup>129</sup> This dispute over Canada's system of government support for domestic milk production and export, and tariff rate quota regime for exports of fluid milk was brought jointly by New Zealand and the United States in 1999. The Panel ruled against Canada and determined Canada needed to bring its regime into conformity within the reasonable period of fifteen months and four days. However, the United States and New Zealand took Canada to an Article 21.5 Panel for failing to comply with the DSB's recommendation as well as an Article 21.5 Appeal which just issued its report in December 2001. The importance of the agricultural sector in Canada, in this case the dairy industry, has made adequate compliance very difficult and perhaps assures that the dispute will not be resolved quickly.

The second dispute is *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*.<sup>130</sup> Just as in *Canada – Dairy*,<sup>131</sup> the *Mexico – Corn Syrup* dispute

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128. It is interesting to note though, that although the WTO claims to be a transparent and open institution, the *Hormones* case was the first Panel dispute proceeding in the history of the WTO to be open to the general public at the WTO headquarters in September 2005.

129. WT/DS113 (29 Dec. 1997) (New Zealand) and WT/DS103 (U.S.) (8 Oct. 1997) [Hereinafter *Canada—Dairy*].

130. WT/DS132 (8 May 1998) [Hereinafter *Mexico—Corn Syrup*].

131. *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 (8 Oct. 1997).

has gone through DSB Panel proceedings, a 21.5 Panel, and finally an appeal of the 21.5 Panel decision.<sup>132</sup> The dispute concerns a 1997 Mexican anti-dumping investigation of HFCS which led to anti-dumping duties on U.S. exports to Mexico. The United States successfully challenged the anti-dumping determination in early 2000 at the WTO, but as of 2001 Mexico had not yet fully complied with the Panel's recommendations. In fact, this dispute has spawned a NAFTA Chapter 19 panel through which U.S. private industry has challenged the Mexican HFCS anti-dumping determinations.<sup>133</sup> This seems also to have been a very politically sensitive issue in Mexico as, interestingly, in two of the NAFTA Chapter 20 decisions discussed below, Mexico threatened retaliation of higher tariffs on HFCS.<sup>134</sup> Insufficient compliance in this case may be used as a bargaining tool by Mexico to gain market access to the U.S. market for Mexican sugar.<sup>135</sup>

These four WTO cases (*EC – Bananas III*; *EC – Hormones*; *Canada – Dairy*; and *Mexico – Corn Syrup*) are just a few of the politically sensitive cases that Hudec suggests would spark instances of noncompliance. The United States, EC, Canada, and Mexico seem to have very strong political will to comply with the legal obligations of the WTO and to pursue free trade.<sup>136</sup> Thus, the politically sensitive cases appear to be those

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132. The initial panel proceeding, however, was never appealed to the AB.

133. *High Fructose Corn Syrup from the USA*, (MEX-USA-98-1904-01); Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/Mexico/ma98101e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98101e.pdf) (last visited Sep. 15, 2006).

134. Mexico targeted the U.S. HFCS industry in its retaliation for the NAFTA Chapter 20 Broom Corn Dispute. *Clinton Lifts Broomcorn Safeguard: Mexico Will Drop Retaliation*, INSIDE U.S. TRADE, December 11, 1998, at 9. Mexico also threatened retaliation against the U.S. HFCS industry in the Mexican Trucking Dispute. *Senators Continue to Dispute NAFTA Trucking Language in Spending Bill*, INSIDE U.S. TRADE, July 27, 2001, at 8.

135. *Mexico, U.S. Handle HFCS Dispute, as Mexico Presses on Sugar Access*, INSIDE U.S. TRADE, December 21, 2001, at 1.

136. This is particularly apparent with the successful launching of trade talks at the Doha Ministerial Conference in November 2001. In 2001 in Doha (Qatar), a promise was given to developing countries, namely their inclusion in the world trading system, in order to achieve a higher level of justice and equity in the world. That is why the new round is called the "development agenda." The argument is that a more open and equitable trading system brings more peace to the world and, in this sense, the Doha Development Agenda should not be approached as a zero-sum game—as many developing countries seem to perceive it—, but as a win-win situation. Mr. Mandelson, who referred to a development package for least-developed countries

instances of "less-than-perfect political will" that Hudec describes.<sup>137</sup>

There are no detailed statistics for the NAFTA Chapter 20 system as there have been only three completed disputes between 1994 and 2001. The first case, *Canadian Agricultural Products*,<sup>138</sup> required no compliance measures since it was a negative ruling. There, in 1996, the United States unsuccessfully challenged Canada's increase of over-quota tariff duties on certain agricultural products as a result of tariffication under the WTO Agriculture Agreement.

The second case, *Broomcorn*,<sup>139</sup> also arose in 1996, and was a dispute over the use of a global safeguard measures by the United States. The U.S. broomcorn broom industry filed a safeguard petition under §202 of the 1974 Trade Act as well as under the NAFTA Implementation Act. While the United States International Trade Commission (USITC)<sup>140</sup> determined that both global and NAFTA imports were causing injury, the President decided to take action only in the global safeguards case and imposed a safeguard through December 1999. Although Honduras and Colombia were also affected by the safeguard action, Mexico imposed a 20% duty on U.S. exports of wine, wine coolers, brandy, Tennessee whiskey, fructose, notebooks, flat glass, and wooden furniture legally under the WTO Agreement on Safeguards.<sup>141</sup> Mexico also brought a NAFTA Chapter 20 case in 1998 claiming that the U.S. safeguard violated its NAFTA obligations. The Panel agreed with Mexico, but the United States did not lift the safeguard immediately. Instead, after the ruling, the U.S. Trade

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(LDCs) as 'indispensable,' indicated at the Hong Kong WTO Ministerial Conference that the EU had committed to step up annual spending on aid for trade to EUR 2 billion by 2010. One billion of this will come from EU Member States, which agreed at the Hong Kong Ministerial Conference to the increase (from EUR 400 million per year); the remainder will come from the European Commission. "Europe did not come to Hong Kong empty-handed on aid for trade," he said. *Lamy Calls on WTO Economies to "Take Risks" for Gains*, JAPAN ECONOMIC NEWSWIRE, Dec. 13, 2005.

137. Hudec, *supra* note 6, at 14.

138. *Canadian Agricultural Products*, *supra* note 15.

139. *Broomcorn*, *supra* note 15.

140. The United States International Trade Commission (USITC) is an independent, non-partisan, quasi-judicial, federal agency of the United States that provides trade expertise to both the legislative and executive branches. Further, the agency determines the impact of imports on U.S. industries, and directs actions against certain unfair trade practices, such as dumping (pricing policy), patent, trademark, and copyright infringement.

141. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 8, 1869 U.N.T.S. 157 (1998).

Representative requested a study from the USITC to determine whether the U.S. broomcorn industry had been positively affected after the safeguard had been imposed. Mexico, however, “[did] not [say it] . . . would retaliate”<sup>142</sup> in response to the study. This is probably because the United States was making a good faith attempt to comply with the ruling, a very important facet to the compliance phase of the NAFTA system. Six months later, in December 1998, the USITC study determined that the U.S. broomcorn broom industry was not making the necessary adjustment while the tariffs were in place. This led to the decision by the Clinton Administration to remove the safeguard early.<sup>143</sup> The U.S. broomcorn broom industry, however, blamed the lifting of the safeguard “on political pressure . . . from the much larger companies that were subject to the [initial] retaliation.”<sup>144</sup> Whatever the grounding of the political will, it was sufficient to make the United States comply with the NAFTA panel report nine months after it was issued.

The third, more recent dispute, *Trucking*,<sup>145</sup> concerned U.S. laws restricting Mexican firms from providing trucking services in the United States, or even investing in the U.S. trucking industry. Under Annex 1 of the NAFTA, the United States had to phase out the reservation it had taken for cross-border trucking services by December 1995, but the Clinton Administration failed to fulfill the NAFTA obligations, citing security concerns. Mexico successfully challenged the U.S. moratorium through a Chapter 20 Panel, which found the United States in violation of its NAFTA obligations. As soon as the report was issued, the Bush Administration was much more willing to come to a resolution of the dispute than the Clinton Administration had been.<sup>146</sup> Thus, Mexican trade officials indicated that “Mexico would not seek to retaliate right away if the U.S. did not bring itself into full compliance with the panel’s finding after 30 days, as would be [Mexico’s] right under NAFTA dispute settlement procedures.”<sup>147</sup> “Here we are looking at a

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142. *Barshefsky Sidesteps Direct Response to NAFTA Panel on Mexican Brooms*, INSIDE U.S. TRADE, May 15, 1998, at 21.

143. *Clinton Lifts Broomcorn Safeguard; Mexico Will Drop Retaliation*, INSIDE U.S. TRADE, Dec., 1998, at 9.

144. *Id.*

145. *Trucking*, *supra* note 15.

146. *Bush Administration Begins Discussion on Implementing Truck Panel*, INSIDE U.S. TRADE, Feb. 16, 2001, at 8.

147. *U.S. Faces Constraints in Implementing NAFTA Truck Panel*, INSIDE U.S. TRADE, Feb. 9, 2001.



U.S. Administration," said a Mexican trade official, "that has said it would fulfill its NAFTA obligations. Our expectation is that they will comply and we expect to be satisfied."<sup>148</sup> The Bush Administration put forward its proposal to allow limited entry to Mexican trucking firms into the United States by early 2002, beginning with expanded access in border "commercial zones."<sup>149</sup> The Administration, however, faced steep opposition to the plan in Congress through the summer of 2001. It was not until November 28, 2001 that Congress and the President were able to come to a mutually acceptable agreement on the matter. While it is unclear whether the borders were opened as of January 1, 2002, the legislation has set a definitive timetable within which the United States will be in compliance with its NAFTA obligations.<sup>150</sup>

There are a few interesting facets to this dispute. First, despite the nine month delay in action, the Mexican government never imposed retaliatory measures on the United States. As in the *Broomcorn* dispute, the Administration's good faith efforts were sufficient to assuage Mexico's concerns and prevent retaliation. Second, the United States passed legislation to comply despite the many security concerns surrounding the entry of Mexican trucks into the United States. This was a very high political hurdle for the Administration and Congress, particularly in light of security concerns in the aftermath of the September 11 tragedies. Third, James Hoffa of the Teamsters was a very vocal opponent of U.S. compliance with the NAFTA panel. He published a report in which he argued:

even if [the United States'] actions as a result of legislation were found to violate the NAFTA, the cost to the U.S. would be small. Possible retaliation from Mexico would be limited to the amount of lost business due to the restrictions [i.e., less border traffic flow because of security concerns], which is already limited due to border congestion.<sup>151</sup>

Mr. Hoffa actually quantified U.S. noncompliance at \$225 million.<sup>152</sup> If the costs of noncompliance were really that low, the outcome of this case perhaps shows the strong political will of the United States to resolve this dispute.

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148. *Id.*

149. *U.S. Plan would open Territory to Mexican Trucks Starting in 2002*, INSIDE U.S. TRADE, Mar. 30, 2001, at 3.

150. *Congress Strikes a Deal on NAFTA Trucks Supported by White House*, INSIDE U.S. TRADE, November 30, 2001, at 7.

151. *Id.*

152. *Id.*

Overall, it seems that compliance with Chapter 20 Panel reports has been good, but extended. Hudec's proposition seems to apply here as well – the NAFTA has a limited system of rules, yet there has been compliance in politically sensitive issues. In examining both the WTO and the NAFTA cases, institutions, and background, it has become all the more apparent that the rules of the systems are made effective by their political underpinnings.

## II. COMPARISON

Because of the political nature of WTO and NAFTA disputes, the rules yield benefits and drawbacks for parties involved in each system. This section will look at some factors that determine the effectiveness of the system by examining each of the potential advantages and disadvantages from the perspective of the winning and losing parties.

### A. WTO

#### 1. Advantages

##### a. Losing Respondent

While the losing party is constrained by the detailed series of rules under the DSU, one advantage of the system is that it has a variety of ways to prolong noncompliance. After the nine months it customarily takes for the adoption of the first panel report, the party can first appeal the decision, adding an extra three months to the process.<sup>153</sup> Second, following the appeal, if the party loses once again and must implement the AB decision, it can try to prolong the RPT by proposing or negotiating a period of time with the other Member or going to arbitration to seek up to fifteen months (a guideline for the maximum period of time) for implementation.<sup>154</sup> Third, the party need not *de jure* comply and can instead send *de facto* implementation procedures to the DSB, which is supposed to supervise implementation. Fourth, the losing party could face a 21.5 panel for insufficient implementation and, fifth, if ruled against, it can

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153. DSU, *supra* note 2, art. 20.

154. *Id.* 21.3(c).

try to appeal the 21.5 ruling to the AB.<sup>155</sup> Sixth, after the 21.5 rulings, the party can still postpone implementation and face the DSU Article 22 compensation proceedings.<sup>156</sup> Seventh, the party can disagree with the other Member's level of compensation and can request arbitration under Article 22.6, which adds an additional period of time after the expiry of the RPT.<sup>157</sup> It is only then that the winning party may suspend concessions and pursue retaliation. Since compensation appears not to be retroactive under the DSU and is only prospective, a losing party has all the possibilities under this system to prolong non-compliance.

This sequence of events was the case in *Bananas*, discussed above, which began under the GATT dispute settlement system in 1993. The WTO panel, which issued its report in May 1997, ruled that the EC's banana regime violated WTO rules on sixteen counts.<sup>158</sup> The EC appealed all parts of the panel decision in July 1997;<sup>159</sup> the complainants cross-appealed on three points.<sup>160</sup> On September 9, 1997, the Appellate Body issued its report upholding all parts of the initial ruling and also reversing two of the cross-appealed opinions in favor of the complainants.<sup>161</sup>

The WTO DSB adopted the reports on September 27, 1997, recommending that the EC bring its regime into compliance

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155. *Id.* art. 21.5. As discussed in the text *supra*, appealing 21.5 Panel decisions is a subject on which the WTO treaty is silent. Because the treaty has not explicitly prohibited the appeal, the treaty has been interpreted to allow appeals of 21.5 panel proceedings to the original Panelists of the AB who heard the case on appeal. The first case of this was in the Panel on *Brazil - Export Financing Programme for Aircraft* (WT/DS46).

156. *Id.* art. 22.

157. *Id.* art. 22.6.

158. Panel Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA, 393–397 (May 22, 1997).

159. Notification of an Appeal by the European Communities, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/9, (June 13, 1997).

160. Ecuador, Guatemala, Honduras, Mexico, and the United States, "European Communities - Regime for the Importation, Sale, and Distribution of Bananas," *Appeal of Ecuador, Guatemala, Honduras, Mexico, and the United States under Rule 23 (1) of the Working Procedures for Appellate Review*, 26 June 1997, 2-3; Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (9 Sept. 1997).

161. USTR, Notice of Determinations, Termination, and Monitoring, "Determination Under 304 of Trade Act of 1974: European Communities' Banana Regime," *Federal Register* 63, No. 32 (18 February 1998): 8248; Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

with the WTO.<sup>162</sup> On October 16, 1997, the EC stated that it would “fully respect its international obligations with regard to this matter,” but would require a “reasonable period of time to do so.”<sup>163</sup> On December 17, 1997, the WTO Arbitrator, at a hearing requested by the complainants, granted the EC a “reasonable period of time” under Article 21.3 of the DSU, until January 1, 1999, to comply with the WTO ruling.<sup>164</sup>

The EC made some attempts to comply in 1998, but the proposals were WTO-inconsistent and the EC did not change its regime by the January 1, 1999 deadline. The United States informed the DSB on January 14 that it intended to suspend concessions to the EC on trade worth \$520 million in harm to U.S. commerce.<sup>165</sup> The EC objected to the level of tariffs that the United States had requested, and exercised its right under Article 22.3 of the DSU.<sup>166</sup> On April 6, 1999, the DSU ruled that the United States could suspend concessions for the amount of \$191.4 million in lost U.S. exports of goods and services.<sup>167</sup> The DSB formally authorized the United States to begin its retaliation on April 19, 1999.<sup>168</sup> The United States instated

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162. Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, 393-397 (May 22, 1997) (adopted Sept. 27, 1997); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (adopted Sept. 27, 1997).

163. Determination Under 304 of Trade Act of 1974: *European Communities' Banana Regime*, 63 Fed. Reg. 32, 8248 (Feb. 18, 1998).

164. Award of Arbitrator, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15 (Jan. 7, 1998).

165. Recourse by the United States to Article 22.2 of the DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/43 (Jan. 14, 1999) [hereinafter *Recourse by U.S.*]; USTR, “United States to Apply Its WTO Retaliatory Rights in Banana Case,” *USTR Press Release*, January 14, 1999. For the story of EC attempts at compliance see: Status Report of the European Communities, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/17 (July 13, 1998); Status Report by the European Communities – Addendum, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/17/Add.1 (Sept. 9, 1998); Status Report by the European Communities – Addendum, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, (Oct. 9, 1998); Status Report by the European Communities – Addendum, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/17/Add.3 (Nov. 13, 1998).

166. Request by the European Communities for Arbitration under Article 22.6 of the DSU, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/46 (Feb. 3, 1999).

167. Decision by the Arbitrators, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB, (April 9, 1999).

168. Press Release, Office of the United States Trade Representative, Executive

100% *ad valorem* duties on handbags, types of paper, lithographs, paperboard, bed linen, lead-acid storage batteries, domestic electric coffee makers (except those from Italy), and bath products from all EU countries (except the Netherlands and Denmark).<sup>169</sup> The tariffs remained until July 2001, when the then-U.S. Trade Representative, Ambassador Robert Zoellick and the former EU trade commissioner Pascal Lamy negotiated a bilateral resolution.<sup>170</sup> The EC has not yet brought its banana regime into conformity despite all of these proceedings, but it has plans to implement some changes by 2006.<sup>171</sup>

A second advantage to a losing respondent in the WTO system relates to retaliatory measures by the aggrieved party. There may be cases in which the dollar amount of the retaliation authorized by the DSB might be relatively small or the non-complying party can provide assistance to domestic interests hurt by the ruling. Where the quantified costs of noncompliance are small while the compliance measures that need to be enacted in order to be in compliance are politically costly, there may be no compliance at all.<sup>172</sup> An example of this scenario is the *Hormones* case discussed above. While the European beef ban might be pure protectionism at its roots, even U.S. government and beef industry officials understand that consumer concerns are very real given the bovine spongiform encephalopathy (BSE),<sup>173</sup> or mad cow disease, and Belgian dioxin scares in the past few years. Because of the BSE crisis, beef consumption in Europe was overall down by 40% around 2000-2001, which put strong pressure on the EU's

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Office of the President, WTO Authorizes U.S. Retaliation, (April 19, 1999).

169. Recourse by U.S., *supra* note 165.

170. Notification of Mutually Agreed Solution, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/58 (July 2, 2001).

171. Status Report by the European Communities – Addendum, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/51/Add. 25 (Jan. 21, 2002).

172. See *supra* text in which Mr. Hoffa of the Teamsters unsuccessfully made this argument for noncompliance in the Mexican *Trucking* case under NAFTA. See *Congress Strikes Deal*, *supra* note 147, at 8.

173. Bovine spongiform encephalopathy (BSE), commonly known as mad cow disease, is a fatal, neurodegenerative disease of cattle, which infects by a mechanism that surprised biologists on its discovery in the late XX century. While never having killed cattle on a scale comparable to other dreaded livestock diseases, such as foot and mouth and rinderpest, BSE has attracted wide attention because it seems that people can contract the disease; it is thought to be the cause of variant Creutzfeldt-Jakob disease (vCJD), sometimes called new variant Creutzfeldt-Jakob disease (nvCJD), a human brain-wasting disease.

Common Agriculture Policy and reduced the likelihood that the ban would be lifted.<sup>174</sup> Thus, as the EC has not found the sufficient domestic impetus to comply with the WTO ruling, it has chosen to bear the retaliatory tariffs imposed by the United States with authorization of the DSB.

Third, conversely, it might also be in a losing party's interest to comply with panel and AB reports to strengthen the credibility of the institution and set, to some degree, some kind of international precedent for its own future dealings. For example, in *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*,<sup>175</sup> which the United States lost, the United States may have wanted to comply with the AB reports in order to set an example for cases in which it was the winning party and had to enforce the case against another member. Canada may want to set a similar precedent by complying with the *Canada – Term of Patent Protection* case.<sup>176</sup> In this case, brought by the United States, the AB found Canada's Patent Act was in violation of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)<sup>177</sup> because there were some cases in which Canada only provided seventeen years of protection for patents, whereas the TRIPS Agreement stipulates a twenty-

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174. *Rise of Mad Cow Disease in France Causes Panic*, GUELPH MERCURY (Ontario, Canada), Nov. 16, 2000, at A12.

175. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

176. Appellate Body Report, *Canada—Term of Patent Protection*, WT/DS170/AB/R (Sept 18, 2000).

177. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Dec. 15, 1993, 33 I.L.M. 81 (1994) [hereinafter TRIPS]. The Agreement on Trade-Related Intellectual Property Measures (TRIPS) is a Uruguay Round Agreement that extends WTO disciplines into the protection of patents, trademarks, copyrights, geographical indications, industrial designs, and trade secrets. Unlike most WTO rules, the TRIPS Agreement requires both domestic enforcement and border measures as part of a member's compliance to prevent piracy and other violations. Developing countries were given longer transition periods for the phase-in of the TRIPS Agreement requirements. The WTO (but also the North American Free Trade Agreement –NAFTA- and the Free Trade Area of the Americas –FTAA-) includes new intellectual property rules which require signatory countries to establish specific patent, copyright and trademark protections in their domestic laws. The pharmaceutical industry exercised heavy influence on WTO negotiations, and these agreements require countries to adopt U.S.-style intellectual property laws, such as granting monopoly sales rights to individual patent holders for extended time periods and including seeds, medicines and other traditionally excluded items as those for which countries must provide patent protections. The TRIPS rules have been subject of a major international fight regarding poor countries' rights to issue compulsory licenses for essential medicines.

year minimum. Canada's prompt compliance with this ruling should set a strong precedent for the developing world to comply with the TRIPS Agreement and the reports of future panels established concerning the TRIPS issues. This argument of 'example' can hold good for countries with large or small amounts of bargaining power.

#### b. Winning Complainant

While there are certainly problems with achieving compliance among members in difficult cases, the WTO provides a detailed, systematic framework whereby the winning party's position vis-à-vis the losing party is bolstered by the credibility of the WTO, a respected international institution to which Members have submitted themselves to jurisdiction. By having the DSB administer the compliance and having the force of the organization behind the winning party through an adopted panel or AB report, the winning Member can take the diplomatic high ground in demanding compliance with the ruling.

This diplomatic pressure, combined with a rule-based approach, gives opportunities for the winning party to receive some sort of compensation. This system gives legitimacy to winning parties to demand compliance within the time-frame stipulated by the rulings as well as to suspend concessions and retaliate against the party in noncompliance with the authorization of the DSB. Although the dollar amounts of the retaliation may be, in some cases, relatively small amounts like in *Bananas* and *Hormones*, diplomatically, any amount of retaliation has an important political effect with minimal trade effects. It should be remembered that while the political tensions remained high over the banana and beef disputes, the retaliation amounts were, respectively, less than U.S.-EC trade in a morning of most business days. And, in cases where the amounts of potential retaliation are significant, as in the *U.S. - FSC* case,<sup>178</sup> where there is potential for \$4 billion retaliation by the EC against the United States, the rule-oriented approach ensures that the aggrieved party eventually has recourse to retaliation even if there is no mutually agreed upon diplomatic solution.

The winning party has means of receiving its compensation

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178. *United States - Tax Treatment for "Foreign Sales Corporation,"* WT/DS108 (18 Nov. 1997).

through retaliation. If the non-compliant party's same sector is not practicable or effective to provide the adequate compensation to the winning party, DSU Article 22.3 permits the use of cross sector retaliation. Or, in cases where this is not practicable or effective as well, DSU Article 22.3 provides for "suspension of concessions or other obligations under another covered agreement." This is yet more insurance for the complaining party that it will receive some type of relief when it successfully challenges trade practices which are deemed WTO-incompatible.

The rule-oriented system is also a power-equalizing force within the organization and helps Members who have a relatively weaker position within the international system to have the possibility to achieve compliance from Members that have much more clout. The winning party, especially if it is a developing country, can be less concerned about its relative power in the international system when requesting that the noncompliant party come into compliance. For example, in *Shrimp-Turtle*, where the United States faced complaints from developing countries, it complied with the AB requests to bring the measures into compliance.<sup>179</sup> Under the GATT panel's consensus rules, perhaps the United States would have been able to block the adoption of the report, but under the WTO automaticity rules, winning parties are able to have the DSB adopt the reports and enforce the implementation measures.

Lastly, while a losing party may be able to set precedent by complying, the winning party may be able to establish precedent for the interpretation of a treaty provision or be able to attack a widely used foreign practice against it by finding one country's provisions WTO-incompatible. The *Canada - Certain Measures Concerning Periodicals* case<sup>180</sup> serves as an appropriate example. In the case, the United States challenged Canadian domestic measures related to the sale of imported periodicals, which the AB found to be discriminatory.<sup>181</sup> Daniel Crosbie, a Canadian trade official, suggested that the United States take the case to the WTO with a view towards cultural trade issues affecting a wider audience than just Canada. This provided the United States with a tactical way to set precedent in order to

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179. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (8 Oct. 1996).

180. WT/DS31 (11 Mar. 1996).

181. Panel Report, *Canada—Certain Measures Concerning Periodicals*, WT/DS31/R (Mar. 14, 1997).



enhance worldwide market access for its magazine industry. Also, the *Canada - Patent Term* case<sup>182</sup> may be another example of the United States trying to set precedent in the area of intellectual property. Thus, winning a case at the WTO might provide two benefits: both being able to change the specific WTO-incompatible measures at hand and setting an international precedent.

## 2. Disadvantages

### a. Losing Respondent

While the WTO system allows the prolongation of a dispute for years, in the end, the member in noncompliance must either bring its measures into compliance with its obligations under the WTO or be faced with suspension of concessions and retaliation by the complaining party. In the final stages of the proceedings, the member must decide to either garner enough political will domestically to comply with the rulings, bear the cost of compensating the other side for its measures, or weather the retaliation against its measures.

Having subjected itself to WTO jurisdiction by being a member of the organization, the member has little choice in determining its courses of action under the circumstances without undermining the organization or its position within the organization. Although the WTO lacks a formal enforcement mechanism, the losing country is faced with the international pressure against it because the panel or AB report has been adopted by the DSB through consensus. The potential spillover effects of noncompliance in other diplomatic arenas are very real, as with the deterioration of U.S.-EC relations over the *Bananas* and *Hormones* cases. Furthermore, within the WTO, as stated above, the disadvantage to a losing party for noncompliance might affect its own ability to bring credible cases in front of the WTO dispute settlement system. If it is not willing to conform to rulings against its practices, why should any country against which the noncompliant party has complaints change its own measures? In other words, by obstinately refusing to comply, the noncompliant Member might give other Members the justification to forgo the unconditional reciprocity of WTO principles and undermine the WTO as a

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182. *Canada—Term of Patent Protection*, WT/DS170 (6 May. 1999).

whole.

Another disadvantage for the losing party under the WTO system, as in *Hormones* and *Bananas*, is that the suspension of concessions/retaliation taken has not been limited to the sectors at issue in the dispute. Because DSU Article 22.3 provides for the possibility of cross-sectoral retaliation, while a losing party may be noncompliant in deference to specific domestic interests that are affected by the subject of the dispute, the suspension of concessions by the complainant may rouse constituencies not party to the dispute and who are unwilling to bear the burden of the costs for the dispute. In weighing the injury to other sectors with cross-retaliation, Members might find their interests better served if they comply.

#### b. Winning Complainant

The winning member may have been able to get a favorable ruling from a panel or the AB, but where the losing party is noncompliant, there may be a sense that the complainant has followed all the procedural rules but has failed to reach an acceptable solution to the problem at hand. As long as the noncompliant party stalls compliance, the complaining party cannot receive any relief as compensation in international law, unlike in domestic law, is not retroactive.<sup>183</sup> While the complainant can go through a DSU Article 21.5 panel, Article 22 arbitration, and retaliation, the process is expensive, especially for developing countries, to risk unacceptable results, politically and economically. Moreover, while retaliation is a punitive measure meant to hurt the party causing the injury economically, measures such as *ad valorem* tariffs<sup>184</sup> or import bans also hurt domestic producers and consumers. For example, the 100% *ad valorem* duties that the United States placed on

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183. Compensation in the WTO is usually prospective.

184. A tariff is a tax on imported goods. It is levied at the point of entry and paid to the government of the importing country. In other words, a tariff is a customs duty on merchandise imports. Tariffs are levied either on an *ad valorem* basis (percentage of value) or on a specific basis (e.g., \$7 per 100 kg). Tariffs give price advantage to locally produced goods and raise revenues for the government. Tariffs are allowed to protect domestic industries. However, they are reduced through negotiations between countries in the WTO and then they are "consolidated." This means that they cannot be increased again unless the principally affected exporting countries, which negotiated the concession, are compensated by concessions on other products. GATT, *supra* 1, art. XXVIII. Tariffs have been reduced in the previous eight trade Rounds, as a result of which the EU average industrial tariff is now about 3%, down from 35% in 1947.

some European goods in conjunction with the banana and beef hormone disputes, doubling of the price of such goods as Italian coffee makers, truffles, Roquefort Cheese, and handbags, may have hurt European producers, but they also made the prices of these goods prohibitively expensive for U.S. businesses and consumers. In this way, the retaliatory measures, which are designed to hurt the economy of the party causing the injury, actually end up hurting the complaining party's economy, compounding the effects of the unfair trade practice of the noncompliant member that caused the dispute.

## B. NAFTA CHAPTER 20

### 1. *Advantages*

#### a. Losing Respondent

While the losing party is bound by the decision of the NAFTA arbitral panel with regard to nullification and impairment, it is not bound by a recommendation to bring its measures into conformity. The NAFTA Article 2018 text states that “the *disputing Parties* shall agree on the resolution of the dispute, which *normally* shall conform with the determinations and recommendations of the panel. . . .”<sup>185</sup> The language suggests that the ultimate burden for the nature of the resolution falls on the parties to negotiate and that the panel report is more like a guideline. As discussed above, the showing of good faith in terms of implementation is the basis on which to avoid suspension of benefits even when implementation has not actually occurred. A good example of this is the Mexican *Trucking* case, in which the United States has taken nine months to complete its rule-making processes to proceed towards implementation. Even though the United States has not fully complied as of January 2002, Mexico has refrained from retaliating because of the Bush Administration's showing of good faith attempts to comply.

Second, apart from the good faith requirement, the ambiguous nature of the thirty days for implementation could also be advantageous to the losing party. While attempting to show that it is trying to make progress in implementation, the

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185. NAFTA, *supra* note 8, art. 2018 (emphasis added).

Party can in effect take as long as it wants to comply. The party is not constrained by a WTO-like RPT, nor does it have to face implementation surveillance by the DSB or 21.5 panels. The solution reached and implemented is wholly diplomatic once the panel issues its ruling. Again, in the Mexican *Trucking* case, Mexico has allowed the United States to take the time necessary beyond the thirty days to bring its measures into compliance. Mexico also did not retaliate in the *Broomcorn* case even though it took the United States nine months to remove its safeguard measure. The thirty-day requirement *de facto* provides much flexibility.

Third, under NAFTA, any retaliation or suspension of concessions taken by the aggrieved party is capped by WTO obligations. This means that the complaining party may not transgress its WTO tariff bindings or other obligations to gain compensation for a ruling under a NAFTA panel. Thus, the punitive capacity of the NAFTA Chapter 20 retaliation is limited and the violating party is less likely to face exorbitant damage sums.<sup>186</sup>

#### b. Winning Complainant

Although the rules may be much less detailed, the NAFTA winning party may be able to use diplomatic channels to come to a quicker solution than if the procedures were more comprehensive. First, following a consultation period which requires more disclosure of information than do the WTO's obligations to consult, the parties may be able to come to a solution on the basis of increased openness. Second, there is mandatory involvement by the Free Trade Commission under the NAFTA, while under the DSU, the involvement of the Director General to offer good offices, conciliation, and mediation is invoked on a purely voluntary basis by the parties to the dispute. This second stage of mediation-like involvement by the Free Trade Commission—which can be likened to the DSB in that both have national representatives as members—may provide for yet another possibility of resolution. Third, if a panel is required and finds for the complaining party, there are no further delays with appeal procedures as with the AB.

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186. On this point, see Kwak, K. & Marceau, G. "Overlap and Conflicts of Jurisdiction between the World Trade Organization and Regional Trade Agreements," *The Canadian Yearbook of International Law*, Vol. XLI, 2003, pp. 83-152.

Finally, the thirty-day period to resolve the situation or take good faith steps to set up a schedule for resolution might provide a better chance for immediate relief if the losing party complies right away.

If there is noncompliance and since compliance is based on more diplomatic solutions, the close ties among Canada, Mexico, and the United States as North Americans might serve as a catalyst for quicker, less delayed compliance. It might be more difficult for bordering countries to play noncompliance games with each other within a regional *forum*, such as the NAFTA, than it would be for them to do so through the WTO, which sits in Geneva. So, perhaps, there will be more political will to resolve disputes in accordance with the panel decision to lend credibility to the North American regional trade agreement dispute settlement decision, and the winning party may have the moral impetus on its side to promote compliance.

## 2. *Disadvantage*

### a. Losing Respondent

Once a party loses under the NAFTA system, it cannot appeal the decision. So, its only recourse is to exploit the diplomatic channels to arrive at a mutually acceptable solution with the complainant. This is particularly problematic in situations where the panel could produce a report that has a lack of specific recommendations which the losing party can use to bring its measures into compliance. While it has not happened to date, perhaps such a ruling would be particularly troublesome for Mexico, as its developing country status may limit its technical capabilities for compliance.

With the force of the panel ruling and the North American ties-type of diplomatic thrust, compliance might be an uphill climb for a losing party to be able to negotiate a solution too extenuated from the panel findings. And, the immediate threat of the thirty-day time limit can make it harder for the losing party not to comply or at least offer a showing of good faith, provided it has the capabilities. Despite the fact that the NAFTA structure is disposed to promote negotiations and to prevent retaliation, the noncompliant party can never be sure whether or when the aggrieved party will decide to suspend concessions and impose retaliation.

In addition, the NAFTA might indeed promote faster

compliance on the part of the losing party, while in WTO compliance cases like *Hormones* the losing party can take measures to stall compliance. If the Mexican *Trucking* case had been decided through the WTO dispute settlement process, the United States could have done a *Foreign Sales Corporation* (FSC) meaning that it could have appealed the case to put off compliance, as has happened with *US - FSC* at the WTO. The NAFTA may have a better chance to get compliance in a difficult case such as *Trucking*, which had produced a diplomatic flurry and Presidential and Congressional dialogue on the matter. As the developments in the case show, the United States did not do an FSC and, instead, the Bush Administration has aggressively pursued compliance with the NAFTA panel decision.

#### b. Winning Complainant

Because of the less detailed rules under NAFTA, winning parties might face a more difficult time to bring a dispute to resolution than they would under a more rule-based approach in the WTO. While diplomatic force may, on the one hand, promote faster compliance by the other side, lack of diplomatic pressure can have the opposite effect. Since the NAFTA system is based on diplomacy, changes in diplomatic climate can have a considerable impact on the workability of the system. On the other hand, operations at the WTO continue regardless of diplomatic climate, and the established procedures provide predictability; ultimate compliance, however, might face the same difficulties of the NAFTA system.

Lastly, the lack of specific recommendations by a panel can also be a detriment to winning parties. While the winning party may enjoy the moral high ground and diplomatic backing, without binding recommendations or monitoring by a DSB-like body, compliance may not happen and the winning party may not know how to advise implementation of the ruling in the other Party's domestic system.

### EPILOGUE AND RECOMMENDATIONS

This article has examined both the dispute settlement systems in the WTO and the NAFTA, and has looked at benefits and disadvantages to parties in each system. If there were to be a case which could be brought under either system, which should a party choose? To answer this question, let us look at

two cases which may have been brought in either *forum*.<sup>187</sup> In fact, in the Mexican *Broomcorn* case where a U.S. *global* safeguard measure was at issue, the United States actually argued in proceedings that the NAFTA panel had no jurisdiction in this matter since it arose under the GATT Article XIX<sup>188</sup> and

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187. The WTO *Canada-Patent* case and the NAFTA Mexican *Broomcorn* case are two disputes that may have been taken to either *forum*. The *Canada - Periodicals* case had to be brought at the WTO since the Canadian measures fell under the NAFTA Article 2106 and Annex 2106 Cultural exceptions. The *Canada - Dairy* case involved a third party, New Zealand, which left no option of the NAFTA *forum*. The *Mexico - Corn Syrup* case concerned dumping which is not covered under Chapter 20. The *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194 (19 May 2000), concerned interpretations of the WTO Agreement on Subsidies and Countervailing Measures; subsidies also do not fall within the jurisdiction of Chapter 20. On the NAFTA cases, the *Canadian Agricultural Products* case concerned Canada's NAFTA tariff schedule. And, the Mexican *Trucking* case also arises out of Annex 1 of the NAFTA.

188. GATT, *supra* note 1, art. XIX. GATT Article XIX reads:

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 subparagraph (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

the WTO Safeguards Agreement.<sup>189</sup> The panel, however, determined that “[s]ince the NAFTA and WTO versions of the rule are substantively identical, application of the WTO version of the rule would have in no way changed the legal conclusion reached”<sup>190</sup> under the corresponding NAFTA provision. Mexico probably chose the NAFTA *forum* because it has preferential tariff rates for broomcorn broom exports into the United States under the NAFTA, and determined that the safeguard measure affected its rights under the NAFTA tariff schedules. The other case which may have been brought in either *forum* is the WTO *Canada – Patent Term* case. While American and Canadian trade officials suggest that the case arose under TRIPS obligations, identical language of the twenty-year patent protection exists in the NAFTA.<sup>191</sup> Thus, this case could, in theory, have also been brought in a NAFTA Chapter 20 proceeding. The United States probably chose the WTO *forum* for the case’s precedential value, just as in *Canada* -

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

189. *Broomcorn*, *supra* note 15, at 19, ¶49-50.

190. *Id.*

191. The TRIPS Articles 70.1 and 70.2 at issue in the case, and NAFTA Articles 1720.1 and 1720.2 are virtually identical. Compare TRIPS, *supra* note 177, arts. 70.1, 70.2 with NAFTA, *supra* note 8, arts. 1720.1 and 1720.2. Also, TRIPS Article 33 is identical to NAFTA Article 1709.12. See TRIPS, *supra* note 177, art. 33; NAFTA, *supra* note 8, art. 1709.12.



*Periodicals.*<sup>192</sup>

For future cases in which forum shopping might occur, the party concerned would need to look at the factors compositely on a case-specific basis to determine whether a dispute should be brought under the WTO or the NAFTA. Furthermore, it is important to remember that all the NAFTA countries believe in the rule of law. Whether in the NAFTA or in the WTO, if the issue is difficult, the *forum* does not matter. This case-by-case approach suggests the highly political nature of forum shopping in the international trade context. For, regardless of the *forum* chosen, the dispute between the countries will only occur if diplomatic channels have been exhausted. It follows that if the parties are more concerned with rules and procedures, the officials might prefer to choose the WTO in all cases because of its highly developed dispute settlement system. However, if a more diplomatically based solution is on the horizon, apart from the initial diplomatic attempts, the NAFTA *forum* might be more effective. With this backdrop, this section will propose general criteria on which the NAFTA countries can make an informed decision under which system to bring the case at hand.

Three questions can be proposed to guide the inquiry. First, is there a substantive obligation that provides a cause of action at both the WTO and the NAFTA dispute settlement systems? Second, if so, is the issue of interest to a NAFTA trading partner under matters referred to in Article 2005[2]<sup>193</sup> or a Third Party at the WTO? Third, politically, may there be an interest in adjudicating in a broader *forum* rather than in a smaller *forum*? While the first two questions are concrete 'yes/no' type of questions, the following criteria speak to this third question.

First, the *forum* chosen lies with the preferences of the domestic interests who petitioned the action from their government. Because the WTO is a relatively new process, there

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192. *Canada - Certain Measures Concerning Periodicals*, WT/DS31 (11 Mar. 1996).

193. NAFTA, *supra* note 8, art. 2005(2). NAFTA Article 2005 (2) reads:

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.

is more awareness of the institution. And, the WTO experience has improved its credibility with domestic groups, and thus they think that their interests are better served at the WTO. There could be other disputes or other issue-specific cases where the private parties think their interests might be better served under NAFTA. This could include matters that are specific to North America. Also, for those who view the WTO as a non-transparent agency controlled by the secretariat staff that has its own agenda,<sup>194</sup> the NAFTA might provide a more transparent, diplomatically oriented alternative to faceless bureaucrats in Geneva deciding the fate of domestic industries.

Second, the parties need to consider which *forum* has a more developed set of rules for the subject of the case at issue. If, for example, a case arose about agriculture or telecommunications issues in which there happened to be WTO and NAFTA concurrent jurisdiction, the parties would need to examine the treaty provisions as well as the previous case law in both *fora* to determine which *forum* would be better equipped to deal with the issue. A theoretical example could be one in which WTO and NAFTA obligations differed, and depending on the issue, the domestic industry could make use of different provisions in a tactical way.

Third, the parties should ask whether the nature of the case lends itself more to the WTO or NAFTA *fora*. If an issue is very technical, it may be more efficiently dealt with in a more structured WTO approach. There may be cases in which there has been a complete diplomatic impasse and the parties require an impartial adjudicatory body to advise them with specifics on how to resolve their dispute. Using the WTO in such cases would be advantageous. Conversely, if the issue is more politically based, it should be negotiated in the NAFTA system instead of passing the buck to a formalized adjudicatory body to make political decisions. On the other hand, when a judicial

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194. More transparency and information into the WTO system is being requested lately. See BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 371-372 (2d ed. 2001). The WTO should establish rules to publish Panel and Appellate Body reports, as well as official documents. In this respect, although for the first time in the history of the WTO, a Panel dispute proceeding was open to the general public at the WTO in September 2005, never has an Appellate Body dispute proceeding been open to the public. This proves the lack of trust of the public opinion in relation to the WTO's transparency. There should also be public access to dispute settlement proceedings. There should be, too, appropriate rules allowing the submission and consideration of *amicus* briefs. See CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY, THE FUTURE OF THE WORLD TRADE ORGANIZATION* 15-16 (2001).

body is forced to make political decisions, its credibility can come into question. Furthermore, noncompliance, particularly in politically sensitive matters, injures the effectiveness and credibility of enforcement for both institutions.

Fourth, the parties need to take into account to what extent they want the outcome of the case to affect broader international policy. As discussed above in the context of the *Canada - Periodicals* case, if any of the NAFTA countries wants to make an international example out of challenging another Party's domestic provisions, the WTO is the better *forum* to do so. NAFTA rulings may serve to provide precedent within the regional trade agreement, but do not have further repercussions. The United States might be more motivated by whether the given issue affects U.S. policy in other countries than Canada would be. Thus, in general the United States might be more concerned with precedential value of decisions and would be more likely to choose the WTO.

Fifth, while retaliation is possible under both systems in cases of noncompliance, the parties may need to determine how much compensation they might seek. If the dollar amounts are very high, the WTO might be the better *forum*, while in the NAFTA, retaliation measures are capped by WTO obligations. Although the general assumption among the parties is that implementation will happen, the parties should take into account scenarios in which it might not and exercise foresight.

Sixth, the parties need to choose if they would like to reserve the option to appeal the panel decision, which is only possible at the WTO. If, alternatively, the case seems clear legally and the complaining party determines that it wants the least institutional impediments to obtain compliance, it might be better served under the NAFTA.

Seventh, the parties need to examine the issue and determine in which *forum* they might be able to find the most impartial panelists. In the WTO, the parties can choose nationals from any part of the world to get the fairest hearing, although they cannot ensure this at the AB level.<sup>195</sup> In the

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195. Some Washington lawyers have, for example, made an issue out of the fact that Mr. Taniguchi from Japan was the Presiding Member for the controversial *Japan - Hot Rolled Steel* decision. For more information, see generally *Panel Report, United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/R (Feb.28, 1999)*. While in theory, panelists and AB members are supposed to be neutral and acting on their own accord, personal bias can perhaps never be remedied.

NAFTA, however, the panelists are citizens of the NAFTA countries. This might be helpful because NAFTA citizens may be better versed in NAFTA issues, but on the contrary the panelists may not be able to be *de jure* impartial. The United States has lost all of the three cases before the NAFTA Chapter 20 panels. Could this be the reason that there have been so few cases before NAFTA Chapter 20 panels and why the United States has not brought any cases after losing the first case it brought under the Chapter against Canada in 1996?<sup>196</sup>

Finally, the use of the *fora* will also ultimately depend on the role that the parties see for each institution, respectively, in the present and in the future. Currently, as is apparent from the few cases brought under the NAFTA Chapter 20, one would argue that the role of Chapter 20 proceedings is exclusively for the NAFTA specific disputes. Chapter 20 has a promising future to deal with issues that are not covered under the WTO, if the NAFTA covers new ground. North Americans may be able to use Chapter 20 to address disputes that arise out of North American issues, one being a North American approach to technical standards where North Americans may be able to agree. There may also be room for Chapter 20 in North American solutions to problems of economic integration – what the rest of the world may not be ready to do or may view as too intrusive, but what North Americans may find acceptable and needed. Some have argued that the Chapter 20 system makes sense in a bilateral setting, but not in the WTO where it may be too difficult to administer. So its effectiveness in the present and the future relies on diplomacy.

The future of WTO dispute settlement will depend on the quality of the work product and the impact of the decisions on the domestic constituencies of the parties. The AB is acquiring increased credibility in the oversight of dispute settlement. With the new set of panelists and the change in leadership in the WTO Secretariat, the United States will probably be more inclined to take a wait-and-see approach.

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196. Panel Decision, *Canadian Agricultural Products* (CDA-95-2008-01) (December 2, 1996).

