

SOLUCION DE CONTROVERSIAS

OBJECTIVES

CANADA

EE.UU.

MEXICO

CONCEPT

1. The Commission

CONCEPT	MEXICO	EE.UU.	CANADA	OBJECTIVES
Decision making. Article 2301.5	Por consenso.	Por consenso.	Por consenso, siempre que sea trilateral. Previendo la adhesión de otros países al Tratado, se opondrá a incorporar la regla en el capítulo.	
Publication of a NAFTA informative journal. Not in the text	Propone la publicación de una revista periódica para efecto de informar sobre la instrumentación general del tratado; el trabajo realizado por los distintos grupos técnicos y la Comisión; las decisiones emitidas por los Paneles; y cualquier otro aspecto relacionado con el funcionamiento y operación del TLC.	Se opondrá a la idea.	Se opondrá a la idea.	
2. Transparency				
Notification and consultation of proposed measures. Article 2304	No acepta la publicación, notificación y consultas respecto de proyectos de medidas.	Propone la notificación por escrito de proyectos de medidas y la posibilidad de consultas respecto de ellas. En general adopta el lenguaje del FTA.	Propone la publicación en el periódico oficial de proyectos de medidas, así como la obligación de notificarlas por escrito y que las contrapartes puedan comentarlas. En este sentido, amplía las obligaciones del FTA.	
3. Dispute Settlement				

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<p>Scope (Exceptions). Article 2308</p>	<p>Excluye las siguientes materias del mecanismo general de solución de controversias: dumping/cvd, servicios financieros e inversiones extranjeras.</p>	<p>Exceptúa del mecanismo general de solución de controversias, los conflictos que surjan entre las Partes en materia de inversiones extranjeras (en favor de un mecanismo específico en el capítulo de inversión extranjera).</p>	<p>No establece excepciones.</p>	
<p>Relation NAFTA-GATT. Article 2309</p>	<p>La propuesta inicial consiste en que de surgir un conflicto bajo el TLC y GATT la parte demandante es la que escoge el foro. No obstante, por tratarse de un acuerdo trilateral es preciso examinar el problema detenidamente. Con tal objeto elaboramos un documento de análisis que entregamos a nuestras contrapartes y debe ser objeto de discusión en la próxima reunión.</p>	<p>De surgir un conflicto bajo el TLC y GATT la parte demandante es la que escoge el foro. De ser dos las partes demandantes y de no llegar a un acuerdo respecto al foro, el conflicto deberá resolverse conforme a las reglas del Tratado. No obstante, han señalado que el tema amerita mayor reflexión.</p>	<p>De surgir un conflicto bajo el TLC y GATT la parte demandante escoge el foro. No obstante, han señalado que el tema amerita mayor reflexión.</p>	
<p>Relation NAFTA-FTA. Article 2310</p>	<p>El mecanismo de solución de controversias del FTA sólo debe subsistir para conflictos sobre materias no incorporadas en el TLC y que se indican en un anexo.</p>	<p>De surgir un conflicto entre EE.UU. y Canadá bajo el FTA y el TLC, el mecanismo aplicable será el del TLC, a menos de que EE.UU. y Canadá acuerden algo distinto.</p>	<p>De surgir un conflicto entre EE.UU. y Canadá bajo el FTA y el TLC, la parte demandante escoge el foro.</p>	

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<p>Contents of the initial report.</p> <p>Article 2320.2</p>	<p>La posición de México difiere de la de EU y Canadá en cuanto al contenido de dicho reporte. El texto mexicano en términos comparativos, limita de manera considerable su contenido al establecer que este sólo deberá incorporar cuestiones de hecho y no de derecho.</p>	<p>El reporte inicial debe contener cuestiones de hecho y de derecho; recomendaciones para la solución de la controversia; y, de solicitarlo las partes en el conflicto, el impacto comercial de la medida considerada incompatible con el Tratado.</p>	<p>Misma propuesta que EE.UU.</p>	
<p>Matters subject to binding arbitration.</p> <p>Article 2323.1a</p>	<p>En nuestra propuesta inicial incluimos reglas de origen, salvaguardias y normas técnicas. Estamos considerando ampliar la lista a otras materias relativas al comercio de bienes.</p>	<p>Sólo se someten al arbitraje obligatorio conflictos respecto de los cuales exista acuerdo entre las Partes.</p>	<p>Únicamente la materia de salvaguardias se somete al arbitraje obligatorio. No obstante, en el capítulo de reglas de origen se señala que esta materia también será objeto de arbitraje obligatorio. Piensan agregar otras materias al capítulo de solución de controversias, una vez concluidos los textos de otros grupos.</p>	

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<p>Other dispute resolution mechanisms. (Cross-reference to other chapters)</p>	<p>México propone uno para los casos de AD/CVD.</p>	<p>EE.UU. propone uno para inversiones extranjeras.</p>	<p>Canadá propone la inclusión de una cláusula (aún no redactada) que garantice a los nacionales de las Partes el derecho de apelar algunas decisiones de las autoridades aduaneras en aspectos tales como valoración, clasificación arancelaria y determinación de origen. Lo anterior a través de un mecanismo análogo (pero más simple y expedito) al establecido en el capítulo 19 del FTA (AC/CVD).</p>	
<p>4. Trilateral impact of NAFTA</p>				
<p>A. Nature of the disputes Comment applicable to all the chapter.</p>	<p>México considera que por la naturaleza de los conflictos, todas las controversias tienen carácter trilateral, ya que los paneles siempre estarán interpretando y aplicando el TLC.</p>	<p>Prevén la existencia de controversias trilaterales y bilaterales.</p>	<p>Prevén la existencia de controversias trilaterales y bilaterales.</p>	
<p>B. Direct or informal consultations initiated between two Parties. Article 2311.3</p>	<p>Si la tercera Parte considera que tiene un interés sustancial en la cuestión objeto de la consulta tiene derecho a participar.</p>	<p>Si la tercera parte tiene interés en participar en las consultas debe notificárselo a las otras dos Partes, y si las tres llegan a un acuerdo las consultas se llevarán a cabo de manera conjunta.</p>	<p>Si la tercera parte considera que tiene un interés sustancial en la cuestión objeto de la consulta tiene derecho a participar.</p>	

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<p>C. Request for the meeting of the Commission. Article 2312.1</p>	<p>Cualquiera puede solicitar que se reúna la Comisión para conocer de un conflicto no resuelto durante las consultas directas, incluso el país que no participó en las consultas directas.</p>	<p>El tercero puede solicitar que se reúna la Comisión cuando hubiere participado en las consultas directas (los tres países llegaron a un acuerdo) o cuando hubiere manifestado su interés por escrito de participar (los tres países no llegaron a un acuerdo).</p>	<p>El tercero is tendrá derecho a solicitar que se reúna la Comisión cuando hubiere participado en las consultas directas.</p>	
<p>D. Participation before the Commission. Article 2312.4</p>	<p>Cualquiera puede intervenir ante la Comisión como parte en el conflicto, aunque no haya participado en las consultas, ni hubiere solicitado la reunión de la Comisión.</p>	<p>El tercero puede intervenir ante la Comisión como Parte, si manifiesta tener un interés substancial en el conflicto dentro de los siguientes 7 días de habersele notificado que la Comisión se reuniría para el conocimiento de una disputa.</p>	<p>El tercero puede intervenir ante la Comisión como Parte en el conflicto cuando hubiere participado en las consultas.</p>	

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CONCEPT

F. Panel composition.
Article 2315.7,8,10 y
2316.1

El panel deberá siempre estar integrado por cinco miembros.

En contraste con la propuesta canadiense y americana, México no distingue entre conflictos bilaterales y trilaterales para efecto de la composición del panel. Propone que cada Parte del Tratado siempre elija un miembro. Debemos aún decidir como serán electos el cuarto y quinto miembro en caso de que los árbitros no llegaran a un acuerdo.

El panel deberá siempre estar integrado por cinco miembros.

Tratándose de un conflicto bilateral cada país elige dos miembros y el quinto lo eligen entre ambas, procurando que sea de la lista de panelistas del GATT. De no llegar a un acuerdo, el quinto miembro se elige por sorteo de la lista de panelistas del GATT, eliminando a los nacionales de las Partes en el conflicto.

Tratándose de un conflicto trilateral, los dos países demandantes eligen a un miembro, y la demandada elige a los otros dos miembros. El quinto lo eligen entre los dos países demandantes.

El panel deberá siempre estar integrado por cinco miembros.

Tratándose de un conflicto bilateral cada país elige dos miembros y el quinto lo eligen entre ambas. De no llegar a un acuerdo, el quinto miembro se elige por sorteo de la lista de panelistas del Tratado (mismo procedimiento que el FTA).

Tratándose de un conflicto trilateral, cada país propone dos miembros y la Comisión se encarga de integrar el panel. De no llegar a un acuerdo, los miembros se elegirán por sorteo, debiendo siempre incluir el panel un nacional del país demandado.

G. Non-binding arbitration
Adoption of the final report of the panel.

Article 2322.1

La Comisión i)integrada por los tres países) debe tomar la decisión. Aún tratándose de un conflicto en el que una de las Partes no hubiere intervenido en ninguna etapa del procedimiento.

Ver comentario anterior.

Ver comentario anterior.

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CONCEPT	MEXICO	EE.UU.	CANADA	OBJECTIVES
<p>H. Binding arbitration.</p> <p>Consent of the Commission in order to refer a matter to binding arbitration, in those subjects that are not object of automatic binding arbitration.</p> <p>Article 2323. 1,b</p>	<p>La Comisión (integrada por los tres países) debe tomar la decisión. Aún tratándose de un conflicto en el que una de las Partes no hubiere intervenido ni en las consultas directas, ni en las consultas ante la Comisión.</p>	<p>La Comisión debe tomar la decisión. No obstante, cabe señalar que cuando el tercero elige no participar en el conflicto una vez que éste es turnado a la Comisión, la Comisión sólo se integra por representantes de los dos países parte en el conflicto.</p>	<p>Únicamente las Partes en el conflicto deben tomar la decisión.</p>	

R E V I S E D

Chimalistac Composite
Dispute Settlement

CONFIDENTIAL
3 February 1992

MEX [Institutional Provisions and Dispute Settlement]

USA [Institutional Provisions]

CDA [Institutional Arrangements]

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INSTITUTIONS

Article 2301: The USA MEX [North American] Trade Commission

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1. The Parties hereby establish the USA MEX [North American] Trade Commission (the Commission).

2. The Commission shall be composed of representatives of each Party. The principal representative of each Party shall be the cabinet-level officer or Minister primarily responsible for international trade or their designees.

3. The Commission shall:

- a) supervise the implementation of this Agreement;
- b) oversee its further elaboration;
- c) resolve disputes that may arise over its interpretation or application; and
- d) consider any other matter that may affect its operation.

MEX [3.bis In order to address matters that affect the operation of the Agreement in a prompt and effective manner, each Party shall designate a permanent representative to the Commission who shall coordinate and execute on a continuing basis the functions described in paragraph 3. Actions of the permanent representatives taken by consensus shall be deemed actions of the Commission.]¹

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¹ Mexico will propose language to substitute this paragraph to cover only a "contact point".

4. The Commission may:

- a) establish, and delegate responsibilities to, ad hoc or standing committees or working groups;
- ^{CDA}(b) establish a standing committee of experts to render opinions as may be requested by the Commission, by any Party, or by any domestic judicial or administrative tribunal of any Party;]
- c) seek the advice of non-governmental individuals or groups; and
- d) take such other action in the exercise of its functions as the Parties may agree.¹

5. The Commission shall establish its rules and procedures.
MEX USA [All decisions of the Commission shall be taken by consensus.]

6. The Commission shall convene at least once a year in regular session to review the implementation and further elaboration of this Agreement and to consider any other matter that may affect its operation. Regular sessions of the Commission shall be hosted² successively by each Party.

Article 2302: The Secretariat

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

2. Each Party shall:

- a) establish a permanent office of its national Section;
- b) be responsible for the operation and costs of its Section;

¹ Further consideration of exact language is necessary.

² May need to use a word other than "hosted".

- c) designate an individual to serve as Secretary for its Section, who shall be responsible for its administration and management; and
 - d) notify the Commission of the location of its office.
3. The Secretariat shall:
- a) provide ^{USA}[secretarial and technical] assistance to the Commission;
 - b) provide secretarial and technical assistance to the panels established under this Agreement; and
 - c) as the Commission may direct:
 - i) support the work of committees and other groups established under this Agreement; and
 - ii) otherwise facilitate the operation of this Agreement.
- ^{CDA}[4. The Secretaries of the disputing Parties shall act jointly to service all meetings of panels established pursuant to this Agreement. The Secretary of the Party in whose territory a panel proceeding is held shall prepare a record thereof, and each disputing Party Secretary shall preserve an authentic copy of such record in its office.]
- ^{CDA}[5. Each disputing Party Secretary shall receive and file all requests, briefs, and other papers properly presented to a panel.]
- ^{CDA}[6. Each disputing Party Secretary shall forward to all other disputing Party Secretaries copies of all official letters, documents, records, or other papers received or filed with its Section pertaining to any proceeding before a panel.]

TRANSPARENCY

Article: 2303: Publication

Each Party shall ensure that any measures of general application respecting any matter covered by this Agreement shall be published promptly or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.¹

Article 2304: Notification

~~[To be provided by USA]~~ Notificación de proyectos de medidas C

MEX CDA [Article 2305: Administration of Laws

Each Party shall administer in a uniform, impartial and reasonable manner all laws, regulations, judicial decisions and administrative rulings of general application affecting matters covered by this Agreement.]² C

CDA [Article 2306: Review and Appeal

1. Each Party shall introduce and maintain judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to matters covered by this Agreement, including access to at least one level of review or appeal of such action. C

2. In any such tribunals or procedures, [a listing of appropriate administrative law principles common to common-law and civil law systems, e.g., right to reasoned decision-making, etc., might be included here] B

Depende del Contenido

¹ Agreed in principle, but language may need revision. Should be considered in light of similar provisions in other chapters. Question whether the provision should be in this chapter or another.

² Location of article remains to be decided. Language (revised by Canada to more closely parallel GATT Art. X) may require more precision, particularly regarding scope of coverage. (e.g., "administer" may not apply conveniently to all the nouns.)

3. Such tribunals or procedures shall be independent of the office or authority entrusted with administrative enforcement and have no substantial interest in the outcome of the matter. B

4. Such decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals.]¹ C

DISPUTE SETTLEMENT

CDA [Article 2307: Cooperation

The Parties shall at all times endeavor to agree on the interpretation and application of this Agreement, and to that end shall use the provisions of part 6 for the avoidance and ~~Settlement of all disputes arising thereunder.]~~² A

Article 2308: CDA [Dispute Settlement - Scope] USA [Application]³ C

~~MEX USA [Except] MEX [for the matters covered in Chapter 11 (Review of Antidumping and Countervailing Duty Amendments Determinations), Chapter 16 (Financial Services), and Chapter 21 (Investment),] USA [as otherwise provided in this Agreement,] the provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes regarding the interpretation or application of this Agreement, MEX USA [unless] MEX [all of] the Parties USA [interested in the matter] agree to use another procedure in any particular case.~~⁴ A

¹ General interest by all three countries in having a provision along this line. Various suggestions on drafting have been made. Its location needs to be decided. Positions on paragraph 2 can only be finalized when text offered. Universe of measures covered by this provision needs particular attention and, potentially, redrafting.

² Mexico agrees with the concept but is concerned about its drafting and implementation.

³ Entire Article to be revisited at end of discussions.

⁴ The need for reference to nullification or impairment should be reconsidered in light of reference to this issue in the paragraphs on panel procedures.

1. Disputes arising under both this Agreement and the General Agreement on Tariffs and Trade, and agreements negotiated thereunder (GATT), may be settled in ^{USA CDA}[either] ^{CDA MEX}[the] ^{MEX}[chosen] at the discretion of the complaining Party ^{USA CDA}[or Parties], according to the rules of that forum ^{MEX}[to be exercised following consultations with the other Parties]. ^{USA}[In the event that there are two complaining Parties and they cannot agree on the forum, the dispute shall be settled exclusively under this Agreement.]¹

2. Once the dispute settlement provisions of this Agreement or the GATT have been initiated pursuant to Article 2312, or the GATT with respect to any matter, the procedure initiated shall be used to the exclusion of any other.²

~~Article 2310: [FTA Dispute Settlement]~~³

^{USA}[1. Disputes between Canada and the United States arising under both this Agreement and the Canada-United States Free-Trade Agreement ("CUSFTA") shall be settled under the provisions of this Agreement unless both Parties agree otherwise. For such disputes, once Canada and the United States have initiated proceedings pursuant to Article 2312 of this Agreement or Article 1805 of the CUSFTA, the procedure initiated shall be used to the exclusion of the other.]

^{CDA}[1. Disputes arising under both this Agreement and the Canada-United States Free Trade Agreement, or arising under both this agreement and other trade agreements binding between the Parties to a dispute, may be settled in either forum at the discretion of the complaining Party, according to the rules of that forum.]

¹ Need to review consistency of terminology: "agreement" and "forum" as well as decide whether "Agreements under GATT" includes understandings and decisions under GATT.

² Paragraph should specify when dispute settlement under the GATT is initiated.

³ Mexico will propose language on NAFTA-FTA choice of forum.

2. Once the dispute settlement provisions of this Agreement or the Canada-United States Free Trade Agreement or that other agreement have been initiated pursuant to Article 2312, the Free Trade Agreement or that other agreement, the procedure initiated shall be used to the exclusion of any other.]

~~USA CDA [3. The referral of a dispute for resolution under the CUSFTA shall not affect any rights that Mexico may have under this Agreement with respect to the matter, including its right to initiate dispute settlement procedures under this Chapter.]~~

Article 2311: 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.¹

2. The Party requesting consultations shall at the same time provide a copy of its request to the ^{USA MEX}[third Party] ^{CDA}[other Parties].

~~and, if the three Parties agree, the consultations may be held jointly.]~~

~~CDA MEX [3. MEX [The third] CDA [Any other] Party that considers it has a substantial interest shall have the right to participate in the consultations.]~~

4. 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, and shall seek to avoid any resolution that adversely affects the interests under this Agreement of ^{CDA}[any other Party] ^{MEX USA}[the third Party].

5. Each Party shall treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information.

¹ Need to consider whether this language permits 2 Parties jointly seeking consultations with a third Party or vice versa.

Article 2312: ^{USA} ^{MEX} [Initiation of Procedures] ^{CDA} [Good Offices, Conciliation, Mediation]

1. If the consulting Parties fail to resolve a matter through consultations within 30 ^{MEX} [calendar] days of the delivery of a written request for consultations under Article 2311, ^{USA} [or within 45 days of such request if two Parties have requested consultations,] any such Party may request in writing a meeting of the Commission.^{1, 2}

2. The request shall state the measure or matter complained of, and shall indicate the provisions of this Agreement that are considered relevant.

3. Unless otherwise agreed, the Commission shall convene within 10 ^{MEX} [calendar] days and shall endeavor to resolve the dispute promptly.

^{USA} If the third Party considers that it has a substantial interest in the matter and seeks to participate as a complaining Party, it shall transmit to the other Parties within 7 days written notice of its participation. If the third Party does not elect to participate:

- a) it may not thereafter initiate procedures under this Article regarding the measure in dispute or challenge the measure under any substantially equivalent provision of the GATT or the CUSFTA; and
- b) the Commission shall consist, for purposes of the resolution of the dispute, of representatives of the ~~two remaining Parties~~

5. The Commission may call on such technical advisors or may create such expert groups or working parties as it deems necessary or may have recourse to good offices, conciliation,

¹ Reference to date of delivery is relevant to other written requests in this chapter.

² "Consulting parties" for Mexico and Canada includes a third party who has a substantial interest, but has not independently requested consultations. For the U.S. this is not the case.

mediation or such other dispute resolution procedures, as may assist the consulting Parties to reach a mutually satisfactory resolution of the dispute.

^{CDA}[6. The Commission may make recommendations to the Parties that it considers to be concerned.]

~~^{CDA} ^{MEX} At the request of any Party, the Commission shall consider and determine whether it is appropriate to consolidate two or more proceedings initiated pursuant to this Chapter. In making such a determination, the Commission shall consider, inter alia, whether the issues involved in the separate proceeding are the same or similar, and whether consolidation would cause delay prejudicial to a Party.]^{1 2}~~

PANEL PROCEEDINGS

³Article 2313 ^{MEX}[Non-Binding Arbitration] ^{USA} ^{CDA}[Panel Procedures]

1. If a dispute has been referred to the Commission under Article 2312 and has not been resolved within a period of 30 ^{MEX}[calendar] days after such referral, or within such other period as the Commission has agreed upon, or has not been referred to ^{MEX}[binding] arbitration pursuant to Article 2323, the Commission, upon the written request of any Party transmitted to the other Parties, shall ^{MEX}[refer the matter to non-binding arbitration before a] ^{USA} ^{CDA}[establish a] panel of ^{MEX}[arbitrators] ^{USA} ^{CDA}[experts to consider the matter]. A panel shall be deemed to be established from the date of the request by a Party.⁴

¹ Canada supports in principle, but has certain difficulties with drafting.

² Need to reconsider use of term "proceeding". Would "dispute" be more appropriate?

³ All countries are considering developing language on terms of reference for panel proceedings under 2313 and arbitration under 2323.

⁴ Term "referral to the Commission" should be clarified to specify whether it refers to the date of the request for a Commission meeting or the date the Commission convened.

MEX [2. The panel shall be established and perform its functions in a manner consistent with the provisions of Articles 2314-2322.]

Article 2314: Roster

The Commission shall develop and maintain a roster of individuals who are willing and able to serve as ^{USA CDA}[panelists] ^{MEX}[arbitrators], in accordance with the following criteria:

- a) Roster members shall have expertise or experience in [law, the resolution of disputes arising under international trade agreements, international trade, or other matters covered by this Agreement,] and shall be chosen strictly on the basis of objectivity, reliability and sound judgement.
- b) Roster members [and ^{USA CDA} [panelists] ^{MEX} [arbitrators]] shall ^{MEX} [be independent of the Parties, and] not be affiliated with or take instructions from any Party.
- c) Roster members shall be citizens of a Party.
- d) The roster shall comprise ^{CDA} [a minimum of] ^{USA MEX} [] members from each Party.

Article 2315: Panel Selection

1. ^{USA} [Except as provided below,] Wherever possible, ^{USA CDA} [panelists] ^{MEX} [arbitrators] shall be chosen from the roster.
2. ^{USA CDA} [Panelists] ^{MEX} [Arbitrators] shall normally fulfill the qualifications required of roster members, as set out in Article 2314(a).
3. Individuals may not serve as ^{USA CDA} [panelists] ^{MEX} [arbitrators] for a dispute where they participated in a dispute resolution procedure established under Article 2312(5).
4. ^{MEX CDA} [The Commission and disputing Parties shall, where appropriate in choosing ^{CDA} [panelists] ^{MEX} [arbitrators], endeavour to ensure that the individuals selected have expertise in the particular matter under consideration.]

¹ All three countries want to reconsider this language.

5. ~~CDA~~ [Unless the Parties to a dispute involving financial services agree otherwise, panels shall be composed of a majority of members possessing financial services expertise.]

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6. The panel shall be composed of five members. ~~MEX~~ [one of whom shall be a citizen of Mexico, one of whom shall be a citizen of Canada, and one of whom shall be a citizen of the United States] ~~CDA~~ [at least 2 of whom shall be citizens of the complaining Party and at least 2 of whom shall be citizens of the Party complained against].

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7. ~~USA~~ [The following procedures shall apply when there are two parties to the dispute:] Within 15 ~~MEX~~ [calendar] days of establishment of the panel, each ~~USA~~ ~~CDA~~ [disputing] Party, in consultation with the other ~~CDA~~ ~~USA~~ [disputing Party] ~~MEX~~ [disputing parties] shall appoint ~~MEX~~ [a member] ~~USA~~ ~~CDA~~ [two members] of the panel.

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8. If a Party fails to appoint ~~MEX~~ [its arbitrator] ~~USA~~ ~~CDA~~ [its panelists] within 15 ~~MEX~~ [calendar] days, such ~~MEX~~ [arbitrator] ~~USA~~ ~~CDA~~ [panelists] shall be selected by lot from among the persons the Party has placed on the roster described in Article 2314.

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9. Panelists shall be subject to a code of conduct to be established by the Commission. 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 the procedures of this Chapter.]

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10. The three appointed arbitrators shall appoint the fourth and fifth arbitrators, who shall jointly chair the panel, within 30 calendar days of the establishment of the panel. If agreement is not possible on the fourth and fifth arbitrators, they shall be selected in the following manner: [to be added]

~~CDA~~ [10. The Commission shall endeavor to agree on the fifth panelist who shall chair the panel. ~~USA~~ [Whenever possible, the fifth panelist shall be selected from the GATT roster of panelists.] If the Commission is unable to agree on the fifth panelist within 15 days of establishment of the panel, then, at the request of either disputing Party, the four panelists shall decide on the fifth panelist within 30 days of the establishment of the panel. If no agreement is possible, the fifth panelist shall be selected by lot from ~~USA~~ [among those persons on the GATT roster who are not nationals of a Party.] ~~CDA~~ [the roster described in Article 2314.]

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Article 2316: Multiple Complaints

1. ~~When there are two complaining Parties to a dispute,~~
the procedures set out in paragraphs 7, 8, 9, and 10 of Article
2315 shall apply, except that:

- a) in consultation with the other Parties, each complaining Party shall select one panelist, the third Party shall select two panelists, and the complaining Parties shall jointly participate in the selection of the fifth panelist; and
- b) the schedule for the selection of panelists shall be extended by 10 days and the schedule for each further stage of the dispute shall be extended by 15 days.]

1. Where more than one Party requests the establishment of a panel on the same matter, a single panel shall be established wherever possible.

In such cases, the following panel selection procedures, rather than those of paragraphs 7, 8, and 10 of Article 2315 shall apply:

- a) Within 15 days of establishment of the panel, each disputing Party shall nominate up to two candidates for the panel.
- b) If a Party fails to nominate its candidates within 15 days, such candidates shall be selected by lot from among its citizens on the roster described in Article 2314.
- c) The Commission shall designate the panelists from among the candidates nominated, and shall designate a Chairperson, within 30 days of the establishment of the panel, having due regard to the interests of all disputing Parties.
- d) If the Commission is unable to agree on membership of a panel within such period, then, at the request of any disputing Party, the panelists shall be selected by lot from the roster described in Article 2314, provided that such panel shall always include at least one citizen of the Party complained against.]

[1. At the request of any Party, the Commission shall consider and determine whether it is appropriate to consolidate two or more proceedings initiated pursuant to this Chapter. In making such a determination, the Commission shall consider, inter alia, whether the issues involved in the separate proceeding are the same or similar, and whether consolidation would cause delay prejudicial to a Party.]

Article 2317: Panel Procedures

1. The Commission shall establish model rules of procedure, in accordance with the following principles:¹

- a) The procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and rebuttal arguments.
- b) The proceedings of the panel ^{MEX CDA} [shall be confidential.] ^{USA} [, the written and oral submissions of the Parties, and the panel's initial report shall not be disclosed other than to employees of the Parties, the Secretariat, the panel, and its assistants.]
- c) ^{MEX} [The Parties shall submit such evidence as they deem appropriate and arguments based on applicable international agreements.]

~~Unless otherwise agreed by [the disputing Parties]~~
^{MEX USA} [the Commission] the panels shall conduct their proceedings in accordance with the Model Rules of Procedure.

[3. The request to refer a matter to a panel shall include proposed terms of reference which shall normally provide as follows:

¹ The Parties agree that this Article should be recast to more deeply define the relation between the NAFTA provisions, the model rules of procedure and the procedures to be applied in each case.

"To examine, in light of the relevant provisions of the NAFTA, the matter referred to the Commission (as set out in the letter requesting a Commission meeting) and to make such recommendations as will assist the disputing Parties in reaching a mutually satisfactory resolution of the dispute."

4. If a Party wishes to argue that a matter has nullified or impaired benefits it reasonably expected to accrue to it, the terms of reference should so indicate.
5. Unless the disputing Parties agree otherwise within 20 days from the establishment of the panel, the terms of reference proposed by the Party requesting a panel shall apply.]

Article 2318: Role of Experts

^{MEX}[1. Where appropriate, a panel may request that the Secretariat appoint technical experts to provide assistance in analyzing and understanding the submissions of the Parties.]

^{CPA}[1. The panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate, including officials designated as members of each Party's section of the Secretariat.]¹

Article 2319: Third Party Rights

[1. If a third Party is not a Party to the dispute, it shall nevertheless be entitled to attend all hearings and to make written and oral submissions to the panel. Upon request, the Secretariat shall promptly transmit to such third Party all substantive written communications between the Parties and the panel concerning the dispute.]

[2. Any other Party having a substantial interest in a matter before a panel, and having notified this to the Commission, shall have an opportunity to be heard by the panel, to receive the written submissions of the disputing Parties, and to provide written submissions. If such Party considers the matter before the panel nullifies or impairs benefits accruing under this Agreement, that Party shall have recourse to the consultation and dispute settlement procedures of this Part.]

¹ Relation between this Article and Article 2320 (1) needs to be considered.

Article 2320: Initial Report

USA CDA [1. Unless otherwise agreed by the disputing Parties, the panel shall base its decision on the arguments and submissions of the Parties.]

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2. Unless the disputing Parties otherwise agree, the panel shall, within 90 ^{MEX} [calendar] days after its ~~establishment~~ ^{USA CDA [] MEX []} appointed, present to the ~~disputing~~ ^{USA CDA [] MEX CDA []} Parties an initial report containing:

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a) ^{MEX} [only] findings of fact;

USA CDA [b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Agreement or otherwise cause nullification or impairment in the sense of Article _____;]

B

USA CDA [c) its recommendations, if any, for resolution of the dispute; and]

USA CDA [d) if requested by any disputing Party at the time of establishment of the panel, findings as to the degree of adverse trade effect on the other Party of any measure found not to conform with the obligations of the Agreement.]

Panelists may furnish separate opinions on matters not unanimously agreed.

3. Within 14 ^{MEX} [calendar] days of issuance of the initial report of the panel, a disputing Party may present written comments on the report to the panel.

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

[a) request the views of any ~~USA []~~ ^{MEX CDA []} Party;

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b) reconsider its report; and

c) make any further examination that it deems appropriate.

Article 2321: Final Report

1. The panel shall present to the ~~USA [disputing]~~
~~CDA MEX [participating]~~ Parties a final report, including any
separate opinions on matters not unanimously agreed, within 30
MEX [calendar] days of delivery of the initial report.

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

MEX [3. If requested by a Party at the time of the
commencement of the panel process, the panel shall present
findings as to the degree of adverse trade effect on the other
Parties of any measure found not to conform with the obligations
of the Agreement.]

CDA MEX [4. Unless the participating Parties agree otherwise, the
final report of the panel, along with any written views that a
participating Party desires to be appended, shall be transmitted
to the Commission ___ days after it is presented to the
participating Parties.]

5. Unless the ~~MEX CDA Commission agrees~~ USA [disputing Parties
~~agree~~ otherwise, the final report of the panel shall be
published USA [five days after it is transmitted to the disputing
Parties].

Article 2322: Implementation of Final Report

1. Upon receipt of the final report of the panel, the
~~MEX USA Commission [disputing Parties]~~ shall agree on the
resolution of the dispute, which USA CDA [normally] shall conform
MEX [to the greatest extent possible] with the MEX [decision]
USA CDA [recommendation] of the panel.

2. Whenever possible, the resolution shall be
non-implementation or removal of a measure not conforming with
this Agreement or CDA [otherwise] causing nullification or
impairment in the sense of Article ___ or, failing such a
resolution, compensation.

^{CDA}[3. The Commission shall be notified of any agreed resolution of any dispute.]¹

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4. If the ~~MEX USA [Commission]~~ ~~CDA [disputing Parties]~~ ~~MEX USA [Parties]~~ ~~CDA [have]~~ not reached agreement on a mutually satisfactory resolution under paragraph 1 within 30 ^{MEX}[calendar] days of receiving the final report of the panel (or such other date as the Commission may decide), ^{USA}[and a disputing Party considers that its] ^{CDA}[and to the extent that the final report of a Panel has determined that the] ^{USA CDA}[fundamental rights (under this Agreement) or benefits (anticipated under this Agreement)] ^{CDA}[of the complaining Party or Parties] ^{USA CDA}[are or would be impaired by the implementation or maintenance of the measure at issue,] ^{CDA}[that] ^{MEX USA}[the] Party ^{CDA}[or Parties] shall be free to suspend the application to the ^{MEX}[other] Party ^{USA}[whose measure is at issue] ^{CDA}[complained against] of benefits of equivalent effect until such time as the ^{CDA}[disputing] ^{MEX CDA}[Parties have reached agreement on a resolution of] ^{USA}[Commission has resolved] the dispute.

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5. ^{CDA MEX} [An additional paragraph should provide some means of dispute settlement regarding the meaning of equivalent effect.]

BINDING ARBITRATION

Article 2323: ~~MEX~~ [Binding] Arbitration

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1. If a dispute has been referred to the Commission under Article 2312 and has not been resolved within a period of 30 ^{MEX}[calendar] days after such referral, the Commission: ^{MEX}[upon request of any Party]:

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¹ Mexico will provide language with regard to time periods for implementation of agreed resolutions.

MEX CDA [a] shall refer a dispute MEX [under] CDA [regarding actions taken pursuant to] Chapter 8 Safeguards-Emergency Action, Chapter 3 (Rules of Origin), MEX [Chapter 12 (Technical Standards) and Article 505 (Technical Regulations and Standards for Agricultural, Food, Beverage and Certain Related Goods)] in accordance with the provisions of those chapters, and

[other] dispute, [with the consent of the disputing Parties], to binding arbitration MEX [before a panel of arbitrators] on such terms as the Commission may adopt.

The panel shall be deemed to be established from the date of such referral.

proceeding, upon the agreement of the Parties that have agreed to

3. Unless the Commission directs otherwise, an arbitration panel shall be established and perform its functions in a manner consistent with the provisions of USA [Article 2315 (1)(6)(7)(8) and (10) and Article 2316 (1)] MEX CDA [Articles 2315, 2316, 2317, 2318, 2319, 2320 and 2321].

MEX CDA [4. Unless the Commission agrees otherwise, the final report of the panel shall be published along with any separate opinions, and any written views that a Party that has participated in the proceeding desires to be published.]

MEX [5. The determination of the panel shall be deemed binding under the domestic law of each Party.]

6. If a disputing Party fails to implement in a timely fashion the findings of a binding arbitration panel and the disputing Parties are unable to agree on appropriate compensation or remedial action, then the other disputing Party or Parties shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party.

¹ These provisions may need to be modified to accord with the provisions negotiated in these areas.

DOMESTIC PROCEEDINGS

^{USA} ^{CDA} [Article 2324: Referrals of Matters from Judicial or
Administrative Proceedings

1. In the event an issue of interpretation of this Agreement arises in any domestic judicial or administrative proceeding of a Party which any Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, ^{CDA} [the Commission shall be notified and shall endeavour] ^{USA} [the Parties concerned shall endeavor] to agree on the interpretation of the applicable provisions of this Agreement as expeditiously as possible. B

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 ^{USA} [Parties are] ^{CDA} [Commission is] unable to reach agreement on the interpretation of the provision of the Agreement at issue, any Party may submit its own views to the court or administrative body in accordance with the rules of that forum.]

R E V I S E D

Chimalistac Composite
Dispute Settlement

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CONFIDENTIAL
3 February 1992

NOTE:

[The United States is considering the inclusion of a provision that would encourage the use of arbitration in commercial disputes between a national or company of a Party and a national or company of another Party.]

[The United States is also considering the inclusion of a provision that would allow the Parties to evaluate more effectively the scientific basis of arguments raised by the Parties to a dispute under this Agreement on grounds related to health, conservation of living resources, or environmental protection.]

N.B. Throughout the text the use of the terms "measure" and "matter" needs to be considered.