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A Practical Guide to Dispute Resolution Under the North American Free Trade Agreement

William D. Merritt*

I. Introduction.

A multibillion dollar trade agreement such as the North American Free Trade Agreement (NAFTA)¹ should be expected to create trade disputes of all types and sizes.² Inherent in NAFTA's design is the encouragement of parties to settle disputes among themselves if at all possible.³ The parties should endeavor to invoke full NAFTA dispute resolution procedures only as a last resort; to do otherwise would contravene the basic principles on which the treaty is based.⁴ Commentators have noted that it is very likely that parties will be unable to resolve disputes effectively between themselves.⁵ Therefore, dispute resolution under NAFTA is a critical factor to consider when assessing the success or failure of NAFTA. NAFTA's dispute resolution provisions represent "another step for-

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1. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, Can. Mex.-U.S., 32 I.L.M. 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

2. David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 164 (1997).

3. See NAFTA, *supra* note 1, art. 2006(1), 32 I.L.M. at 698. "Each party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area." *Id.*

4. See *id.* art. 2006, 32 I.L.M. at 694. If alternative dispute resolution attempts fail, NAFTA has another built-in dispute resolution mechanism that will take effect before a full panel hearing will be required. See *id.* If a party believes that another party's proposed measure may affect the operation of NAFTA, that party may submit a written request for consultation with the alleged offending party. See *id.* art. 2006(1), 32 I.L.M. at 694. The parties must then try to arrive at a satisfactory resolution to the problem. See *id.* art. 2006(5), 32 I.L.M. at 694. In arriving at this resolution, the parties must: [(1)] "provide sufficient information to enable a full examination of how the . . . measure . . . might affect the operation of this agreement; [(2)] treat any confidential . . . information . . . on the same basis as the [other] Party . . . and [(3)] seek to avoid any resolution that adversely affects the interests under this agreement of any other Party." *Id.* art. 2006(5)(a)-(c), 32 I.L.M. at 694.

5. See Lopez, *supra* note 2, at 164.

ward in the ongoing evolution of legal means for resolving trade disputes.”⁶ This article will analyze the dispute resolution procedures under Chapter 19, Chapter 20, the Environmental Side Agreement, the Labor Side Agreement, and the results of some disputes handled under three of the four provisions.

The focus of this comment is to offer an effective guide to navigate the requirements needed to efficiently resolve a dispute under the framework of NAFTA. Readers should, however, be cautioned. The short amount of time NAFTA has been in effect, and the relatively small number of disputes arising under its provisions, have made it difficult to recognize patterns or biases that the mechanisms may inherently possess.

II. Dispute Resolution Under NAFTA's Chapter 19.

Chapter 19 dispute resolution provisions apply to situations dealing solely with antidumping and countervailing duty controversies between disputing members of NAFTA.⁷ “Dumping is an unfair trade practice, whereby products of one country are exported to another country at below cost or at less than the domestic price of the products. Antidumping or countervailing duties are special duties applied at the point of importation to offset the unfair price differential.”⁸ Chapter 19 differs from Chapter 20 in that Chapter 20 deals with interpretation, application, and breaches of NAFTA. Chapter 19 deals with more specific and narrow issues of distinct laws applied to member parties by other member parties.⁹ All the member countries in NAFTA have domestic tools for investigating acts of dumping by foreign parties into their domestic economies.¹⁰ Further, each party has tools for implementing countervailing duties to combat problems associated with dumping.¹¹ Chapter 19's purpose and scope is “to create a means of adjudication, beyond pre-existing means, by which one NAFTA party can challenge another NAFTA party's decision to impose a countervailing duty.”¹² Moreover, Chapter 19 allows parties to apply their own antidumping laws and countervailing duty laws to goods imported from

6. Jeffrey Bialos & Deborah E. Seigel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603 (1993). The NAFTA dispute resolution procedures do not represent a grand departure from past resolution procedures or a radical new approach. See *id.* NAFTA relies on experiences gained from prior trade agreements and is an attempt to create an improved mechanism. See *id.* “These improvements in dispute resolution, if appropriately implemented, may help to ensure the integrity of the process, may encourage the NAFTA Parties to employ the dispute resolution measures incorporated into the agreement and, consequently, may reinforce the rule of law in the resolution of international trade disputes.” *Id.* at 604. NAFTA also brings in new elements to dispute resolution by addressing matters such as intellectual property. See *id.* “NAFTA is the first international agreement to provide a working mechanism for protecting trade secrets—a milestone in the development of international economic cooperation.” James A.R. Nafziger, *NAFTA's Regime for Intellectual Property: In the Mainstream of Public International Law*, 19 HOUS. J. INT'L L. 807, 820 (1997).

7. See Lopez, *supra* note 2, at 173.

8. *Id.*

9. See generally, NAFTA, *supra* note 1, chs. 19, 20.

10. See Lopez, *supra* note 2, at 173.

11. See *id.*

12. *Id.*

other member countries.¹³ Although Chapter 19 varies from Chapter 20 in its initial dispute resolution procedures, as discussed below, the overall theme of this Chapter is consistent with the avoidance-of-conflicts approach found throughout NAFTA. Article 1907, which discusses consultations, embraces this theme by stating, "[t]he [p]arties shall consult annually . . . to consider any problems that may arise with respect to the implementation or operation of this Chapter and recommend solutions, where appropriate."¹⁴

A. CHAPTER 19 DISPUTE RESOLUTION PROCEDURES.

Resolution procedures under Chapter 19 begin "with a request for an arbitral panel."¹⁵ In essence, these matters are appeals of prior rulings from a government agency that held that dumping had occurred and injured a domestic industry.¹⁶ The domestic agency's determinations are assumed to be based on information, complaints, and responses from earlier stages. Such stages are similar to those provided for in Chapter 20's Consultation and Free Trade Commission stages.¹⁷ Therefore, any party that is subject to another party's antidumping or countervailing duty measures can request that the measures be reviewed by a binational panel to determine if the measures conform to NAFTA.

The panel must consist of five panelists selected from a roster of seventy-five judges, former judges, and lawyers.¹⁸ Each party to the dispute has thirty days to select two panelists.¹⁹ Within fifty-five days of the written request, the disputing parties must mutually select the fifth panelist after they have selected the first four.²⁰ After formation of the panel, NAFTA provisions, for the most part, leave the panel to its own measures to establish procedural rules to govern their actions when reviewing statutory amendments of another party's antidumping or countervailing duty statutes.²¹ NAFTA does, however, ensure that the parties will have at least one hearing before the panel and an opportunity to submit writings and rebuttals.²²

13. See NAFTA, *supra* note 1, art. 1902(1), 32 I.L.M. at 682. "Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents." *Id.* Further, each party retains the right to alter its antidumping laws or its countervailing duty laws as long as it: (1) clearly states that the alterations specifically apply to goods from other parties to NAFTA; (2) notifies the other parties in writing of the alteration; (3) consults with the party or parties affected by the alteration if requested to do so; and (4) as long as the alteration is not inconsistent with the General Agreement on Tariffs and Trade and the objectives and purposes of NAFTA. See *id.* art. 1902(2), 32 I.L.M. at 682. Moreover, NAFTA specifically states that its objective in this area "is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices . . ." *Id.* art. 1902(2)(d)(ii), 32 I.L.M. at 682.

14. *Id.* art. 1907(1), 32 I.L.M. at 685.

15. See Lopez, *supra* note 2, at 174.

16. See *id.*

17. See *id.*

18. See NAFTA, *supra* note 1, annex 1901.2(1), 32 I.L.M. at 687.

19. See *id.* annex 1901.2(2), 32 I.L.M. at 687.

20. See *id.* annex 1901.2(3), 32 I.L.M. at 687.

21. See *id.* art. 1903(1), 32 I.L.M. at 682; See *id.* annex 1903.2(1), 32 I.L.M. at 688. "The panel shall establish its own rules of procedure unless the Parties otherwise agree prior to the establishment of that panel." *Id.*

22. See *id.* annex 1903.2(1), 32 I.L.M. at 688.

When reviewing statutory amendments, the panel formed under Chapter 19 provisions must supply the disputing parties with an initial written declaratory opinion. The time frame for this opinion is within ninety days after appointment of the chairman to the panel.²³ This declaratory opinion should contain both findings of fact and panel determinations.²⁴ If the panel affirmatively determines that the amendment of an antidumping or countervailing duty measure is indeed offensive, it may offer recommendations or suggestions to aid the parties in remedying the offensive statute's provisions.²⁵ The parties are then required to enter into consultations in an attempt to reach a solution to the matter within ninety days of the issuance of the opinion.²⁶ If the disputing parties do not contest the initial opinion of the panel, it will become the final declaratory opinion of the panel.²⁷ If, however, either of the parties disagrees with the panel's initial opinion, the complaining party may request reconsideration of that opinion within fourteen days of its issuance.²⁸ Upon receipt of such a request, the panel will reconsider its opinion and then, within thirty days, issue a final written opinion.²⁹

In addition, the panel may review final antidumping and countervailing duty determinations.³⁰ The parties may request, in writing, that the panel make such a review to determine whether the final "determination was in accordance with the antidumping or countervailing duty law of the importing [p]arty."³¹ After written request for review, the panel has 315 days to issue a final decision on the matter.³² At this point, the panel may uphold the party's final antidumping determination or return it to the party for reformation.³³ Decisions made by the panel are by a majority vote and are binding on the involved parties.³⁴

If one party denies the panel's decision binding force, the complaining party may request consultations with the importing party.³⁵ If the parties fail to resolve the matter through consultations within forty-five days, the complaining party may enforce its right to have a special committee formed.³⁶ This special committee must be formed within fifteen days of the request for formation.³⁷ The special committee will consist of three members selected by the disputing parties.³⁸

23. See *id.* annex 1903.2(2), 32 I.L.M. at 688.

24. See *id.*

25. See *id.* annex 1903.2(3), 32 I.L.M. at 688.

26. See *id.* art. 1903(3)(a), 32 I.L.M. at 682.

27. See *id.* annex 1903.2(3), 32 I.L.M. at 688.

28. See *id.* annex 1903.2(3), (4), 32 I.L.M. at 688.

29. See *id.* annex 1903.2(4), 32 I.L.M. at 688.

30. See *id.* art. 1904, 32 I.L.M. at 683.

31. *Id.* art. 1904(2), 32 I.L.M. at 683; See also *id.* art. 1904(4), 32 I.L.M. at 683. "A request for a panel shall be made in writing to the other involved Party within 30 days following the date of publication of the final determination in question" *Id.*

32. See *id.* art. 1904(14), 32 I.L.M. at 683.

33. See *id.* art. 1908, 32 I.L.M. at 686.

34. See *id.* art. 1904(9), 32 I.L.M. at 683; See also *id.* annex 1901.2(5), 32 I.L.M. at 687.

35. See *id.* art. 1905(1), 32 I.L.M. at 684.

36. See *id.* art. 1905(2), 32 I.L.M. at 684.

37. See *id.* art. 1905(3), 32 I.L.M. at 684.

38. See *id.* art. 1905(5), 32 I.L.M. at 684. The members of the panel are selected from a roster of fifteen former federal level judges from the three member countries. See *id.* annex 1904.13(1), 32 I.L.M. at 688.

If the special committee determines that the party complained against did in fact fail to take action according to the panel's findings, the parties are required to enter into consultations within ten days.³⁹ The disputing parties then have sixty days to reach a mutually satisfactory resolution.⁴⁰ If, however, the parties fail to reach a resolution, the complaining party is permitted to suspend the other party's NAFTA benefits.⁴¹ The complaining party has only thirty days after the end of the sixty-day consultation period to effectuate this suspension.⁴² But, this measure does not give unbridled power to the complaining party. The party subject to the benefit suspension may request that the special committee reconvene to determine whether the suspension of benefits is excessive or unwarranted.⁴³ If the special committee determines that the suspension is warranted then the special committee's report becomes effective the day after the date the report was first issued.⁴⁴

B. TRACK RECORD OF CHAPTER 19 DISPUTES.

Chapter 19 disputes are identifiable and traceable because they require a written request to initiate the formal dispute resolution process under this Chapter.⁴⁵ Twenty-eight disputes have tested the provisions under Chapter 19.⁴⁶ The disputes involved nine separate steel industry cases; two unrelated matters, each dealing with apple growers; three matters dealing with Mexican cookware; two separate cement cases; and one dispute each, dealing with live swine, leather wearing apparel, polystyrene, twine, color picture tubes, flowers, beer, carpeting, refined sugar, bacteriological culture media, corn syrup, and hydrogen peroxide.⁴⁷

1. Disputes Resolved Prior to Final Binational Panel Determination.

Nine of the Chapter 19 disputes ended before a panel decision was required.⁴⁸ These nine included the two apple disputes, two of the steel disputes, the carpeting dispute, the leather clothing dispute, the bacteriological dispute, one of the Mexican cookware cases, and the hydrogen peroxide dispute.⁴⁹ These nine cases are discussed below.

The first dispute to arise in the Chapter 19 area was an apple dispute involving the expiration of a protective tariff imposed by Canada on apples imported from the United

39. See *id.* art. 1905(7), 32 I.L.M. at 684.

40. See *id.*

41. See *id.* art. 1905(8), 32 I.L.M. at 684-85.

42. See *id.* art. 1905(8), 32 I.L.M. at 685.

43. See *id.* art. 1905(10)(a), 32 I.L.M. at 685.

44. See *id.* art. 1905(11), 32 I.L.M. at 685.

45. See Lopez, *supra* note 2, at 175.

46. See *id.* at 176.

47. See *id.* at 175 (internal citations omitted); see also *Mexican Cookware Makers Request NAFTA Panel on U.S. Antidumping Duties*, 15 Int'l Trade Rep. (BNA) 1509 (Sep. 9, 1998); *U.S. Corn Refiners Seek NAFTA Panel on Mexican Duties*, 15 Int'l Trade Rep. (BNA) 335 (Feb. 25, 1998); *Mexican Cement Maker Requests NAFTA Panel on U.S. Dumping Duties*, 15 Int'l Trade Rep. (BNA) 736 (Apr. 29, 1998); *Mexican Firm Seeks NAFTA Panel on SECOFI's Hydrogen Peroxide Ruling*, 14 Int'l Trade Rep. (BNA) 1881 (Oct. 29, 1997).

48. See Lopez, *supra* note 2, at 176; see also *Mexican Firm Withdraws Request for NAFTA Panel*, 15 Int'l Trade Rep. (BNA) 753 (Apr. 29, 1998).

49. See *id.*

States.⁵⁰ The Canadian Government placed this tariff on imported apples in an attempt to protect domestic apple growers.⁵¹ After conducting a study, however, the Canadian Government determined that the dumping actions by the U.S. apple growers did not substantially impact the Canadian industry.⁵² The government, therefore, allowed the protective tariff to expire.⁵³ After the expiration of the tariff, a group of Canadian apple growers requested a binational panel review of the issue under NAFTA's Chapter 19 procedures.⁵⁴ As discussed above, this panel review is capable of overruling and replacing domestic judicial determinations if it determines that the decision-making country has acted inconsistently with its own antidumping or countervailing duty law.⁵⁵ After the panel had convened and begun deliberations, the parties to the dispute terminated the panel review after they mutually reached a compromise.⁵⁶

The second dispute arising under Chapter 19 again involved the apple market between Canada and the United States.⁵⁷ Canadian growers alleged that U.S. growers began dumping apples in the Canadian market as soon as the tariff from the first apple dispute, discussed above, was lifted.⁵⁸ In response to this allegation, Canada imposed a new antidumping duty on apples imported from the United States.⁵⁹ Subsequently, growers in the United States appealed the Canadian imposition of the duty for a panel review under Chapter 19 provisions.⁶⁰ This proceeding, however, was quickly terminated at the request of the U.S. growers for undisclosed reasons.⁶¹

The first steel case terminated prior to a panel decision involved the United States and Mexico.⁶² Mexico imposed an 82.4 percent antidumping duty on U.S. steel tubes entering the Mexican market.⁶³ In response to this imposition, a U.S. steel company requested the formation of a binational panel to rule on the validity of the Mexican antidumping duty.⁶⁴ After the formation and initial deliberations began, however, the U.S. steel company terminated its request for a ruling on this matter by the binational panel.⁶⁵

50. See *Canadian International Trade Tribunal Rescinds Injury Finding on U.S. Apples*, 11 Int'l Trade Rep. (BNA) 254 (Feb. 16, 1994).

51. See *id.*

52. See *id.* The Canadian Government determined that the ill effects felt in the market were more directly caused by factors not linked to the United States. See *id.*

53. See *id.*

54. See *Canadian Apple Growers Want Dumping Duties on U.S. Imports*, 11 Int'l Trade Rep. (BNA) 19 (May 11, 1994).

55. See NAFTA, Article 1904 Binational Panel Reviews; Request for Panel Review, 59 Fed. Reg. 18993, (Int'l Trade Admin. 1994).

56. See Lopez, *supra* note 2, at 176.

57. See *Final Dumping Determination Issued Against Apples Exported to Canada*, 12 INT'L TRADE REP. (BNA) 2 (Jan. 11, 1995).

58. See *Canadian Apple Growers Want Dumping Duties on U.S. Imports*, *supra* note 54.

59. See *Final Dumping Determination Issued Against Apples Exported to Canada*, *supra* note 57.

60. See Notice of Completion of Panel Review, 60 Fed. Reg. 19,210, 19,210-11 (Dep't Commerce 1995).

61. See *id.*

62. See *Mexico Will Set Up NAFTA Panel To Review Imports of Steel Tubes*, 12 Int'l Trade Rep. (BNA) 47 (Nov. 29, 1995).

63. See *id.*

64. See Notice of Completion of Panel Review, 60 Fed. Reg. 65,637 (Dep't Commerce 1995).

65. See *id.*

The second steel case arose when Canada requested a binational panel review of Mexican charges that asserted dumping activities by a Canadian steel manufacturer.⁶⁶ This request for Chapter 19 proceedings was unique in that Mexico had not applied any antidumping duties on the Canadian steel manufacturer at the time of the request.⁶⁷ The Canadian company requested the binational panel in an attempt to clear its name of any dumping allegations.⁶⁸ After the formation of the panel—but before a decision was reached—the Canadian company terminated the panel review after Mexico dropped the dumping charges.⁶⁹

The next issue that escalated under Chapter 19 provisions was a dispute between the United States and Canada regarding carpet.⁷⁰ Canada asserted that its domestic market was injured due to U.S. dumping actions in the carpet industry.⁷¹ In an attempt to combat this injury, Canada imposed an antidumping duty on these products.⁷² After the imposition of this duty, a U.S. carpet manufacturer sought a bi-panel review under Chapter 19 of NAFTA to assess the validity of the Canadian duty.⁷³ This dispute, like those discussed above, was terminated at the request of the U.S. carpet manufacturer, prior to a final binational panel ruling.⁷⁴

Settlement was also reached prior to a final panel determination in a dispute between Mexico and the United States dealing with leather goods.⁷⁵ Two Mexican leather apparel producers requested panel review in an attempt to obtain judicial review of tariffs imposed by the United States on leather products exported to the United States.⁷⁶ After the request for the binational panel was made, the United States unsuccessfully attempted to dismiss the case on jurisdictional grounds.⁷⁷ The United States, subsequently, revoked the duties it

66. See *Canadian Steelmakers Seek NAFTA Panels in Three Mexican Dumping Investigations*, 13 Int'l Trade Rep. (BNA) 7 (Feb. 14, 1996).

67. See *id.*

68. See *id.*

69. See Lopez, *supra* note 2, at 177.

70. See *Dumping of U.S. Carpeting Into Canada Accelerated FTA Effect, Tribunal Says*, 9 Int'l Trade Rep. (BNA) 842 (May 13, 1992).

71. See *id.*

72. See *id.*

73. See Lopez, *supra* note 2, at 177.

74. See *id.*

75. See *Request Filed for Review of Ruling on Mexican Leather Wearing Apparel*, 11 Int'l Trade Rep. (BNA) 40 (Oct. 12, 1994).

76. See *id.*

77. See *Commerce Fails to Convince Panel to Dismiss Challenge to CVD Order*, 12 Int'l Trade Rep. (BNA) 17 (April 12, 1995). The United States challenged the matter pursuant to 34(1)(B) and 39(3) of the Rules of Procedure for Article 1904 Panel Reviews. See *id.* These rules hold that the panel has jurisdiction only when interested parties bring an action for judicial review under NAFTA. See *id.* The panel concluded that the Mexican parties in this matter were in violation of these particular rules of NAFTA procedure, but were entitled to seek panel review due to the United States' failure to timely notify the Mexican parties of the case. See *id.* The panel concluded that this failure of notice placed the Mexicans in a substantially prejudiced position. See *id.* Moreover, the panel determined that the controlling provisions of the procedural guidelines of NAFTA provided the Mexicans with a manifestly inadequate remedy. See *id.* Therefore, "the panel concluded that it had jurisdiction to hear the challenge and denied [the United State's] motion to dismiss." *Id.*

had imposed on the goods entering its domestic market, thereby terminating the need for a final determination by the binational panel regarding this dispute.⁷⁸

A bacteriological culture media dispute between the United States and Canada also utilized the Chapter 19 dispute resolution procedures.⁷⁹ Canada determined that U.S. producers of this product were dumping it into their domestic market to the detriment of Canadian producers.⁸⁰ In order to protect the domestic producers, Canada imposed antidumping duties on the bacteriological culture media entering the Canadian market.⁸¹ Following the imposition of this duty, a U.S. producer of bacteriological culture media requested the formation of a binational panel to investigate the validity of this antidumping duty.⁸² Shortly after the formation of this panel, however, the matter was terminated by an agreement between the parties, thereby removing the need for a final determination from the panel.⁸³

Another matter regarding Chapter 19 disputes, terminated prior to a final determination by a binational panel, again involved the United States and Mexico.⁸⁴ This dispute dealt with cookware products.⁸⁵ Following a determination that Mexican producers of certain types of cookware had participated in dumping activities on the U.S. market, the United States imposed an antidumping duty on these imported products.⁸⁶ A U.S. producer of cookware subsequently requested the formation of a binational panel to determine the validity of the duty imposed on the imported Mexican cookware.⁸⁷ This matter, however, was terminated at the request of the instigating party, after the formation of the binational panel, but prior to a final determination by that panel.⁸⁸

The most recent matter dealt with under Chapter 19 that was terminated prior to a final determination by a binational panel involved a Mexican producer of hydrogen peroxide. The producer requested a panel review of an antidumping ruling that affected the importation of U.S. hydrogen peroxide.⁸⁹ This matter was a bit unusual because it dealt with a Mexican company relying on NAFTA procedures in order to obtain a review of Mexico's commerce ministry.⁹⁰ The Mexican company sought review of a decision to remove antidumping

78. See *Leather Wearing Apparel From Mexico; Amended Final Results of Countervailing Duty Administrative Review in Accordance With Decision on Remand*, 61 Fed. Reg. 2492, 2492 (Dep't Commerce 1996).

79. See *Canada Makes Final Dumping Ruling on U.S. Bacteriological Culture Media*, 13 Int'l Trade Rep. (BNA) 17 (May 1, 1996).

80. See *id.*

81. See *id.*

82. See NAFTA, Article 1904 Binational Panel Reviews; Request for Panel Review, 61 Fed. Reg. 34,421 (Dep't Commerce 1996).

83. See Lopez, *supra* note 2, at 177.

84. See Notice of Final Results of Antidumping Duty Administrative Review: Porcelain-on-Steel Cookware From Mexico, 61 Fed. Reg. 54,616 (Dep't Commerce 1996).

85. See *id.*

86. See *id.*

87. See NAFTA, Article 1904 Binational Panel Reviews; Request for Panel Review, 61 Fed. Reg. 65,027 (Dep't Commerce 1996).

88. See Lopez, *supra* note 2, at 177.

89. See *Mexican Firm Seeks NAFTA Panel on SECOFI's Hydrogen Peroxide Ruling*, *supra* note 47.

90. See *id.*

duties that had been imposed against imported U.S. hydrogen peroxide.⁹¹ Six months later, however, the company withdrew its request for binational panel review.⁹²

2. Disputes Resolved by Final Binational Panel Determinations.

Fourteen of the twenty-four disputes arising under Chapter 19 dispute resolution procedures progressed through the binational panel review stage and required formal opinions to be issued by the panels.⁹³ As a result, the antidumping determinations were either affirmed, repealed in their entirety, or affirmed in part and remanded in part by the panels.⁹⁴

a. Decisions affirmed by the Binational Panel.

In another steel dispute, Canada determined that U.S. steel producers had dumped steel products in the Canadian market to the detriment of Canadian producers.⁹⁵ In response to this determination and the U.S. dumping actions, Canada imposed an antidumping duty on certain steel products entering its market.⁹⁶ Following the implementation of this duty, several U.S. steel producers sought review of this duty under Chapter 19 provisions.⁹⁷ After convening and considering the facts surrounding this matter, the binational panel concluded that the Canadian market had suffered harm as a result of the U.S. dumping activities.⁹⁸ This affirmative finding further led to a determination that the duty imposed by Canada was justified and valid.⁹⁹

The next matter dealing with a final panel decision upholding an antidumping duty centered around a dispute between Mexico and the United States.¹⁰⁰ Mexico made a final determination that certain U.S. producers of polystyrene had dumped their product in the Mexican market injuring Mexican producers.¹⁰¹ Mexico followed this determination with the imposition of an antidumping duty, which certain U.S. producers sought review of under Chapter 19 proceedings.¹⁰² After hearing the facts regarding this case, the binational panel affirmed the finding of injury in the Mexican report, thereby affirming the validity of the imposition of the antidumping duty put into effect by Mexico.¹⁰³

91. See *id.* "The Mexican commerce agency had determined that . . . imports of hydrogen peroxide . . . did not enter Mexico at discriminatory prices, thus market circumstances were sufficiently changed so that dumping did not exist." *Id.*

92. See *Mexican Firm Withdraws Request for NAFTA Panel*, *supra* note 48.

93. See Lopez, *supra* note 2, at 178.

94. See *id.* at 179.

95. See *In re Certain Corrosion-Resistant Steel Sheet Products Originating in or Exported from the United States of America (Injury)*, No. CDA-94-1904-04, 1995 WL 416312, at *2 (NAFTA Binat'l Panel, July 10, 1995).

96. See *id.*

97. See *id.* at *1.

98. See *id.* at *8.

99. See *id.* at *13.

100. See *NAFTA Dispute Panel Hears Request by Polystyrene Maker on Complaint*, 13 Int'l Trade Rep. (BNA) 3 (Jan. 17, 1996).

101. See *id.*

102. See NAFTA, Article 1904 Binational Panel Reviews, 61 Fed. Reg. 54,622, 54,622 (Dep't Commerce 1996).

103. See *id.*

A very unique and complex matter arising between the United States and Mexico concerning antidumping duties on cement was the next dispute to arise under Chapter 19.¹⁰⁴ This matter initially arose prior to NAFTA's inception and was governed under the General Agreement on Tariffs and Trade (GATT).¹⁰⁵ A panel, formed in 1990 pursuant to a GATT provision, determined that U.S. antidumping duties imposed on Mexican cement producers were invalid.¹⁰⁶ After this determination, the GATT panel ruled that the United States should refund the money it collected under the antidumping duty to Mexico.¹⁰⁷ The United States disagreed with the GATT panel and refused to refund the money.¹⁰⁸ After several years of unsuccessfully negotiating with the United States to accept the GATT panel decision, Mexican cement producers, after the implementation of NAFTA, requested the formation of a binational panel to review the antidumping duties imposed several years earlier by the United States.¹⁰⁹ Following this request, a binational panel determined that the U.S. antidumping duty imposed on Mexican cement exporters was valid and would not be overruled.¹¹⁰

A dispute involving color picture tubes was the next Chapter 19 case to arise.¹¹¹ After

104. See *Mexico Seeks NAFTA Panel to Review Cement Rulings*, 12 Int'l Trade Rep. (BNA) 29 (July 19, 1995).

105. See *GATT Antidumping Committee Meets to Hear Cement, Steel, Other Cases*, 12 Int'l Trade Rep. (BNA) 43 (Nov. 1, 1995).

106. See *id.*

107. See *id.*

108. See *Mexico Urges U.S. to Adopt Ruling by GATT Panel on Cement Dumping Duties*, 11 Int'l Trade Rep. (BNA) 31 (Aug. 3, 1994). The United States asserted that the ruling made by the panel was in excess of its mandate and that the refund would be beyond United States' required obligations under GATT. See *id.*

109. See *Mexico Seeks NAFTA Panel to Review Cement Rulings*, *supra* note 104.

110. See NAFTA, Article 1904 Binational Panel Reviews, 61 Fed. Reg. 54,621, 54,622 (Dep't Commerce 1996). The binational panel noted that it did not have the authority to consider the validity or applicability of the GATT panel decision requiring the United States to refund the money collected from the antidumping duties. See *In re Gray Portland Cement and Clinker from Mexico*, No. USA-95-1904-02, 1996 WL 523197, at *9 (NAFTA Binat'l Panel, Sept. 13, 1996). Moreover, the panel noted that if it did have the authority to consider the GATT panel actions it would disregard them because they are not binding on NAFTA binational panels. See *id.* at *10.

111. See *CIT Dismisses Canadian Picture Tube Case Because Binational Panel Review Sought*, 13 Int'l Trade Rep. (BNA) 11 (March 13, 1996). This matter also raises an interesting procedural point. Mitsubishi not only sought binational review under Chapter 19 provisions, but also, simultaneously, challenged the antidumping duty in the United States Court of International Trade. See *id.* Mitsubishi urged the court to repeal this antidumping provision and to prevent Canada from initiating any new measures. See *id.* "The defendants moved to dismiss for lack of jurisdiction, claiming that the [Court of International Trade lacked] jurisdiction because Mitsubishi . . . requested a binational panel [under Chapter 19 provisions]." *Id.* Mitsubishi, however, asserted that the Court of International Trade had jurisdiction over the matter in light of the fact that the binational panel had not determined whether it would review the case or not. See *id.* The court, however, noted that pursuant to "19 USC 1516a, the [Court of International Trade] may not hear a case where binational panel review is requested." *Id.* Therefore, the defendant's motion for dismissal was granted and Mitsubishi's sole body to voice its grievances to, until after the panel had completed its review, was the binational panel. See *id.* "The statute grants exclusive jurisdiction to the binational panel once a binational panel review is 'requested' . . . The fact that the binational panel has not yet reached a decision is not enough, by itself, to give the court a basis for jurisdiction." *Id.*

the United States elected to continue its imposition of an antidumping duty imposed on Canadian color picture tubes entering its domestic market, a Canadian manufacturer sought binational review of the duty under Chapter 19 provisions in an attempt to have the measure repealed.¹¹² After deliberation, the binational panel concluded that the U.S. antidumping duty was valid and enforceable against Canada and, therefore, felt there was no need to revoke the duty.¹¹³

The last decision that required the formation of a binational panel that subsequently affirmed an antidumping duty involved the United States and Canada and the imposition of duties on beer being exported to Canada.¹¹⁴ Initially, Canada determined that its domestic beer market was adversely affected by U.S. beer producers exporting beer to Canada.¹¹⁵ Following this determination, Canada imposed antidumping duties on U.S. producers of beer that exported their product to Canada.¹¹⁶ After this determination and implementation, Canada rescinded its position and repealed the antidumping duty imposed on U.S. beer exporters.¹¹⁷ Following this rescission, three Canadian producers of beer sought binational panel review of their government's cancellation of the antidumping duty.¹¹⁸ After formation of the binational panel and deliberations by the panel, it was determined that both the rescission by the Canadian Government and the removal of the antidumping duty were proper exercises under Canadian law.¹¹⁹

b. Decisions remanded by the Binational Panel.

Chapter 19 dispute resolution provisions were enacted in another steel dispute between Mexico and the United States.¹²⁰ This dispute was the first requiring a decision by a Chapter 19 binational panel.¹²¹ The dispute centered around a determination by Mexico that certain U.S. steel producers had engaged in activities that amounted to dumping steel in its domestic market.¹²² Following this finding by Mexico, an antidumping duty on steel products imported from the United States became effective.¹²³ Thereafter, two U.S. steel producers filed a request for the formation of a binational panel to review Mexico's imposition of the duty.¹²⁴ After hearing the facts, the binational panel rendered a final decision

112. *See id.*

113. *See In re Color Picture Tubes from Canada*, No. USA-95-1904-03, 1996 WL 230035, at *5 (NAFTA Binat'l Panel, May 6, 1996).

114. *See NAFTA Panel Affirms CITT's Removal of Injury Finding on U.S. Malt Exports*, 12 Int'l Trade Rep. (BNA) 47 (Nov. 29, 1995).

115. *See id.*

116. *See id.*

117. *See id.*

118. *See In re Certain Malt Beverages from the United States of America (Injury)*, CDA-95-1904 01, 1995 WL 693198, at *2 (NAFTA Binat'l Panel, Nov. 15, 1995).

119. *See id.* at *18.

120. *See* NAFTA, Article 1904 Binational Panel Reviews; Notice of Decision of Binational Panel, 60 Fed. Reg. 47,153, (Dep't Commerce 1996).

121. *See Panel Sides with U.S. Steelmakers in NAFTA Dispute Resolution Process*, 12 Int'l Trade Rep. (BNA) 35 (Sept. 6, 1995).

122. *See* NAFTA, Article 1904 Binational Panel Reviews; Notice of Decision of Binational Panel, *supra* note 120.

123. *See id.*

124. *See id.*

against Mexico.¹²⁵ The panel determined that the committees that conducted Mexico's antidumping investigations were not properly created under Mexican law and were, therefore, illegal.¹²⁶ The binational panel ordered Mexico to rescind any antidumping duties imposed on the two U.S. steel producers within twenty-one business days.¹²⁷ Moreover, the panel also required Mexico to refund all duties it had collected under this illegal antidumping duty within the twenty-one-day period.¹²⁸ Mexico followed the mandate and repealed the antidumping duties within twenty-one days and advised its Finance Ministry to refund the money collected under the duties to the importers.¹²⁹

c. Decisions affirmed in part and remanded in part by the Binational Panel.

Finally, the panel affirmed in part and remanded in part a total of nine cases, all of which were remanded and upheld for a variety of technical reasons beyond the scope of this paper.¹³⁰

d. Matters Pending before Binational Panels.

At the time of publication there are three matters pending before binational panels. The matters currently pending deal with U.S.-made corn syrup, Mexican-made cement, and Mexican-made cookware.¹³¹

U.S. corn refiners sought panel review of Mexico's imposition of a final antidumping duty against U.S. corn syrup in late February 1998.¹³² The refiners sought the panel review because they had been unable to compete with the cheaper Mexican corn syrup. A final determination by the binational panel is forthcoming.

The largest Mexican producer of cement sought panel review of U.S. antidumping duties imposed upon Mexican cement exports.¹³³ The request for panel review was made in late April 1998 and a final determination by the panel is forthcoming.¹³⁴

The final matter currently pending before a binational panel is a matter dealing with Mexican-made cookware.¹³⁵ Mexican cookware exporters requested a panel review in early September 1998 to review an administrative ruling of duties dealing with cookware exports.¹³⁶ A final determination by the binational panel is forthcoming.

125. *See id.*

126. *See id.*

127. *See id.* at 47,154.

128. *See id.*

129. *See Mexico Complies with NAFTA Panel Decision Affecting U.S. Steelmakers*, 12 Int'l Trade Rep. (BNA) 39 (Oct. 4, 1995).

130. *See Lopez, supra* note 2, at 181-84.

131. *See U.S. Corn Refiners Seek NAFTA Panel on Mexican Duties, supra* note 47; *Mexican Cement Maker Requests NAFTA Panel on U.S. Dumping Duties, supra* note 47; *Mexican Cookware Makers Request NAFTA Panel on U.S. Antidumping Duties, supra* note 47.

132. *See U.S. Corn Refiners Seek NAFTA Panel on Mexican Duties, supra* note 47.

133. *See Mexican Cement Maker Requests NAFTA Panel on U.S. Dumping Duties, supra* note 47.

134. *See id.*

135. *See Mexican Cookware Makers Request NAFTA Panel on U.S. Antidumping Duties, supra* note 47.

136. *See id.*

III. Dispute Resolution Under NAFTA's Chapter 20.

Chapter 20 is the dispute resolution mechanism for most disputes arising under NAFTA other than antidumping and countervailing duty disputes, which are covered by Chapter 19, as discussed above.¹³⁷ In addition, NAFTA, for the most part, does not apply to private commercial disputes.¹³⁸ Chapter 20 deals with the interpretation, application, and any alleged breaches of NAFTA provisions under a three-part resolution process consisting of: (1) consultations between the parties, (2) a meeting of the Free Trade Commission if consultations fail, and (3) formation of an arbitral panel if all else fails.¹³⁹

Before formally discussing the intricacies of Chapter 20 provisions, it is noteworthy to discuss the institutions involved in the dispute resolution process under this Chapter. Two institutions or levels of official involvement exist in Chapter 20 dispute resolution matters: The Free Trade Commission (FTC) and the Secretariat.¹⁴⁰

The FTC was created to oversee the implementation and elaboration of NAFTA and, among other things, to resolve disputes concerning the interpretation or application of NAFTA.¹⁴¹ It comprises "cabinet-level representatives of the Parties or their designees."¹⁴² Moreover, the FTC is permitted to consult and "rely on technical advisors, convene working groups or experts, or seek conciliation, mediation or other dispute resolution procedures in an effort to resolve the dispute promptly."¹⁴³

The second institution or official level involved in Chapter 20 dispute resolution mat-

137. See Michael Barber, *NAFTA Dispute Resolution Provisions: Leaving Room for Abusive Tactics by Airlines Looking Southward*, 61 J. AIR L. & COM. 991, 998 (1996). See also NAFTA, *supra* note 1, art. 2004, 32 I.L.M. at 693. "[T]he dispute settlement provisions of this Chapter shall apply . . . to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a party considers that an actual or proposed measure of another Party is or would be inconsistent with [NAFTA] . . ." *Id.*

138. See Barber, *supra* note 137. "Article 2022 does refer to private commercial disputes, but fails to provide for a dispute resolution mechanism under the Agreement." *Id.* at 1005.

139. See Bialos & Seigel, *supra* note 6, at 615.

140. See NAFTA, *supra* note 1, art. 2001(1), 2002(1), 32 I.L.M. at 693.

141. See *id.* art. 2001(2)(a)-(e), 32 I.L.M. at 693. Article 2001(2)-(5) creates the Free Trade Commission and holds:

2. The Commission shall: (a) supervise the implementation of this Agreement; (b) oversee its further elaboration; (c) resolve 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 2001.2; and (e) consider any other matters that may affect the operation of this Agreement. 3. The Commission may: (a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups; (b) seek the advice of non governmental persons or groups; and (c) take such other action in the exercise of its functions as the Parties may agree. 4. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree. 5. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party.

142. *Id.* art. 2001(1), 32 I.L.M. at 693.

143. Michael J. Chrusch, *The North American Free Trade Agreement: Reasons for Passage Requirements to be a Foreign Legal Consultant in a NAFTA Country*, 3 ILSA J. INT'L & COMP. L. 177, 186 (1996).

ters is the Secretariat.¹⁴⁴ The Secretariat was established and is overseen by the FTC.¹⁴⁵ The functional role of the Secretariat is to provide administrative support to the FTC, the dispute panels, and committees provided for by the Agreement.¹⁴⁶

A. STEP ONE IN THE RESOLUTION PROCESS: CONSULTATION BETWEEN THE PARTIES.

The first step in the resolution process is for the complaining party to formally request consultations with the offending party.¹⁴⁷ As discussed earlier, NAFTA contemplates and encourages the parties to settle disputes between themselves rather than by orders from another body.¹⁴⁸ Therefore, alternative dispute resolution (ADR) methods are heavily relied upon at this stage of the process.¹⁴⁹

ADR offers several advantages over full Chapter 20 resolution proceedings.¹⁵⁰ "ADR avoids complex issues of private international law . . . [and] encourages expediency, confidentiality, greater assurance of technical expertise, an emphasis on problem-solving rather than vindication of rights, greater flexibility in fashioning solutions, and encouragement of mutually satisfactory settlements."¹⁵¹ But if the ADR attempts fail to yield a mutually acceptable resolution during consultations, either party may request a formal meeting of the FTC within thirty days.¹⁵²

144. See NAFTA, *supra* note 1, art. 2002, 32 I.L.M. at 693.

145. See *id.* art. 2002(1), 32 I.L.M. at 693.

146. See *id.* art. 2002, 32 I.L.M. at 693. This article creates the Secretariat and holds in pertinent part that:

1. The Commission shall establish and oversee a Secretariat comprising national Sections. 2. Each Party shall: (a) establish a permanent office of its Section; (b) be responsible for (i) the operation and costs of its Section, and (ii) the remuneration and payment of expenses of panelists and members of committees and scientific review boards established under this Agreement, as set out in Annex 2002.2; (c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and (d) notify the Commission of the location of its Section's office. 3. The Secretariat shall: (a) provide assistance to the Commission; (b) provide administrative assistance to (i) panels and committees established under Chapter 19 (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and (ii) panels established under this Chapter, in accordance with procedures established pursuant to Article 1012; and as the Commission may direct (i) support the work of other committees and groups established under this Agreement, and (ii) otherwise facilitate the operation of this Agreement.

Id.

147. See *id.* art. 2006(1), 32 I.L.M. at 694.

148. See Barber, *supra* note 137, at 999.

149. See Nafziger, *supra* note 6, at 825.

150. See *id.*

151. *Id.*

152. See NAFTA, *supra* note 1, art. 2007(1)(a), 32 I.L.M. at 695. But see Nafziger, *supra* note 6, at 825. "There is . . . no assurance that an individual will gain diplomatic protection in order to pursue Chapter 20 remedies . . . [T]he intergovernmental procedures of Chapter 20 are not only potentially unreliable but are also highly political. On the other hand, they are expeditious and encourage a substantial measure of state responsibility." *Id.*

B. STEP TWO IN THE RESOLUTION PROCESS: A MEETING OF THE FREE TRADE COMMISSION.

After a formal request for an FTC meeting has been made, the Commission must meet within ten days and attempt to resolve the dispute.¹⁵³ As discussed earlier, NAFTA does not cover disputes involving private parties or their agents.¹⁵⁴ Therefore, "any individual claiming that another Party has violated the agreement must have its government raise the claim before the [Free Trade Commission] and request establishment of a panel, except with respect to investment disputes subject to Chapter [Eleven]."¹⁵⁵ In an attempt to resolve the dispute in a timely fashion, the FTC may utilize technical advisers or experts before making appropriate recommendations.¹⁵⁶ At the conclusion of the second stage of the resolution process, the FTC "makes a non-binding recommendation to the disputing Parties [suggesting approaches to a resolution]."¹⁵⁷

C. STEP THREE IN THE RESOLUTION PROCESS: FORMATION OF AN ARBITRAL PANEL.

If the FTC's recommendations fail to resolve the dispute within thirty days, any of the parties may request that an arbitral panel then be formed.¹⁵⁸ The arbitral panel consists of five arbitrators drawn from a roster of thirty individuals that have expertise in law, international trade, or the resolution of disputes arising under international trade agreements.¹⁵⁹ NAFTA requires the panel "[t]o examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission . . . and to make findings, determinations and recommendations."¹⁶⁰

Within ninety days after the last panelist is selected, the panel must issue an initial report.¹⁶¹ The report must contain findings of fact, the panel's "determination as to whether the measure at issue is or would be inconsistent with [NAFTA,] . . . [and] its recommendations, if any, for resolution of the dispute."¹⁶² The disputing parties may then, within fourteen days, submit written comments to the panel concerning the initial

153. See NAFTA, *supra* note 1, art. 2007(4), 32 I.L.M. at 695.

154. See Barber, *supra* note 137, at 1005. "Article 2022 does refer to private commercial disputes, but fails to provide for a dispute resolution mechanism under the agreement." *Id.*

155. Bialos & Seigel, *supra* note 6, at 616.

156. See Lopez, *supra* note 2, at 166-67.

157. Barber, *supra* note 137, at 998.

158. See NAFTA, *supra* note 1, art. 2008(1), 32 I.L.M. at 695.

159. See *id.* art. 2009, 32 I.L.M. at 695-96. Article 2009 further holds that panelists must "be independent of, and not be affiliated with or take instructions from, any Party; and . . . comply with a code of conduct . . . established by the [Free Trade Commission]." *Id.* art. 2009(2)(b), (c). The disputing parties first must choose the chair of the panel within 15 days of the initial request for the formation of the arbitral panel. See *id.* art. 2011(2)(b), 32 I.L.M. at 695-96. The parties then have 15 days to select the remaining four panelists. See *id.* art. 2011(2)(c), 32 I.L.M. at 695-96. For disputes involving two parties, the "disputing Party shall . . . select two members who are citizens of the other Party . . . In a dispute involving more than two disputing Parties, Parties will select panelists on each side of the dispute . . . from citizens of the Parties on the other side of the dispute." Bialos & Seigel, *supra* note 6, at 617.

160. NAFTA, *supra* note 1, art. 2012(3), 32 I.L.M. at 696.

161. See *id.* art. 2016(2), 32 I.L.M. at 697.

162. *Id.* art. 2016(2)(a)-(c), 32 I.L.M. at 697.

report.¹⁶³ After receiving the comments, the panel may “request the views of any participating Party[,] reconsider its report[,] and make any further examination that it considers appropriate.”¹⁶⁴ “The panel must issue its final report to the disputing parties within thirty days of the presentation of its initial report.”¹⁶⁵ In an attempt to quash claims of national bias and maintain integrity, NAFTA requires the panelists to remain silent concerning whether they are associated with the minority or majority opinions.¹⁶⁶

After the final report is issued, the disputing parties are required to agree upon a resolution within thirty days that conforms with the determinations and recommendations of the panel.¹⁶⁷ “NAFTA provides that . . . the resolution shall entail the elimination of the offending measure that was the subject of the dispute or, failing such a resolution, compensation.”¹⁶⁸ If the parties do not reach a mutually satisfactory agreement within thirty days after the panel releases its final report, the complaining party may seek suspension of the other parties’ equivalent NAFTA benefits until a resolution can be reached.¹⁶⁹

D. TRACK RECORD OF CHAPTER 20 DISPUTES.

Since NAFTA’s inception, there have been relatively few disputes subjected to full Chapter 20 resolution measures.¹⁷⁰ Scholars have noted that in theory it is easy to track Chapter 20 disputes.¹⁷¹ NAFTA requires a complaining party to notify the Secretariat when they invoke Chapter 20 procedures.¹⁷² Further, NAFTA requires the disputants to inform the Secretariat of any further proceedings under Chapter 20 provisions or any res-

163. See *id.* art. 2016(4), 32 I.L.M. at 697.

164. *Id.* art. 2016(5)(a)-(c), 32 I.L.M. at 697.

165. Bialos & Seigel, *supra* note 6, at 617. The panel’s final report shall also include separate opinions on things that were not unanimously agreed on. See NAFTA, *supra* note 1, art. 2017, 32 I.L.M. at 697.

166. See NAFTA, *supra* note 1, art. 2017(2), 32 I.L.M. at 697.

167. See *id.* art. 2018(1), 32 I.L.M. at 697.

168. Bialos & Seigel, *supra* note 6, at 619. See also NAFTA, *supra* note 1, art. 2018(2), 32 I.L.M. at 697.

169. See NAFTA, *supra* note 1, art. 2019(1), 32 I.L.M. at 697. If the panel determines that a measure violates NAFTA and the parties do not reach a mutually satisfactory resolution within 30 days after issuance of the final report, the complaining party may have the complained against party’s NAFTA benefits suspended to such a degree as to be equal to the effect of the complained against action or measure experienced by the complaining party. See *id.* “[A] complaining party should first seek . . . [suspension of] . . . benefits in the same sector . . . as that affected by the measure or other matter that the panel has found to be inconsistent with . . . [NAFTA] . . .” *Id.* art. 2019(2), 32 I.L.M. at 697. If a complaining party determines that suspension in the same sector would be ineffective, then that party may suspend benefits in another sector. See *id.* art. 2019(2)(b), 32 I.L.M. at 697.

170. Lopez, *supra* note 2, at 168.

171. See *id.*

172. See NAFTA, *supra* note 1, art. 2006(1), (2), 32 I.L.M. at 694. “Any party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement. . . . The requesting Party shall deliver the request to the other Parties and to its section of the Secretariat.” *Id.*

olutions of the conflicts.¹⁷³ Theoretically, the Secretariat tracks formal Chapter 20 disputes, but practically speaking, the Secretariat tends to report only those disputes that reach full arbitral panel review.¹⁷⁴

Nine disputes have formally entered the Chapter 20 consultation phase.¹⁷⁵ Six of the nine Chapter 20 controversies were submitted to the FTC for resolution.¹⁷⁶ Further, only one of those controversies was submitted to an arbitral panel for resolution under the NAFTA provisions.¹⁷⁷

The first dispute to test Chapter 20 provisions occurred in 1994.¹⁷⁸ It was a dispute between Canada and the United States concerning uranium.¹⁷⁹ Canada invoked Chapter 20 provisions due to its concern over an amendment to an agreement between Russia and the United States concerning exports and imports of uranium.¹⁸⁰ Canada asserted that by being party to the agreement, the United States was violating its obligations under NAFTA.¹⁸¹ After consulting with each other, however, the parties, pursuant to Chapter 20, resolved the matter through formal consultations in late 1994.¹⁸²

The second dispute arising in this area occurred in 1995 and was, again, between Canada and the United States.¹⁸³ The United States requested formal consultations with Canada regarding tariffs applied to dairy, poultry, and egg products imported to the United States.¹⁸⁴ The United States asserted that the tariffs were inconsistent with NAFTA, "which calls for the eventual lifting of all tariffs between the United States and Canada and bars introduction of new tariffs."¹⁸⁵ When Chapter 20 consultations between the United

173. See *id.* art. 2007(3), 32 I.L.M. at 695. Article 2007 requires the Parties to notify the Secretariat and the other Parties in writing of any request for a meeting of the Free Trade Commission. See *id.* Further, Article 2008 requires Parties requesting formation of an arbitral panel to notify the Secretariat of any such request. See *id.* art. 2008(1)(c), 32 I.L.M. at 695. Finally, Article 2018 states that the Parties shall notify the Secretariat of any resolution that the parties mutually agree to. See *id.* art. 2018(1), 32 I.L.M. at 697.

174. See Lopez, *supra* note 2, at 168. The U.S. "NAFTA Secretariat periodically publishes and distributes . . . the 'NAFTA Panels Status Report.'" See, e.g., NAFTA Secretariat, Statistical Summary of Dispute Settlement Panels Under the North American Free Trade Agreement 4 (June 6, 1996) (available from the NAFTA Secretariat, Washington, D.C.). *Id.* at 168 n.35.

175. See *id.* at 168; see also *Mexico and United States Hold Consultations on Sugar Trade*, 15 Int'l Trade Rep. (BNA) 702 (Apr. 22, 1998).

176. See Lopez, *supra* note 2, at 171; see also *NAFTA Cross-Border Trucking Group Meets; Little Progress Reported, More Talk Likely*, 15 Int'l Trade Rep. (BNA) 1451 (Aug. 26, 1998).

177. See Lopez, *supra* note 2, at 172.

178. See *id.* at 168-70.

179. See *id.* at 168.

180. See *Canada Seeks NAFTA Consultations On U.S.-Russia Uranium Agreement*, 11 Int'l Trade Rep. (BNA) 512 (March 30, 1994).

181. See *id.*

182. See *Canada Assessing Results of Uranium Consultations with U.S.*, 11 Int'l Trade Rep. (BNA) 1672 (Nov. 2, 1994); *U.S. Barriers Still In Place, Says 1995 Canadian Register*, 12 Int'l Trade Rep. (BNA) 625 (April 5, 1995).

183. See *Also In The News*, 12 Int'l Trade Rep. (BNA) 279 (Feb. 8, 1995).

184. See *id.*

185. *United States Asks for Panel on New Canadian Ag Tariffs*, 12 Int'l Trade Rep. (BNA) 1239 (July 19, 1995).

States and Canada failed to resolve the matter, it was submitted to the FTC for review, but they were also unable to resolve the dispute.¹⁸⁶ Therefore, when the United States requested the formation of an arbitral panel, this matter became the first dispute to require the formation of an arbitral panel under Chapter 20.¹⁸⁷ The panel conformed to Chapter 20 guidelines. In December 1996, the panel issued its final report concluding that Canada's tariffs conformed to NAFTA provisions.¹⁸⁸

After the United States instituted proceedings against Canada in the dairy and poultry case discussed above, Canada responded by requesting consultations with the United States regarding tariffs placed on exported Canadian sugar products.¹⁸⁹ After consultations, the parties failed to reach an agreement. Therefore, the matter was submitted to the FTC, which was subsequently unable to resolve the dispute.¹⁹⁰ Canada was, thereupon, in a position to request the formation of an arbitral panel, but chose not to do so.¹⁹¹ Consistent with the general themes and desires of NAFTA, the parties negotiated a settlement between themselves, thus ending the dispute without any further NAFTA proceedings.¹⁹²

The next proceedings involved Mexico and the United States regarding "Mexico's alleged failure to provide national treatment to a U.S.-owned express delivery company."¹⁹³ The United States sought consultations alleging that Mexico did not meet its NAFTA requirements when it failed to allow U.S. companies, such as United Parcel Service, the right to use large delivery trucks similar to those used by Mexican competitors.¹⁹⁴ The consultations, however, were unsuccessful in resolving the matter. The matter, therefore, proceeded to the FTC, which was also unsuccessful at resolving the dispute.¹⁹⁵ At the present time, neither party has requested the formation of an arbitral panel and the dispute remains in the informal negotiation phase.¹⁹⁶

The next Chapter 20 proceeding again involved Mexico and the United States.¹⁹⁷ Mexico requested formal consultations regarding the opening of the border to Mexican

186. *See id.*

187. *See id.*

188. *See Lopez, supra* note 2, at 173.

189. *See Canadian Government Seeks NAFTA Talks On U.S. Restrictions On Sugar Exports*, 12 Int'l Trade Rep. (BNA) 300 (Feb. 15, 1995). Canadian Officials stated that they had "concerns with a number of measures taken by the U.S. which . . . reduced Canada's access to the U.S. market for sugar and sugar-containing products." *Id.* It is also noteworthy to point out that NAFTA's attempt of letting the parties settle the dispute themselves was recognized by these parties. *See id.* Formal Chapter 20 proceedings were not requested until after informal consultations had failed. *See id.*

190. *See Canadian Sugar Industry Grudgingly Accepts Deal with U.S., Official Says*, 14 Int'l Trade Rep. (BNA) 1470 (Sept. 3, 1997).

191. *See id.* "Canada has been in a legal position to request NAFTA dispute resolution since April 21, 1997, but the federal government has consistently said that it would prefer to reach a negotiated settlement with the United States." *Id.*

192. *See id.*

193. *USTR Asks Mexico for Consultations On Treatment of Express Delivery Firm*, 12 Int'l Trade Rep. (BNA) 772 (May 3, 1995).

194. *See id.*

195. *See Lopez, supra* note 2, at 171.

196. *See Report On Trade Expansion Priorities Pursuant to Executive Order 12901 ("Super 301")*, 61 Fed. Reg. 52,827, 52,832 (Office of U.S. Trade Representative 1996).

197. *See Mexico Expects To Consult on Trucking Under NAFTA Chapter 20, Official Says*, 13 Int'l Trade Rep. (BNA) 68 (January 17, 1996).

trucking companies.¹⁹⁸ The United States failed to open its borders, as provided for in NAFTA, due to concerns stemming from the lack of safeguards guaranteeing Mexican compliance with U.S. automotive safety standards.¹⁹⁹ The FTC met in August of 1998 in an unsuccessful attempt to resolve this matter.²⁰⁰ "If the dispute is not resolved at this stage, Mexico can seek a bilateral dispute resolution panel, which could suspend some NAFTA trade benefits to the United States for delaying Mexican truck access."²⁰¹ But many think it is unlikely that Mexico will seek [an arbitral panel].²⁰² This matter, at the present time, is still unresolved. The United States and Mexico remain in consultations under Chapter 20 provisions.²⁰³

In the same year that the "trucking" dispute arose, Mexico also requested Chapter 20 consultations with the United States regarding tariffs imposed on imported Mexican tomatoes.²⁰⁴ This conflict stemmed from Florida farmers that pushed the United States to take action in order to defend against seasonal surges of Mexican tomatoes that negatively diluted the U.S. market.²⁰⁵ In October of 1996, the parties resolved this dispute without the use of any further formal measures that were available to them under Chapter 20.²⁰⁶

Later in 1996, Mexico and Canada both requested Chapter 20 consultations with the United States regarding the U.S. Helms-Burton Act.²⁰⁷ Mexico and Canada alleged that the legislation violated NAFTA because it restricted entry to the United States for business people and it could possibly grant certain American citizens a right of action against business executives of foreign companies.²⁰⁸ After the consultations regarding this matter were unsuccessful in resolving the dispute, Canada requested a meeting of the FTC. The FTC, however, was also unable to resolve the matter.²⁰⁹ At the present time the matter remains unresolved.²¹⁰

Canada has the right, pursuant to provisions within Chapter 20, to request the formation of an arbitral panel to aid in a resolution of the Helms-Burton dispute.²¹¹ Currently,

198. *See id.*

199. *See id.*

200. *See NAFTA Cross-Border Trucking Group Meets; Little Progress Reported, More Talks Likely, supra* note 176.

201. *Id.*

202. *Id.*

203. *See U.S. Seeks NAFTA Transport Fix Before DOT Secretary Pena's Exit*, 14 Int'l Trade Rep. (BNA) 89 (Jan. 15, 1997).

204. *See U.S.-Mexico Consultations to Continue on Trucking, Tomato Quota, Secofi Says*, 13 Int'l Trade Rep. (BNA) 102 (January 24, 1996).

205. *See Commerce, Mexican Tomato Growers Initial Proposed Suspension Agreement*, 13 Int'l Trade Rep. (BNA) 1584 (October 16, 1996).

206. *See id.* The parties agreed to suspend the antidumping duties in exchange for "minimum import price[s] for Mexican tomatoes [sic] entering the United States." *Id.*

207. *See U.S. Agrees to Talk with Canada, Mexico on Helms-Burton Cuba Sanctions Measure*, 13 Int'l Trade Rep. (BNA) 476 (March 20, 1996).

208. *See id.*

209. *See NAFTA Designates Confer on Complaint Against Helms-Burton Under Chapter 20*, 13 Int'l Trade Rep. (BNA) 27 (July 3, 1996).

210. *See Canada Delays NAFTA Helms-Burton Case Pending EU Negotiations with United States*, 14 Int'l Trade Rep. (BNA) 307 (Feb. 19, 1997).

211. *See id.*

Canada has not elected to escalate the matter to that stage.²¹² Canada has indicated that it will delay proceedings until negotiations concerning the Helms-Burton Act between the United States and the European Union are completed.²¹³

During the latter part of 1996, Mexico requested Chapter 20 consultations in response to a recommendation made to the U.S. President to raise protective tariffs on imported Mexican brooms.²¹⁴ These tariffs were designed to reduce the number of brooms imported into the United States in an attempt to protect the U.S. broom industry.²¹⁵ The Chapter 20 consultations between the parties proved to be ineffective and failed to resolve the matter.²¹⁶ Mexico subsequently exercised its rights under Chapter 20 and requested a meeting of the FTC.²¹⁷ This meeting, just as the consultations, failed to resolve the matter to the satisfaction of both parties.²¹⁸ Mexico, therefore, requested the formation of an arbitral panel in an attempt to resolve this dispute.²¹⁹ The arbitral panel "found that a safeguard measure imposed by the United States against broom corn brooms was inconsistent with NAFTA because the International Trade Commission (ITC) determination on which safeguard tariffs were based did not contain adequate explanation."²²⁰ The arbitral panel determined that the ITC failed to produce an adequate explanation of its legal conclusions.²²¹ The missing "explanation makes this part of the ITC ruling unreviewable and contrary to NAFTA Article 803 Annex 803.3(12) . . . Paragraph 12 of Annex 803.3 mandates that the administering authority—in this case the ITC—must provide reasoned conclusions on law and fact in making its determination."²²²

The most recent dispute to utilize the dispute resolution procedures of Chapter 20 is a matter between the United States and Mexico dealing with corn syrup.²²³ Mexico requested Chapter 20 consultations with the United States to discuss trade levels, quotas, and access conditions for Mexican sugar entering the U.S. market.²²⁴ The two parties held their first round of formal consultations in late April 1998. This matter, at the time of publication, remains unresolved, but discussions are expected to continue.²²⁵

212. *See id.*

213. *See id.*

214. *See USTR Announces Presidential Decision To Seek Negotiated Solution in Broom Case*, 13 Int'l Trade Rep. (BNA) 1365 (Sept. 4, 1996).

215. *See Increased Imports of Broom Corn Brooms from Mexico are Injuring U.S. Industry*, 13 Int'l Trade Rep. (BNA) 1127 (July 10, 1996).

216. *See Mexico Seeks Dispute Panel on U.S. Broom Safeguards*, 14 Int'l Trade Rep. (BNA) 128 (Jan. 22, 1997).

217. *See id.*

218. *See id.*

219. *See id.*

220. *NAFTA Panel Backs Mexico in Spat with U.S. on Broom Corn Brooms*, 15 Int'l Trade Rep. (BNA) 280 (Feb. 18, 1998).

221. *See id.*

222. *See id.*

223. *See Mexico Seeks NAFTA Consultations to Settle Dispute Over Sugar, Corn Syrup*, 15 Int'l Trade Rep. (BNA) 481 (Mar. 18, 1998).

224. *See id.*

225. *See Mexico and United States Hold Consultations on Sugar Trade*, *supra* note 175.

IV. Dispute Resolution Under the Labor Side Agreement.

A. PROCEDURE FOR DISPUTE RESOLUTION.

When the members of NAFTA agreed to reduce trade barriers, they also agreed to protect the North American labor markets.²²⁶ By signing the Labor Side Agreement, the parties set out to (1) improve working conditions and living standards; (2) promote labor principles; (3) encourage cooperation; (4) promote innovation and rising levels of productivity and quality; and (5) to promote compliance with, and effective enforcement by each Party of its labor law.²²⁷ The parties further obligated themselves to respect other parties' domestic labor laws while agreeing that such domestic laws "shall ensure . . . high labor standards, consistent with high quality and productive workplaces."²²⁸ The Labor Side Agreement also provides for a private cause of action.²²⁹ It further provides that "[e]ach party shall ensure that its administrative, quasi-judicial, judicial and labor tribunal proceedings for the enforcement of its labor law are fair[,] equitable and transparent."²³⁰

In order to efficiently implement and manage the agreement, the parties created the Commission for Labor Cooperation.²³¹ This Commission comprises a ministerial Council and a Secretariat, which are assisted by the National Administrative Office of each party.²³²

The Council is staffed by labor ministers of the member countries and establishes the rules and procedures for the Commission.²³³ Moreover, the Council is the governing body of the Commission for Labor Cooperation.²³⁴ The Council is charged with directing the work and activities of the Secretariat, facilitating Party-to-Party consultations, addressing questions and differences that may arise between the Parties, and handling any other matter within the scope of the Labor Side Agreement.²³⁵

The Secretariat is headed by an executive director that is chosen by the Council for a three-year term.²³⁶ The role of the Secretariat is to aid the Council and to offer support as needed by the Council.²³⁷ The Secretariat also prepares periodic reports detailing labor law and market conditions in the member countries.²³⁸

226. North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 [hereinafter Labor Side Agreement].

227. *Id.* art. 1(a), (b), (c), (f), 32 I.L.M. at 1503.

228. *Id.* art. 2, 32 I.L.M. at 1503.

229. *See id.* art. 4(1), 32 I.L.M. at 1503. "Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party's labor law." *Id.* art. 4(1), 32 I.L.M. at 1503.

230. *See id.* art. 5(1), 32 I.L.M. at 1504.

231. *See id.* art. 8(1), 32 I.L.M. at 1504.

232. *See id.* art. 8(2), 32 I.L.M. at 1504. The National Administrative Offices serve as a point of contact with members of this agreement at the federal government level. *See id.* art. 16, 32 I.L.M. at 1507.

233. *See id.* art. 9(1), (2), 32 I.L.M. at 1505.

234. *See id.* art. 10(1), 32 I.L.M. at 1505.

235. *Id.* art. 10(1)(a), (b), (f), (g), 32 I.L.M. at 1505.

236. *See id.* art. 12(1), 32 I.L.M. at 1506.

237. *See id.* art. 13(1), 32 I.L.M. at 1506.

238. *See id.* art. 14(1)(a), (c), 32 I.L.M. at 1506.

"The Labor Side Agreement creates a four-step dispute settlement process that consists of: [1] initial consultations between [National Administrative Offices]; [2] ministerial consultations; [3] expert evaluations; and [4] further consultations that may lead to non-binding arbitration."²³⁹ Like the other provisions of NAFTA, this four-step process contemplates and urges the disputing parties to resolve the matter among themselves, if at all possible, and at all times to maintain a sense of cooperation and consultation.²⁴⁰

The first step in the resolution process contemplated by the Labor Side Agreement involves the National Administrative Offices.²⁴¹ This process begins when a member of the public submits to a National Administrative Office a matter dealing with the labor laws of another NAFTA country.²⁴² If the National Administrative Office determines that a matter does in fact exist, they may request consultations with the alleged offending member party in order to attempt to mutually resolve the matter.²⁴³

If the National Administrative Offices fail to mutually resolve the matter, any of the involved parties may request that the matter proceed to the next level of the dispute resolution process, the ministerial consultation phase.²⁴⁴ Again, at this point, the Agreement implies a desire to mediate the problem without any further administrative intervention. Article 22 dictates that the parties "shall make every attempt to resolve the matter through consultations under this Article."²⁴⁵ If, however, the ministerial mediations fail to resolve the matter, the parties may require that the dispute proceed to the third phase, an evaluation by the Evaluation Committee of Experts.²⁴⁶ This committee is limited, and may only review matters that pertain to the enforcement of "occupational safety and health or other technical labor standards."²⁴⁷

The Evaluation Committee of Experts consists of one chairperson and two members, all with expertise in labor matters.²⁴⁸ Within 120 days, the Evaluation Committee of Experts must present a draft report to the Council containing an opinion on the matter, any conclusions, and any recommendations.²⁴⁹ The Evaluation Committee of Experts then has sixty days to present a final report to the Council regarding the matter under consideration.²⁵⁰ If the Committee is unable to reach a satisfactory resolution, then the dispute may proceed to the final level of dispute resolution procedures provided for under the Labor Side Agreement, consultations that may lead to non-binding arbitration.²⁵¹ As with the previous level of resolution procedures, this final level further narrows the scope of matters that can be addressed. A dispute may proceed to this final level if it can be classi-

239. Lopez, *supra* note 2, at 193; see also Labor Side Agreement, *supra* note 226, pts. 4, 5, 32 I.L.M. at 1507-13.

240. See Labor Side Agreement, *supra* note 226, art. 20, 32 I.L.M. at 1507.

241. See *id.* art. 16, 32 I.L.M. at 1507.

242. See *id.* art. 16(3), 32 I.L.M. at 1507.

243. See *id.* art. 21(1), 32 I.L.M. at 1507.

244. See *id.* art. 22, 32 I.L.M. at 1508.

245. *Id.* art. 22(3), 32 I.L.M. at 1508.

246. See *id.* art. 23(1), 32 I.L.M. at 1508.

247. *Id.* art. 23(2), 32 I.L.M. at 1508.

248. See *id.* art. 24(1)(a)-(c), 32 I.L.M. at 1508.

249. See *id.* art. 25(1)(a)-(c), 32 I.L.M. at 1508-09.

250. See *id.* art. 26(1), 32 I.L.M. at 1509.

251. See *id.* art. 29(1), 32 I.L.M. at 1509.

fied within a very narrow category of cases.²⁵² A matter can be considered for continued consultation and possible non-binding arbitration if the matter pertains to (1) occupational safety and health issues, (2) child labor issues, or (3) minimum wage issues in which the Evaluation Committee of Experts has determined that the party complained against has exhibited a "persistent pattern" of failure to enforce its laws.²⁵³

At this point, the parties are required to, again, "make every attempt to arrive at a mutually satisfactory resolution of the matter through consultations."²⁵⁴ If, however, these consultations fail to resolve the matter within sixty days, then any of the parties may request a session of the Council.²⁵⁵ The Council is then permitted to consider the matter and make recommendations as to how the parties should resolve the dispute.²⁵⁶

If the Council is unable to resolve the matter within sixty days, the matter may proceed to an arbitral panel.²⁵⁷ The matter will advance to the panel only if the parties request the formation of such a panel and the Council approves the formation by a two-thirds vote.²⁵⁸ The members of the arbitral panel are selected from a roster of up to forty-five individuals possessing expertise in labor law or dispute resolution under international agreements.²⁵⁹

Within 180 days after formation of the panel, the members must present to the parties an initial report with findings of fact, any determination of the existence of the complained of activity, and a plan of action to remedy the matter.²⁶⁰ Finally, within sixty days of the submission of the initial report, the panel must submit its final report containing a plan of action for the offending party to implement.²⁶¹ As with other provisions of NAFTA, if the offending party fails to implement the plan of action called for by the panel, the complaining party may seek to have the other party's NAFTA benefits suspended.²⁶²

B. TRACK RECORD OF LABOR SIDE AGREEMENT DISPUTES.

A total of seven controversies have arisen under the Labor Side Agreement.²⁶³ Five of these disputes were settled at the National Administrative Offices consultation phase and only two of those seven advanced to the ministerial consultations phase.²⁶⁴ Moreover, no disputes have risen to the level requiring the formation of an Evaluation Committee of Experts.²⁶⁵

252. See *id.* art. 27(1), 32 I.L.M. at 1509.

253. *Id.*

254. *Id.* art. 27(4), 32 I.L.M. at 1509.

255. See *id.* art. 28(1), 32 I.L.M. at 1509.

256. See *id.* art. 28(4)(c), 32 I.L.M. at 1509.

257. See *id.* art. 29(1), 32 I.L.M. at 1509.

258. See *id.*

259. See *id.* art. 30(1), (2)(a)-(c), 32 I.L.M. at 1510.

260. See *id.* art. 36(1), (2), 32 I.L.M. at 1511.

261. See *id.* arts. 37, 38, 32 I.L.M. at 1511.

262. See *id.* art. 41, 32 I.L.M. at 1512.

263. See Lopez, *supra* note 2, at 195.

264. See *id.*

265. See *id.*

1. *Disputes Terminated Upon National Administrative Organization Consultations.*

The first matter to test the dispute resolution system under the Labor Side Agreement arose out of two complaints that were submitted simultaneously regarding Mexican workers and unions.²⁶⁶ Two U.S.-based unions asserted that Mexican employees of two U.S. companies operating plants in Mexico were fired after they attempted to organize unions in the Mexican plants.²⁶⁷ The unions requested review of the matters by the National Administrative Office, asserting that the workers' rights of freedom and association were being infringed upon in contravention of the aims of the Labor Side Agreement.²⁶⁸ The National Administrative Office then conducted hearings to investigate the unions' allegations regarding this matter.²⁶⁹ The purpose of the review was to gather information to aid the U.S. National Administrative Office to better understand and publicly report on the Mexican Government's "promotion of, compliance with, and effective enforcement of, its labor law."²⁷⁰ After concluding the hearings, however, the National Administrative Office found "no evidence that Mexico failed to enforce its labor laws when dealing with complaints from union activists [that were] terminated."²⁷¹ The National Administrative Office found that the terminated workers had taken severance pay following their discharge.²⁷² The workers' actions were found to have pre-empted Mexican officials from

266. See *Unions File Charges Under NAFTA Against General Electric, Honeywell*, 11 Int'l Trade Rep. (BNA) 8 (Feb. 23, 1994).

267. See *id.* The two companies denied the allegations and reaffirmed their position that no employees were fired for union activities. See *id.*

268. See Determination to Accept Submission 940002 for Review, 59 Fed. Reg. 18,833 (Office of Sec., Dep't Labor 1994). "The procedural guidelines for the U.S. National Administrative Office . . . specify that, in general, the Secretary . . . shall accept a Submission for review if it raises issues relevant to labor law matters in Canada or Mexico and if a review would further the objective of the [Labor Side Agreement]." *Id.* The unions requested that National Administrative Office require both companies "to reinstate the workers, [sic] and to allow workers at [the] . . . Mexican facilities to choose union representation without intimidation from management." *Unions File Charges Under NAFTA Against General Electric, Honeywell*, *supra* note 266. A request was also made by the unions for the imposition of sanctions against companies that violate the Labor Side Agreement. See *id.*

269. See *NAFTA Labor Protections Put to Test as Mexican Workers Testify Before NAO*, 11 Int'l Trade Rep. (BNA) 36 (Sept. 14, 1994). At these hearings the officials from the companies did not testify, but issued prepared statements dismissing the allegations. See *id.* Mexican workers, however, did testify that "they and co-workers were harassed and eventually fired because of their union activity at so-called maquiladora plants . . ." *Id.*

270. Determination to Accept Submission 940002 for Review, *supra* note 268, at 18,833.

271. *NAO Closes Book on Union NAFTA Charges Against Honeywell and General Electric*, 11 Int'l Trade Rep. (BNA) 41 (Oct. 19, 1994). One Mexican worker testified that "she was fired after she refused to give company officials the names of other workers supporting the union-organizing drive. She also detailed how workers were not adequately protected against the toxic chemicals they used, and how some were forced to work faster and longer than they physically could." *NAFTA Labor Protections Put To Test As Mexican Workers Testify Before NAO*, *supra* note 269. The two companies maintained that they followed all applicable Mexican labor laws and their determination to terminate people were made solely on business conditions. See *id.*

272. See *NAO Closes Book On Union NAFTA Charges Against Honeywell and General Electric*, *supra* note 271.

determining whether the workers were fired properly or in a retaliatory manner.²⁷³ In light of the fact that the National Administrative Office could not determine whether Mexico had failed to enforce its labor laws, due to the preemption, it would not recommend that this matter proceed to the next stage of the resolution process.²⁷⁴

2. *Disputes Resolved Through Ministerial Consultations.*

The first dispute to take the resolution procedures to Ministerial Consultations involved Sony Corporation, the Mexican Government, and four human rights organizations.²⁷⁵ The human rights organizations alleged that Sony and the Mexican Government failed to follow Mexican labor laws in contravention of the Labor Side Agreement.²⁷⁶ The human rights organizations asserted that "union activists at [Sony's] operation in [Mexico] were fired and harassed. The groups faulted the Mexican Government for its persistent lax enforcement of applicable labor laws."²⁷⁷ The National Administrative Office's review concentrated on the enforcement by the Mexican Government of its labor laws and not Sony's conduct.²⁷⁸ After reviewing the matter, the "National Administrative Office . . . faulted Mexican authorities for thwarting the workers' efforts to get formal recognition of an independent union."²⁷⁹ Upon making this determination, the National Administrative Office recommended that the matter proceed to the next level of dispute resolution provided for under the Labor Side Agreement, ministerial consultations.²⁸⁰

273. See *id.* "The [National Administrative Office] acknowledged the unions' charge that the workers were coerced by the companies or compelled by personal economic hardships to accept the settlement payments." *Id.* The personal reasons for accepting the severance pay, however, did not effect the National Administrative Office's position that the acceptance of the severance pay preempted the Mexican authorities from establishing the cause of the termination. See *id.*

274. See *id.* Critics of the National Administrative Office's failure to advance this matter to ministerial consultation blasted the Labor Side Agreement as being ineffective. See *id.* The National Administrative Office responded to its critics asserting that the resolution steps employed in this matter were effective in achieving their goal to learn about Mexican labor law. See *id.*

275. See *Sony, Mexican Government Charged with NAFTA Law Violations*, 12 Int'l Trade Rep. (BNA) 34 (Aug. 24, 1994). The four human rights organizations were (1) the International Labor Rights Education and Research Fund, (2) the Asociacion Nacional de Abogados Democraticos, (3) the Coalition for Justice in the Maquiladoras, and (4) the American Friends Service Committee. See Notice of Determination Regarding Review of Submission #940003, 59 Fed. Reg. 52992 (Office of Sec., Dep't Labor 1994).

276. See *Sony, Mexican Government Charged with NAFTA Law Violations*, *supra* note 275.

277. *Id.* "Specifically, the complaint charges Sony attempted to destroy a democratic workers' movement by firing union activists, and demoted and harassed maquiladora workers who criticized the collaboration between Sony management and CTM leaders and tried to organize an independent union." *Id.* The organizations also sought review of allegations regarding working conditions in the Sony plant. See *id.* The National Administrative Office, however, declined to pursue this allegation. See Notice of Determination Regarding Review of Submission #940003, *supra* note 275.

278. See *Mexico Union Registration Process Faulted In U.S. NAO Report on Sony*, 12 Int'l Trade Rep. (BNA) 16 (April 19, 1995).

279. *Id.* The report stated that the employees were "probably" terminated due to their attempts to organize a union. See *id.* This type of termination is a violation of Mexican labor law. See *id.*

280. See *id.*

As required by the Labor Side Agreement, the Mexican Labor and Social Welfare Secretary and the U.S. Secretary of Labor conducted ministerial consultations.²⁸¹ The ministerial consultations resulted in an announcement from the Mexican Government that it would "evaluate Mexico's methods of registering independent labor unions."²⁸² One year later, the U.S. Secretary of Labor declined to reopen ministerial consultations with Mexico regarding this matter.²⁸³ At that time the U.S. Secretary of Labor noted that even though "Mexican workers have a 'very difficult' time registering an independent union . . . the efforts between Mexico and the United State [sic] fulfilled the objective, which was to conduct 'a full examination of the matter.'"²⁸⁴

The second dispute to rise to ministerial consultations was also the first dispute filed by a Mexican union against an American corporation.²⁸⁵ Proceedings were initiated against Sprint Corporation by the Telephone Workers Union of the Republic of Mexico for firing employees and closing a Mexican plant one week before a union representation election was to be held.²⁸⁶ The union asserted that Sprint's actions, and the U.S. inaction, were violative of the goals of the Labor Side Agreement.²⁸⁷ The union, therefore, sought review by the National Administrative Office.²⁸⁸ After reviewing the matter and determining U.S. labor laws were likely violated, the National Administrative Office requested ministerial consultations with the United States in an attempt to resolve this matter.²⁸⁹

281. See *Mexican DOL Expected To Announce Plan To Evaluate Independent Labor Unions*, 12 Int'l Trade Rep. (BNA) 26 (June 28, 1995).

282. *Id.*

283. See *Reich Orders Informal U.S. Monitoring of Mexican Union Registration Changes*, 13 Int'l Trade Rep. (BNA) 24 (June 12, 1996).

284. *Id.*

285. See *Telephone Workers Union of Mexico Files Charge Against Sprint Under NAFTA*, 12 Int'l Trade Rep. (BNA) 7 (Feb. 15, 1995). This dispute also represents the first of its kind filed with a National Administrative Office other than the American National Administrative Office. See *id.* If Mexico determined that the United States had failed to effectively enforce its own laws, then Mexico could request ministerial consultations with the United States. See *id.* This was significant due to the fact that, under the Labor Side Agreement, the decision regarding whether the United States had failed to enforce its own labor laws, for the first time ever, rested in the hands of Mexican Officials. See Labor Side Agreement, *supra* note 226, art. 23, 32 I.L.M. at 1508.

286. *Telephone Workers Union of Mexico Files Charge Against Sprint Under NAFTA*, *supra* note 285. The union "charged that the company adopted a 'vicious anti-union policy' that 'caused it to fire all its workers and close the facility alleging financial problems . . .'" *Id.*

287. See *id.*

288. See *id.* "The complaint asks that the [National Administrative Office] prohibit Sprint from establishing itself in Mexico . . . [and] seeks reinstatement of the La Conexion Familiar workers and a mandate that the company comply with U.S. labor law by respecting the rights of its workers 'to organize freely without interrogations, intimidations or firings.'" *Id.* The complaint further requested a public declaration from Sprint that it would acknowledge the rights of its workers and accept any "Mexican union that demonstrates the support of a majority of workers . . ." *Id.*

289. See *U.S. Reviews Mexican NAO Request To Discuss Sprint Labor Practices*, 12 Int'l Trade Rep. (BNA) 23 (June 7, 1995). Mexican officials stated that the request for ministerial consultations on this dispute were not in retaliation for the previous finding, in the Sony dispute, that Mexico had failed to effectively enforce its own labor laws. *Id.* "The Mexican union claimed that economic globalization—accelerated through the NAFTA—is threatening workers' rights by strengthening the power of multinationals and their anti-union strategies." *Id.*

After meeting and reviewing this dispute for several months, Mexico and the United States signed an accord in an attempt to resolve this dispute.²⁹⁰ The agreement required the United States to hold a public forum "to allow interested parties an opportunity to convey to the public their concerns on the effects of the sudden closing of a plant on the principle of freedom of association and the right of workers to organize."²⁹¹ After the public forum was conducted, it was determined that U.S. labor laws failed to protect Sprint Corporation workers fired one week before a unionization vote.²⁹² Even though it was determined that the U.S. laws failed, there was no redress under NAFTA for the ex-employees of Sprint Corporation.²⁹³

The next issue to rise to the level of ministerial consultations dealt with pregnancy-based sex discrimination in Mexico.²⁹⁴ The U.S. National Administrative Office accepted and investigated complaints that charged "the Mexican Government with allowing pregnancy-based sex discrimination to 'flourish unchecked' in the maquiladora industry."²⁹⁵ The Mexican Labor Secretary agreed to the U.S. requests for ministerial consultations after the U.S. National Administrative Office concluded that the alleged discrimination did occur and, further, that it violated Mexican law.²⁹⁶ At the time of publication, this matter remains in the ministerial consultation phase.

At present, it appears that the Labor Side Agreement effectively addresses most major objectives dealing with labor issues. Some critics, however, have stated that "what is missing [in the Labor Side Agreement] are effective remedies for violations of these objectives and prompt enforcement of these remedies."²⁹⁷ Implementation of these remedies may have offered the Sprint workers, discussed above, the redress they were seeking.

3. *Disputes Settled Prior to Ministerial Consultations.*

Since the inception of NAFTA and the Side Agreements, only one dispute has arisen under the Labor Side Agreement that was filed, reviewed, and then settled by agreement between the parties before ministerial consultations were held.²⁹⁸ This dispute began following the filing of a complaint by the Communications Workers of America against Maxi-Switch Inc. and the Mexican Government.²⁹⁹ Communications Workers of America

290. See U.S., *Mexico Accord On Sprint Calls for Study of Plant Closings*, 12 Int'l Trade Rep. (BNA) 50 (Dec. 20, 1995).

291. *Public Forum on the Effect of Sudden Plant Closings and the Impact on the Principle of Freedom of Association and the Right of Workers To Organize*, 61 Fed. Reg. 2,533 (Office of Sec., Dep't Labor 1996).

292. *NLRA Failed to Protect Sprint Workers, Union Tells NAFTA Trilateral Committee*, 13 Int'l Trade Rep. (BNA) 10 (March 6, 1996).

293. See *id.*

294. See U.S., *Mexican Labor Secretaries to Consult on Charges of Maquiladora Pregnancy Bias*, 15 Int'l Trade Rep. (BNA) 377 (Mar. 4, 1998).

295. *Id.*

296. See *id.*

297. *Id.*

298. See *NAFTA Complaint Spurred Recognition of Mexican Union, According to Experts*, 14 Int'l Trade Rep. (BNA) 775 (Apr. 30, 1997).

299. See *CWA Charges in NAFTA Complaint Mexico Failed to Protect Union Activists*, 13 Int'l Trade Rep. (BNA) 1584 (Oct. 16, 1996).

alleged that "the Mexican Government had colluded with the government-aligned Confederation of Mexican Workers to prevent workers from organizing an independent union at a Maxi-Switch plant."³⁰⁰ Communications Workers of America filed the complaint and sought review by the National Administrative Office for a determination regarding the workers' freedom of association and the right to organize.³⁰¹ Upon receiving the request, the National Administrative Office elected to review the matter in order "to better understand and publicly report on the Government of Mexico's compliance with the objectives set forth in Article 3 and 5 of the [Labor Side Agreement]."³⁰² In an attempt to determine all of the facts surrounding this dispute, the National Administrative Office announced plans to conduct a public hearing to allow members of the public to offer testimony regarding this matter.³⁰³ Two days before this public hearing, however, the Communications Workers of America withdrew its complaint.³⁰⁴ The withdrawal followed the recognition by the Mexican Government of an independent labor union.³⁰⁵ This recognition removed the need for the public hearing and further review by the National Administrative Office.³⁰⁶

4. *Disputes Currently Pending.*

One of the matters currently pending under the Labor Side Agreement involves Human Rights Watch/Americas, the International Labor Rights Fund, the Asociacion Nacional de Abogados Democraticos (National Association of Democratic Lawyers), and involves the representation of employees of the Ministry of the Environment, Natural Resources, and Fishing by the Single Trade Union of Workers of the Fishing Ministry."³⁰⁷

300. *NAFTA Complaint Spurred Recognition of Mexican Union, According to Experts*, *supra* note 298. This dispute began when a "union organizing drive . . . prompted plant managers to threaten to fire workers if they joined the union, . . . [following the threats, workers allege that the company] fired several union leaders, in addition to verbally abusing and physically punching at least one union leader . . ." See *CWA Charges in NAFTA Complaint Mexico Failed to Protect Union Activists*, *supra* note 299.

301. See Notice of Determination Regarding Review of Submission #9602, 61 Fed. Reg. 65,598 (Office of Sec., Dep't Labor 1996).

302. *Id.* The review, however, was limited to "the issues of freedom of association and the right to organize, including the failure to insure that labor tribunal proceedings are fair, equitable and transparent, and the failure to effectively enforce labor law." *Id.* The National Administrative Office declined to review matters regarding the "issue of minimum employment standards, including overtime pay." *Id.*

303. See Hearing on Submission #9602, 62 Fed. Reg. 11,924 (Office of Sec., Dep't Labor 1997).

304. See *NAFTA Complaint Spurred Recognition of Mexican Union, According To Experts*, *supra* note 298.

305. See *id.*

306. See *id.* The recognition of the independent labor union was largely the result of increased public attention focused on Mexican labor practices. See *id.* The dismissal of the matter, however, left several questions regarding the grievances of the workers unanswered. See *id.*

307. Notice of Determination Regarding Review of Submission #9601, 61 Fed. Reg. 40,453 (Office of Sec., Dep't Labor 1996). "The objective of the review of the submission will be to gather information to assist the [National Administrative Office] to better understand and publicly report on the Government of Mexico's compliance with the objectives set forth in Articles [Three] and [Five] of the [Labor Side Agreement]." *Id.*

The matter centers around "allegations concerning the right to organize and freedom of association for federal workers in Mexico."³⁰⁸ The three human rights groups asserted that "Mexico violated the [Labor Side Agreement] . . . when it 'arbitrarily' dissolved the government trade union of workers of the fishing ministry . . . and barred it from re-registering."³⁰⁹ The human rights groups further alleged that after dissolving the trade union, the Mexican Government "allowed a pro-government union to represent the federal workers."³¹⁰ The Mexican Government denied these allegations and urged the National Administrative Office to elect not to pursue this matter, asserting that there was no legal basis to review the dispute.³¹¹ Mexico cited Labor Side Agreement procedures that specify that the U.S. National Administrative Office may "deny a public submission for review if the matter is pending before an international organization. [Moreover, Mexico asserted that that was] precisely the situation in this particular complaint."³¹² The National Administrative Office, however, disregarded Mexico's request and elected to review the matter under the procedures delineated in the Labor Side Agreement.³¹³

The National Administrative Office, in an attempt to gather all the facts regarding this dispute, elected to hold a public hearing.³¹⁴ The public hearing was aimed at giving affected people an opportunity to express their views regarding this dispute and "to further investigate labor rights activists' charges that Mexico's freedom of association laws do not conform to international treaties."³¹⁵ Following the public hearing, the National Administrative Office will release a report regarding this matter.³¹⁶ This report will contain a recommendation as to "whether the NAFTA labor ministers should meet to examine the matter further . . . [with the use of ministerial consultations]."³¹⁷ At the present time, this report remains unreleased. This matter, therefore, is still unresolved and awaits a determination by the National Administrative Office regarding the next step to terminate the dispute.

The second pending matter under the Labor Side Agreement involves a manufacturing plant in Mexico that supplies chassis and trailer platforms to a subsidiary of Hyundai Corporation of Korea.³¹⁸ The dispute revolves around a complaint that sparked an investi-

308. *Id.*

309. *Mexico Asked U.S. to Reject Complaint on Union Rights, But U.S. to Examine It*, 13 Int'l Trade Rep. (BNA) 1350 (Aug. 21, 1996).

310. *U.S., Mexico to Hold Conference on Labor Concerns*, 14 Int'l Trade Rep. (BNA) 1574 (Sept. 17, 1997).

311. *See Mexico Asked U.S. to Reject Complaint on Union Rights, But U.S. to Examine It*, *supra* note 309.

312. *Id.*

313. *See id.*

314. *See Hearing on Submission #9601*, 61 Fed. Reg. 56,064 (Office of Sec., Dep't Labor 1996). The purpose of this hearing was to establish information regarding "Mexico's promotion of, compliance with, and effective enforcement of, its labor law through appropriate government action . . . and on the steps the government of Mexico has taken to ensure that its administrative, quasi-judicial and labor tribunal proceedings for the enforcement of its labor law are fair, equitable and transparent . . ." *Id.*

315. *U.S., Mexico to Hold Conference on Labor Concerns*, *supra* note 310.

316. *See U.S. NAO Sets NAFTA Hearing on Charge Concerning Mexican Government Workers*, 13 Int'l Trade Rep. (BNA) 1717 (Nov. 6, 1996).

317. *Id.*

318. *See Labor Department Seeks Top-Level Talks with Mexico About Organizing at Han Young*, 15 Int'l Trade Rep. (BNA) 793 (May 6, 1998).

gation that revealed that workers at Hyundai subsidiary "won union registration only after extensive litigation, intervention by top Mexican labor authorities, two elections, and international public and media attention."³¹⁹ The U.S. National Administrative Office's investigation revealed that "the local Mexican labor board interfered with the rights of workers trying to organize [at the plant]."³²⁰ In late April 1998, the U.S. Labor Secretary requested ministerial consultations with the Mexican Labor Secretary to discuss possible strategies to protect workers that try to form independent unions.³²¹ The request for ministerial consultations is still pending.³²²

The third matter currently pending under the Labor Side Agreement deals with a U.S. company's Mexican automobile parts plant.³²³ The "complaint . . . alleges fraud and threats of violence in a union organizing drive . . . [and] is the first filed with the [Canadian NAO] and will challenge the Canadian Government to meet its promise that the Side Agreement . . . [will] protect labor standards."³²⁴ According to the complaint, workers at the plant "were threatened with violence by armed guards hired by the company and the government-controlled Confederacion de Trabajadores Mexicanos."³²⁵ At the time of publication, this matter remains unresolved under the Labor Side Agreement.

The final pending matter under the Labor Side Agreement revolves around a complaint filed with the Mexican National Administrative Office concerning a U.S. egg farm.³²⁶ The Mexican National Administrative Office accepted a complaint that "U.S. labor law failed to protect migrant workers against abuses and substandard conditions at the Maine-based DeCoster Egg Farm."³²⁷ The complaint alleged that the U.S. law "failed to protect migrant workers, maintain minimum working conditions, eliminate discrimination in the workplace, prevent occupational injuries, and compensate injured workers."³²⁸ At the time of publication, this matter remains unresolved under the Labor Side Agreement.

V. Dispute Resolution Under the Environmental Side Agreement.

A. PROCEDURES FOR DISPUTE RESOLUTION.

Just as the members of NAFTA obligated themselves to each other regarding labor markets, they also obligated themselves regarding the environment of North America. This agreement was reached when the parties signed the North American Agreement on

319. *Id.*

320. *Id.*

321. *See id.*

322. *See U.S. to Seek Talks with Mexico on Safety Issues at Tijuana Auto Plant*, 15 Int'l Trade Rep. (BNA) 1432 (Aug. 19, 1998).

323. *See First Complaint Filed with Canadian NAO Against U.S. Company's Mexican Operation*, 15 Int'l Trade Rep. (BNA) 619 (Apr. 8, 1998).

324. *Id.*

325. *Id.*

326. *See Mexico Accepts NAFTA Labor Complaint by Migrant Workers Against U.S. Egg Farm*, 15 Int'l Trade Rep. (BNA) 1431 (Aug. 19, 1998).

327. *Id.*

328. *Id.*

Environmental Cooperation Between the government of The United States of America, the government of Canada, and the government of the United Mexican States.³²⁹ The purpose of this side agreement to NAFTA is to, among other things, protect and improve the environment, promote development, cooperation and supportive environmental and economic policies, and increase the cooperation among the parties in an attempt to protect the environment.³³⁰ The parties further pledged to each other, by signing this side agreement, to protect the environment while decreasing trade barriers. In doing so, they obligated themselves to do certain things regarding the environment, such as: (1) preparing and producing reports on the environment, (2) developing emergency preparedness measures for the environment, (3) fostering education in environmental areas, (4) encouraging scientific research of environmental matters, (5) determining environmental impacts, and (6) using economically viable means to promote environmental matters.³³¹

Though this side agreement to NAFTA implies a set of obligations upon the parties, it does not interfere with the parties' domestic environmental laws.³³² This side agreement, in essence, requires the parties to create and effectively enforce their own domestic environmental laws and for those laws to provide for "high levels of environmental protection."³³³ The agreement does not, however, remain silent on what some of the domestic laws should deal with.³³⁴ Article 5 of this side agreement holds that the parties are to enforce the environmental laws by the use of inspectors, monitoring compliance, seeking assurances of voluntary compliance, publishing instances of non-compliance, requiring records to be kept, and conducting hearings or meetings to impose sanctions on violating parties.³³⁵

The Environmental Side Agreement, like the Labor Side Agreement, but unlike Chapters 19 and 20, allows for a private cause of action.³³⁶ The other dispute resolution tools provided for under NAFTA offer no assurance that a private party will be capable of acquiring diplomatic standing in order to pursue remedies under NAFTA's dispute resolution tools.³³⁷ In contrast, the Environmental Side Agreement "ensure[s] that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with [the] law."³³⁸ The Environmental Side Agreement ensures that people

329. See North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex. U.S., 32 I.L.M. 1480 [hereinafter Environmental Side Agreement].

330. See *id.* art. 1(a)-(j), 32 I.L.M. at 1483. The agreement specifically lists the following as its objectives: (1) the protection and improvement of the environment; (2) promotion of supportive environmental and economic policies; (3) to increase the amount of support between the parties on efforts to conserve the environment; (4) to support the environmental objectives of NAFTA; (5) to avoid the creation of new trade barriers; (6) to improve the development of environmental laws; (7) to increase compliance with environmental laws; (8) to encourage public participation in the development of environmental laws; (9) to produce economically viable environmental agreements; and (10) to develop and implement anti-pollution measures. See *id.*

331. See *id.* art. 2(1)(a)-(f), 32 I.L.M. at 1483.

332. See *id.* art. 3, 32 I.L.M. at 1483.

333. *Id.*

334. See *id.* art. 5, 32 I.L.M. at 1483-84.

335. See *id.* art. 5(1)-(3), 32 I.L.M. at 1483-84.

336. See *id.* art. 6, 32 I.L.M. at 1484.

337. See Nafziger, *supra* note 6, at 825.

338. Environmental Side Agreement, *supra* note 329, art. 6(1), 32 I.L.M. at 1484.

"have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations."³³⁹ The private party's access provided for by the Environmental Side Agreement includes the right to sue under their own jurisdiction for damages, the right to seek sanctions, the right to request that appropriate action be taken by competent authorities to protect the environment, and the right to seek injunctions when appropriate.³⁴⁰ The Environmental Side Agreement also ensures procedural guarantees to protect a party's ability to seek relief and support.³⁴¹

In order to implement the objectives of the Environmental Side Agreement, the parties created the Commission for Environmental Cooperation.³⁴² The Commission for Environmental Cooperation comprises a council, a Secretariat, and a Joint Public Advisory Committee.³⁴³

The council includes "cabinet-level or equivalent representatives of the Parties, or their designees."³⁴⁴ The council is charged with the duty to establish rules and procedures, by consensus vote, and to meet at least once a year.³⁴⁵ Moreover, the function of this council is: (1) to be the governing body of the Commission for Environmental Cooperation; (2) to implement and develop recommendations to further the goals of the Environmental Side Agreement; (3) to look after the Secretariat; and (4) most important, to address conflicts that may arise between the parties over the interpretation or application of the agreement.³⁴⁶ As discussed earlier, the purpose of this side agreement is not to override domestic environmental laws, but rather to facilitate their effective enforcement and implementation. Therefore, the council is required to "encourage . . . effective enforcement by each Party of its environmental laws and regulations[,] compliance with those laws and regulations[,] and technical cooperation between the Parties."³⁴⁷

The Secretariat is headed by an executive director that is selected by the council for a three-year term.³⁴⁸ The executive director is authorized to appoint the staff of the Secretariat and to determine and control their powers.³⁴⁹ The Secretariat's overriding function is to provide "technical, administrative and operational support to the Council."³⁵⁰

"The Environmental Side Agreement contains dispute settlement processes that may be invoked to resolve two general types of controversies: 'non-enforcement matters' and

339. *Id.* art. 6(2), 32 I.L.M. at 1484.

340. *See id.* art. 6(3)(a)-(d), 32 I.L.M. at 1484.

341. *See id.* art. 7, 32 I.L.M. at 1484-85. The parties to the agreement must ensure that proceedings provided for under the agreement are freely open to all parties. *See id.* This provision is an attempt by the member parties to provide for adequate due process under this international treaty. *See id.*

342. *See id.* art. 8(1), 32 I.L.M. at 1485.

343. *See id.* art. 8(2), 32 I.L.M. at 1485.

344. *Id.* art. 9(1), 32 I.L.M. at 1485.

345. *See id.* art. 9(2)-(3), 32 I.L.M. at 1485.

346. *See id.* art. 10(1)(a)-(d), 32 I.L.M. at 1485. To examine other functions of the council delineated in the agreement *See id.* art. 10(1)(e), (f), 32 I.L.M. at 1485, which holds that the council is to "approve the annual program and budget of the Commission; and promote and facilitate cooperation between the Parties with respect to environmental matters." *Id.*

347. *Id.* art. 10(4)(a)-(c), 32 I.L.M. at 1486.

348. *See id.* art. 11(1), 32 I.L.M. at 1487.

349. *See id.* art. 11(2), 32 I.L.M. at 1487.

350. *Id.* art. 11(5), 32 I.L.M. at 1487.

enforcement matters.”³⁵¹ ‘Non-enforcement’ matters are disputes that do not deal with a government failing to enforce its environmental laws.³⁵² ‘Enforcement matters’ are disputes that center around a government’s failure to apply its domestic environmental laws.³⁵³

Article 13 of the Environmental Side Agreement deals with the “non-enforcement” matters.³⁵⁴ It permits the Secretariat to prepare a report, which may subsequently be released to the public, on matters “within the scope of the annual program.”³⁵⁵ Moreover, the Secretariat, subject to the discretion of the Council, has the ability to draft a report on other environmental matters that deal with NAFTA and the Environmental Side Agreement.³⁵⁶ These other environmental matters, however, “shall not include issues related to whether a Party has failed to enforce its environmental laws and regulations.”³⁵⁷ The Secretariat, therefore, may endeavor into controversies of non-enforcement issues and submit reports on such controversies, that may or may not be released to the public, but all of this is subject to the Council, which may completely block such an investigation.³⁵⁸ If the Council blocks such an investigation, then the matter, for the most part, goes unattended, because there are no other dispute resolution provisions regarding non-enforcement matters contained in the Environmental Side Agreement.³⁵⁹

The dispute resolution system deals with ‘enforcement matters’ primarily, in two ways.³⁶⁰ The first resolution system deals with members and non-recurring offenses. The second resolution system deals with members and recurring offenses.

Articles 14 and 15 deal with situations involving a government that has failed to enforce its own environmental laws.³⁶¹ If a non-governmental agent asserts that a member government has failed to enforce its environmental law, and the assertion is found to be properly submitted, then the Secretariat’s main objective is to determine if the matter warrants a formal response from the party complained against.³⁶² In order to determine if a formal response is required, the Secretariat considers if the harm being alleged is affecting the complaining party and, when available, private remedies have been pursued.³⁶³ If the

351. Lopez, *supra* note 2, at 185.

352. *Id.*

353. *Id.*

354. See Environmental Side Agreement, *supra* note 329, art. 13, 32 I.L.M. at 1487.

355. *Id.* The annual program is a report prepared by the Secretariat covering the activities and expenses during the past year, the budget for the upcoming year, the actions that the members of NAFTA have taken over the past year to fulfill their obligations and to enforce environmental laws. See *id.* art. 12(2)(a)-(c), 32 I.L.M. at 1487. Further, the report may address the state of the environment in the areas covered by NAFTA. See *id.* art. 12(3), 32 I.L.M. at 1487.

356. See *id.* art. 13(1), 32 I.L.M. at 1487-88. The Secretariat is required to submit notification to the Council that it is addressing a matter outside the scope of the annual report. See *id.* The Council is permitted to override the Secretariat’s request to address these matters if it obtains a two thirds vote within 30 days. See *id.*

357. *Id.* art. 13(1), 32 I.L.M. at 1488.

358. See Lopez, *supra* note 2, at 185.

359. See *id.*

360. See Environmental Side Agreement, *supra* note 329, arts. 14, 15, & 22-36, 32 I.L.M. at 1488-89, 90-94.

361. See *id.* arts. 14, 15, 32 I.L.M. at 1488-89.

362. See *id.* art. 14(2), 32 I.L.M. at 1488.

363. See *id.*

Secretariat requests a response, and upon receipt of such response, determines that a problem may in fact exist, they may be required to develop a factual record.³⁶⁴ The final record, and any comments from any NAFTA members concerning the lack of enforcement of the environmental laws of the offending party, may, by a two-thirds vote of the Council, be made publicly available.³⁶⁵ This is where the dispute settlement process ends in cases involving a country's mere failure to effectively enforce its own environmental laws.³⁶⁶

Articles 22 through 36 are a second way that the Environmental Side Agreement deals with "enforcement matters."³⁶⁷ These provisions are used when a member government has exhibited a "persistent pattern" of failure to enforce its environmental laws.³⁶⁸ When this situation presents itself, any other member country may formally request consultations with the offending party.³⁶⁹ At this point the consulting parties must attempt to resolve the matter by mutually satisfactory means.³⁷⁰

If the parties have not reached a mutually satisfactory resolution within sixty days of the beginning of the consultations, then any party may request a special meeting of the Council to resolve the dispute.³⁷¹ The Council must meet within twenty days, and then, have sixty days to attempt to resolve the dispute.³⁷² The Council may rely on experts, technical advisers, and others in formulating its recommendations.³⁷³

If the Council fails to resolve the matter within sixty days, and then receives a request to form an arbitral panel, and then approves the formation by a two-thirds vote, an arbitral panel shall convene.³⁷⁴ The panel is charged with the duty "[t]o examine, in light of the relevant provisions of the Agreement . . . whether there has been a persistent pattern of failure by the Party complained against to effectively enforce its environmental law, and to make findings, determinations and recommendations."³⁷⁵ After the last panelist is selected, the panel has 180 days to provide the disputing parties with an initial report.³⁷⁶ This report must contain findings of fact, the panel's determination as to whether a persistent pattern exists, or any other requested determination.³⁷⁷ The recommendations should be "a proposed [plan of action] that the offending party is to adopt and implement. The ini-

364. See *id.* art. 15(1), 32 I.L.M. at 1488. The Council must instruct the Secretariat, by a two thirds vote, to develop a factual record. See *id.* art. 15(2), 32 I.L.M. at 1488.

365. See *id.* art. 15(6),(7), 32 I.L.M. at 1489.

366. See Lopez, *supra* note 2, at 186.

367. See Environmental Side Agreement, *supra* note 329, arts. 22-36, 32 I.L.M. at 1490-94.

368. See *id.* art. 22(1), 32 I.L.M. at 1490. "Persistent pattern" is defined by the Environmental Side Agreement as "sustained or recurring course of action or inaction . . ." *Id.* art. 45(1)(b), 32 I.L.M. at 1495.

369. See *id.* art. 22(1), 32 I.L.M. at 1490.

370. See *id.* art. 22(4), 32 I.L.M. at 1490.

371. See *id.* art. 23(1)-(3), 32 I.L.M. at 1490.

372. See *id.* art. 23(1), (2), 32 I.L.M. at 1490.

373. See *id.* art. 23(4)(a)-(c), 32 I.L.M. at 1490.

374. See *id.* art. 24(1), 32 I.L.M. at 1490. The panelist shall be selected from a roster of 45 individuals with expertise in environmental law and dispute resolution. See *id.* art. 25(1), (2), 32 I.L.M. at 1491. The panel is to consist of five members, one mutually selected chair and two panelists chosen by each disputing party. See *id.* art. 27(1)(b), (c), 32 I.L.M. at 1491.

375. *Id.* art. 28(3), 32 I.L.M. at 1492.

376. See *id.* art. 31(2), 32 I.L.M. at 1492.

377. See *id.* art. 31(2)(a)-(c), 32 I.L.M. at 1492.

tial report is to be followed by written comments from the disputants . . . and a final report by the panel.”³⁷⁸ The implementation of the final report is the last role of the formal dispute resolution process under this side agreement.³⁷⁹

B. TRACK RECORD OF ENVIRONMENTAL SIDE AGREEMENT DISPUTES.

As with other disputes arising under provisions of NAFTA, environmental disputes submitted for formal resolution procedures can be tracked because of the requirement that the parties submit notice when invoking these provisions.³⁸⁰ The Secretariat has been required to deal with only one matter under Article 13 and six matters under Articles 14 and 15.³⁸¹ Moreover, there have been no matters submitted for consideration dealing with a member country “engaged in a persistent pattern of failure to effectively enforce its environmental laws.”³⁸²

VI. Conclusion.

NAFTA is a relatively young treaty that, for the most part, remains untested. The limited number of disputes analyzed in this comment can hardly be seen as dispositive proof of whether the mechanisms allowed for under NAFTA are effective. In order to gain a full understanding of the potential usefulness and adequacy of Chapters 19 and 20 and the Environmental and Labor Side Agreements, the members of NAFTA will have to wait and allow the mechanisms to work. As the years progress, problems will undoubtedly arise regarding dispute resolution tactics adopted under this treaty. It appears, however, that the creators of NAFTA and its side agreements placed numerous correction procedures within the agreements that allow adaptation when necessary. This adaptability will allow the goals of the treaty to be more effectively achieved in an ever-changing world.

378. Lopez, *supra* note 2, at 186. See also Environmental Side Agreement, *supra* note 329, art. 31(1), (2)(c), (4), 32 I.L.M. at 1492.

379. See Lopez, *supra* note 2, at 186.

380. See *id.* at 188.

381. See *id.* The six matters submitted under the non-enforcement provisions were resolved with the use of a range of mechanisms, including publishing a factual report. See *id.* at 189-92.

382. *Id.* at 188.

The New Transatlantic Agenda and the Future of EU-U.S. Relations

edited by Jörg Monar, *University of Leicester, Centre for Federal Studies, Dept. of Politics, UK*

This book presents the results of an international conference on the 'New Transatlantic Agenda' organized in Brussels in July 1996 by the Centre for European Politics and Institutions (CEPI) of the University of Leicester, in cooperation with the Directorate-General I of the European Commission and Kluwer Law International. While most of its chapters are revised versions of papers presented at the conference, some were commissioned afterwards in order to address several relevant issues which could not be covered adequately within the time-limited framework of the conference. The book provides an analysis both of the innovative elements of the 'New Transatlantic Agenda' and of the main challenges that EU-US relations will have to face at the turn of this century. While the main focus is on whether the 'New Transatlantic Agenda' constitutes an adequate response to these challenges, this volume also explores the necessary conditions for a successful long-term implementation of the 'Agenda' and asks what lessons can be drawn in this respect from previous experiences in transatlantic cooperation. Emphasis has been given to the consideration of justice and home affairs as matters of EU-US cooperation, not only because this is undoubtedly one of the most innovative areas of the 'New Transatlantic Agenda', but also because it is an area in which both are confronted with rapidly increasing challenges.

This volume aims to make a significant contribution to the discussion of the future of the transatlantic relationship, whose quality is likely to depend on the capability of both sides to respond with new approaches - such as those laid out in the 'New Transatlantic Agenda' - to inevitable changes in both the bilateral and global contexts.

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Basic Documents on International Trade Law Third Revised Edition

edited by Chia-Jui Cheng, *Dean, Graduate School of Law, Soochow University, Taipei, Taiwan*

Anyone involved in the study or practice of trade law knows the difficult and time-consuming nature of obtaining primary source material and consulting each of the main trade law instruments when examining the applicable treatment of a particular point. Now in its third edition, *Basic Documents on International Trade Law* solves this problem of inconvenience by assembling, in a single, easy-to-use resource, a very comprehensive collection of the most important and frequently used documents on the law of international trade.

Professor Cheng's document selection is guided by his balance of experience in both academia and professional practice. In addition to its obvious practical value, this work also reveals much about the process of harmonisation in international trade law, the operation of the key international bodies, and the growth of the Law Merchant. *Basic Documents on International Trade Law* provides both an examination of key aspects of international trade law and a suggestion as to its future as well as a helpful source of reference for students, academics, international business lawyers, legislators, and government officials in the field.

This latest edition contains a wealth of new material, reflecting the appearance of new conventions and model laws in international trade since the publication of the earlier versions. Certain parts have been substantially revised and re-arranged and several new instruments are included.

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The law and regulation pertaining to the birth, life, affairs and death of corporate enterprises, is one of the most dynamic and important areas in any legal system. Corporate enterprises, in their various forms, constitute the engines of economic and financial development and therefore the rules relating to their establishment, governance, operation and cessation are of vital importance to all those who deal directly or indirectly with business and the financial world, or who advise those who do. With the creation of new market based economies around the world, the ever increasing tendency to internationalisation of trade, the creation of a global and highly interrelated world economy and profound developments, due to technology and other factors, on the way in which business is done, it is hardly surprising that there is a constant stream of new law and regulatory obligations. This law impacts directly upon all those who are engaged, directly or indirectly in commerce and finance.

Knowledge and understanding of these developments is not only necessary for efficiency, but is a prerequisite for those who wish to properly and professionally advise their commercial and financial clients. Furthermore, there is a tendency for such new laws and regulations to piece legal obligations of due diligence and probably directly on those who facilitate and advise upon other peoples' business. Given the significance of this ever changing body of law, a world wide network of specialists in various areas of corporate law and practice have been brought together by the Centre for Corporate Law and Practice of the Institute of Advanced Legal Studies, in London, to provide a unique service, through the *International Corporate Law Bulletin*, published by Kluwer Law International. The *ICLB* carries authoritative information on developments in substantive corporate law and practice, together with other areas of the law, related to the creation, operation and death of corporate enterprises. Therefore, topical information on related areas of financial services regulation, banking, insolvency, employment and public law will be available alongside detailed comment on corporate law.

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Established in 1952, the Law Institute of the Americas at Southern Methodist University School of Law was originally designed to promote good will and to improve relations among the peoples of the Americas through the study of comparative laws, institutions and governments respecting the American Republics and to train lawyers in handling legal matters pertaining to the nations of the Western Hemisphere. Today, in reviving this institution, the Law Institute of the Americas comprises meaningful academic research, teaching and programs pertaining to the "NAFTA Process" and Western Hemispheric integration efforts; to Latin and Central American law and judicial reform, particularly focusing on Argentina, Brazil, Chile, Guatemala, Mexico, Peru and Venezuela; and, to a more limited extent, to Canadian legal issues, particularly as they interrelate to the NAFTA. The Law Institute of the Americas also is concerned with increasing (regional and hemispheric) legal and economic interconnections between the "NAFTA Process" and European and Asia-Pacific integration activities.

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As the Institute focuses on issues pertaining to the North American Free Trade Agreement and the broader economic, political, legal and social integration process underway in the Western Hemisphere, the *NAFTA: Law and Business Review of the Americas* is one of its publications, and is produced jointly by the Law Institute of the Americas and the International Law Review Association of SMU. Other parties involved in the production of the journal are the SMU School of Business, the SMU Departments of Economics and Political Science, the University of London, Centre for Commercial Law Studies, the American Bar Association Section of International Law and Practice and Kluwer Law International.

* From 1952 through the early 1970s, the name was the Law Institute of the Americas; in 1993, it was reactivated as the Centre for NAFTA and Latin American Legal Studies; and in 1998, it returned to its original name. For further detailed information on the Law Institute of the Americas, please refer to the Winter 1998 issue of the *NAFTA Review*, pages 5 through 36; this information is substantially current except for the new name change referred to above.