Chapter Twenty

Institutional Arrangements and Dispute Settlement Procedures

SECTION A - INSTITUTIONS

Article 2001: The Trade Commission

1. The Parties hereby establish the Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

2. The Commission shall:

   (a) supervise the implementation of this Agreement;

   (b) oversee its further elaboration;

   (c) resolve disputes that may arise regarding its interpretation or application;

   (d) supervise the work of all committees, working groups and expert groups established under this Agreement, referred to in Annex 2001.2; and

   (e) consider any other matter that may affect the operation of this Agreement.

3. The Commission may:

   (a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;

   (b) seek the advice of non-governmental persons or groups; and

   (c) take such other action in the exercise of its functions as the Parties may agree.

4. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree.

5. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party.

Article 2002: The Secretariat

1. The Commission shall establish and oversee a Secretariat comprising national Sections.

2. Each Party shall:

   (a) establish a permanent office of its Section;

   (b) be responsible for the operation and costs of its Section, as set out in Annex 2002.2;

   (c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management;

   (d) notify the Commission of the location of its Section's office; and

3. The Secretariat shall:

   (a) provide assistance to the Commission;

   (b) provide administrative assistance to:

      (i) the panels and committees established under Chapter Nineteen, in accordance with the procedures established pursuant to Article 1908, and

      (ii) if the panels established under this Chapter, in accordance with the procedures established pursuant to Article 2012; and

   (c) as the Commission may direct:

      (i) support the work of other committees and groups established under this Agreement, and

      (ii) otherwise facilitate the operation of this Agreement.

SECTION B - DISPUTE SETTLEMENT

Article 2003: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Article 2004: Recourse to Dispute Settlement Procedures

***[Except as otherwise provided in this Agreement,] the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

Article 2005: GATT Dispute Settlement[1]

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

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[1] At present, the three sides believe that no special provision on FTA dispute settlement is required since any matter that would otherwise arise under both NAFTA and FTA either have been incorporated in NAFTA or suspended.

2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall inform any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall[2] be settled under this Agreement.

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

4. In any dispute referred to in paragraph 1 that arises under Chapter Nine (Standards-Related Measures) or Chapter Seven, Section B (Sanitary and Phytosanitary):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal, or plant life or health, or to protect its environment; and

(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters,

where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

5. The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or 4 to the other Parties and to its section of the Secretariat. Where the complaining Party has

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[2] Canada has recommended an agreed footnote clarifying that this phrase is understood to express a strong admonition, but is not itself intended to be disputable under this Chapter.

initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. Upon receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.

6. Once dispute settlement procedures have been initiated under Article 2008 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.

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

Consultation

Article 2006: Consultations

1. Any Party may request in writing consultations with any other Party regarding any actual or proposed measure or any other matter that it considers might affect the operation of this Agreement.

2. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.

3. Unless the Commission otherwise provides in its rules and procedures established under Article 2001(4), a third Party that considers it has a substantial interest in the matter shall be entitled to participate in the consultations on delivery of written notice to the other Parties and to its Section of the Secretariat.

4. Consultations on matters regarding perishable goods[3] shall commence within 15 days of the date of delivery of the request.

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[3] U.S. acceptance of this provision is based on defining "perishable goods." Mexico will propose a definition.

5. The consulting Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions of this Agreement. To this end, the consulting Parties shall:

(a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter might affect the operation 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) seek to avoid any resolution that adversely affects the interests under this Agreement of any other Party.

Initiation of Procedures

Article 2007: Commission Good Offices, Conciliation and Mediation

1. If the consulting Parties fail to resolve a matter pursuant to Article 2006 within:

(a) 30 days of delivery of a request for consultations;

(b) 45 days of delivery of such request if any other Party has subsequently requested or has participated in consultations regarding the same matter;

(c) 15 days of delivery of a request for consultations in matters regarding perishable goods; or

(d) such other period as they may agree,

any such Party may request in writing a meeting of the Commission.

2. A Party may also request in writing a meeting of the Commission where:

(a) it has initiated dispute settlement proceedings under the GATT regarding any matter subject to Article 2005(3) or (4), and has received a request pursuant to Articles 2005(5) for recourse to dispute settlement procedures under this Chapter; and

(b) consultations have been held pursuant to Articles ***[experts consultations].

3. The requesting Party shall state in the request the measure or other matter complained of and indicate the provisions of this Agreement that it considers relevant, and shall deliver the request to the other Parties and to its Section of the Secretariat.

4. Unless it decides otherwise, the Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly.

5. The Commission may:

(a) call on such technical advisers or create such working groups or expert groups as it deems necessary;

(b) have recourse to good offices, conciliation, mediation or such other dispute resolution procedures; or

(c) make recommendations,

as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.

6. Unless it decides otherwise, the Commission shall consolidate two or more proceedings before it pursuant to this Article regarding the same measure. The Commission may consolidate two or more proceedings regarding other matters before it pursuant to this Article that it determines are appropriate to be considered jointly.

Panel Proceedings

Article 2008: Request for an Arbitral Panel

1. If the Commission has convened pursuant to Article 2007(4), and the matter has not been resolved within:

(a) 30 days thereafter;

(b) 30 days after the Commission has convened in respect of the matter most recently referred to it, where proceedings have been consolidated pursuant to Article 2007(6); or

(c) such other period as the consulting Parties may agree,

any consulting Party may request in writing the establishment of an arbitral panel. The requesting Party shall deliver the request to the other Parties and to its Section of the Secretariat.

2. Upon delivery of the request, the Commission shall establish an arbitral panel.

3. A third Party that considers it has a substantial interest in the matter shall be entitled to join as a complaining Party, on delivery of written notice of its intention to participate to the disputing Parties and its Section of the Secretariat. Such notice shall be delivered at the earliest possible time, and in any event no later than seven days after the date of delivery of a request by a Party for the establishment of a panel.

4. If such Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating or USA MEX [pursuing dispute settlement] CDA [continuing][4]:

(a) CDA [a dispute settlement procedures] under this Agreement; or

(b) CDA [a dispute settlement proceedings] in the GATT on grounds that are substantially equivalent to those available to that Party under this Agreement,

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[4] Canada points out that the agreed June 19 text was "initiating a dispute settlement proceeding".

regarding the same matter in the absence of a significant change in economic or commercial circumstances.

5. Unless otherwise agreed by the disputing Parties, the panel shall be established and perform its functions in a manner consistent with the provisions of this Chapter.[5]

Article 2009: Roster

1. The Parties shall establish 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.

2. Roster members 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, and shall be chosen strictly on the basis of objectivity, reliability and sound judgement;

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

(c) comply with a code of conduct to be established by the Commission.

Article 2010: Qualifications of Panelists

1. All panelists shall meet the qualifications set out in Article 2009(2).

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[5] This provision needs to be considered in light of the Investment and Services Chapters.

2. Individuals may not serve as panelists for a dispute in which they have participated pursuant to Article 2007(5).

Article 2011: Panel Selection

1. Where there are two disputing Parties:

   (a) The panel shall comprise five members.

   (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen of that Party.

   (c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.

   (d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.

2. Where there are more than two disputing Parties:

   (a) The panel shall comprise five members.

   (b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the Party or Parties on the side of the dispute chosen by lot shall select within 10 days a chair who is not a citizen of such Party or Parties.

   (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.

(d) If any disputing Party fails to select a panelist within such period, such panelist shall be selected by lot in accordance with the citizenship criteria of subparagraph (c).

3. Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 15 days[6] after the individual has been proposed.

4. If a disputing Party believes that a panelist is in violation of the code of conduct, the disputing Parties shall consult and if they agree, the panelist shall be removed and a new panelist shall be selected in accordance with this Article.

***[5. Unless the Parties to a dispute involving financial services agree otherwise, panels shall include a majority of members possessing financial services expertise.][7]

Article 2012: Rules of Procedure

1. The Commission shall establish Model Rules of Procedure, in accordance with the following principles:

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[6] All three sides are considering this time period further.

[7] This provision needs to be revised in light of provision in Financial Services Chapter.

(a) The procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions.

(b) The panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential. ***[To this end:

(i) only the panelists and their assistants, ***[representatives of] the participating Parties and Secretariat personnel may be present at panel hearings,

(ii) a Party may disclose to other persons such information in connection with panel proceedings as it considers necessary for the preparation of its case, and

(iii) such Party shall take effective measures to prevent the further disclosure of any such information.][8]

(c) A Party asserting that a measure of another Party is inconsistent with the provisions of this Agreement shall have the burden of establishing such inconsistency. ***[A Party asserting that a measure is subject to an exception under this Agreement shall have the burden of establishing that the exception applies.]

2. Unless the disputing Parties otherwise agree, the panel shall conduct its proceedings in accordance with the Model Rules of Procedure.

3. Unless the disputing Parties otherwise agree within 20 days from the date of the delivery of the request for the establishment of the panel, the terms of reference shall be:

"To examine, in the light of the relevant provisions of the NAFTA, the matter referred to the Commission (as

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[8] Once the three sides agree on the precise language for this bracketed language, it will be incorporated into the Model Rules.

set out in the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2)."

4. If a complaining Party wishes to argue that a matter has nullified or impaired benefits, the terms of reference shall so indicate.

5. If a disputing Party wishes the panel to make findings as to the degree of adverse trade effects on any Party of any measure found to have caused nullification or impairment in the sense of Annex 2004, the terms of reference shall so indicate.

Article 2013: Role of Experts

At the request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree.

Article 2014: Scientific Review Boards

1. At the request of a disputing Party or, unless the disputing Parties disapprove, on its own initiative, the panel may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding, subject to such terms and conditions as such Parties may agree.

2. The board shall be selected by the panel from among highly qualified, independent experts in the scientific matters, after consultations with the disputing Parties and the scientific bodies set out in the Model Rules of Procedure established pursuant to Article 2012(1).

3. The participating Parties shall be provided:

(a) advance notice of, and an opportunity to provide comments to the panel on, the proposed factual issues to be referred to the board; and

(b) a copy of the board's report and an opportunity to provide comments on the report to the panel.

4. The panel shall take the board's report and any comments by the Parties thereon into account in the preparation of its report.

Article 2015: Third Party Participation

A Party that is not a disputing Party, on delivery of a written notice to the disputing Parties and to its Section of the Secretariat, shall be entitled to attend all hearings, to make written and oral submissions to the panel and to receive written submissions of the disputing Parties.

Article 2016: Initial Report

1. Unless the disputing Parties otherwise agree, the panel shall base its report on the submissions and arguments of the Parties and on any information before it pursuant to Article 2013 or 2014.

2. Unless the disputing Parties otherwise agree, the panel shall, within 90 days after the last panelist is selected or such other period as the Model Rules of Procedure established pursuant to Article 2012(1) may provide, present to the disputing Parties an initial report containing:

(a) findings of fact, including any findings pursuant to a request under Article 2012(5);

(b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004, or any other determination requested in the terms of reference; and

(c) its recommendations, if any, for resolution of the dispute,

3. Panelists may furnish separate opinions on matters not unanimously agreed.

4. A disputing Party may submit written comments to the panel on its initial report within 14 days of presentation of the report.

5. In such an event, and after considering such written comments, the panel, on its own initiative or at the request of any disputing Party, may:

(a) request the views of any participating Party;

(b) reconsider its report; and

(c) make any further examination that it deems appropriate.

Article 2017: Final Report

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

2. Neither the initial report nor the final report shall disclose which panelists are associated with majority or minority opinions.

3. The final report of the panel, including any report of a scientific review board established under Article 2014, along with any written views that a disputing Party desires to be appended, shall be transmitted by the disputing Parties to the Commission on a confidential basis within a reasonable period of time after it is presented to them.

4. Unless the Commission decides otherwise, the final report of the panel shall be published 15 days after it is transmitted to the Commission.

Implementation of Panel Reports

Article 2018: Implementation of Final Report

1. Upon receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute.

2. Whenever possible, such resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Annex 2004 or, failing such a resolution, compensation.

Article 2019: Non-Implementation - Suspension of Benefits

1. If in its final report a panel has determined that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex 2004 and the Party complained against had not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 2018(1) within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.

2. In considering what benefits to suspend pursuant to paragraphs 1:

(a) a complaining Party should first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Agreement or to have caused nullification or impairment by the non-complying Party in the sense of Annex 2004; and

(b) a complaining Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.

3. At the request of any disputing Party, the Commission shall establish a panel to determine whether the level of benefits

suspended by a Party pursuant to paragraph 1 is manifestly excessive.

4. The panel proceedings shall be conducted in accordance with the Model Rules of Procedure. The panel shall present its determination within 60 days after the last panelist is selected or such other period as the disputing Parties may agree.

SECTION C - DOMESTIC PROCEEDINGS AND PRIVATE COMMERCIAL DISPUTE SETTLEMENT

Article 2020: Referrals of Matters from Judicial or Administrative Proceedings

1. If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.

2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation to the court or administrative body in accordance with the rules of that forum.

3. If the Commission is unable to agree, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

Article 2021: Alternative Dispute Resolution of Commercial Disputes

1. Each Party shall, to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the free trade area.

2. To this end, each Party shall provide appropriate procedures to ensure observance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

3. A Party shall be deemed to be in compliance with paragraph 2 if it is a party to and is in compliance with the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the 1975 Inter-American Convention on International Commercial Arbitration.

4. The Commission shall establish an advisory committee comprising persons with expertise or experience in the resolution of private international commercial disputes. The committee shall report and provide recommendations to the Commission on general issues referred to it by the Commission respecting the availability, use and effectiveness of arbitration and other procedures for the resolution of such disputes within the free trade area.

ANNEX 2001

Committees and Working Groups

The committees, subcommittees, working groups, subgroups and experts groups established under this Agreement include:

(a) Committees:

(i) Committee on Trade in Goods, Article 317,

(ii) Committee on Agricultural Trade, Article ***711,

(iii) Committee on Sanitary and Phytosanitary Measures, Article 764,

(iv) Committee on Trade in Worn Clothing, Annex 300.B (Textiles and Apparel Goods),

(v) Committee on Standards-Related Measures, Article 913,

(vi) Committee on NAFTA Small Business, Article 1021,

(vii) Financial Services Committee, Article 1414, and

(viii) Advisory committee on private commercial disputes, Article 2021;

(b) Subcommittees:

(i) Land Transportation Services Standards Subcommittee, Annex 913-A,

(ii) Subcommittee on Labelling of Textiles and Apparel Goods, Annex 913-D,

(iii) Telecommunications Standards Subcommittee, Annex 913-B,

(c) North American Automotive Standards Counsil, Annex 913-C; and

(d) Working Groups:

(i) Working Group on Rules of Origin, Article 513(1),

(ii) Working Group on Trade and Competition, Article 1504, and

(iii) Temporary Entry Working Group, Article 1605;

(e) Subgroups:

(i) Customs Subroup, Article 513(5);

(f) Others authorized under this Agreement.

ANNEX 2002.2

1. The Commission shall establish the amounts of renumeration and expenses that will be paid to the panelists, committee members and members of scientific review boards.

2 The renumeration of panelists or committee members and their assistants, members of scientific review boards, their travel and lodging expenses, and all general expenses of panels, committees or scientific review boards shall be borne equally by:

(a) in the case of panels or committees establishes under Chapter Nineteen, the involved Parties, as they are defined in Article 1911; or

(b) in the case of panels and scientific review boards established under this Chapter, the disputing Parties.

3. Each panelist shall keep a record and render a final account of the person's time and expenses, and the panel, committee or scientific review board shall keep a record and render a final account of all general expenses.

***ANNEX 2004

Nullification and Impairment

Model Rules

Consideration should be given to inclusion in the Model Rules of Procedure of some restraints on the basis for objections.

The timing of receipt of the report of the scientific review board and the opportunity to comment need to be addressed in the Rules.

The Model Rules shall provide that panels may decide any procedural matter not covered by the Rules or otherwise agreed by the Parties.

The Rules shall provide that each Section shall receive and maintain modifications and rectifications to average, in accordance with Article 1022.