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I. INTRODUCTION

This pioneering conference on the North American Free Trade Agreement deals with two interrelated subjects, the General Agreement on Tariffs and Trade ("GATT")[1] and the recent North American Free Trade Agreement ("NAFTA")[2] between Canada, Mexico, and the United States. In considering the links between these two treaties, we are handicapped by the fact that GATT currently is being revised, and thus the text we are considering may not be final, and that the draft of the tripartite treaty has only recently been made public, and may not yet be a definite one. Nevertheless, we can compare the existing texts before us and may even hope that our deliberations may influence the final texts of these instruments.

As the various substantive sections of NAFTA will be discussed in detail by various experts, I shall confine myself to discussing the main area where GATT and NAFTA overlap, namely, their role in facilitating the settlement of international trade disputes. Our Mexican colleague, Hector Rojas, will discuss the dispute resolution process under NAFTA, which leaves me to discuss the GATT provisions on the subject. I would like to consider, therefore, what problems it presents to us, in view of the fact that, according to a NAFTA provision, most disputes arise under parallel provisions of NAFTA and GATT "may be settled in either forum at the discretion of the complaining party."[3]

It may be noted, parenthetically, that Article 103 of NAFTA provides in its first paragraph that the parties affirm their existing rights and obligations with respect to each other under GATT and "other agreements to which such Parties are party." In the second paragraph, however, it states that in the event of any inconsistency between the provisions of NAFTA "and such other agreements," the provisions of NAFTA shall prevail to the extent of the inconsistency, "except as otherwise provided" in NAFTA. It is not clear whether the phrase in the second paragraph referring to "such other agreements" refers only to the "other agreements" mentioned in the first paragraph, or whether it also embraces

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1. Apr. 10, 1947, 55 UNTS 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT].

2. Oct. 7, 1992 draft, U.S.-Can.-Mex., [hereinafter NAFTA].

3. *Id.* art. 2005.

GATT. Article 104, on the other hand, mentions clearly that the obligations referred to in certain environmental and conservation agreements prevail over inconsistent NAFTA provisions, and only specifies that if an obligation under the other agreements can be complied with in different ways, the party should choose the alternative that is least inconsistent with NAFTA. A similar provision about the relationship to GATT would have been helpful as the legislative history of NAFTA does not make it clear that NAFTA prevails over GATT, unless NAFTA specifically provides otherwise. Yet, there are provisions in NAFTA, such as Article 802, which mention expressly that a GATT provision is to be applied in certain circumstances.

II. THE GATT SYSTEM

GATT, established in 1947 as the result of a first round of negotiations, has since been revised by six additional rounds of negotiations. The current eighth round, the so-called Uruguay Round, is based on the Punta del Este Declaration adopted in Uruguay in 1986.[4] While the early rounds of GATT negotiations dealt primarily with tariff reductions, the Tokyo Round (the seventh) concentrated, in addition, on non-tariff measures ("NTMS") that constitute barriers to international trade.[5] The Uruguay Round is supposed to broaden further the scope of GATT rules by adding rules relating to trade in services, trade-related aspects of intellectual property rights ("TRIPS"), and trade-related investment measures ("TRIMS"). In addition, the Punta del Este Declaration established as objectives of the eighth round the development of arrangements: (a) to monitor trade policies and practices of contracting parties and their impact on the functioning of the multilateral trading system; (b) to improve the decision-making system of GATT (for instance, by providing for more frequent and more substantive meetings of Trade Ministries or their senior deputies); and (c) to strengthen the links with other international organizations responsible for monetary and financial matters (especially with the World Bank and the International Monetary Fund), in order to obtain greater coherence in global economic policy-making.[6] A special negotiating group was also established to improve and strengthen the GATT dispute settlement process, and to develop more adequate arrangements for monitoring and facilitating compliance with adopted recommendations.

I shall not be dealing with these substantive subjects, nor with general aspects of the "functioning of the GATT system" (ironically abbreviated to "FOGS"), but shall restrict myself to the issue of dispute settlement. Too often parties to a negotiation consider that their job is finished when, after prolonged and difficult negotiation, they have reached a

4. PUNTA DEL ESTE DECLARATION (Uruguay, 1986) 25 I.L.M. 1624.

5. For some of the texts of the various agreements and codes approved in the Tokyo Round, see 18 I.L.M. 579, 621, 1052, 1079 (1979).

6. *See* PUNTA DEL ESTE DECLARATION, *supra* note 4, at 1626-27.

comprehensive agreement on the subject. This is, however, only the first step. International multipartite agreements are full of compromises, often written in rather ambiguous language, and all these efforts might be easily frustrated by unilateral discordant interpretations. Unless some institutions are established to interpret the terms of the agreement uniformly for the benefit of all concerned, the practice of states would immediately start diverging and inconsistent interpretations would destroy the pioneering work of the authors of the agreement. Therefore, institutions are needed to monitor the implementation of the agreement by the various governments, national legislatures, administrative officials, and courts. Should some problems arise, the institutions should bring them to the attention of all concerned, and should help make arrangements for solving them through a variety of means, primarily by negotiations, consultations, mediation, and conciliation; but if no solution is reached by such means, there should also be a possibility of referring the issue to an arbitral tribunal or an international court. The object of today's discussion is to explore to what extent the North American Free Trade Agreement is likely to provide adequate means for dispute settlement, either directly or through its link with the procedures being proposed for the GATT agreement.

Much has been written about the dispute settlement provisions of GATT, especially by Professor John H. Jackson of the University of Michigan and Professor Robert E. Hudec of the University of Minnesota, both of whom published many articles, as well as recent books, containing detailed chapters on this subject.[7] The *International Lawyer*, the excellent publication of our International Law and Practice Section, has also published several up-to-date articles on the subject by Judith H. Bello and Alan F. Holmer.[8] Our section, together with the U.S. Chamber of Commerce, presented a symposium in 1991 on the Uruguay Round Trade Negotiations. The papers from that symposium provide both an analysis of past developments and a look toward the future.[9] I restrict myself, therefore, to an evaluation of the latest proposals, pointing out to what extent they may assist a Canadian, Mexican, or American lawyer in determining whether to use the GATT option.

The GATT system is based on the original 1947 Protocol of Provisional Application,[10] which put into effect the Tariff Agreement and a set of certain general provisions that accompanied the never-ratified Charter of the International Trade Organization,[11] which was to be the trade partner of the financial institutions formulated by the Bretton Woods Conference

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7. *See* JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM (1990); ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (2d ed. 1990).

8. *See*, Judith H. Bello, *Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAW 519 (1990); Alan F. Homer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?* 26 INT'L LAW 795 (1992).

9. American Bar Association, *National Institute on Uruguay Round Negotiations: Where Do We Go From Here?*, Washington, D.C. (Mar. 21-22, 1991).

10. T.I.A.S. No. 1700, annex; 55 U.N.T.S. 308.

11. U.N. Doc. E/Conf. 2/78, U.N. Publ. Sales No. 1948.II.D.4.

in 1944. In addition to the General Agreement, more than 180 agreements were concluded later by the contracting parties, mostly dealing with the accession of new states to the GATT protocol. There are, however, also several agreements that supplement the GATT provisions in various ways. Among them are nine agreements concluded during the Tokyo Round dealing with such subjects as technical barriers to trade, government procurement, subsidies, and anti-dumping duties.[12] Some of them even contain separate institutional arrangements and special dispute settlement mechanisms. These are independent agreements in the sense that they are binding only on the states that have accepted them. The Tokyo Round produced certain "understandings," of less clear status, one of which nevertheless strengthened considerably the GATT system of notifications, consultations, dispute settlement, and surveillance.[13] It is likely that many of the results of the Uruguay Round will be embodied in similar separate instruments, agreements, or understandings.

As already mentioned, the Punta del Este Conference directed the establishment of a special negotiating group to improve further the GATT dispute settlement process, which group has by now has produced a draft on the subject.[14] From the very beginning the basic method of settling disputes was consultation. In the first place, a party to the agreement is obliged to engage in consultations with any other party which brings to its attention any matter affecting the operation of the agreement. This is especially true when a party complains that any measure taken by the other party may nullify or impair any benefit accruing to it directly or indirectly under the agreement, or constitutes an impediment to the attainment of any objective of the agreement. A claim can be made even when the application by any other contracting party does not conflict directly with a provision of the agreement. While ordinarily the complaining party has to prove that there was a "nullification or impairment," the burden of proof shifts when there has been a breach of a GATT obligation. Thus, when the United States imposed a tax on imports of certain oil products which was higher than the tax imposed on like products produced domestically, a GATT panel ruled that the United States must assume the burden of showing that there was no nullification or impairment.[15] As the United States was unable to prove that, the panel finally ruled against the United States, and the U.S. Government had to ask Congress to bring the tax into conformity with GATT as interpreted by the panel.[16]

If no satisfactory adjustment is effected by consultations between the

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12. See *supra* note 5.

13. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT Doc. L/4907 (1979) [hereinafter Understanding]; *see also* Bello, *supra* note 8, at 521.

14. Improvements to the GATT Dispute Settlement Rules and Procedures, Apr. 12, 1989, GATT Doc. L/6489 (1989).

15. JACKSON, *supra* note 7, at 63.

16. Id.

parties concerned, any one of these parties may ask the contracting parties (acting as a group, either directly at their meeting or through the GATT Council) to assist in these consultations. The contracting parties in early years usually appointed a working party consisting either of all the governments concerned (a "political" procedure designed to promote an agreement between the parties) or of representatives of governments that do not have an interest in the matter (a "quasi-judicial" panel). After 1955, panels of three or five experts were substituted for government representatives, and the procedure became more judicial in character. While in most cases these panels were established, working parties were also used, for example, to investigate in 1957 the consequences of the creation of the European Community ("EC") and in 1973 the effect of the enlargement of the EC from six countries to nine (by admission of Denmark, Ireland, and the United Kingdom). These cases were considered as being more "practical" than legal.[17]

After receiving a report from the working group or the panel investigating the matter, the contracting parties can make an appropriate recommendation or give "a ruling." 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 obligations under this agreement as they determine to be appropriate in the circumstances."[18] The party which is the object of such countermeasures (or retaliation) may, after giving a notice, withdraw from the agreement.[19]

The panel procedure was elaborated in 1979 by the Tokyo Round's Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, which codified the experience gained in some twenty years.[20] The Understanding pointed out, for instance, that the consultations should be concluded expeditiously "with a view to reaching mutually satisfactory conclusions," and that the parties must act "in good faith in an effort to resolve the disputes."[21] To expedite the proceedings, the Understanding imposed short periods for the appointment of panels, the issuance of the reports (three months in cases of urgency), and the compliance of the parties with a report. Nevertheless, parties have been able to devise ways to delay proceedings, sometimes for years, and a party may still block indefinitely the adoption of an adverse report by the Council by invoking the consensus rule.

The Understanding also provided explicitly that the GATT Director-General may act as conciliator; that written and oral statements may be presented to the panels; and that a panel may issue a report with a statement of facts and reasons supporting its recommendations. Some earlier panels have been criticized for writing imprecise reports or for "splitting the difference" instead of making clear what factors were taken

17. *See* HUDEC, *supra* note 7, at 213, 224.
18. GATT, *supra* note 1, art. XXIII.
19. *Id.*
20. *See* Understanding *supra* note 13.
21. *Id.*

into account in arriving at the recommendation. There has also been dissatisfaction with the slowness of governments' compliance with the recommendations approved by the GATT Council, and the difficulty encountered by some governments, including that of the United States, with making the follow-up changes in their laws which are required by the panel's interpretation of the GATT provisions.

The 1988 Montreal ministerial meeting of the contracting parties removed another difficulty by authorizing the GATT Director-General to form a panel when the consultations between the parties break down on the issue of the panel's composition. It also speeded up the procedural time-limits to make possible completing the proceedings in nine months.

Altogether, the number of cases before the panels declined in the 1960s, after a flurry in the late 1950s, but increased again when the United States submitted a number of cases under Section 301 of the 1974 U.S. Trade Act.[22] The very fact of bringing a case before a GATT panel often has a salutary effect, as a large number of cases were settled or withdrawn as soon as they were submitted to GATT, and another group was settled or withdrawn before a panel report was completed. About ninety reports were completed by 1989; most of them were "adopted" by the Contracting Parties; some were merely "noted," but none was explicitly rejected.[23] Most parties have complied with the reports, but in some cases compliance was considerably delayed. Some of the cases of non-compliance were, according to Professor Jackson, "significant and troublesome."[24]

In general, cases can be submitted to GATT only by states. Yet in the United States, Congress, responding to complaints by U.S. exporters, set up in Section 301 of the Trade Act of 1974 a procedure for American firms and citizens to petition an agency of the U.S. Government.[25] The U.S. Government then had to investigate whether American commercial interests have been harmed by illegal or unfair actions of foreign governments, and if appropriate bring a GATT complaint or recommend various retaliatory actions by the U.S. Government.

The 1988 Omnibus Trade Competitiveness Act[26] amended Section 301 to mandate governmental action and to limit government discretion in various cases, especially where there is a breach of legal obligation by a foreign government. In such cases, the U.S. Trade Representative is obliged to invoke the available dispute settlement procedure, and is given broad powers to impose duties, fees or other restrictions on the offending state's trade. Because of Congressional dissatisfaction with the GATT dispute settlement procedures, Section 301, as revised, has been interpreted so that even after submitting the case to GATT, the U.S. Government is not obliged to wait for the termination of the proceedings, and may start retaliatory actions sooner. Foreign governments have strongly ob-

22. 19 U.S.C §§ 2171 to 2487 (1974).
23. JACKSON, *supra* note 7 at 66-67.
24. *Id.* at 67.
25. 19 U.S.C. §§ 2171 to 2487.
26. 19 U.S.C. § 2902 (1992).

jected to these developments, and the European Community has raised its objections in the GATT Council.[27]

Because the United States has acted in this manner, other countries have attempted to do the same. For example, the EC has adopted similar regulations which allow the citizens of its member countries to petition the EC Commission to take action against foreign countries, including the United States. In international law the Golden Rule—"Do unto others as you would have them do unto you"— prevails, and any retaliatory actions by the United States can easily provoke countermeasures. The EC Commission is not authorized, however, to go as far as the United States; it has to wait until the conclusion of any GATT procedure before it can retaliate. It would be safer for the U.S. Representative to follow the same rule, although the congressional mandate on the subject is not explicit.

The latest draft of the Uruguay Round's version of the Understanding on Rules and Procedures Governing Settlement of Disputes Under Articles XXII and XXIII of GATT[28] presented by the Chairman of the Trade Negotiating Committee in December 1991, tries to close some of the loopholes in the GATT procedures. It emphasizes two points: first, the fact that the dispute settlement system of GATT "is a central element in providing security and predictability to the multilateral trading system;" and second, that the "prompt settlement of situations in which a contracting party considers that any benefits accruing to it directly or indirectly under the General Agreement are being impaired by measures taken by another party, is essential to the effective functioning of the General Agreement and to the maintenance of a proper balance between the rights and obligations of contracting parties."[29] It made clear that the decisions of the GATT Council are to be made by consensus, and that consensus exists when no member of the Council formally objects to the decision.[30]

The Understanding contains a detailed section on the conduct of consultations, which emphasizes the need for speedy action, especially where perishable goods are concerned. Similarly, time limits are imposed when good offices, mediation, or conciliation are employed by the parties.

When these time limits expire without a settlement, the complaining party may request the Council to establish a panel. The panel is selected from a list of governmental and non-governmental individuals with such qualifications as prior service as a member of a panel or advocate before it, as a representative of a state in GATT or a member of the GATT Secretariat, as a senior official in a trade office of a contracting party, or as a teacher of trade law or author of books or articles on the subject. Citizens of the parties to the dispute are usually excluded from being

27. JACKSON, *supra* note 7, at 71 n.49.

28. Draft Final Act Embodyinig the Results of the Uruguay Round of Multilateral Trade Negotiations, UR-91-0185, GATT Secretariat (Dec. 20, 1991) (known as the Dunkel Draft).

29. *Id.* ¶ 1.2-1.3.

30. *Id.* ¶ 1.9 & accompanying note.

on a panel. A panel is composed of three members unless the parties request a five-member panel. The GATT Secretariat nominates persons for a panel to the parties concerned, and a party "shall not oppose nominations except for compelling reasons."[31] If parties cannot agree on the composition of the panel, at the request of either party, the Director-General of GATT, in consultation with the Chairman of the Council, and after consulting the parties, appoints "the panelists whom he [or she] considers most appropriate."[32]

The main function of a panel is to assist the contracting parties in making the recommendations or in giving the rulings provided for in GATT Article XXIII(2). For this purpose, a panel "should make an objective assessment of the matter before it," both of facts and of conformity with the GATT, and should also "consult regularly with the parties to the dispute and give them an adequate opportunity to develop a mutually satisfactory solution."[33] If the parties reach a settlement, the panel would submit to the contracting parties only a short description of the case and would report that a solution has been found. If, however, the parties fail to find a solution, the panel's report must contain the findings of fact as well as a statement on the applicability of relevant GATT provisions and "the basic rationale behind the findings and recommendations that it makes."[34]

The panel first prepares an interim report and submits it to the parties for comments, and in light of those comments it prepares the final report, which must include a discussion of the arguments presented in the comments.[35] Other contracting parties may present written comments on the report, and the parties to the dispute have the right to participate fully in the consideration of the panel report by the Council.

Before the Council adopts (or rejects) the report, a party has a chance to appeal to a standing Appellate Body. This Body is an important new feature of the 1991 draft. It is to be composed of "a pool of seven members, three of whom shall serve on any one case."[36] They are to be appointed by the contracting parties to serve for a four-year term, and may be reappointed once. An appeal has to be limited to "issues of law covered in the panel report and legal interpretation developed by the panel."[37] An appellate report "shall be adopted by the Council and unconditionally accepted by the parties to the dispute unless the Council decides by consensus to reject it."[38] If there is no consensus to reject, the report stands.

The draft also contains detailed proposals for the implementation of the report's recommendations, and for an arbitration if the parties cannot

31. *Id.* ¶ 6.6.
32. *Id.* ¶ 6.7.
33. *Id.* ¶ 9.1.
34. *Id.* ¶ 10.8.
35. *Id.* ¶ 13.2, 13.3.
36. *Id.* ¶ 15.1.
37. *Id.* ¶¶ 15.2-15.13.
38. *Id.* ¶ 15.14.

agree on what would be a reasonable period for implementing the recommendation or ruling adopted by the Council. If the parties cannot agree upon an arbitrator within ten days, the arbitrator is to be appointed by the Director-General within ten days after consulting the parties. The Council is obliged to keep the matter under surveillance until the issue is resolved.[39] The basic duty of the party that lost the case is to bring the measure inconsistent with GATT into conformity with the Agreement. Compensation and suspension of concessions or other obligations are to be considered only as temporary measures, and any argument about the level of suspension shall be submitted to arbitration, preferably by the original panel.[40]

If these reforms are actually adopted, GATT procedures would be dramatically improved. Decisions will be adopted promptly and will be effectively implemented. They present an excellent model to be followed by regional agreements such as NAFTA. On the other hand, these regional agreements can pioneer in other areas, and if their experiments work, their improvements can be brought to GATT in the next round.

Professor Jackson presents two possible approaches, which coincide with what seems to be happening.[41] In the final section of his recent book he suggests the drafting of a new charter for international trade cooperation, to be served and managed by a World Trade Organization.[42] This would be an interesting topic for a future conference. Professor Jackson also suggests in an earlier chapter a "mini-lateral approach" that would allow a small group of countries to develop an improved procedure for use in disputes among themselves.[43] This is exactly what Canada, Mexico, and the United States are trying to do in the North American Free Trade Agreement.

III. BACKGROUND OF THE NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement is a document of mixed parentage. In the first place, as stated in its preamble, it builds on the respective rights and obligations of the three parties "under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation" and, as previously noted, it affirms in Article 103 "their existing rights and obligations with respect to each other under [these agreements]," reserving, however, that in case of inconsistency the new agreement shall prevail. Secondly, NAFTA constitutes an extension to Mexico of various rules and procedures which were included in, or developed in practice under, the Free Trade Agreement between Canada and the United States. At the same time, the new agreement also looks forward and establishes "a framework for further trilateral, regional and

39. *Id.* ¶ 19.
40. *Id.* ¶ 20.
41. JACKSON, *supra* note 7, at 75-80.
42. *Id.* at 92-102.
43. *Id.* at 76-78.

multilateral cooperation to expand and enhance the benefits of this Agreement."[44]

The three bar associations which are represented at this conference, American, Canadian, and Mexican, have taken an active part in the preparation of proposals for the dispute settlement part of NAFTA, basing their work, in turn, on the earlier work done by an American-Canadian Bar Association joint working group on the subject which the Mexicans recently joined. The American-Canadian Bar Association's co-operation in the international field started in 1942, fifty years ago, when they joined forces in preparation of proposals for the United Nations Charter, and organized a series of meetings across the United States and Canada to educate the lawyers of the two countries about the problems that needed to be solved and to obtain their advice on how that might be accomplished. Our colleagues from the University of New Mexico may be surprised to learn that the then-President of the University, Albert Fulton Zimmerman, took an active part in a meeting held at Los Angeles, and later signed the draft that was presented to the two Governments in 1944 as a result of these deliberations, under the title "The International Law of the Future."[45] Several important provisions of the Charter, especially the statement of principles in Article 2, and Article 51 on the right of self-defense, are clearly traceable to that draft.

A year later the two Bar Associations joined forces again and organized another series of meetings to obtain the support of their members for the continuation of the International Court at the Hague. As a result, while its name was slightly changed, the jurisdiction acquired by the old court under the optional clause and hundreds of treaties was transferred to the new court. This idea also came from the Bar Associations' proposal. Our cooperation was revived again in the 1970s and resulted in a draft treaty for the settlement of Canadian-United States disputes, which led to some discussions between the two governments but did not result in a treaty. A second draft agreement providing for equal access to and equality of remedies available in the courts of the two countries proved to be more successful. It was transformed into the Uniform Transfrontier Pollution Reciprocal Access Act,[46] which was adopted in 1982 by the Uniform Law Conference of Canada and the United States National Conference of Commissioners on Uniform State Laws, and is now in force in several provinces of Canada and several states of the United States.

When negotiations started, in the 1980s, on the Free Trade Agreement between Canada and the United States, the Joint Working Group presented proposals for dispute settlement provisions in 1987, and another set of

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44. NAFTA, *supra* note 2, art. 102(f).

45. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE INTERNATIONAL LAW OF THE FUTURE: POSTULATED PRINCIPLES AND PROPOSALS XX (1944).

46. U.S. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM TRANSFRONTIER POLLUTION RECIPROCAL ACT (1982).

proposals in 1988.[47] Some of these suggestions have found their way into the final text of that agreement. Encouraged by that result, the two Bar Associations, joined by Barra Mexicana, agreed on a set of dispute settlement proposals for NAFTA, which contained three basic recommendations: the establishment of an effective and flexible system for the identification and management of disputes; the allowing of private parties to have broad recourse to the dispute settlement mechanisms with respect to trade disputes with which they are concerned; and the establishment of a tribunal to decide disputes concerning the interpretation and application of NAFTA.[48]

47. American & Canadian Bar Associations, Joint Working Group on the Settlement of Disputes, *Two Reports on the Settlement of Disputes Under the Proposed Free Trade Agreement*, 22 INT'L LAW. 879, 897 (1988).

48. Joint Working Group of the American Bar Association, the Canadian Bar Association & Barra Mexicana, *Dispute Settlement Under a North American Free Trade Agreement*, 26 INT'L LAW. 855 (1992).

ANNEX
SUMMARY OF NAFTA PROVISIONS DEALING WITH THE SETTLEMENT OF DISPUTES

Article 2004 of Chapter Twenty of NAFTA provides that "this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement" except as otherwise provided in the Agreement.[1] Chapter Nineteen governs review and dispute settlement in antidumping and countervailing duty matters.

Apart from these two chapters containing the main provisions on dispute settlement, the Agreement contains a variety of other provisions on that subject. For instance, Article 316 establishes a Committee on Trade of Goods authorized to participate in consultations on any matter relating to this broad topic; in particular, the parties agreed to consult promptly on any request for anti-dumping action.[2] In Annex 311, paragraph 10, the parties agree to "cooperate and consult" on matters relating to country of origin marking. Annex 300-B, relating to textile and apparel goods, provides for consultations on import and export restrictions,[3] on bilateral emergency action invoking quantitative restrictions,[4] on reviewing and revising rules of origin causing difficulties to any party,[5] on trade in worn clothing for which a special trilateral committee is to be established,[6] and on goods produced outside the free trade area.[7]

Article 414(1), dealing with the complex problem of rules of origin, spells out more clearly than other provisions the purpose of consultation; it provides that the parties "shall consult regularly to ensure that [Chapter 4] is administered effectively, uniformly and consistently with the spirit and objectives of this Agreement, and shall cooperate in the administration of [Chapter 4] in accordance with Chapter Five (Customs Procedures)."

Under Article 513, a tripartite Working Group is established for "the effective implementation and administration" of the chapters on rules of origin and customs procedure, as well as of the Marking Rules and Uniform Regulations, and for the effective administration of the customs-related aspects of the chapter on national treatment and market access.[8] This group was authorized to ensure uniform interpretation of these chapters, to endeavor to reach an agreement on any proposal of a party to modify certain rules, or to make an addition to them, and to propose to the tripartite Free Trade Commission the adoption of any agreed modification or addition.[9] Upon approval by the Commission, each party

1. North American Free Trade Agreement, Oct. 7, 1992 draft, U.S.-Can.-Mex., art. 2004.
2. *Id.* art. 317(2).
3. *Id.* annex 300-B, § 3 & app. 3.1.
4. *Id.* annex 300-B, § 5 & app. 5.1.
5. *Id.* annex 300-B, § 7.
6. *Id.* annex 300-B, § 9.
7. *Id.* annex 300-B, app. 6, ¶ B.8.
8. *Id.* art. 513(1)(a).
9. *Id.* art. 513(3).

will be obligated, "to the greatest extent practicable, [to] take all necessary measures to implement" any such modification or addition within 180 days.[10] If the Working Group fails to resolve a matter referred to it within thirty days of such referral, any party may request a meeting of the Commission to consider the matter and to try to resolve it by good offices, mediation, or conciliation.

Article 513(6) also provides for the establishment by the Working Group of a Subgroup, which shall endeavor to agree on "the uniform interpretation, application and administration"[11] of the relevant chapters, rules, and regulations, and on "any other matter referred to it by a Party, the Working Group or the Committee on Trade in Goods" established by Article 316 (as noted above).[12] If the Subgroup is unable to agree on any such matter, it shall refer it to the Working Group which in turn may refer it to the Commission.[13]

Article 603(4) requires the submission to the parties themselves of any issue of imposition by a party of restrictions on imports of an energy or petrochemical good from non-party countries, and the parties in such a case "shall consult with a view to avoiding undue interference with or distortion of pricing, marketing and distribution arrangements in another Party."

Consultations are required under Article 702 whenever a party desires to adopt a measure pursuant to any international commodity agreement with respect to an agricultural good, in order to avoid impairment of a concession granted by it under NAFTA. Article 705(6), relating to export subsidies, provides not only for consultations in certain situations but also establishes a Working Group on Agricultural Subsidies which would monitor the volume and price of agricultural imports that have benefitted from export subsidies, and would provide "a forum for the Parties to develop mutually acceptable criteria and procedures for reaching agreement on the limitation or elimination of export subsidies" on agricultural goods imported into the parties' territories. With the help of the Advisory Committee on Private Commercial Disputes, to be established under Article 2022(4), each party shall establish a system for resolving private commercial disputes regarding transactions in agricultural goods that would provide prompt and effective resolution of such disputes, especially when perishable goods are involved under Article 707.

To monitor the implementation of all these provisions, Article 706 provides for the establishment of a Committee on Agricultural Trade that would report annually to the tripartite Free Trade Commission on the implementation of the agricultural provisions, and would also serve as a forum for the parties to consult at least semi-annually.

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10. *Id.* art. 513(4).
11. *Id.* art. 513(6)(a)(i).
12. *Id.* art. 513(6)(a)(v).
13. *Id.* art. 515(5) & (6)(d).

A different approach is taken with respect to agricultural grading and marketing standards, where separate Working Groups are established for United States and Mexico and for Canada and Mexico. Under Annex 703.2, these Working Groups are authorized not only to review the operation of these standards, but also to "resolve issues that may arise."[14]

With respect to enactment of sanitary and phytosanitary measures, which may be necessary for the protection of human, animal, or plant life or health, Article 718 provides for a system of publishing notices and notifying the other parties and persons. The party proposing such measures shall then discuss them with those who presented comments, and "take the comments and results of such discussions into account." A special Committee on Sanitary and Phytosanitary Measures is to be established under Article 722, to promote technical cooperation between the parties and to facilitate consultations on specific matters. According to Article 723(3), when a party requests consultations regarding the applicability of NAFTA's provisions to measures being taken by another party, the Committee "may facilitate the consultations, if it does not consider the matter itself, by referring the matter for non-binding technical advice or recommendations" to one of its working groups, to an ad hoc working group, or to another forum.

During a transition period of ten years, if a good is imported from the territory of one party to that of another in such increased quantities as to cause substantial injury, or threat thereof, to domestic industry of the other party, that party may increase the rate of duty on such good, but must first give notice to the exporting party of the institution of the proceeding that could result in such emergency action, and request consultations on the subject, in particular on the compensation due to the other party for resulting loss in exports. A requirement for consultation also exists if the emergency is created by imports from other parties considered collectively. Articles 801 through 804 provide that, in both situations, consultations or, if they do not succeed, unilateral action of equivalent value will be the only available remedies against an emergency action, as the Agreement expressly precludes any request for establishing an arbitral panel in this case.

Another set of detailed provisions on consultations may be found in Articles 909 through 914, dealing with disputes concerning standards-related measures, especially those relating to safety and to the protection of human, animal, and plant life and health, the environment, and consumers. In addition to various rules relating to notification, publication, provision of information, and the technical cooperation and consultation rules connected therewith, these articles establish a Committee on Standards-Related Measures which, inter alia, provides a forum for

14. *Id.* annex 703.2, § A, ¶ 25 (Mexico and the United States) and § B, ¶ 13 (Canada and Mexico).

the parties to consult on issues relating to such measures. The Committee is authorized to monitor and facilitate such consultations, as well as to consider the substance of the dispute itself, or to refer it for non-binding technical advice to one of its many subcommittees or working groups, or even to establish a special ad hoc subcommittee or working group for this purpose. It may be noted that the Agreement envisages in Article 913(5) the creation by the Committee of subcommittees or working groups on standards for land transportation, telecommunications, automobiles, the labelling of textile and apparel goods, and any other topic the Committee considers appropriate.