DISPUTE SETTLEMENT IN THE RCEP

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A preliminary analytical perspective

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A PRELIMINARY ANALYTICAL PERSPECTIVE

INTRODUCTION

On 15 November 2020, ministers from 15 countries[1] signed the Regional Comprehensive Economic Partnership Agreement (RCEP). This capped two decades of increasingly ambitious regional trade agreements (RTAs) both within the region and between member economies and other trading partners.[2] Despite these developments, the exchange of information and experience on *dispute resolution* within the region does not yet reflect the rich experience of Asian countries with RTAs. There are, I think, three reasons for this:

1. Most trade disputes between Asian countries over the past two decades engage disciplines that are *exclusive* to the WTO, such as those governing trade remedies.
2. Until recently, the WTO could boast that it housed one of the most sophisticated inter-state dispute resolution mechanisms in the world. Its complexity did raise concern about time and expense of litigation, but it also gave comfort to economies whose measures are challenged that their concerns would be treated seriously.
3. Comprehensive RTAs were still something of a rarity in the Asia-Pacific region.

The entry into force of the Comprehensive and Progressive Agreement for Transpacific Partnership (CPTPP) followed by the signature of the RCEP Agreement two years later are momentous enough, on their own, to deserve serious study, both substantively and institutionally. And although it remains the case that most trade disputes are within the legal framework of the WTO Agreement,[3] the dispute resolution mechanism of the WTO

[1] RCEP negotiations were launched in November 2012 between the Association of Southeast Asian Nations (ASEAN includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam) and ASEAN's free trade agreement partners (Australia, China, India, Japan, New Zealand and Republic of Korea). India indicated, however, that it was not yet ready to accede to the agreement; RCEP remains open for India. https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep/news/ministers-declaration-indias-participation-regional-comprehensive-economic-partnership-rcep

[2] http://mddb.apec.org/Documents/2017/CTI/CTI2/17_cti2_045.pdf; http://mddb.apec.org/Documents/2017/CTI/CTI2/17_cti2_010.pdf.

[3] The non-NAFTA FTA section of www.worldtradelaw.net lists only four panel reports.

is no longer *fully* functional – and it is not clear when, if ever, it will go back to functioning as it did.

It is no surprise, then, that there is intensified interest in RTA *dispute resolution*, especially in the Asia-Pacific region. Hence our brief discussion today.

I propose to structure my talk in three parts:

1. a very brief exposition of the legal and institutional *multilateral* framework within which, or as against which, RTA dispute resolution functions;
2. the dispute resolution mechanism of the RCEP – its structures and scope; and
3. how we can expect the RCEP DRM to work in practice based on experience with other RTA DRMs.

I will conclude by suggesting that we need even more innovative and creative ways of addressing trade disputes than the formal mechanisms on offer.

I should add that my talk today is, of necessity, no more than a sketch; the issues I touch upon do require considerably more in-depth research and analysis.

THE MULTILATERAL FRAMEWORK

Let me first turn to the relationship of an RTA, and its dispute resolution mechanism, with the WTO Agreement. This relationship is invariably deep and complex, and of necessity shapes dispute resolution within the RTA.

To begin with, RTAs are substantively *dependent* on the WTO Agreement, in at least four ways:

1. At the most basic level, an RTA must be consistent with the requirements of Article XXIV:5 of the General Agreement on Tariffs and Trade (GATT).[4] The reason is

[4] Article XXIV:5 provides:

> 5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free trade area; Provided that:
>
> > (a) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the

simple: if it is not, then any concession given under the RTA must be extended immediately and unconditionally to all non-RTA Members of the WTO. I think this point is elementary and does not need further elaboration.

2. No treaty, and certainly no trade agreement, is negotiated in a vacuum. RTAs of necessity rely on terminology and concepts negotiated and – crucially – *developed* in the WTO (and the GATT before it). This means that when an RTAs uses terms such as "like products" or "treatment less favourable", it is incorporating in the RTA the corpus of WTO case law and practice related to those terms *at least* up to the signing of the RTA.
3. RTAs build on the WTO in another way: through direct[5] or implied[6] incorporation of specific obligations. The experience of Canada-US FTA and the NAFTA demonstrates that such an approach can result in interesting choice of forum *and* legal issues.
4. Finally, RTAs are WTO-plus agreements. They build on and add to the WTO. There are good reasons for this, but it also means that invariably, key disciplines – such as trade remedies – are "left" in the WTO.

Institutionally, until recently – we can discuss whether the inflection point was in 2016, 2018, or 2019 – there was only one game in town.

> constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
> (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each if the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and
> (c) any interim agreement referred to in sub-paragraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

[5] Article 301.1 of the NAFTA provides:

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

[6] In the *Supply Management* case under the NAFTA, the panel found that certain *rights* and obligations contained in Article 4.2 of the WTO *Agreement on Agriculture* were also part and parcel of the NAFTA legal regime governing certain agricultural goods.

The WTO had – and I think I can say this with considerable confidence and without any risk of exaggeration – the most sophisticated inter-state system of dispute settlement in the world:

1. mandatory and binding jurisdiction;
2. an expert secretariat providing legal, economic, and policy support – and, significantly, continuity – to quasi-judicial decision-making;
3. a two-step dispute resolution framework that included a semi-permanent appellate organ, *itself* supported by a legal secretariat;
4. overtime, credible and wide-ranging jurisprudence anchored in public international law; and
5. all of that overseen by a mostly sober and expert political instance, the Dispute Settlement Body.

Anyone with experience in dispute resolution under an RTA[7] could recite in chapter and verse the particular attractions of the WTO system, and we did; Mexico did so *before the WTO itself*.[8] As we will see and as I have argued elsewhere,[9] the relationship between WTO and RTA dispute resolution is neither direct nor linear. There is, however, a correlation between the effectiveness of one and interest in the other.

TRADE DISPUTE RESOLUTION IN RCEP

A free trade agreement is, in its essence, an economic arrangement. To be sure, it could – and often does – incorporate other objectives, but economies enter into FTAs or RTAs primarily to enhance economic performance or development. For this reason, I will approach trade dispute resolution in the RCEP in three analytical steps:

1. I start with a brief discussion of the economic context of the RCEP.
2. Because the economic value of an FTA is determined by a combination of disciplines and scope of coverage, this is the second topic I will touch upon briefly today.

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[7] See Annex I for an analysis of the *Supply Management* case under Chapter 20 of the NAFTA, and Annex II for an analysis of dispute resolution under Chapters 11 and 20 of the NAFTA.

[8] *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WT/DS308. https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds308_e.htm

[9] Rambod Behboodi, "RTA-WTO jurisprudential interface: conflict or convergence?" https://www.biicl.org/files/2835_biicl_wto_2007_behboodi.pdf

3. Finally, the disciplines of an RTA – the economic concessions of one party to the other parties – have an economic impact if they are actually implemented as expected; the scope of obligations and failure to implement is generally linked to a functioning dispute resolution mechanism. Now, the relationship between dispute settlement and implementation is fraught, both empirically and theoretically, but here again, as we will see, there is considerable correlation between the two and this is the background as against which an analysis of dispute resolution is integral to an assessment of the economic and developmental benefits of an FTA or an RTA.

RCEP in context

Let's start, then, with the economic framework.

The numbers are impressive.

1. 15 countries, among them two economic superpowers and many major trading economies, many of these frequent and, indeed, *early* users of dispute settlement under the WTO.
2. The RTA covers 30% of the world population and GDP.
3. The economic gains of the agreement are estimated to be $186 billion by 2030.[10]

Significantly, given the profile of many of the economies as *manufacturing* hubs,[11] as an ADB paper observed:

> RCEP could further promote trade in the region by strengthening regional production networks through greater harmonization of regulations and policies across members.[12]

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[10] Jong Woo Kang, "RCEP is a gargantuan trade deal but will economies be able to make the most of it?" RCEP is a gargantuan trade deal but will economies be able to make the most of it? (adb.org)

[11] Of note:

> The overall regional value chain participation rate among RCEP economies was 46.8% and their complex regional value chain participation rate was 15.8% in 2018, lower than the regional average of 48.9% and 26.2%, respectively. This means that 46.8% of trade among RCEP signatories entails production stages in at least 2 member economies, and 15.8% of their trade involves intermediate goods crossing borders at least twice before final goods are exported.

Yasuyuki Sawada, "RCEP: What's in it for Asia and the Pacific?" RCEP: What's in it for Asia and the Pacific? - Yasuyuki Sawada | Asian Development Bank (adb.org)

[12] Sawada, *ibid*.

This is the first time that Japan enters into a free trade agreement with China and the Republic of Korea.[13] Not surprisingly, therefore, once it enters into force, it will be the largest free trade area in the world.[14]

Substantive coverage

In linking Japan, Korea, and China, and in bringing together ASEAN and its trading partners under one umbrella, RCEP is not only broad but also ambitious in its coverage.

It has been argued that RCEP's scope of *substantive* coverage and its tariff concessions are more modest than those in CPTPP – some have used the term "shallow". I'm not entirely sure that comparisons between agreements with different parties, geopolitical realities, and economic profiles are analytically useful. To illustrate my point, let me refer to three items in one comparative "issue coverage" chart:

Trade Remedies	●	●	●
Sanitary and Phytosanitary Measures	●	●	●
Technical Barriers to Trade	●	●	●

In the area of trade remedies, for example, there are substantive provisions dealing with RCEP safeguards measures; on dumping, subsidies, and countervailing matters, the *principal* obligation is a reference to the WTO Agreement:

> The Parties retain their rights and obligations under Article VI of GATT 1994, the AD Agreement, and the SCM Agreement. This Section affirms and builds on those rights and obligations.[15]

The key substantive provision that "builds on" those rights appears to be a legislated prohibition of zeroing.[16] In this sense, the RCEP appears somewhat stricter than the CPTPP, but not *substantively* so.[17] In respect of SPS measures, the RCEP directly

[13] https://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal/
[14] https://www.dfat.gov.au/trade/agreements/not-yet-in-force/rcep
[15] Article 7.11. https://rcepsec.org/wp-content/uploads/2020/11/Chapter-7.pdf
[16] Article 7.13. https://rcepsec.org/wp-content/uploads/2020/11/Chapter-7.pdf
[17] Article 6.8 of the TPP. 6-trade-remedies.pdf (dfat.gov.au)

incorporates WTO definitions[18] and disciplines.[19] Similarly with the TBT provisions.[20] The TBT provisions of the CPTPP are more detailed;[21] the same with the SPS provisions of the CPTPP.[22]

As a former government trade official, I look at the *totality* of an agreement and try to assess its *overall* contribution to trade liberalization. In this respect, and without going into too much detail into the substance of the agreement, let me make three observations.

1. In at least one respect I have, I think, already given away my own biases: any free trade agreement that includes China, Japan, and Korea is a bonus in my book – and I don't appear to be the only one: as Sawada observes, "RCEP has made possible an agreement among the three economies, of which the progress has been stalling for quite some time."[23]
2. The RCEP "potentially replaces 28 existing bilateral/plurilateral FTAs among its members".[24] This could have two significant *dynamic* outcomes:
    a. In a former life, as head of the market access unit of the Trade Law Bureau of Canada's trade ministry, I was responsible for advising all Canadian government departments on Canada's trade law obligations. This meant, of course, looking at every trade agreement and every nuance of every different provisions. In this sense alone, streamlining is a net benefit to good policy.
    b. It's also good for business, as it reduces – especially in complex value chain operations – transaction costs.
3. Until you see a free trade agreement in action, it is difficult to make a definitive assessment of its depth relative to other agreements. Whether, for example, the differences between the CPTPP and the RCEP will translate to "deeper" disciplines in one relative to the other depends on how the parties to each RTA implement and seek to enforce those obligations through dispute resolution. This, incidentally, is

[18] Article 5.1(a): "the definitions provided in Annex A of the SPS Agreement shall apply". https://rcepsec.org/wp-content/uploads/2020/11/Chapter-5.pdf
[19] Article 5.7: "The Parties shall strengthen their cooperation on risk analysis in accordance with the SPS Agreement …". https://rcepsec.org/wp-content/uploads/2020/11/Chapter-5.pdf
[20] Article 6.1. https://rcepsec.org/wp-content/uploads/2020/11/Chapter-6.pdf
[21] TTP TBT Chapter Text - Jan 2015 (dfat.gov.au)
[22] 7-sanitary-and-phytosanitary-measures.pdf (dfat.gov.au)
[23] Sawada, *supra*.
[24] Patrick Ziltener, "The RCEP: What does it mean for Swiss Companies?", p. 4. https://www.s-ge.com/en/publication/case-study/20204-c4-ziltener-rcep

true not just in respect of enumerated disciplines, but also those that appear to be missing (sustainable development and labour).

Dispute resolution

And so, at long last, we arrive at the dispute resolution mechanism of the RCEP. This is set out in Chapter 19.[25]

Function, objectives, and effects

Earlier I linked the scope of obligations and failure to implement to a functioning dispute resolution mechanism. There are entire PhD theses in this observation but let me briefly address each point before turning to the structure of dispute settlement under the RCEP.

I start from the following two premises.

First, deeply inconsistent interpretation and implement of disciplines within an RTA brings its efficacy into question. Where there are new disciplines, therefore, an RTA needs to have a way of fixing the *scope* of those disciplines. This can be done, generally, in at least one of three ways:

1. general agreement among the parties to the treaty;
2. state practice over time; or
3. "clarification" through dispute settlement.

Second, rampant failure to implement clear disciplines brings the RTA into disrepute. Peer pressure and dispute settlement are different means of persuading trade partners to pay heed to agreed disciplines.

In this sense, a sound and functioning dispute resolution is essential for a sound and functioning RTA.

Structure

As a general observation: this is a conventional RTA dispute settlement chapter. I don't mean that as a judgement, positive or negative, but rather as a statement of fact:

1. Formal dispute resolution starts with Consultations.[26]

[25] Annex III.
[26] Article 19.6.

2. There is what might well be considered an obligatory though perfunctory nod to good offices, conciliation, or mediation.[27] I will have more to say about this in the concluding section.
3. There is a Choice of Forum provision.[28]
4. There are provisions on multiple complainants[29] – as we will see, this could be particularly important in an RTA – and third parties.[30]
5. Article 19.11 sets out panel establishment provisions that rely on the office of the Director General of the WTO to resolve any impasse in respect of panel composition. This is another point I will come back to in the next section.
6. The "reasonable period of implementation" is to be decided, under Article 19.5(4) by the Chair of the
7. Article 19.16 provides for "reconvening" a panel to review compliance – this is similar to Article 21.5 of the WTO process.
8. Article 19.17(9) provides for "reconvening" a panel to determine the level of suspension.
9. Article 19.17(13) addresses a *post-retaliation* scenario – incidentally, I had to deal with this in the context of the *Hormones Retaliation* case and the in the DSU reform negotiations.
10. Article 19.18 deals with developing and least developed countries.
11. Article 19.19 governs expenses.

Relative to the WTO, two points stand out:

a. There is, of course, no instance of appeal.
b. Disputing parties are responsible for the costs of the panel process itself.
c. The panel is never functus and is always "reconvened" to address specific steps of the process.

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[27] Article 19.7. In the absence of the office of the Director General, as is the case in the WTO, "good offices" has a different hue.

[28] Article 19.5(1):

> Where a dispute concerns **substantially equivalent rights and obligations** under this Agreement and another international trade or investment agreement to which the Parties to the dispute are party, the Complaining Party may select the forum in which to settle the dispute and that forum shall be used to the exclusion of other fora. [**bold** added]

[29] Article 19.9.

[30] Article 19.10.

Relative to other RTAs, the panel establishment/composition provisions are highly streamlined.

Finally, the dispute resolution mechanism of the RCEP does not have complete coverage. I mention in particular Section B of Chapter 7,[31] regarding Antidumping and Countervailing Duties, because in that Chapter, as we have seen, there are substantive disciplines *specific* to the RCEP. There are also exclusions set out in Chapter 12, on e-commerce;[32] Chapter 17 in respect of measures against corruption;[33] Chapter 6 in respect of incorporated WTO provisions;[34] Chapter 8 on aspects of the services commitment;[35] and Chapter 13 in respect of Competition.[36]

RTA DISPUTE RESOLUTION IN PRACTICE – AND WHAT WE CAN EXPECT FROM RCEP

One observer commented:

> The bureaucratically thinner, more ad hoc, and less institutionalized dispute settlement mechanisms in RCEP Chapter 19 presage a different degree of economic partnership cooperation and dispute settlement than current existing paradigms.[37]

This is not correct, in my view, for two reasons.

1. As I observed in an earlier presentation,[38] it's difficult to predict the relative success of a dispute resolution mechanism in an RTA in abstract and before it becomes fully operational. This is because developments in trade, law, and politics are dynamic, and they react in unpredictable ways with institutional design. For example, the Canada-US FTA dispute resolution mechanism was used regularly, and used quite effectively, in its short life; the parties proceeded to establish the NAFTA – a

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[31] Article 7.16:

> Non-Application of Dispute Settlement No Party shall have recourse to dispute settlement under Chapter 19 (Dispute Settlement) for any matter arising under this Section or Annex 7A (Practices Relating to Anti-Dumping and Countervailing Duty 7-13 Proceedings).

[32] Article 12.17(3).

[33] Article 17.9.

[34] Article 6.4(3).

[35] Articles 8.10(5) and 8.22.

[36] Article 13.9.

[37] Diane Desierto, "The Regional Comprehensive Economic Partnership (RCEP)'s Chapter 19 Dispute Settlement Procedures." https://www.ejiltalk.org/the-regional-comprehensive-economic-partnership-rceps-chapter-19-dispute-settlement/

[38] See Annex II.

framework that combined an essentially non-functioning inter-state dispute resolution mechanism with a high degree of cooperation and economic integration.

2. It's an analytical error to draw any conclusions about the success of an RTA by comparing its dispute resolution framework to that of the WTO, at least when it was functioning.

In the light of all that we have discussed in the foregoing, what preliminary – *predictive* – judgements can we make about the dispute settlement mechanism of the RCEP? I make four observations for discussion purposes, two substantive, and two institutional.

Substantively, we can make a distinction between matters exclusive to an RTA and disciplines of broadly shared jurisdiction. The experience of the Canada-US FTA is instructive. There were five cases under the FTA.

One was a rules of origin case – clearly exclusive to the FTA. And this is my **first** observation. Here is an interesting research project for economists: the likelihood of dispute resolution under an FTA is directly proportionate to the combined effect of three interrelated factors: the depth of tariff concessions in a sector, the complexity of the applicable rules of origin, and the sector's economic sensitivity. And of course should any disputes arise in these areas, economists and accountants will be in particular demand. (I will come back to this in my institutional observations.)

The other FTA disputes were GATT obligations incorporated into the FTA. Here is my **second** observation: where multilateral dispute settlement is dysfunctional, RTA mechanisms become more attractive. But note: this is only a necessary and not a sufficient condition. Under the FTA, the US and Canada made a conscious effort to make the FTA *work*. In this sense, if WTO dispute settlement remains in its current limbo for long, we can theoretically expect parties to an RTA to turn to its mechanisms, but for this to actually happen, you need politicians and trade policy officials and diplomats and lawyers to come together.

I close my presentation by making two **institutional** comments.

My **third** observation flows directly from the last one. Using an untested dispute resolution mechanism carries political risk; this risk is increased when there is a tested, if imperfect, alternative. Here, institutional design will, I think, be determinative: the WTO, even limping on only the panel process, has an expert Secretariat that includes lawyers, policy officials, economists, and accountants; the jurisprudence, for all its imperfections,

is ample; the processes is tested and tried; and even the support framework – for example, the ACWL – is into its twentieth year of operation. Against this background, RCEP government lawyers and trade policy officials could reasonably arrive at the recommendation to test a whole new procedure (in areas of joint jurisdiction) where:

1. WTO dispute settlement becomes essentially non-functioning, because of routine appeals into the void;
2. they can ensure that RCEP panelists will have adequate economist, policy, and research support; and
3. there is adequate *legal* support, at least for the complainant.

Finally, the RCEP appears to have addressed at least some of the problems observed in other RTAs; it will have challenges of its own, and here I can envisage at least two:

1. The absence of an agreed roster means that there will be a great deal of temptation, in the selection of a panelist, to appoint an advocate rather than a judge. This is as much a political as a legal consideration and so if I have any advice to future disputing parties it would be this: for at least the first five cases, select panelists jointly from among the most eminent trade law and policy specialists around the globe.
2. The panel is expected to be "on call" for the life of a dispute. This is an important consideration to avoid discontinuity – especially given that there is no secretariat – but where you rely on part-time *ad hoc* panelists, this could end up being overly burdensome.

RTA DISPUTE RESOLUTION IS AN ANSWER, BUT WHAT IS THE QUESTION?

It's important, in my view, for RCEP parties to have a full understanding of both the potentials and the possible challenges of formal dispute settlement under the RCEP. And, I hope, I have shown that this is an important element in the functioning and ultimate success of the RCEP.

In closing, let me turn to a parallel but no less important matter – the subject of another project, but one that is inseparable from this one.

I've spent two thirds of my professional life as a trade lawyer, about half of that as a litigator; I've devoted most of my *academic* life writing and teaching about international trade litigation, and training advocates. I can attest to the fact that the time and expense of trade litigation, or the expertise of the litigators, is not always reflected in a satisfactory

outcome. That time and expense, and lack of expertise, themselves constitute a deterrent against bringing cases.

And so disputes that go through the process sometimes fester; and those that don't always do.

For smaller economies, for least developed countries, for trade disputes that are important enough to be irritants but not so as to require the time and expense of dispute settlement, for issues that do not consume politicians – there is a vast number of trade disputes that formal mechanisms are not designed to address and, in fact, structurally do not.

As with all other trade agreements, the RCEP provides for informal mechanisms without further developing them. It's time, in my view, to start thinking about developing appropriate mediation and conciliation facilities to address these forgotten disputes.

Annex I

THE NAFTA *SUPPLY MANAGEMENT* CASE

INTRODUCTION

This note begins with an overview of the various dispute resolution mechanisms of the NAFTA for context. It then discusses the only Chapter 20 dispute between Canada and the United States, *In the matter of Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products*[39] in three parts: structure, substance, and outcome. In the assessment section, I set out my views on the potential path ahead.

DISPUTE SETTLEMENT UNDER THE NAFTA

Background

The dispute settlement mechanisms of the NAFTA reflect three framework considerations:

1. The two dispute settlement mechanisms of the Canada-US Free Trade Agreement ("CUSFTA")[40] (state-to-state dispute resolution under Chapter 18,[41] and the special trade remedy binational panel process under Chapter 19[42]) had proven relatively successful.
2. The NAFTA was the first free trade agreement between develop countries and a developing country. All parties – and in particular Mexico itself – had an interest in solidifying the liberalizing gains that Mexico experienced since it joined the GATT in 1986.[43]
3. Additional substantive and institutional provisions were necessary to address the concerns of the incoming Clinton Administration.

In the NAFTA, the parties kept the CUSFTA's Chapter 19 process, made changes to the panel selection process of the state-to-state dispute resolution mechanism of CUSFTA's

[39] "*Supply management* decision", CDA-95-2008-01.
[40] https://www.international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusfta-e.pdf.
[41] There were five cases between the two countries between 1989 and 1993: https://can-mex-usa-sec.org/secretariat/report-rapport-reporte.aspx?lang=eng.
[42] There were 52 cases filed under the Chapter 19 process; 29 led to a panel decision.
[43] https://www.kslaw.com/news-and-insights/the-dog-that-did-not-bark.

Chapter 18 (now incorporated into Chapter 20 of the NAFTA), and added three more dispute resolution mechanisms. In all, the five procedures are:

a) **Chapter 19**: in essence, a domestic judicial review mechanism. The law it applies is the domestic law of each NAFTA Party, and in general, the disputing parties are private parties; the procedures reflect this fact.

b) The side agreements on **labor** and the **environment**: likewise, these are concerned with the application and enforcement of the domestic law of each Party.

c) **Chapter 11**: involves claims raised by investors of one Party as against the measures of another before arbitral tribunals governed by procedural rules under international law.

d) **Chapter 20**: sets out a mechanism for the settlement of state to state disputes, with an innovative panel selection process.

NAFTA Chapter 20

There were three cases under Chapter 20, and only one between Canada and the United States in the almost-thirty years of the operation of the NAFTA.

In *Mexico – Soft Drinks*, Mexico argued that:

> "4.91 [...] Unfortunately, **the critical element of automaticity** that differentiates the WTO's dispute settlement process from that of the GATT 1947 was not present in the NAFTA. Mexico therefore requested that the United States give its consent for the establishment of an arbitral panel.
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> 4.92 Mexico submitted a formal request for consultations, which took place but did not lead to a resolution of the dispute. Mexico then requested a meeting of the Free Trade Commission, the second step of the proceeding, which took place as well, but it too failed to resolve the dispute. Finally, **Mexico formally requested the establishment of an arbitral panel, but the United States refused its establishment**. To date, the United States has blocked Mexico's efforts to resolve the dispute through the NAFTA institutional mechanisms."[44]

[44] *Mexico – Soft Drinks*, WT/DS308/R, bold added.

The challenge arose because although the NAFTA parties established an innovative panel selection process, they did not fix, or at least they did not foresee, a key underlying problem.

The innovation was set out in Article 2011(1)(c): "Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the **other** disputing Party."[45] The idea behind this selection procedure was to foster the nomination of the highest quality candidates to the roster (and, in particular, discourage each NAFTA party from having national champions on *its* own roster).[46] The difficulty was that the establishment of the *roster* from which automatic panel appointments could be made was subject to consensus.[47] And no Chapter 20 roster was established under the NAFTA.

THE CANADA-US DISPUTE UNDER CHAPTER 20

The first inter-state case under the NAFTA, and the only one between Canada and the United States, was in respect of the application, following the WTO tariffication exercise, of tariffs to supply-managed goods (dairy, eggs, and chicken) imported from the United States. The United States argued that the NAFTA had eliminated all tariff measures as between the parties; Canada considered that under Chapter Seven of the NAFTA a special trade regime applied to agricultural goods and, in particular, measures that had been required to be tariffied in the run up to the conclusion of the Uruguay Round. In the light

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[45] Article 2011(2)(c) sets out the situation where there is more than one complaining party:

> "(c) Within 15 days of selection of the chair, the Party complained against shall select two panelists, one of whom is a citizen of a complaining Party, and the other of whom is a citizen of another complaining Party. The complaining Parties shall select two panelists who are citizens of the Party complained against."

[4646] Article 1807(3) of the Canada-US Free Trade Agreement provides:

> "The panel shall be composed of five members, at least two of whom shall be citizens of Canada and at least two of whom shall be citizens of the United States. Within 15 days of establishment of the panel, each Party, in consultation with the other Party, shall choose two members of the panel and the Commission shall endeavour to agree on the fifth who shall chair the panel. **If a Party fails to appoint its panelists within 15 days, such panelists shall be selected by lot from among its citizens on the roster described in paragraph 1.** If the Commission is unable to agree on the fifth panelist within such period, then, at the request of either Party, the four appointed panelists shall decide on the fifth panelist within 30 days of establishment of the panel. If no agreement is possible, the fifth panelist shall be selected by lot from the roster described in paragraph 1." [bold added]

[47] Article 2009(1) provides:

> "The Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed."

of its experience with the CUFTA and its strategic trade policy decision to make the NAFTA Chapter 20 procedure work, Canada agreed to the establishment of a panel despite the fact that there was no agreed roster.[48]

Panel Selection

Panel selection proceeded smoothly. After an exhaustive review of publications,[49] Canada selected two eminent professors of international law and international trade law in US universities. The United States also selected two university professors. As we understand, although selecting the first candidate (Professor McRae) was not difficult, finding a second candidate proved challenging, as USTR did not have as in-depth an exposure to Canadian law schools as Canadian officials did to US experts. Each of Canada and the United States put forward candidates for Chair, who was eventually decided by a coin toss.

Unique among all trade disputes between Canada and the United States, the panel was composed entirely of university professors, with one added twist – which became important in the oral hearing – that the Chair had considerable experience in international commercial arbitration.

Finally, because the NAFTA does not have a standing Secretariat,[50] the panelists appointed assistants to help with research and drafting.[51]

The proceedings

The first US submission to the panel was ten pages long, with three paragraphs of legal argument. It relied on three propositions:

1. Upon the entry into force of the WTO, Canada had converted its agricultural non-tariff measures to tariffs, and applied these tariffs to US-origin goods.
2. Article 302(1) of the NAFTA provided that, “Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating good.”

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[48] Sidney Picker, Jr, “The NAFTA Chapter 20 Dispute Resolution Pr A Chapter 20 Dispute Resolution Process: A View from the Inside”, 23 Canada-US Law Journal 525 (1997), p. 529 https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1885&context=cuslj.
[49] The author did the full review.
[50] See also Dale E. McNeil, “The NAFTA Panel Decision on Canadian Tariff-Rate Quotas: Imagining a Tariffying Bargain”, Yale Journal of International Law Vol. 22: 345, p. 379 https://core.ac.uk/download/pdf/72839042.pdf.
[51] *Supply management* decision, footnote 1.

3. Nothing in the NAFTA "otherwise provided".

Canada's defence was based on the principles of treaty interpretation in customary international law and, in particular, *lex specialis*, *lex posteriori*, and effectiveness:

1. The NAFTA did, in fact, "provide otherwise", in Chapter Seven.
2. Chapter Seven of the NAFTA incorporated Chapter Seven of the CUSFTA by reference.
3. Article 710 of the CUSFTA provided that:

   > "Unless otherwise specifically provided in this Chapter, the Parties **retain** their **rights and obligations** with respect to agricultural, food, beverage and certain related goods under the General Agreement on Tariffs and Trade (GATT) and **agreements negotiated under the GATT**, including their rights and obligations under GATT **Article XI**."

   This meant that:

   a. In context and given the reference to "agreements negotiated under the GATT", "retain" had a dynamic sense and was not frozen in time as of the entry into force of CUSFTA.
   b. What was "retained" was a **balance** of "rights and obligations" in respect of market access for certain products, including measures taken under Article XI.
   c. The WTO Agreement was an "agreement negotiated under the GATT".
4. That negotiated balance, or "bargain",[52] was found in Article 4.2 and footnote 1 of the Agreement on Agriculture: the *obligation* not to maintain non-tariff measures was inseparable from the *right* to apply the converted tariffied measures.

[52] The panel adopted this term, at para. 185:

> "Thus, in the Panel's view, an examination of the course of the negotiations on agriculture in the Uruguay Round as evidenced by the Dunkel Draft and the Modalities Document leads to the conclusion that the arrangement under which agricultural non-tariff barriers were eliminated rested on a simple **bargain**. States agreed to eliminate their non-tariff barriers as the quid pro quo for the right to replace them with "tariff equivalents". That is, they were replacing protection in the form of quotas or other non-tariff barriers with protection in the form of tariffs. This right to establish such tariffs was also subject to certain reduction and volume commitments, including a commitment to phase those tariffs down over time." [bold added; footnote omitted]

5. The "bargain" protected the tariffs agreed to at the conclusion of the Uruguay Round, even if those tariffs did not result from the conversion of pre-existing non-tariff measures.

In response, the United States dismissed the concept of a "bargain". It argued that Canada had been well aware of the potential interaction between the NAFTA and tariffication, and simply "gambled" away its supply managed sector. US counsel referred to his own participation in the negotiations as support – entirely unremarkable in trade disputes; the Chair wondered whether counsel was acting as his own witness, a somewhat challenging proposition in international commercial arbitration.

Finally, in the course of the interim review, the United States submitted three large volumes of negotiating history, attacked the panel's findings as "unreasonable" and "bereft of logic", and sought the reversal of those findings.

The Final Report

The panel found that the United States had not established its case under Article 302 of the NAFTA.

The panel agreed with Canada's proposed "dynamic" interpretation of Chapters 3 and 7 of the NAFTA and Chapter 7 of the CUSFTA. It underlined the core of the "bargain" and agreed that "tariffication" had been agreed despite widespread inconsistency in respect of the underlying "converted" measures. As to the "gamble", the panel observed:

> "In this regard, there appears to the Panel to be an unresolved inconsistency in the United States position. The United States has argued that Canada 'gambled' that it could convince participants in the Uruguay Round to preserve the right to maintain agricultural quotas. But, if FTA Article 710 had frozen GATT rights and obligations as of 1989 or 1994, then there can have been no 'gamble' by Canada at least in relation to the United States. Whether or not GATT Article XI was modified under the Uruguay Round to Canada's satisfaction, Canada would still have had the right under the NAFTA, by virtue of a 'frozen-in-time' FTA Article 710, to continue with quotas. The 'frozen-in-time' theory preserves GATT Article XI in its pre-Uruguay Round version as between Canada and the United States."[53]

[53] *Supply management* decision, para. 160.

ASSESSMENT

What can we learn from the NAFTA Chapter 20 experience

Four general conclusions may be drawn from the experience of the parties with NAFTA Chapter 20.

First, the failure of the parties to agree to a roster upon the entry into force of the NAFTA gave rise to at least the appearance of a crisis of confidence in the Chapter 20 mechanism. As noted below, there are more complex reasons why Chapter 20 was not used as often as Chapter 18 under the CUSFTA, but this is a contributing factor. The parties to the new Canada-US-Mexico Agreement (CUSMA) have already established a roster for its general dispute resolution mechanism.[54]

Second, in a non-paper distributed among WTO Members in the context of DSU reform negotiations,[55] Canada observed that "dispute settlement should, in principle, be rooted in the obligations set out in the agreement". In this light, although it is the case that the dispute settlement institutions of the NAFTA were less certain than those of the WTO, a review of the *substance* of the disputes between Canada and the United States since the entry into force of the WTO suggests a different underlying reason for the parties' failure to use Chapter 20: most of the WTO disputes between Canada and the United States relate to obligations that are not in the NAFTA at all or that are less developed in the NAFTA than in the WTO Agreement.

Third, this is not to say that institutional structures are not relevant. The fallout from the *Supply management* decision highlights a key reason for the insistence of many Members of the WTO for a functioning appellate review mechanism: no matter how eminent the panelists, the absence of appellate review opens the process to potentially debilitating legitimacy concerns. After all, in *Supply management*, three of the panelists (including the Chair) were selected by the United States and the other two were American university professors. In my view, US disappointment with the results of a single panel could not have determined its national policy in respect of the NAFTA dispute settlement mechanism as a whole, but to the extent that this had an impact, it was because of the *finality* of the report rather than the panel process itself.

[54] https://can-mex-usa-sec.org/secretariat/dispute-differends-controversias/members-membres-miembros.aspx?lang=eng.
[55] Treaty Drafting Guidelines, April 2002.

Finally, the relative success of CUSFTA Chapter 18 and the failure of NAFTA Chapter 20 can be explained, at least in part, by institutional *alternatives*. The CUSFTA operated in the later stages of the GATT; even the 1989 mid-term reforms to the GATT dispute resolution mechanism failed to revive it. Given the dysfunctions of the GATT, Canada and the United States made an effort to make Chapter 18 function. By the time the *Supply management* case was decided, the WTO dispute resolution mechanism was not only in full force, but also being used actively by all the major players, including the United States. It was, institutionally, a far more sophisticated system than Chapter 20; from a trade policy perspective, legal gains in a WTO case involving non-NAFTA partners could have positive systemic and policy consequences in unrelated cases, including those against NAFTA parties.

Path forward

To ensure that a dispute resolution mechanism in a regional trade agreement functions well, at least three requirements must be met:

a) the RTA dispute resolution mechanism must be structured to address substantive disputes that are distinct to the RTA;

b) institutionally, the RTA must have mechanisms in place to preserve and enhance the mechanism's legitimacy; and

c) the disputing parties must agree to use the system rather than available alternatives.

Annex II

"THE DOG THAT DID NOT BARK"[56]

INTRODUCTION

My presentation today is a conceptual exploration of certain themes related to NAFTA dispute settlement, rather than a critique of institutions or agreements that bind the Three Amigos or prescriptions in respect of other negotiations that might, or might not, be going on right now.

What I'm saying is, don't think of an elephant whose name might be TPP.

The title of this paper was meant to be catchy – and now that there are not one but two Sherlock Holmes TV series, somewhat topical to boot. But it is misleading, in at least two respects.

First, the dog in question, though somnolent, did, in fact, bark; three times, to be exact.

Second, there is another dog, the other half of my talk, that not only barks, but, according to some, like the Hound of the Baskervilles ravenously attacks everything in its orbit.

This, then, is the tale of two dogs: why the one, NAFTA Chapter 20, has lain dormant for much of its life, and what it is about the other, NAFTA Chapter 11, that demands our special attention. In my talk today, I will try to figure out the solution to what might also be called *The Mysterious Affair at NAFTA*.

DISPUTE SETTLEMENT MECHANISMS UNDER THE NAFTA

Picture this: Washington, D.C., 1992. Recession. Election fever. Ross Perot. "Giant sucking sound".

[56] http://ccsi.columbia.edu/2013/04/08/the-dog-that-did-not-bark-the-mystery-of-the-missing-dispute-settlement-chapter-in-nafta/

Revised and edited by the author for web-publication in 2018. The numbers have not been updated, but the themes remain current.

It was the worst of times for concluding a free trade agreement – the first ever – with a developing country.

And yet, the Canada-US FTA had been a major success. Mexico was liberalizing. Each of the two candidates who had a chance of winning the White House was a committed free trader. If not now, when; if not this, what? Yes, yes – getting to that. It was the best of times.

In dispute settlement terms, the results were revolutionary.

Structure

In the NAFTA, there are five mechanisms for the settlement of disputes. These are set out in the side agreements and Chapters 11, 19 and 20.

- Chapter 19 is, in its essence, a domestic judicial review mechanism parading as an international process. The law it applies is the domestic law of each NAFTA Party, and in general, the disputing parties are private parties; the procedures reflect this fact.
- The side agreements, likewise, are concerned with the application and enforcement of the domestic law of each Party. While a challenge is launched against one of the Parties to the agreement, the applicable law is that of the Party, and not internationally agreed substantive rules.
- The dispute settlement mechanisms under Chapters 11 and 20, the subjects of my talk today, apply international law.
    - Chapter 11 involves claims raised by investors of one Party as against the measures of another before arbitral tribunals governed by procedural rules under international law.
    - Chapter 20 provides a mechanism for the settlement of state to state disputes under the NAFTA. Interestingly, and of note, it may also be used to settle disputes *under the substantive rules of the GATT and successor agreements*. This, of course, is different from instances in which the substantive law of the

GATT is directly incorporated into the NAFTA – and so different from the three Canada – US FTA cases that had applied GATT disciplines.[57]

Recourse

There is an enormous difference in usage as between the different dispute settlement mechanisms of the NAFTA. There have been three cases under Chapter 20, some 130 cases under Chapter 19, and nearly forty active or decided cases under Chapter 11.[58]

Of course, numbers on their own don't tell you the full story.

For example, there are many more cases under Chapter 19 than under Chapter 20. Does, or should, that fact tell you anything about the relative "success" of the two dispute settlement mechanisms? Not really. Chapter 19 cases are driven and led by private sector interests and on private sector terms. Chapter 20 cases are state-to-state disputes. Different parties; different dispute settlement considerations; different law; different processes; different numbers.

In the same vein, critics of investment disciplines point to the fact that there are 28 cases filed against Canada under Chapter 11. True, Canada is, in general, a law abiding and fairly open economy, and so we would not expect too many *investment* maltreatment claims against it. *But*, the *complainants* are private interests advised and driven by private counsel; we would expect rather more claims under Chapter 11 than, for example, state-to-state claims.

If, therefore we were to stick to the numbers alone, I could end my talk now and we could all head to lunch.

But, I have to justify my trip up here. And, truth be told, there is more. The numbers highlight two curious facts.

First, there has been only one case under the NAFTA between Canada and the United States in the past twenty years; there were five cases in the preceding five under the FTA. Were we more litigious back then and less so now? Did the NAFTA usher in a period of trade peace and harmony as between the United States and Canada? Or were the NAFTA

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[57] *Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec*, USA-CDA-1993-1807-01, FTA--Chapter 18--Article 1807, 06/03/1993; *Salmon and Herring*, CDA-USA-1989-1807-01, FTA--Chapter 18--Article 1807, 10/16/1989; *United States Regulations on Lobster*, USA-CDA-1989-1807-01, FTA--Chapter 18--Article 1807, 05/25/1990.

[58] Data were current as of 2013. There has not been much movement in Chapter 11 numbers since.

disciplines somehow clearer than those of the FTA, giving rise to fewer challenges? Or less binding?

Let's dismiss peace and harmony as an explanation right off the bat: In the same period, there were 11 cases between Canada and the United States under the WTO Agreement – six or seven cases, depending on how you count, on *Softwood* alone. Now, as I will explain shortly, the *Softwood* cases give you a plausible semi-explanation as to why this state of affairs prevails, but it is a somewhat curious situation.

Second, there have been active 37 investment disputes under Chapter 11 of the NAFTA. There are no comparable figures for the Canada-US FTA because, of course, it did not include an investor-state dispute settlement mechanism. So far so unremarkable.

Here is the curious fact: of all Chapter 11 cases filed so far (some of which are inactive or pending), 19 are against Mexico, 19 against the United States, and 28 against Canada.

Why curious?

Let me explain.

Todd Weiler notes that,

> A rather paternalistic view still appears to linger in the corridors of some governmental agencies that the NAFTA was only ever intended to protect Canadian and American investors from the hands of the Mexican State.

The lingering might be paternalistic, but as to the parties' intentions at the time of the negotiations, the context suggests that the view was not, perhaps, ill-founded.

Mexico is now such a fixed feature of WTO dispute settlement – with an Appellate Body member,[59] and active participation in both disputes and negotiations on the rules – that it's hard to believe it joined the GATT *in 1986*, barely six years before the NAFTA entered into force.

We – Canada, the US and in fact all developed countries – are so enmeshed in complex webs of multidirectional – North-South, TransPacific, Mediterranean, Americas – free trade agreements that we forget that the NAFTA was the first *free* trade agreement

[59] The Appellate Body Member from Mexico retired in January 2018.

between a developing country and developed countries. The issue of the day in the 1980s in Mexico was protecting the Mexican government's privatization policy.[60]

There were real concerns about Mexico's history of treatment of investments;[61] and because the expectation was, as Ross Perot's "giant sucking sound" would tell you, that there would be an influx of investment to the south, and that investment had to be protected.

That is, *all* parties to the negotiations on the inclusion of investment rules in the NAFTA were concerned, if not necessarily about protecting investors from Mexican policies, at least about potential *Mexican* regression from the liberalizing path it was on.

And yet, the investment arbitration mechanism they devised is now used equally as against all three. Here's Barry Appleton on this curious development: "No one quite understood or anticipated where it would go."[62]

THE ISSUE

One dog stopped barking; the other turned on its putative masters.

What happened? Is it as simple as, "no one quite understood"? Not the negotiators, not the lawyers, not the politicians, not the legislators, not the stakeholders, not the experts, not the academics – no one anticipated and no one understood?

More to the point – does it matter?

Should it matter why Chapter 20 has not been used often? Or is this simply a curious fact in search of an academic explanation of no practical consequence or intellectual import? That was a rhetorical question.

It matters because of the elephant you should not be thinking about. And then there is the Appleton comment: beware of trade negotiators bearing dispute settlement mechanisms.

OK – so here is the *problematique*:

[60] Gaines
[61] Kinnear
[62] Gaines

> On the one hand, you have a mechanism that is not being used. It is not because there are no disputes – they are just taken elsewhere. It is not because the agreement as a whole is defective, because in fact its other dispute settlement mechanisms are working well.
>
> On the other, mechanisms and disciplines developed for one purpose are now serving quite a different one. I am dating myself here, but every time I think of Chapter 11, I am reminded of the immortal words of Diana Ross: "Do you know where you're going to?"

What can this tell us about either mechanism, or dispute settlement generally in trade agreements?

When the dog stopped barking

Let me first turn to the headline topic: the dog that stopped barking.

Three numbers: five, one, 19. The FTA, the NAFTA and the WTO.

I've sandwiched the NAFTA between the FTA and the WTO not just for chronological reasons. But to highlight that the paucity of use is not because trade disputes between Canada and the United States magically vanished in 1992. Rather, the question is why are the numbers so lopsided? Now, the question becomes even more puzzling when we consider that under the NAFTA, the Parties may engage the dispute settlement mechanism to settle disputes in respect not only of GATT obligations directly incorporated into the NAFTA, but also those under GATT and WTO obligations.

Under the FTA, this particular feature was used three times – 60% of the cases under Chapter 18. (The other two cases related to the specific disciplines of the FTA.) As any standard choice of forum analysis would conclude, where the applicable law is the same, the determining factor is likely to be the institutional set up. And, of course, any standard history of the GATT would support such a conclusion. Its dispute settlement mechanism was not working. Here was a chance to show that a new model of trade dispute settlement could be effective. And, indeed, it was. In the GATT, panels could not even get established, and it is this upstart FTA that has five panels in five years.

Not bad that.

Then came the NAFTA, with innovative panel selection and panel procedures, some of which even find their way into the DSU,[63] which came into force three years later …

In 1995, someone looking at the dispute settlement terrain between Canada and the United States could not have predicted with too much confidence in which direction the pendulum of dispute settlement use would swing.

True, the NAFTA was untested, but it had good pedigree; true, the new WTO was untested, but both Canada and the US had managed to get many of their asks hardwired into the new organisation. Within a year, Canada and the US were embroiled in two disputes in *both* fora. They were being tested alright. Which way?

Still not clear. The NAFTA case was about the tariff elimination provisions of the NAFTA; Canada would be more vulnerable in the WTO in respect of its cultural industries, hence the WTO case against it in *Periodicals*.

By the end of the 1990s, NAFTA Chapter 20 was dead and Canada and the US had a half-dozen active cases against one another in the WTO.

The culprit, whispered the corridors of the Academy and of Trade Policy, the *Supply Management* case under the NAFTA. Here was an ironclad case for the complaining party – the US was so confident that its first submission had a grand total of three paragraphs of legal argument – that five "pure academics" sitting in judgement managed to blow. Yes, three of the five were the choice of the United States, but why quibble over details like that?

Well, not quite whispered. Here is a former USDA General Counsel writing in the Yale Journal of International Law, arguing that a panel comprising five law professors and presiding over a dispute governed by basic rules of procedure:

> chose not to consult the GATT legal secretariat, which might have provided informal advice about the GATT tariff regime and possibly even a formal letter of legal advice.

And, because the likes of Eli Lauterpacht and Don McRae evidently lacked it:

> the parties might consider creating a legal staff, either located in the NAFTA secretariat or on retainer, to ensure that panels have access to the needed *legal expertise*.

[63] The Dispute Settlement Understanding of the WTO Agreement.

All this because the Panel failed to buy the principal US argument:

> Canada abandoned its use of absolute quotas to defend supply management, relinquished the protection of FTA article 710, and gambled the fate of its protected industries on winning a favorable decision from a NAFTA dispute-settlement panel.

The gamble paid off, of course – if, that is, one considers that countries "gamble" about public policy. In a sense, irrelevant. The US, the story goes, simply lost faith in the NAFTA dispute settlement process and, taking its marbles, turned its energies to the WTO.

This narrative got a major boost in 2005, oddly enough because of a WTO case.

The case is *Mexico – Soft Drink*. It's a US dispute, in the WTO, against certain Mexican taxes on US-origin soft drinks. Mexico argued that the genesis of the dispute is in the NAFTA and so the panel should exercise its discretion to defer to the NAFTA dispute settlement process and, consequently *not* to hear the case. Why? This is where it gets interesting:

> 4.91 Mexico and the United States disagreed over the letters exchanged in 1993. Mexico had generated a surplus and believed that it had a right to export larger amounts of sugar to the United States' market than the United States was prepared to admit. Mexico therefore took steps during the late 1990s to resolve the dispute through the NAFTA general dispute settlement mechanism stipulated in Chapter XX. Unfortunately, the critical element of automaticity that differentiates the WTO's dispute settlement process from that of the GATT 1947 was not present in the NAFTA. Mexico therefore requested that the United States give its consent for the establishment of an arbitral panel.
>
> 4.92 Mexico submitted a formal request for consultations, which took place but did not lead to a resolution of the dispute. Mexico then requested a meeting of the Free Trade Commission, the second step of the proceeding, which took place as well, but it too failed to resolve the dispute. Finally, Mexico formally requested the establishment of an arbitral panel, but the United States refused its establishment. To date, the United States has blocked Mexico's efforts to resolve the dispute through the NAFTA institutional mechanisms.
>
> 4.93 Mexico and the United States have also held consultations and negotiations at various times over the past decade. However, they have been unable to reach an

> agreement through that channel either. It warrants noting that it was in the interests of certain parties to prolong the dispute. As long as the Mexican market remained in a state of disequilibrium, the Me xican industry would be subject to greater financial stress and exits from the Mexican sugar industry would be that much more likely. This in turn could be expected to reduce Mexico's ability to generate a surplus. Thus, the longer it would take to resolve this dispute, the better for certain United States interests.

Indubitably, the skeptics intoned. *Now we know* why the dog isn't barking: it's been euthanized.

The Hound unleashed

My apologies for the gruesome image, but now that I am treading this path, let me push the metaphor to its limit.

There was one beast the NGO community, at any rate, would have been perfectly pleased to put down, and that was Chapter 11. This was not, to be sure, a specific dislike of Chapter 11 itself – I mean, it encompassed the whole NAFTA thing, and then the multilateral agreement on investment, and then of course Seattle – in the 90s, there was a veritable embarrassment of choices if you were prone to throwing bricks through shop windows in protest against international law development on trade and economic issues.

The Chapter 11 mechanism started out well enough – as expected, the first cases were against Mexico. It did not help that the company that launched the case had a name right out of a cheesy science fiction movie. Nor that the measure at issue was, apparently, the designation of a piece of property as an "ecological zone". But, it was more or less expected that there were going to be cases against Mexico, and here was a case against Mexico. Chapter 11 was working as intended.

Then came *Ethyl*. Now, I had a tangential involvement in the case, and so will refrain from commenting on the substance – and, in fact, I don't propose to go into the substance of any of the disputes. But the context was important and remains relevant.

In *Ethyl* the measure at issue was the Canadian ban on the importation and interprovincial trade, but not the use, of MMT, a gasoline additive. Among its more charming qualities, MMT is a suspected neurotoxin, and some claimed that it interfered with onboard environmental diagnostics of automobiles. *Ethyl* – a perceived "environmental" case – was followed by others in the same vein: *SD Myers*, about a ban on

the exportation of PCBs, another highly toxic substance. *Sunbelt*, about British Columbian measure on the protection of water – and only Anne Murray and Sidney Crosby are more sensitive topics in Canada.

And that was just in Canada. Barely a year after *SD Myers*, a Canadian chemical company challenged California's phase-out of MTBE – a gasoline additive that, according to California, had contaminated ground and surface water throughout California.

By the time Y2K arrived, for the environmental and anti-investment agreement NGO community, Chapter 11 had morphed into "The Sum of All Fears." And there were (and largely remain) three:

- first, Chapter 11 was yet another means for corporate interests to attack environmental measures;
- second, foreign corporate entities had more rights than domestic interests; and
- third, because Canada and the US were being targeted, Chapter 11 was being used in ways not intended by the parties.

For me, the most interesting – I am trying to use a neutral word – is the case filed on January 25, 2012: *Detroit International Bridge Company. v. Government of Canada*. The website of the Department of Foreign Affairs and International Trade of Canada describes the case as follows:

> The Detroit International Bridge Company complaint concerns legislation passed by the Government of Canada that gives the Government of Canada authority over the construction, operation and ownership of international bridges.

Maybe Barry Appleton was right: "No one quite understood or anticipated where it would go." Chapter 11, the narrative goes, is a wild hound on the loose: witness the monopolist owner of the Ambassador Bridge suing the Government of Canada for paying for a new bridge, and highways, spanning the Detroit River.

AN ALTERNATIVE THEORY

The moral of the Standard Unifying Narrative of the NAFTA, it would seem, is this: "beware of trade negotiators bringing you dispute settlement chapters."

This is the point at which, in an Agatha Christie novel, Inspector Japp saunters over to the Great Belgian Detective and says, "Well, Poirot, looks like the mystery is solved."

Whereupon Poirot, brows furrowed, looks into the distance and mutters, "*Eh bien, mon ami*, perhaps you have reason. And yet, it was too easy …"

Don't get too comfortable, though. Because, a Bobby is about to run into the room to announce that a new body has been found in the library, the vicarage or the mews. It's the handyman, the maid, the elderly doctor.

"*Non, non, non!*" Poirot would exclaim, "I have been an imbecile *abominable*. Hastings, please to review the evidence!"

Let me turn to the NAFTA first.

It is true, as Mexico argued in *Soft Drinks*, that the dispute settlement institutions of the NAFTA are less certain than those of the WTO, with automaticity of panel establishment being, arguably, the most significant challenge. And yet: we know that the same lack of automaticity existed under the FTA and the old GATT, and panels did get established even then, and reports adopted and implemented.

It is true that the US was disappointed with the results of the *Supply Management* panel. But with a little bit of preparation, the parties in a dispute have control over the choice of panelists; disappointment with the results of a single panel cannot, and does not, determine national policy in respect of an entire treaty organization.

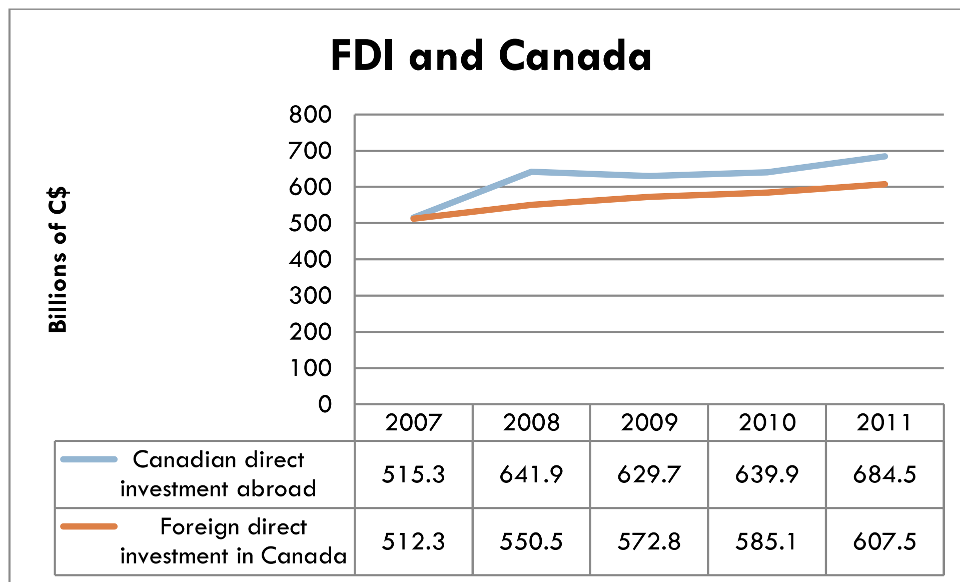
And it is true that the parties have had a lot of disputes under the WTO.

Here is the thing. It's when you look at the *substance* of those disputes – not the dispute settlement mechanism, not panel selection or the Appellate Body or automaticity – that you get a true sense of why the disputes ended up in the WTO and not NAFTA Chapter 20.

Between Canada and the United States, all of the WTO disputes relate to obligations that are not in the NAFTA at all or that are less developed in the NAFTA than in the WTO Agreement. *Magazines*, *Dairy*, *Softwood* … Especially *Softwood* - six or seven cases under the SCM Agreement, depending on how you count, in respect of matters on which there are no substantive rules in the NAFTA.

I suggested that in 1995, looking at the two cases before the two institutions and the nature of the dispute settlement mechanisms, you could not predict which way the pendulum would swing. *But* if you looked at the pattern of disputes between the parties and the nature of the obligations in the two agreements, you could and probably would have predicted a heavy tilt in favour of the WTO.

And what about Chapter 11? Here is a remarkable number. In 2011, foreign direct investment in Canada amounted to just over $600 billion.



	2007	2008	2009	2010	2011
Canadian direct investment abroad	515.3	641.9	629.7	639.9	684.5
Foreign direct investment in Canada	512.3	550.5	572.8	585.1	607.5

Of which more than half originated in the US and Mexico.

The total value of damages awarded or claims settled in Canada amount to under $200 million over the life of the Agreement – or an average of one third of one tenth of one percent of total investments. A number of the disputes, moreover, had to do with the *Softwood* dispute, which has its own economic logic.

And the two celebrated environmental cases? *Ethyl* was settled for $13.5 million, and in *SD Myers* the company was awarded $5 million in damages.

The wonder of Chapter 11 is not that it has been used too often; it is that it has hardly been used, and then with such negligible effect on the balance of trade and investment between Canada and its NAFTA trading partners. And, of course, to the extent that it has been used relatively sparingly as against Mexico demonstrates the soundness of the initial Mexican impetus for agreeing to the disciplines in the first place.

So here we are, almost at the end of the journey. I began with Holmes and end with Poirot; and like the Great Belgian himself in *Murder on the Orient Express*, I have offered you alternative solutions. I close by making the following observation.

If you agree with what I have called the Standard Unifying Narrative, you will end up spending a great deal of time in each trade agreement fine-tuning the dispute settlement mechanism. This is because you will agree with the proposition that the NAFTA Chapter 20 mechanism failed because of its institutional weaknesses, and that those who negotiated Chapter 11 basically had no clue about its direction and impact, and so we should be extra-vigilant about future such provisions.

If, however, you agree with the alternative look at the evidence that I have set out before you, you will concentrate rather more on getting the substantive rules right, anticipating that dispute settlement will follow a pragmatic path along the negotiated rules.

The choice is yours. I thank you for your patience.

[i] **Rambod Behboodi** developed an in-depth understanding of dispute resolution in the Asia-Pacific Region while serving as Canada's delegate to the APEC Dispute Mediation Experts Group (97-98). He gained particular insight into the operation of regional trade agreements as counsel in the *Supply Management* case, the first inter-state case under the NAFTA; he then negotiated the rules of procedure for the NAFTA's highly innovative labour and environmental side agreement dispute resolution mechanisms. In 1997, he also wrote the first analytical paper on the legal reasoning of the Appellate Body, and proceeded in the next ten years to argue numerous cases before panels and the Appellate Body. He served on postings to Brussels and Geneva, where he was deeply engaged in dispute settlement reform negotiations; as General Counsel at Canada's Finance Ministry, he worked closely on the dispute settlement mechanism of the Canada-EU CETA. Mr. Behboodi has particular additional insight into dispute resolution because of his experience as Counsellor at the Rules Division of the WTO. He taught international trade law in universities in Canada and Europe, and in the past five years has been deeply involved in training and capacity-building. His latest publication is "The Panel Process", a chapter in Practical Aspects of WTO Litigation.

Annex III

CHAPTER 19

DISPUTE SETTLEMENT

Article 19.1: Definitions

For the purposes of this Chapter:

(a) **Complaining Party** means any Party or Parties that requests consultations pursuant to paragraph 1 of Article 19.6 (Consultations);

(b) **Parties to the dispute** means the Complaining Party and the Responding Party;

(c) **Party to the dispute** means the Complaining Party or the Responding Party;

(d) **Responding Party** means any Party to which the request for consultations is made pursuant to paragraph 1 of Article 19.6 (Consultations);

(e) **Rules of Procedures** means the *Rules of Procedures for Panel Proceedings* adopted by the RCEP Joint Committee; and

(f) **Third Party** means any Party that makes a notification pursuant to paragraph 2 of Article 19.10 (Third Parties).

Article 19.2: Objective

The objective of this Chapter is to provide effective, efficient, and transparent rules and procedures for settlement of disputes arising under this Agreement.

Article 19.3: Scope[1]

1. Unless otherwise provided in this Agreement, this Chapter shall apply:

[1] Non-violation complaints shall not be permitted under this Agreement.

(a) to the settlement of disputes between Parties regarding the interpretation and application of this Agreement; and

(b) when a Party considers that a measure of another Party is not in conformity with the obligations under this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement.

2. Subject to Article 19.5 (Choice of Forum), this Chapter shall be without prejudice to the rights of a Party to have recourse to dispute settlement procedures available under other agreements to which it is party.

Article 19.4: General Provisions

1. This Agreement shall be interpreted in accordance with the customary rules of interpretation of public international law.

2. With respect to any provision of the WTO Agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of WTO panels and the WTO Appellate Body, adopted by the WTO Dispute Settlement Body. The findings and determinations of the panel cannot add to or diminish the rights and obligations under this Agreement.[2]

3. All notifications, requests, and replies made pursuant to this Chapter shall be in writing.

4. The Parties to the dispute are encouraged at every stage of a dispute to make every effort through cooperation and consultations to reach a mutually agreed solution to the dispute. Where a mutually agreed solution is reached, the terms and conditions of the agreement shall be jointly notified by the Parties to the dispute to the other Parties.

5. Any period of time provided in this Chapter may be modified by agreement of the Parties to the dispute provided that any modification shall be without prejudice to the rights of the Third Parties provided in Article 19.10 (Third Parties).

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[2] The Parties confirm that the first sentence of this paragraph does not prevent a panel from considering relevant interpretations in reports of WTO panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body, with respect to a provision of the WTO Agreement which is not incorporated into this Agreement.

6. The prompt settlement of disputes in which a Party considers that any benefits accruing to it directly or indirectly under this Agreement is being impaired by measures taken by another Party is essential to the effective functioning of this Agreement and the maintenance of a proper balance between the rights and obligations of the Parties.

Article 19.5: Choice of Forum

1. Where a dispute concerns substantially equivalent rights and obligations under this Agreement and another international trade or investment agreement to which the Parties to the dispute are party, the Complaining Party may select the forum in which to settle the dispute and that forum shall be used to the exclusion of other fora.

2. For the purposes of this Article, the Complaining Party shall be deemed to have selected the forum in which to settle the dispute when it has requested the establishment of a panel pursuant to paragraph 1 of Article 19.8 (Request for Establishment of a Panel) or requested the establishment of, or referred a matter to, a dispute settlement panel or tribunal under another international trade or investment agreement.

3. This Article shall not apply where the Parties to the dispute agree in writing that this Article shall not apply to a particular dispute.

Article 19.6: Consultations

1. Any Party may request consultations with any other Party with respect to any matter described in paragraph 1 of Article 19.3 (Scope). A Responding Party shall accord due consideration to a request for consultations made by a Complaining Party and shall accord adequate opportunity for such consultations.

2. Any request for consultations made pursuant to paragraph 1 shall give the reasons for the request, including identification of the measures at issue and an indication of the factual and legal basis for the complaint.

3. The Complaining Party shall simultaneously provide a copy of the request for consultations made pursuant to paragraph 1 to the other Parties.

4. The Responding Party shall immediately acknowledge its receipt of the request for consultations made pursuant to paragraph 1, by way of notification to the Complaining Party, indicating the date on which the request was received, otherwise the date when the request was made shall be deemed to be the date of the Responding Party's receipt of the request. The Responding Party shall simultaneously provide a copy of the notification to the other Parties.

5. The Responding Party shall:

   (a) reply to the request for consultations made pursuant to paragraph 1 no later than seven days after the date of its receipt of the request; and

   (b) simultaneously provide a copy of the reply to the other Parties.

6. The Responding Party shall enter into consultations no later than:

   (a) 15 days after the date of its receipt of the request for consultations made pursuant to paragraph 1 in cases of urgency including those which concern perishable goods; or

   (b) 30 days after the date of its receipt of the request for consultations made pursuant to paragraph 1 regarding any other matter.

7. The Parties to the dispute shall engage in consultations in good faith and make every effort to reach a mutually agreed solution through consultations. To this end, the Parties to the dispute shall:

   (a) provide sufficient information in the course of consultations to enable a full examination of the matter, including how the measures at issue might affect the implementation or application of this Agreement;

   (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information; and

   (c) endeavour to make available for the consultations personnel of their government agencies or other regulatory

bodies who have responsibility for or expertise in the matter.

8. The consultations shall be confidential and without prejudice to the rights of any Party to the dispute in any further or other proceedings.

9. Whenever a Party other than the Parties to the dispute considers that it has a substantial trade interest in the consultations, such Party may notify the Parties to the dispute no later than seven days after the date of receipt of the copy of the request for consultations referred to in paragraph 3, of its desire to be joined in the consultations. The notifying Party shall simultaneously provide a copy of the notification to the other Parties. The notifying Party shall be joined in the consultations if the Parties to the dispute agree.

Article 19.7: Good Offices, Conciliation, or Mediation

1. The Parties to the dispute may at any time agree to voluntarily undertake an alternative method of dispute resolution, including good offices, conciliation, or mediation. Procedures for such alternative methods of dispute resolution may begin at any time, and may be terminated by any Party to the dispute at any time.

2. If the Parties to the dispute agree, such procedures referred to in paragraph 1 may continue while the matter is being examined by a panel under this Chapter.

3. Proceedings involving such procedures referred to in paragraph 1 and positions taken by a Party to the dispute during these proceedings shall be confidential and without prejudice to the rights of any Party to the dispute in any further or other proceedings.

Article 19.8: Request for Establishment of a Panel

1. The Complaining Party may request the establishment of a panel to examine the matter, by way of notification to the Responding Party, if:

   (a) the Responding Party does not:

(i) reply to the request for consultations in accordance with subparagraph 5(a) of Article 19.6 (Consultations); or

(ii) enter into consultations in accordance with paragraph 6 of Article 19.6 (Consultations); or

(b) the consultations fail to resolve a dispute within:

(i) 20 days after the date of the Responding Party's receipt of the request for consultations made pursuant to paragraph 1 of Article 19.6 (Consultations) in cases of urgency including those which concern perishable goods; or

(ii) 60 days after the date of the Responding Party's receipt of the request for consultations made pursuant to paragraph 1 of Article 19.6 (Consultations) regarding any other matter.

2. A request for the establishment of a panel made pursuant to paragraph 1 shall identify the specific measures at issue and provide details of the factual and legal basis for the complaint, including the relevant provisions of this Agreement, to be addressed by the panel, sufficient to present the problem clearly.

3. The Complaining Party shall simultaneously provide a copy of the request for the establishment of a panel made pursuant to paragraph 1 to the other Parties.

4. The Responding Party shall immediately acknowledge its receipt of the request for the establishment of a panel made pursuant to paragraph 1, by way of notification to the Complaining Party, indicating the date on which the request was received, otherwise the date when the request was made shall be deemed to be the date of the Responding Party's receipt of the request. The Responding Party shall simultaneously provide a copy of the notification to the other Parties.

5. Where a request for the establishment of a panel is made pursuant to paragraph 1, a panel shall be established in accordance with Article 19.11 (Establishment and Reconvening of a Panel).

Article 19.9: Procedures for Multiple Complainants

1. Where more than one Party requests the establishment or reconvening of a panel relating to the same matter, a single panel should be established or reconvened to examine the complaints relating to that matter whenever feasible.

2. The single panel shall organise its examination and present its findings and determinations to the Parties to the disputes in such a manner that the rights which the Parties to the disputes would have enjoyed had separate panels examined the complaints are in no way impaired.

3. If more than one panel is established or reconvened to examine the complaints relating to the same matter, the Parties to the disputes shall endeavour to ensure that the same individuals serve as panellists on each of the separate panels. The panels shall consult with each other and the Parties to the disputes to ensure, to the greatest extent possible, that the timetables for the panels' processes are harmonised.

Article 19.10: Third Parties

1. The interests of the Parties to the dispute and those of other Parties shall be fully taken into account during the panel process.

2. Any Party having a substantial interest in a matter before a panel may notify the Parties to the dispute of its interest no later than 10 days after the date of the request made pursuant to:

   (a) paragraph 1 of Article 19.8 (Request for Establishment of a Panel); or

   (b) paragraph 1 of Article 19.16 (Compliance Review); or

   (c) paragraph 13 of Article 19.17 (Compensation and Suspension of Concessions or Other Obligations).

   The notifying Party shall simultaneously provide a copy of the notification to the other Parties.

3. Any Party notifying its substantial interest pursuant to paragraph 2 shall have the rights and obligations of a Third Party.

4. Subject to the protection of confidential information, each Party to the dispute shall make available to each Third Party its written submissions, written versions of its oral statements, and its written responses to questions, made prior to the issuance of the interim report, at the time such submissions, statements, and responses are submitted to the panel.

5. A Third Party shall have the right to:

   (a) subject to the protection of confidential information, be present at the first and second hearings of the panel with the Parties to the dispute prior to the issuance of the interim report;

   (b) make at least one written submission prior to the first hearing;

   (c) make an oral statement to the panel and respond to questions from the panel during a session of the first hearing set aside for that purpose; and

   (d) respond in writing to any questions from the panel directed to the Third Parties.

6. If a Third Party provides any submissions or other documents to the panel, it shall simultaneously provide them to the Parties to the dispute and the other Third Parties.

7. A panel may, with the agreement of the Parties to the dispute, grant additional or supplemental rights to any Third Party regarding its participation in panel proceedings.

Article 19.11: Establishment and Reconvening of a Panel

1. Where a request for the establishment of a panel is made pursuant to paragraph 1 of Article 19.8 (Request for Establishment of a Panel), a panel shall be established in accordance with this Article.

2. Unless the Parties to the dispute agree otherwise, the panel shall consist of three panellists. All appointments and nominations of panellists under this Article shall conform with the requirements referred to in paragraphs 10 and 13.

3. Within 10 days of the date of the receipt of the request for the establishment of a panel made pursuant to paragraph 1 of Article 19.8 (Request for Establishment of a Panel), the Parties to the dispute shall enter into consultations with a view to reaching agreement on the procedures for composing the panel, taking into account the factual, technical, and legal aspects of the dispute. Any such procedures agreed upon shall also be used for the purposes of paragraphs 15 and 16.

4. If the Parties to the dispute are unable to reach agreement on the procedures for composing the panel within 20 days of the date of the receipt of the request for the establishment of a panel made pursuant to paragraph 1 of Article 19.8 (Request for Establishment of a Panel), any Party to the dispute may at any time thereafter notify the other Party to the dispute that it wishes to use the procedures set out in paragraphs 5 through 7. Where such a notification is made, the panel shall be composed in accordance with paragraphs 5 through 7.

5. The Complaining Party shall appoint one panellist within 10 days of the date of the receipt of the notification made pursuant to paragraph 4. The Responding Party shall appoint one panellist within 20 days of the date of the receipt of the notification made pursuant to paragraph 4. A Party to the dispute shall notify the appointment of its panellist to the other Party to the dispute.

6. Following the appointment of the panellists in accordance with paragraph 5, the Parties to the dispute shall agree on the appointment of the third panellist who shall serve as the chair of the panel. To assist in reaching such agreement, each Party to the dispute may provide to the other Party to the dispute a list of up to three nominees for the chair of the panel.

7. If any panellist has not been appointed within 35 days of the date of the receipt of the notification made pursuant to paragraph 4, any Party to the dispute, within a further period of 25 days, may request the Director-General of the WTO to appoint the remaining panellists within 30 days of the date of such request. Any list of nominees which was provided under paragraph 6 shall also be provided to the Director-General of the WTO, and may be used in making the required appointments.

8. If the Director-General of the WTO notifies the Parties to the dispute that he or she is unavailable, or does not appoint the remaining panellists within 30 days of the date of the request made pursuant to paragraph 7, any Party to the dispute may

request the Secretary-General of the Permanent Court of Arbitration to appoint the remaining panellists promptly. Any list of nominees which was provided under paragraph 6 shall also be provided to the Secretary-General of the Permanent Court of Arbitration, and may be used in making the required appointments under paragraph 12.[3]

9. The date of establishment of the panel shall be the date on which the last panellist is appointed.

10. Each panellist shall:

(a) have expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements;

(b) be chosen strictly on the basis of objectivity, reliability, and sound judgement;

(c) be independent of, and not be affiliated with or take instructions from, any Party;

(d) not have dealt with the matter in any capacity;

(e) disclose, to the Parties to the dispute, information which may give rise to justifiable doubts as to his or her independence or impartiality; and

(f) comply with the Code of Conduct as annexed to the Rules of Procedures.

11. In addition to the requirements of paragraph 10, each panellist appointed under paragraph 7 or 8 shall:

(a) have expertise in law including public international law, international trade, and the resolution of disputes arising under international trade agreements;

(b) be a well-qualified governmental or non-governmental individual including an individual who has served on a WTO panel or the WTO Appellate Body or in the WTO Secretariat, taught or published on international trade law

[3] For greater certainty, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules shall not be used to appoint any remaining panellist under this paragraph.

or policy, or served as a senior trade policy official of a WTO Member; and

(c) in the case of the chair of the panel, wherever possible:

(i) have served on a WTO panel or the WTO Appellate Body; and

(ii) have expertise or experience relevant to the subject matter of the dispute.

12. In appointing a panellist under paragraph 8, and in accordance with the requirements referred to in paragraphs 10 and 11, the following procedure shall be used, unless the Parties to the dispute agree otherwise:

(a) the Secretary-General of the Permanent Court of Arbitration shall notify the Parties to the dispute of an identical list containing at least three nominees for panellists;

(b) within 15 days of the date of the receipt of the list referred to in subparagraph (a), each Party to the dispute may return the list to the Secretary-General of the Permanent Court of Arbitration after having deleted any of the nominees which it objects to and having numbered the remaining nominees on the list in the order of its preference;

(c) after the expiry of the period of time referred to in subparagraph (b), the Secretary-General of the Permanent Court of Arbitration shall appoint the remaining panellists from the remaining nominees on any list returned to him or her and in accordance with the order of preference indicated by the Parties to the dispute; and

(d) if for any reason the remaining panellists cannot be appointed in accordance with the procedure set out in this paragraph, the Secretary-General of the Permanent Court of Arbitration may appoint, in his or her discretion, the remaining panellists in accordance with this Chapter.

13. Unless the Parties to the dispute agree otherwise, the chair shall not be a national of any Party to the dispute or a Third Party and shall not have his or her usual place of residence in any Party to the dispute.

14. Each panellist shall serve in his or her individual capacity and not as a government representative, nor as a representative of any organisation. Any Party shall not give any panellist instructions nor seek to influence any panellist as an individual with regard to matters before a panel.

15. If a panellist appointed under this Article resigns or becomes unable to act, a successor panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist and shall have all the powers and duties of the original panellist. The work of the panel shall be suspended until the successor panellist is appointed. In such a case, any relevant period of time for the panel proceedings shall be suspended until the successor panellist is appointed.

16. Where a panel is reconvened pursuant to Article 19.16 (Compliance Review) or Article 19.17 (Compensation and Suspension of Concessions or Other Obligations), the reconvened panel shall, where feasible, have the same panellists as the original panel. Where this is not feasible, a replacement panellist shall be appointed in the same manner as prescribed for the appointment of the original panellist, and shall have all the powers and duties of the original panellist.

Article 19.12: Functions of Panels

1. The panel shall make an objective assessment of the matter before it, including an objective assessment of:

   (a) the facts of the case;

   (b) the applicability of the provisions of this Agreement cited by the Parties to the dispute; and

   (c) whether:

      (i) the measure at issue is not in conformity with the obligations under this Agreement; or

      (ii) the Responding Party has otherwise failed to carry out its obligations under this Agreement.

2. The panel shall have the following terms of reference unless the Parties to the dispute agree otherwise within 20 days of the date of the establishment of the panel:

> "To examine, in the light of the relevant provisions of this Agreement, the matter referred to in the request for the establishment of a panel made pursuant to paragraph 1 of Article 19.8 (Request for Establishment of a Panel), and to make findings and determinations as provided for in this Agreement."

3. The panel shall set out in its report:

   (a) a descriptive section summarising the arguments of the Parties to the dispute and Third Parties;

   (b) its findings on the facts of the case and on the applicability of the provisions of this Agreement;

   (c) its determinations as to whether:

      (i) the measure at issue is not in conformity with the obligations under this Agreement; or

      (ii) the Responding Party has otherwise failed to carry out its obligations under this Agreement; and

   (d) the reasons for its findings and determinations referred to in subparagraphs (b) and (c).

4. In addition to paragraph 3, a panel shall include in its report any other findings and determinations pertaining to the dispute which have been jointly requested by the Parties to the dispute or provided for in its terms of reference. The panel may suggest ways in which the Responding Party could implement the findings and determinations.

5. Unless the Parties to the dispute agree otherwise, a panel shall base its report on the relevant provisions of this Agreement, the submissions and arguments of the Parties to the dispute, and any information or technical advice it has received in accordance with paragraphs 12 and 13 of Article 19.13 (Panel Procedures).

6. A panel shall only make the findings, determinations, and suggestions provided for in this Agreement.

7. Each Third Party's submission shall be reflected in the report of the panel.

8. The findings and determinations of the panel cannot add to or diminish the rights and obligations under this Agreement.

9. The panel shall consult regularly with the Parties to the dispute and provide adequate opportunities for the Parties to the dispute to develop a mutually agreed solution.

10. Paragraphs 1 through 4 shall not apply to a panel reconvened pursuant to Article 19.16 (Compliance Review) and Article 19.17 (Compensation and Suspension of Concessions or Other Obligations).

Article 19.13: Panel Procedures

1. A panel shall adhere to this Chapter and, unless the Parties to the dispute agree otherwise, shall follow the Rules of Procedures.

2. On request of a Party to the dispute or on its own initiative, a panel established pursuant to Article 19.11 (Establishment and Reconvening of a Panel) may, after consulting the Parties to the dispute, adopt additional rules of procedure which do not conflict with this Chapter and with the Rules of Procedures. A panel reconvened pursuant to Article 19.16 (Compliance Review) or Article 19.17 (Compensation and Suspension of Concessions or Other Obligations) may, after consulting the Parties to the dispute, establish its own rules of procedures which do not conflict with this Chapter and the Rules of Procedures, drawing as it deems appropriate from this Chapter or the Rules of Procedures.

3. Panel procedures should provide sufficient flexibility so as to ensure high-quality reports, while not unduly delaying the panel process.

Timetable

4. After consulting the Parties to the dispute, a panel established pursuant to Article 19.11 (Establishment and Reconvening of a Panel) shall, as soon as practicable and whenever possible within 15 days of the date of its establishment, fix the timetable for the panel process. The period of time from the date of establishment of a panel until the date of issuance of the panel's final report to

the Parties to the dispute shall, as a general rule, not exceed seven months.

5. A panel reconvened pursuant to Article 19.16 (Compliance Review) or paragraph 13 of Article 19.17 (Compensation and Suspension of Concessions or Other Obligations) shall, as soon as practicable and whenever possible within 15 days of the date of its reconvening, fix the timetable for the compliance review process taking into account the periods of time specified in Article 19.16 (Compliance Review).

Panel Proceedings

6. The panel shall make its findings and determinations by consensus, provided that where the panel is unable to reach consensus, it may make its findings and determinations by majority vote. A panellist may furnish dissenting or separate opinions on matters not unanimously agreed. Opinions expressed by an individual panellist in the report shall be anonymous.

7. Panel deliberations shall be confidential. The Parties to the dispute and Third Parties shall be present only when invited by the panel to appear before it.

8. There shall be no *ex parte* communications with the panel concerning matters under consideration by it.

Submissions

9. Each Party to the dispute shall have the opportunity to set out in writing the facts of its case, its arguments and counter arguments. Further to paragraphs 4 and 5, the timetable fixed by the panel shall include precise deadlines for submissions by the Parties to the dispute and Third Parties.

Hearings

10. Further to paragraphs 4 and 5, the timetable fixed by the panel shall provide for at least one hearing for the Parties to the dispute to present their case to the panel. As a general rule, the timetable shall not provide more than two hearings unless special circumstances exist.

Confidentiality

11. Written submissions to the panel shall be treated as confidential, but shall be made available to the Parties to the dispute and, where provided for in Article 19.10 (Third Parties), the Third Parties. The Parties to the dispute, the Third Parties, and the panel shall treat as confidential, information submitted by a Party to the dispute or a Third Party to the panel which that Party has designated as confidential. For greater certainty, nothing in this paragraph shall preclude a Party to the dispute or a Third Party from disclosing statements of its own positions to the public, provided that there is no disclosure of statements or information submitted by a Party to the dispute or a Third Party to the panel which that Party has designated as confidential. A Party to the dispute or a Third Party shall, on request of a Party, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Additional Information and Technical Advice

12. Each Party to the dispute and each Third Party shall respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

13. On request of a Party to the dispute or on its own initiative, a panel may seek additional information and technical advice from any individual or body which it deems appropriate. However, before doing so the panel shall seek the views of the Parties to the dispute. Where the Parties to the dispute agree that the panel should not seek the additional information or technical advice, the panel shall not do so. The panel shall provide the Parties to the dispute with any additional information or technical advice it receives and an opportunity to provide comments. Where the panel takes into account the additional information or technical advice in preparation of its report, it shall also take into account any comments by a Party to the dispute on the additional information or technical advice.

Reports of the Panel

14. The panel established pursuant to Article 19.11 (Establishment and Reconvening of a Panel) shall issue its interim report to the Parties to the dispute within 150 days of the date of its establishment. In cases of urgency including those which concern perishable goods, the panel shall endeavour to issue its interim report within 90 days of the date of its establishment.

15. In exceptional cases, if the panel established pursuant to Article 19.11 (Establishment and Reconvening of a Panel) considers it cannot issue its interim report within the period of time referred to in paragraph 14, it shall notify the Parties to the dispute of the reasons for the delay together with an estimate of the period within which it will issue its interim report to the Parties to the dispute. Any delay shall not exceed a further period of 30 days.

16. A Party to the dispute may submit written comments to the panel on its interim report within 15 days of the date of the receipt of the interim report. After considering any written comments by the Parties to the dispute on the interim report, the panel may make any further examination it considers appropriate and modify its interim report.

17. The panel shall issue its final report to the Parties to the dispute within 30 days of the date of issuance of the interim report.

18. The interim and final reports of the panel shall be drafted without the presence of the Parties to the dispute.

19. The panel shall circulate its final report to the other Parties within seven days of the date of issuance of the final report to the Parties to the dispute, and at any time thereafter a Party to the dispute may make the final report publicly available subject to the protection of any confidential information contained in the final report.

Article 19.14: Suspension and Termination of Proceedings

1. The Parties to the dispute may agree at any time that the panel suspend its work for a period not exceeding 12 months from the date of such agreement. Within this period, the suspended panel proceedings shall resume on request of any Party to the dispute. In the event of such suspension, any relevant period of time for the panel proceedings shall be extended by the period of time that the work was suspended. If the work of the panel has been continuously suspended for more than 12 months, the authority for establishment of the panel shall lapse unless the Parties to the dispute agree otherwise.

2. The Parties to the dispute may agree to terminate the panel proceedings in the event that a mutually agreed solution has been

found. In such event, the Parties to the dispute shall jointly notify the chair of the panel.

3. Before the panel issues its final report, it may at any stage of the proceedings propose to the Parties to the dispute that the dispute be settled amicably.

4. The Parties to the dispute shall jointly notify the other Parties that the panel proceedings have been suspended or terminated or the authority for the establishment of the panel has lapsed, pursuant to paragraph 1 or 2.

Article 19.15: Implementation of the Final Report

1. The findings and determinations of the panel shall be final and binding on the Parties to the dispute. The Responding Party shall:

   (a) if the panel makes a determination that the measure at issue is not in conformity with the obligations under this Agreement, bring the measure into conformity; or

   (b) if the panel makes a determination that the Responding Party has otherwise failed to carry out its obligations under this Agreement, carry out those obligations.

2. Within 30 days of the date of the issuance of the panel's final report to the Parties to the dispute pursuant to paragraph 17 of Article 19.13 (Panel Procedures), the Responding Party shall notify the Complaining Party of its intentions with respect to implementation and:

   (a) if the Responding Party considers it has complied with the obligation under paragraph 1, it shall notify the Complaining Party without delay. The Responding Party shall include in the notification a description of any measure it considers achieves compliance, the date the measure comes into effect, and the text of the measure, if any; or

   (b) if it is impracticable to comply immediately with the obligation under paragraph 1, the Responding Party shall notify the Complaining Party of the reasonable period of time the Responding Party considers it would need to comply with the obligation under paragraph 1 along with

an indication of possible actions it may take for such compliance.

3. If the Responding Party makes a notification pursuant to subparagraph 2(b) that it is impracticable for it to comply immediately with the obligation under paragraph 1, it shall have a reasonable period of time to comply with the obligation under paragraph 1.

4. The reasonable period of time referred to in paragraph 3 shall, whenever possible, be agreed by the Parties to the dispute. Where the Parties to the dispute are unable to agree on the reasonable period of time within 45 days of the date of the issuance of the panel's final report to the Parties to the dispute, any Party to the dispute may request that the chair of the panel determine the reasonable period of time, by way of notification to the chair and the other Party to the dispute. Such a request shall be made within 120 days of the date of the issuance of the panel's final report to the Parties to the dispute.

5. Where a request is made pursuant to paragraph 4, the chair of the panel shall present the Parties to the dispute with a determination of the reasonable period of time and the reasons for such determination within 45 days of the date of the receipt by the chair of the panel of the request.

6. As a guideline, the reasonable period of time determined by the chair of the panel should not exceed 15 months from the date of the issuance of the panel's final report to the Parties to the dispute. However, such reasonable period of time may be shorter or longer, depending upon the particular circumstances.

7. Where the Responding Party considers it has complied with the obligation under paragraph 1, it shall notify the Complaining Party without delay. The Responding Party shall include in the notification a description of any measure it considers achieves compliance, the date the measure comes into effect, and the text of the measure, if any.

Article 19.16: Compliance Review[4]

1. Where the Parties to the dispute disagree on the existence or consistency with this Agreement of any measure taken to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report), such dispute shall be settled through recourse to a panel reconvened for this purpose (hereinafter referred to as "Compliance Review Panel" in this Chapter). The Complaining Party may request the reconvening of a Compliance Review Panel by way of notification to the Responding Party. The Complaining Party shall simultaneously provide a copy of the request to the other Parties.

2. The request referred to in paragraph 1 may only be made after the earlier of either:

   (a) the expiry of the reasonable period of time established in accordance with Article 19.15 (Implementation of the Final Report); or

   (b) a notification to the Complaining Party made by the Responding Party pursuant to subparagraph 2(a) or paragraph 7 of Article 19.15 (Implementation of the Final Report) that it has complied with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report).

3. A Compliance Review Panel shall make an objective assessment of the matter before it, including an objective assessment of:

   (a) the factual aspects of any action taken by the Responding Party to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report); and

   (b) the existence or consistency with this Agreement of any measure taken by the Responding Party to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report).

4. The Compliance Review Panel shall set out in its report:

   (a) a descriptive section summarising the arguments of the Parties to the dispute and Third Parties;

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[4] For greater certainty, consultations under Article 19.6 (Consultations) are not required for the procedures under this Article.

(b) its findings on the facts of the case arising under this Article and on the applicability of the provisions of this Agreement;

(c) its determinations on the existence or consistency with this Agreement of any measure taken to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report); and

(d) its reasons for its findings and determinations referred to in subparagraphs (b) and (c).

5. Where a request is made pursuant to paragraph 1, a Compliance Review Panel shall reconvene within 15 days of the date of the request. The Compliance Review Panel shall, where possible, issue its interim report to the Parties to the dispute within 90 days of the date of its reconvening, and its final report 30 days thereafter. If the Compliance Review Panel considers that it cannot issue either report within the relevant period of time, it shall notify the Parties to the dispute of the reasons for the delay together with an estimate of the period of time within which it will issue the report.

6. The period of time from the date of the request made pursuant to paragraph 1 until the date of issuance of the final report of the Compliance Review Panel shall not exceed 150 days.

Article 19.17: Compensation and Suspension of Concessions or Other Obligations

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the Responding Party does not comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report) within the reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to compliance with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report). Compensation is voluntary and, if granted, shall be consistent with this Agreement.

2. Where any of the following circumstances exists:

(a) the Responding Party has notified the Complaining Party that it does not intend to comply with the obligation under

paragraph 1 of Article 19.15 (Implementation of the Final Report); or

(b) the Responding Party fails to notify the Complaining Party in accordance with paragraph 2 of Article 19.15 (Implementation of the Final Report); or

(c) the Responding Party fails to notify the Complaining Party in accordance with paragraph 7 of Article 19.15 (Implementation of the Final Report) by the expiry of the reasonable period of time; or

(d) the Compliance Review Panel determines that the Responding Party has failed to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report) in accordance with Article 19.16 (Compliance Review),

the Responding Party shall, on request of the Complaining Party, enter into negotiations with a view to developing mutually acceptable compensation.

3. If the Parties to the dispute have:

(a) been unable to agree on compensation within 30 days after the date of the receipt of the request made pursuant to paragraph 2; or

(b) agreed on compensation but the Responding Party has failed to observe the terms and conditions of that agreement,

the Complaining Party may at any time thereafter notify the Responding Party and the other Parties that it intends to suspend the application to the Responding Party of concessions or other obligations equivalent to the level of nullification or impairment, and shall have the right to begin suspending concessions or other obligations 30 days after the date of the receipt of the notification.

4. Notwithstanding paragraph 3, the Complaining Party shall not exercise the right to begin suspending concessions or other obligations under that paragraph where:

(a) a review is being undertaken pursuant to paragraph 9; or

(b) a mutually agreed solution has been reached.

5. A notification made pursuant to paragraph 3 shall specify the level of the intended suspension of concessions or other obligations and indicate the relevant sector or sectors in which the Complaining Party proposes to suspend such concessions or other obligations.

6. In considering what concessions or other obligations to suspend, the Complaining Party shall apply the following principles:

   (a) the Complaining Party should first seek to suspend concessions or other obligations in the same sector or sectors in which the panel has determined that there is non-conformity with, or failure to carry out an obligation under this Agreement; and

   (b) if the Complaining Party considers that it is not practicable or effective to suspend concessions or other obligations in the same sector or sectors, it may suspend concessions or other obligations in other sectors.

7. The level of the suspension of concessions or other obligations shall be equivalent to the level of nullification or impairment.

8. If the Responding Party:

   (a) objects to the level of suspension proposed; or

   (b) considers that it has observed the terms and conditions of the compensation agreement; or

   (c) considers that the principles set out in paragraph 6 have not been followed,

   it may, within 30 days of the date of the receipt of the notification made pursuant to paragraph 3, request the reconvening of a panel to examine the matter by way of notification to the Complaining Party. The Responding Party shall simultaneously provide a copy of the request to the other Parties.

9. When a request is made pursuant to paragraph 8, the panel shall reconvene within 15 days of the date of the request. The reconvened panel shall provide its determination to the Parties to the dispute within 45 days of the date of its reconvening.

10. In the event the panel reconvened pursuant to paragraph 9 determines that the level of suspension is not equivalent to the level of nullification or impairment, it shall determine the appropriate level of suspension it considers to be of equivalent effect. In the event the panel determines that the Responding Party has observed the terms and conditions of the compensation agreement, the Complaining Party shall not suspend concessions or other obligations referred to in paragraph 3. In the event the panel determines that the Complaining Party has not followed the principles set out in paragraph 6, the Complaining Party shall apply them consistently with that paragraph.

11. The Complaining Party may suspend concessions or other obligations only in a manner consistent with the panel's determination referred to in paragraph 10.

12. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report) has been complied with or a mutually agreed solution has been reached.

13. Where:

    (a) the right to suspend concessions or other obligations has been exercised by the Complaining Party under this Article;

    (b) the Responding Party has made a notification pursuant to paragraph 7 of Article 19.15 (Implementation of the Final Report) that it has complied with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report); and

    (c) the Parties to the dispute disagree on the existence or consistency with this Agreement of any measure taken to comply with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report),

    any Party to the dispute may request the reconvening of a panel to examine the matter by way of notification to the other Party to the dispute. The requesting Party shall simultaneously provide a copy of the request to the other Parties.[5]

[5] Where a panel is reconvened pursuant to this paragraph, it may also, upon request, determine whether the level of any suspension of concessions or other obligations is

14. Where the panel reconvenes pursuant to paragraph 13, paragraphs 3 through 6 of Article 19.16 (Compliance Review) shall apply *mutatis mutandis*.

15. If the panel reconvened pursuant to paragraph 13 determines that the Responding Party has complied with the obligation under paragraph 1 of Article 19.15 (Implementation of the Final Report), the Complaining Party shall promptly terminate the suspension of concessions or other obligations.

Article 19.18: Special and Differential Treatment Involving Least Developed Country Parties

1. At all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a Least Developed Country Party, particular consideration shall be given to the special situation of Least Developed Country Parties. In this regard, Parties shall exercise due restraint in raising matters under these procedures involving a Least Developed Country Party. If nullification or impairment is found to result from a measure taken by a Least Developed Country Party, a Complaining Party shall exercise due restraint regarding matters covered under Article 19.17 (Compensation and Suspension of Concessions or Other Obligations) or other obligations pursuant to these procedures.

2. Where any Party to the dispute is a Least Developed Country Party, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on special and differential treatment for a Least Developed Country Party that form part of this Agreement which have been raised by that Party in the course of the dispute settlement procedures.

Article 19.19: Expenses

1. Unless the Parties to the dispute agree otherwise, each Party to the dispute shall bear the costs of its appointed panellist and its own expenses and legal costs.

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still appropriate in light of its findings on the measure taken by the Responding Party and, if not, determine an appropriate level.

2. Unless the Parties to the dispute agree otherwise, the costs of the chair of the panel and other expenses associated with the conduct of the panel proceedings shall be borne in equal parts by the Parties to the dispute.

Article 19.20: Contact Point

1. Each Party shall, within 30 days of the date of entry into force of this Agreement for that Party, designate a contact point for this Chapter and shall notify the other Parties of the contact details of that contact point. Each Party shall promptly notify the other Parties of any change to those contact details.

2. Any notification, request, reply, written submission, or other document relating to any proceedings under this Chapter shall be delivered to the relevant Party through its designated contact point. The relevant Party shall provide confirmation of the receipt of such documents in writing through its designated contact point.

Article 19.21: Language

1. All proceedings under this Chapter shall be conducted in the English language.

2. Any document submitted for use in any proceedings under this Chapter shall be in the English language. If any original document is not in the English language, a Party submitting it for use in the proceedings shall submit that document together with an English translation.