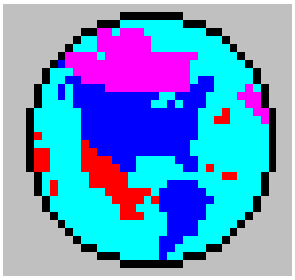
THE LAW OF
REGIONAL ECONOMIC INTEGRATION
IN THE AMERICAN HEMISPHERE



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UNIT X

Dispute Resolution (General: Ch.20)

** Special dispute settlement procedures in certain areas, e.g., antidumping and countervailing duties, labor, environment and investment, are dealt with in each corresponding unit.*

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Guiding Questions

1. It is said that in most transnational dispute settlement mechanisms there exist both "legalist" and "pragmatic" considerations. Think about the merits and demerits of both positions. Can these seemingly conflicting concepts co-exist?

2. In the NAFTA context, there are several different dispute resolution mechanisms. You must be aware of basic procedures of each mechanism. (Please look carefully at the overview table) Compare those different features and think about the rationale behind each mechanism. (We will delve into the dispute settlement system on environment, labor and investment in corresponding classes.)

3. NAFTA Trucking Case – This is an important case law in various aspects. From the perspective of legal realism, why do you think did the US lose the case? What should the US do to comply with this ruling? How did the panel handle the US' main argument based on the wide regulatory discrepancy in public safety existing between the US and Mexico in the area of transportation (trucking business)? Compare the panel's ruling on regulatory justification with those rulings in Gasoline and Shrimp-Turtle. On what grounds could the panel broadly cite and quote the GATT/WTO jurisprudence?

4. ECC – What is the standard of review adopted by the ECC? Is the ECC an appellate tribunal? What is the role of the ECC under NAFTA?

*An Overview of the NAFTA Dispute Settlement System

(Parenthetical numbers are cumulatively-calculated time-limits stipulated in the Agreements)

	Initiation	**Early Settlement**	**Institutional Settlement (or High-level Consultation)**	**Panel**	**Nature of Panel Decis-ion**	**Enforcement (Implementa-tion)**
General *(NAFTA Ch. 20)* (www.nafta-sec-alena.org/english/index.htm)	Request for Consulta-tion by a Member Country	Consulta-tion → Mutually Satisfact-ory Resolution (30)	Request for the Free Trade Commission (FTC) → Convene (40)→ Prompt Resolution (70)	Request for Forma-tion (70) →Select-ion of Panelists (100)→ Initial Report (190)→ Final Report (220)	Non-binding Decis-ion	Compliance (Conformation) with the panel decision or Mutually Satisfactory Resolution (250) → *if not*, Suspension of Benefits
AD & CVD *(NAFTA Ch. 19)* (www.nafta-sec-alena.org/english/index.htm)	Request for a Panel by a Member Country	N.A. (in fact, Appeal of Prior Ruling by a Gov't Agency)	N.A.	Selection of Panelists (55) → Final Decision (uphold or remand) (315) → Extra-ordinary Challenge Procedure	Binding Decis-ion	Compliance with the panel decision →*if not*, Request for Consultation → Request for a Special Committee → Decision → Consultation→ Mutually Satisfactory Solution→ *if not*, Suspension of Benefits

Environment (www.cec.org)						
-Non-Enforcement (NAAEC Art. 13)	Request for Investigation by a Person or NGO	N.A.	A Report by the Secretariat (may be disclosed to the public unless precluded by the Council)	N.A.	N.A.	N.A.
-Enforcement :Single Case (NAAEC Art. 14-15)	Submission of a Petition by a Person or NGO	N.A.	"Factual Record" (may be disclosed to the public unless precluded by the Council)	N.A.	N.A.	N.A.
-Enforcement :Persistent Pattern (NAAEC Art. 22-26)	Request for a Consultation	Consultation → Mutually Satisfactory Resolution (60)	Request for a Special Session of the Council (60)→ Convene (80)→ Prompt Resolution (140)	Request for Formation (140) →Selection of Panelists (170) →Initial Report (350) →Final Report (410)	Non-binding Decision	Compliance with the panel decision or Mutually Satisfactory Action Plan→ *if not*, Reconvening of a Panel and Monetary Enforcement Assessment → *if unpaid*, Suspension of benefits
Labor *(NAALC)*	Submission of Review to NAO by the Public (NGO)→ Determination as to whether to accept after public hearing (60)	Consultation (with another NAO)→ Issuance of Public Report (120)	Ministerial Consultations → Evaluation Committee of Experts (ECE) **occupational safety and health only* → A Draft Report (120 from the ECE)→ A Final Report (180)	* Three Subject-Matter Requirements (subject of EEC Report / occupational safety; health; child labor; minimum wage/ persistent pattern)	See NAAEC Proceeding ("Persistent Pattern")	See NAAEC Proceeding ("Persistent Pattern")
Investment *(NAFTA Ch. 11)* *-ICSID or;*	Submission to Arbitration by an Investor of	Consulatation or Negotiation	N.A.	Selection of Arbitrators (90) → Final	Non-binding Award	Compliance with the Arbitration Award →*if not*, Enforcement of a Final Award by

-Additional Facility Rules of ICSID or; *-UNCITRAL (Art. 1120)*	a Party (Consent & Waiver)			Award		Domestic Courts → *if not*, possibly Ch. 20 Proceeding

I. Introduction

1-1. Summary

http://www.sice.oas.org/summary/nafta/nafta20.asp

OAS Overview of the North American Free Trade Agreement

Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures

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Dispute Settlement Procedures

Article 2003 imposes an obligation on the Parties to seek agreed interpretations, and to "make every attempt" to reach agreed solutions. Article 2004 makes clear that the dispute settlement procedures of the Agreement, rather than any unilateral action, are to be pursued whenever the Parties have a disagreement with each other.

The NAFTA dispute settlement procedures comprise three stages. First, in the event that any matter arises that might affect the operation of the agreement, Article 2006 provides that any country may request consultations with the government concerned. The third country may join the consultations. Paragraph 5 emphasizes the importance of a full exchange of views at the consultation stage. While consulting Parties are obliged to 'provide sufficient information to enable a full examination' of the maker, the Agreement does not compel the production of documents nor draw any inferences from any disclosure of information or failure to do so. The Article also obliges the disputing Parties to seek to avoid any resolution that would adversely affect the interests of any third Party under the Agreement.

In several chapters, as a means of dispute avoidance, the NAFTA provides for expert consultations in the first instance. The Agreement deems consultations held by the Rules of Origin Working Group, the Committee on Sanitary and Phytosanitary Measures and the Committee on Standards-Related Measures to be "consultations" for the purposes of chapter twenty. Second, should consultations fail to resolve the matter, Article 2007 provides that any consulting country may request a meeting of the Commission. The NAFTA places emphasis on amicable dispute settlement, and directs the Commission to seek to settle the dispute promptly, including through using good offices, mediation, conciliation, or any other means of alternate dispute resolution (ADR) that might facilitate an amicable resolution.

Third, if the countries concerned are unable to agree on a solution through the Commission, Article 2008 provides that any consulting country may initiate panel proceedings. Panel proceedings largely resemble those conducted in the GATT.

Article 2012 provides that the Parties will establish model rules of procedure, which shall be used by the panel unless the Parties otherwise agree. Article 2009 requires the Commission to

establish a code of conduct, to be complied with by all panelists. There is a right to at least one hearing before the panel, and the opportunity to provide written submissions and rebuttal arguments. Panel hearings, deliberations and all written submissions to and communications with the panel are confidential. A third country may join as a co-complainant, or may intervene as an "amicus" or "intervener".

Under Article 2016, an initial report is to be presented to the disputing parties by the panel within 90 days of the selection of the last panelist, unless the parties agree on another timetable. The report will contain findings of fact, a determination of whether the measure at issue is or would be inconsistent with a Party's obligations under the Agreement or nullifies or impairs benefits that the complaining government or governments could reasonably have expected under the Agreement, and any recommendations that the panel might offer to resolve the dispute. Disputing parties may comment on the initial report within 14 days of its delivery. The panel may seek further views of participating panties, reconsider its repon, or undertake further examination of the matter before issuing a final report under Article 2017.

Article 2018 obliges the disputing parties to attempt to resolve the dispute, normally in conformity with the determinations and recommendations of the panel. Wherever possible, the resolution will be an agreement not to implement or to remove the offending measure. If there is no agreed solution or the offending measure is not removed, the defending Party must offer appropriate compensation or else Article 2019 provides that the aggrieved Party may suspend the application of equivalent benefits until a settlement is reached. The offending Party may not counter retaliate.

Article 2009 of the NAFTA calls for a consensus roster of persons acceptable to all member countries. Panelists must have expertise or experience in law, international trade, other matters covered by NAFTA or the resolution of disputes arising under international trade agreements, and will be chosen strictly on the basis of objectivity, reliability and sound judgement.

Instead of selecting nominees from the roster on a "labour arbitration" model, by which each government chooses from its own national list, Article 2011 of the NAFTA calls for a process of "reverse selection", by which one country must select from among the other country's nationals on the roster. While Parties are free to nominate panelists from outside the roster, any such nomination is subject to peremptory challenge. Article 2011 permits third-country and non-member country nationals to serve as chair of a panel.

Disputes regarding financial services are fully subject to dispute settlement, through specialized procedures set out in chapter fourteen (financial services) to ensure appropriate panel expertise.

Special rules set out in Article 2015 permit the use of Scientific Review Boards to address factual issues related to environmental, safety, health or conservation measures. In any panel proceeding, the Board is selected by the panel from among highly qualified, independent experts in the scientific matters at issue. The model rules of procedure will set out the procedures by which a panel will select the board. The disputing parties will have full opportunity to comment on the issues to be put to the board and on the board's report to the panel.

Binding dispute settlement is made available under Article 2019 to determine whether one country's retaliation in response to another country's failure to comply with a panel report is itself "manifestly excessive". This Article provides a guarantee against unilateral measures not authorized by the NAFTA itself.

Under the NAFTA, both binding and non-binding panels may produce reports. One difference in the status of decisions by the two types of panels is that in the case of binding panels, the Parties shall comply within 30 days, or else compensation/retaliation may result, whereas in the case of non-binding panels, the Parties shall comply or agree on another solution within 30 days, or else compensation/retaliation may result. Also, in the case of binding panels the offending Party may not counter-retaliate. No panel report of either type is automatically enforceable in domestic law. All NAFTA panels lead to reports with which the Parties are bound to comply in the absence of an agreement or another solution, and in no case may the offending Party counter retaliate.

Relationship to GATT Dispute Settlement

Article 2005 provides that, as a general matter, disputes arising under both the NAFTA and the GATT may be settled in either forum at the choice of the complaining Party. If there are two complaining Parties and they cannot agree, the dispute shall normally be settled under the NAFTA. An agreed note to this Article states that the exhortation to use NAFTA dispute settlement is not itself disputable.

Paragraphs 3 and 4 of Article 2005 set out special rules regarding certain environmental matters. In any dispute where the defending Party claims that its action comes within the terms of Article 104 (Relation to Environmental and Conservation Agreements), or where the dispute arises under chapter seven-B (sanitary and phytosanitary measures) or chapter nine (standards-related measures) concerning a measure which is both adopted for the proection of life, health or the environment in the defending Party's territory and which raises factual scientific issues concerning the environment, health, safety or conservation, the defending Party may bring the dispute to NAFTA dispute settlement.

In the case of actions taken under an international environmental agreement referred to in Article 104 of the NAFTA, as the GATT has no equivalent rule to the one set out in this Article, it is appropnate, where Article 104 can be applied, to bring disputes on such actions to the NAFTA.

In the case of paragraph 4, it is essential that all conditions under this paragraph be met. Thus, the purpose of the measure under dispute must be to protect life or health or the Party's environment. In addition, the complaint must raise factual issues concerning the environment, health, safety, conservation or other scientific justification for the measure, and not, for example, the economic impact of that measure on the complaining Party.

Nullification and Impairment

Annex 2004 provides the terms on which a Party may complain where the actions of another Party have nullified or impaired a benefit that it reasonably expected would accrue under the NAFTA. The concept of nullification and impairment is based on Article XXIII of the GATT,

and allows for dispute settlement to challenge any measure that, although technically not a breach of the NAFTA, has the effect of undermining the value of the bargain inherent in the Agreement.

The annex confirms that this concept of "non-violation" nullification and impairment will apply to trade in goods' obligations as it does in the GATT. Regarding services and intellectual property obligations, the concept applies except where a country is acting pursuant to a general exception under Article 2101. No claim of non-violation nullification or impairment may be made respecting investment or cultural industries, as provided in the FTA.

Relationship to Domestic Law and Proceedings

Article 2021 prohibits any private right of action under domestic law against another Party on the ground that a measure of that other Party is inconsistent with the Agreement. Chapter twenty dispute settlement proceedings are conducted at the international level between governments, and have no automatic effect in domestic law. Occasionally, however, an issue of interpretation or application of the NAFTA might arise in a domestic administrative or judicial proceeding. Where the administrative or judicial body solicits the views of a Party, or where a Party considers that the matter merits its intervention, Article 2020 provides that the Commission shall endeavour to agree on an appropriate response, and the Party in whose territory the court or administrative body is located shall submit any agreed interpretation of the Commission in accordance with the rules of the forum. If the Commission is unable to agree, any Party may submit its own views in accordance with such rules.

Alternative Dispute Resolution

Article 2022 reflects a commitment by the three countries to encouraging the use of arbitration and other means of alternative dispute resolution for the settlement of private international commercial disputes in the free trade area. To this end, a trilateral Advisory Committee on Private Commercial Disputes is established, comprising persons with appropriate expertise and experience, to report and provide recommendations to the Commission.

1-2. Legal Text

http://www.sice.oas.org/trade/nafta/naftatce.asp

Chapter Twenty: Institutional Arrangements and Dispute Settlement Procedures

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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 for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and 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. 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.

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 notify 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 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 Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(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 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. On 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 2007 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 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 Customs Valuation Code.

Consultations

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 agricultural goods shall commence within 15 days of the date of delivery of the request.

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 agricultural 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 Article 2005(5) for recourse to dispute settlement procedures under this Chapter; or

(b) consultations have been held pursuant to Article 513 (Working Group on Rules of Origin), Article 723 (Sanitary and Phytosanitary Measures Technical Consultations) and Article 914 (Standards-Related Measures Technical 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. On 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. The 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 a third Party does not join as a complaining Party in accordance with paragraph 3, it normally shall refrain thereafter from initiating or continuing:

(a) a dispute settlement procedure under this Agreement, or

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

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.

Article 2009: Roster

1. 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.

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 judgment;

(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).

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, the following procedures shall apply:

(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, the following procedures shall apply:

(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 within15 days 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.

(…)

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 2014 or 2015.

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 on 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 considers 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. No panel may, either in its initial report or its final report, disclose which panelists are associated with majority or minority opinions.

3. The disputing Parties shall transmit to the Commission the final report of the panel, including any report of a scientific review board established under Article 2015, as well as any written views that a disputing Party desires to be appended, 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. On 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. Wherever possible, the 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 has 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 paragraph 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 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. On the written request of any disputing Party delivered to the other Parties and its Section of the Secretariat, 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 of the Commission 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: Private Rights

No Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement.

Article 2022: Alternative Dispute Resolution

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 InterAmerican Convention on International Commercial Arbitration.

4. The Commission shall establish an Advisory Committee on Private Commercial Disputes 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 in the free trade area.
(…)

Annex 2004

Nullification and Impairment

1. If any Party considers that any benefit it could reasonably have expected to accrue to it under any provision of:

(a) Part Two (Trade in Goods), except for those provisions of Annex 300-A (Automotive Sector) or Chapter Six (Energy) relating to investment,

(b) Part Three (Technical Barriers to Trade),

(c) Chapter Twelve (Cross-Border Trade in Services), or

(d) Part Six (Intellectual Property),

is being nullified or impaired as a result of the application of any measure that is not inconsistent with this Agreement, the Party may have recourse to dispute settlement under this Chapter.

2. A Party may not invoke:

(a) paragraph 1(a) or (b), to the extent that the benefit arises from any crossborder trade in services provision of Part Two, or

(b) paragraph 1(c) or (d),

with respect to any measure subject to an exception under Article 2101 (General Exceptions).

II. Philosophical Debate about Legalism vs. Pragmatism

- **Basic Features**

Legalism

- rule-oriented approach
- adjudication by the impartial third party
- would also involve negotiation for a settlement, but by reference to the rules
- solution to the *prisoner's dilemma*
- common phenomenon in the history of civilization
  : a gradual *evolution* from a power-oriented approach towards a rule-oriented approach (**John Jackson**)
- stability and predictability
  : enables businessmen and investors to set up long-term plans

Pragmatism

- power-oriented approach
- process of consensus and compromise
- would involve negotiation, by reference to the effective (economic or military) power
- "poison the atmosphere" (**Robert Hudec**)
  : to pick the *winner* rather than to resolve the dispute (cf. analogy of divorce suit)
- representativeness and responsiveness to domestic interests

- **Cross-Connotation (J.H.H. Weiler)**

Legalism in Pragmatism

- power camouflaged by the rule
- subterfuge for the deflection by the weak (*The rule is unfair!*)

Pragmatism in Legalism

- governments are often *captured* by the parochial interests

→ in this sense, legalism is pragmatic.(cf. repercussion of the US-Gasoline case)

- **A Mix of Both Approaches in the NAFTA Context (David Lopez)**

Ch. 20 dispute settlement process

: (i) consultation (pragmatism)→ (ii) FTC (pragmatism)→(iii) panel(legalism)

III. NAFTA Trucking Case (2001)

NORTH AMERICAN FREE TRADE AGREEMENT

ARBITRAL PANEL ESTABLISHED PURSUANT TO CHAPTER TWENTY

IN THE MATTER OF

CROSS-BORDER TRUCKING SERVICES

(Secretariat File No. USA-MEX-98-2008-01)

Final Report of the Panel

February 6, 2001

To download the original report, visit http://www.nafta-sec-alena.org/english/index.htm

I. INTRODUCTION

A. The Dispute

1. The Panel in this proceeding must decide whether the United States is in breach of Articles 1202 (national treatment for cross-border services) and/or 1203 (most-favored-nation treatment for cross-border services) of NAFTA by failing to lift its moratorium on the processing of applications by Mexican-owned trucking firms for authority to operate in the U.S. border states.1 Similarly, the Panel must decide whether the United States breached Articles 1102 (national treatment) and/or 1103 (most-favored-nation treatment) by refusing to permit Mexican investment in companies in the United States that provide transportation of international cargo. Given the expiration on December 17, 1995 of the Annex I reservation that the United States took to allowing cross-border trucking services and investment, the maintenance of the moratorium must be justified either under the language of Articles 1202 or 1203, or by some other provision of NAFTA, such as those found in Chapter Nine (standards) or by Article 2101 (general exceptions).2

The Parties' views are summarized as follows:

2. **Mexico** contends that the United States has violated NAFTA by failing to phase out U.S. restrictions on cross-border trucking services and on Mexican investment in the U.S. trucking industry, as is required by the U.S. commitments in Annex I, despite affording Canada national treatment.3 Mexico believes such failure is a violation of the national treatment and most-favored-nation provisions found in Articles 1202 and 1203 (cross-border services) and Articles 1102 and 1103 (investment).4

3. Mexico also contests the U.S. interpretation of Articles 1202 and 1203, without arguing that the Mexican regulatory system is equivalent to those of the United States and Canada.5 According to Mexico, Mexican trucking firms are entitled to the same rights as U.S. carriers under U.S. law, that is "(i) consideration on their individual merits and (ii) a full opportunity to contest the denial of operating authority."6 Any other approach is a violation of Articles 1202 and 1203. During the NAFTA negotiations, both governments understood that "motor carriers would have to comply fully with the standards *of the country in which they were providing service*."7 However, the obligations of the Parties were "not made contingent upon completion of the standards-capability work program" or the adoption of an identical regulatory system in Mexico.8

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1 The initial request for consultations on December 18, 1995 related to the requirement under Annex I that cross-border trucking services and related investment be permitted for persons of Mexico in the border states by the United States beginning December 18, 1995. However, the same considerations are applicable with regard to the obligation as of January 1, 2000 to permit cross-border services throughout the United States.

2 The Panel also notes that similar questions have been raised concerning Mexico's obligations under Annex I and Articles 1202 and 1203, in light of its alleged refusal to permit U.S. owned firms to obtain authority to operate in the Mexican border states, but that specific matter is not before this Panel. *See* paras. 22 and 24, infra.

3 MIS at 61-62.

4 MIS at 75-81.

5 Mexico also argues that adoption of an identical motor carrier regulatory system cannot properly be made a condition of NAFTA implementation. MIS at 62.

6 MIS at 75.

7 MIS at 74-75, emphasis added.

8 MIS at 62, 64.

4. Mexico asserts that the U.S. conduct must be reviewed in light of Article 102(2) of NAFTA, 9which requires that the "Parties shall interpret and apply the provisions of the [NAFTA] Agreement in the light of its objectives set out in paragraph 1." Among others, the objectives include eliminating barriers to trade in services and increasing investment opportunities "in accordance with applicable rules of international law."10 Mexico contends that the U.S. conduct does not further these objectives.

5. According to Mexico, "There are no exceptions to the relevant NAFTA provisions that could even potentially be applicable."11 Mexico contends that the U.S. failure to implement its cross-border trucking services and investment obligations is not justified by the standards provisions contained in Chapter Nine (standards) nor by Article 2101 (general exceptions), particularly in light of the fact that when NAFTA was negotiated the United States was well aware that Mexico's regulatory system was significantly different from those operating in the United States and Canada.12

6. Mexico charges that the U.S. inaction is motivated not by safety concerns but by political considerations relating to opposition by organized labor in the United States to the implementation of NAFTA's cross-border trucking obligations.13

7. The **United States** argues that because Mexico does not maintain the same rigorous standards as the regulatory systems in the United States and Canada, "the in like circumstances" language in Article 1202 means that service providers [from Mexico] may be treated differently in order to address a legitimate regulatory objective.14 Further, since the Canadian regulatory system is "equivalent" to that of the United States, it is not a violation of the most-favored-nation treatment under Article 1203 for the United States to treat Canadian trucking firms which are "in like circumstances" vis-a-vis U.S. trucking firms in a more favorable manner than Mexican trucking firms.15

8. According to the United States, the inclusion in NAFTA Articles 1202 and 1203 of the phrase "in like circumstances" limits the national treatment and most-favored-nation obligations to circumstances with regard to trucking operations which are like, and that because "adequate procedures are not yet in place [in Mexico] to ensure U.S. highway safety," NAFTA permits "Parties to accord differential, and even less favorable, treatment where appropriate to meet legitimate regulatory objectives."16

9. The United States believes its interpretation is confirmed by Article 2101, which provides that:

> nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption or enforcement by any Party of measures

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9

10 MIS at 66.

11 MIS at 64.

12 MIS at 74-75; 81-83; 87-90.

13 MIS at 70-74.

14 USCS at 2.

15 USCS at 2-3.

16 USCS at 39.

> necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.17

10. The United States also rejects Mexico's contention that the U.S. failure to implement Annex I with regard to cross-border trucking services and investment was politically motivated. At best, the United States contends, political motivation is "only of marginal relevance" to this case in the sense that highway safety has generated controversy in the United States.18 Moreover, the United States asserts that WTO practice is to avoid inquiring into the intent of parties accused of WTO violations.19 The issue, rather, is "whether Mexico has met its burden of proving a violation by the United States of its NAFTA obligations."20

(…)

B. Terms of Reference

(…)

14. The following abbreviations (in alphabetical order) are used herein:

CS	Canada's Submission
GAO	U.S. General Accounting Office
FHWA	U.S. Federal Highway Administration
FMCSA	U.S. Federal Motor Carrier Safety Administration
FMCSR	U.S. Federal Motor Carrier Safety Regulations
FTA	The United States-Canada Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICC	U.S. Interstate Commerce Commission
MFN	Most-Favored-Nation
MIS	Mexico's Initial Submission
MPHS	Mexico's Post-Hearing Submission
MRB	Mexico's Reply Brief
MSRB	Mexico's Comments on the Request for a Scientific Review Board
NAFTA	The North American Free Trade Agreement
SECOFI	Mexico's Secretary of Commerce and Industry
SRB	Scientific Review Board
TR	Transcript of the Hearing
USCS	United States' Counter-Submission

17 USCS at 40.

18 USCS at 50.

19 USPHS at 16-17.

20 USCS at 50.

USDOT	U.S. Department of Transportation
USPHS	United States' Post-Hearing Submission
USSS	United States' Second Submission
USTR	United States' Trade Representative
WTO	World Trade Organization

(…)

VI. ANALYSIS OF THE ISSUES

214. In this analysis, the Panel declines to examine the motivation for the U.S. decision to continue the moratorium on cross-border trucking services and investment; it confines its analysis to the consistency or inconsistency of that action with NAFTA. The Panel notes that this approach is fully consistent with the practice of the WTO Appellate Body, which in *Japan - Taxes on Alcoholic Beverages*, at 28, and in *Chile - Taxes on Alcoholic Beverages*, para. 62, has declined to inquire into the subjective motivations of government decision-makers, or examine their intent. As the Appellate Body observed in analogous circumstances, in *Chile-Alcoholic Beverages*, "The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters."**21**

(…)

A. Interpretation of NAFTA

(…)

217. The objectives of NAFTA are proclaimed in Article 102(1):

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation [sic] treatment and transparency, are to:
>
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties; (…)

218. Article 102(2) provides a mandatory standard for the interpretation of the detailed provisions of NAFTA: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law."

219. The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia,* to "create an expanded and secure market for the goods and services produced in their territories."22 Given these clearly stated objectives and the language of the Preamble, the Panel must recognize this trade liberalization background. (…) The Panel also notes, however, that the Preamble of NAFTA reflects a recognition that the Parties intended to "preserve their flexibility to safeguard the public welfare."

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21 *See also* HERSH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 52 (1958) ("Interpretation as a juristic process is concerned with the sense of the word used, and not with the will to use that particular word."); CHARLES C. HYDE, INTERNATIONAL LAW 531 (1945) ("The final purpose of seeking the intention of the contracting states is to ascertain the sense in which terms are employed. It is the contract which is the subject of interpretation, rather than the volition of the parties.").

22 International tribunals have not hesitated to resort to the preamble of a treaty in order to discover the principal object of the treaty, as is contemplated in Article 31 of the Vienna Convention, discussed *infra*, note 231, 235. *See also The Lotus*, P.C.I.J., (1927) Ser.A, No.10, 17; *Free Zones of Upper Savoy and the District of Gex* (Order) (1929), P.C.I.J., Ser. A, No. 22, 12; *Asylum (Colombia, Perú)*, I.C.J, (1950) Rep. 266 at 276, 282. *Rights of U.S. Nationals* at 196; D.P. O'CONNELL, INTERNATIONAL LAW 260 (2d ed. 1970).

220. In identifying the rules of interpretation of international law referred to in Article 102(2), the Panel need go no further than the 1969 Vienna Convention on the Law of Treaties.23 Both Parties agree that the Vienna Convention is appropriate for this purpose,24 as NAFTA Parties have agreed in the past.25 The guiding rule of the Vienna Convention is Article 31(1), which provides in pertinent part, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

221. Thus, in addition to the ordinary meaning of the terms, interpretation must take into account the context, object and purpose of the treaty.26 The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes, any agreement relating to the treaty.27 If necessary, there shall be taken into account, together with the context, any subsequent practice and any relevant rules of international law applicable in the relations between the parties.28

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23 "International tribunals have not hesitated to resort to the preamble of a treaty in order to discover the principal objectives of a treaty, and Article 31 of the Vienna Convention treats the preamble as part of the 'context' for purpose of interpretation." For documentation and summary sessions of the Vienna Conference, *see* A/CONF.39/11. For official documents, *see* A/CONF.39/11/Add.2. Text of the Vienna Convention can be found at www.un.org/law/ilc/texts/treaties.htm.

24 "The United States considers the Vienna Convention on the Law of Treaties 1969 to be a valid source of law for this purpose of [interpreting NAFTA]." USCS at 37, note 92; "[T]his Panel should apply the rules for interpretation of public international law as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties." MIS at 67.

25 *Dairy Products*, at paras. 118-121 (applying NAFTA Article 102(2) and Articles 31 and 32 of the Vienna Convention).

26 *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants* (Netherlands v. Sweden) I.C.J. Rep., 1958, 55 at 67.

27 Article 31:2 provides:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

28 Article 31:3 provides:

> There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.

Article 31:4 states: "A special meaning shall be given to a term if it is established that the parties so intended."

222. If these criteria are insufficient, there may then be recourse to supplementary means of interpretation, as provided under Article 32 of the Vienna Convention.29 (…) The Panel must therefore commence with the identification of the plain and ordinary meaning of the words, in the context in which the words appear and considering them in the light of the object and purpose of the treaty. 30 Only if the ordinary meaning of the words established through the study and analysis of the context, seems to contradict the object and purpose of the treaty, may other international rules on interpretation be resorted to for the interpretation of the provision. 31 In this proceeding, the Panel has found it unnecessary to go beyond the dictates of Article 31 of the Vienna Convention.

223. Article 31, like other provisions of the Convention, must be applied in conjunction with Article 26, which provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith," i.e., *Pacta sunt servanda*. The Panel must interpret the treaty provisions in dispute with the understanding that the Parties accept the binding nature of NAFTA and that its obligations shall be performed in good faith.

224. Finally, in light of the fact that both Parties have made references to their national legislation on land transportation, the Panel deems it appropriate to refer to Article 27 of the Vienna Convention, which states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." 32 This provision directs the Panel not to examine national laws but the applicable international law. Thus, neither the internal law of the United States nor the Mexican law should be utilized for the interpretation of NAFTA.33 To do so would be to apply an inappropriate legal framework.34

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29 Article 32 provides:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable."

30 "It is impossible to say that an article is clear before its object and end is determined. Only when the object is established can one ascertain that the natural sense of the terms used remains within or exceeds the intention as disclosed." Judge Anzilotti in *Interpretation of the Convention of 1919 Concerning the Employment of Women during the Night*, P.C.I.J., Ser. A/B, No. 50 (1932). *Ambatielos Case*, I.C.J. Rep., 1952, 28 at 60. "Hence the idea that there is a natural meaning to words is delusive". D.P. O'Connell, op.cit., 254. *Anglo-Iranian Oil Case*, I.C.J. Rep., 1952, 104. Lord McNair, *The Law of Treaties*, 1961, 364. HERBERT W. BRIGGS, THE LAW OF NATIONS 877-899 (2d ed.); CHARLES G. FENWICK, INTERNATIONAL LAW 535-540 (4th ed.).

31 This approach has been clearly endorsed by the International Court of Justice:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.

Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, March 1950, I.C.J. Rep., 4 at 8.

32 The proposition contained in this Article has been affirmed since the *Alabama Arbitration*, MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 653 (vol. 1 1898); Wimbledon, P.C.I.J. Rep., Ser., A. No. 1 *Greco-Bulgarian Communities,* P.C.I.J. Rep. Ser., B, No. 17. *Polish Nationals, Treatment in Danzig,* P.C.I.J. Rep., Ser., A/B, No. 44. The International Court of Justice adopted the same view in *Reparation for Injuries suffered in the Service of the United Nations*, I.C.J. Reports 1949, 180.

33 The Panel does not intend to suggest that issues of "internal" law are necessarily irrelevant to international law since national law may be relevant in a variety of ways, including as a fact in an international tribunal. *ELSI Case (U.S. v. Italy)*, I.C.J. Reports 1989, 15.

34 International precedents and authorities supporting this proposition may be found in Roberto Ago, *Third Report on State Responsibility*, 89-105 (A/CN.4/246, 1971).

B. Reservations for Existing Measures and Liberalization Commitments - Annex I

1. Positions of the Parties

225. In its initial submission, **Mexico** presented its view that "the Phase-out elements of the U.S. reservations override the reservations themselves.35 In that section, Mexico concluded, "The Phase-Out elements of the U.S. reservations for motor carrier services do not contemplate any other type of exceptions."36 (…)

226. During the Oral Hearing, a Panelist said to the representative of the **United States**, "I'm wondering about what you said, that your interpretation of Annex I doesn't establish an obligation, is what I understood."37 To this remark, the representative of the United States responded, "correct,"38 and added, "I think I said there's a legal view. The phase-out didn't, per se, obligate us to do anything. . . . So a phase-out of national treatment just means that you lose your right as of that day not to follow certain obligations."39

(…)

2. The Panel's Analysis

228. The Panel begins its inquiry by looking at the interpretative Note ("the Note") that precedes the Parties' Schedules at pages I-1, I-2 and I-3 of Annex I. The drafters provided the interpretative Note of Annex I to assist in the reading and understanding of the Reservations contained in Annex I. Specifically, the Note provides rules and otherwise acts as guidance for the Panel in interpreting the Annex I Schedules of Canada, Mexico and the United States, including the reservations and phase-out provisions applicable to cross-border trucking services and investment.

229. The text of the Note is set out below:

> 1. The Schedule of a Party sets out, pursuant to Articles 1108(1) (Investment), 1206(1) (Cross-Border Trade in Services) and 1409(4) (Financial Services), the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by:
> (a) Article 1102, 1202 or 1405 (National Treatment),
> (b) Article 1103, 1203 or 1406 (Most-Favored-Nation Treatment), (…)

35 MIS at 85-86.

36 MIS at 86.

37 TR at 230.

38 TR at 230.

39 TR at 230-231.

> 3. In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of the Chapters against which the reservation is taken. To the extent that:
> (a) the Phase-Out element provides for the phasing out of non-conforming aspects of measures, the Phase-Out element shall prevail over all other elements;
> (b) the Measures element is qualified by a liberalization commitment from the Description element, the Measures element as so qualified shall prevail over all other elements;40
> and (…)

230. Significantly, the Note indicates that in interpreting liberalization commitments regarding Phase-Out elements in Annex I, the elements of the reservation must be considered in the light of the relevant provisions of the Chapters against which the reservation is taken,41 and that the Phase-Out element of a reservation shall prevail over all other elements of the reservation.42

231. Because of its importance to this case, the reservation at issue in the Schedule of the United States Sector: Transportation, Sub-Sector: Land Transportation, Phase-Out: Cross-Border Services, Investment, pages I-U-18 to I-U-20 is quoted in full:

> **Sector**: Transportation
> **Sub-Sector**: Land Transportation
> **Industry Classification**: SIC 4213 Trucking, except Local
> SIC 4215 Courier Services, Except by Air
> SIC 4131 Intercity and Rural Bus Transportation
> SIC 4142 Bus Charter Service, Except Local
> SIC 4151 School Buses (limited to interstate transportation not related to school activity)
>
> **Type of Reservation**: National Treatment (Articles 1102, 1202) Most-Favored-Nation Treatment (Articles 1103, 1203) Local Presence (Article 1205)
>
> **Level of Government**: Federal
>
> **Measures**: 49 U.S.C.§10922(l)(1) and (2); 49 U.S.C.§10530(3); 49 U.S.C.§§ 10329,10330 and 1170519; 19 U.S.C. §1202; 49 C.F.R. § 1044
> Memorandum of Understanding Between the United States of America and the United Mexican States on Facilitation of Charter/Tour Bus Service, December 3, 1990

40 Emphasis supplied.

41 Head of Paragraph 3.

42 Paragraph 3.a

As qualified by paragraph 2 of the Description element

Description: ***Cross-Border Services***
(…)

Investment

5.The moratorium has the effect of being an investment restriction because enterprises of the United States providing bus or truck services that are owned or controlled by persons of Mexico may not obtain ICC operating authority.

Phase-out: **Cross-Border Services**

A person of Mexico will be permitted to obtain operating authority to provide:
(a) three years after the date of signature of this Agreement, cross-border truck services to or from border states (California, Arizona, New Mexico and Texas), and such persons will be permitted to enter and depart the territory of United States through different ports of entry;
(b) three years after the date of entry into force of this Agreement, cross-border scheduled bus services; and
(c) six years after the date of entry into force of this Agreement, cross-border truck services.

Investment

A person of Mexico will be permitted to establish an enterprise in the United States to provide:
(a) three years after the date of signature of this Agreement, truck services for the transportation of international cargo between points in the United States; and
(b) seven years after the date of entry into force of this Agreement, bus services between points in the United States.

The moratorium will remain in place on grants of authority for the provision of truck services by persons of Mexico between points in the United States for the transportation of goods other than international cargo.

(…)

234. The Note stipulates that in Annex I, the "Measures" element identifies the laws, regulations or other measures, as qualified, where indicated, by the "Description" element, for which the reservation is taken. Most significantly, the Note explicitly develops a hierarchy of rules for the interpretation of the agreed reservations. Paragraph 3 (b) states that if the Measures element is qualified by a liberalization commitment from the Description element, the Measures element as so qualified shall prevail over all other elements.43

235. In light of the Note, the text of the Phase-Out elements in Annex I concerning both the liberalization of cross-border truck services and the investment in truck services is unambiguous, based on the ordinary meaning of the words. The relevant clauses establish specific dates in Annex I for the Party to liberalize barriers to services (December 18, 1995) and investment (December 18, 1995) in land transportation cross-border trade services. The Phase-Out clauses and their context in the Annex I do not suggest that the commitment to phase-out reservations on December 18, 1995 is dependent upon any other element of the Reservation or the Note. The Panel is unaware of any agreement related to NAFTA, or any subsequent practice or legal principle, that could accommodate the perception that there is a conditional element for the execution of the liberalization commitments. Thus, it follows that the liberalization commitments were unconditional within Annex I. Any other interpretation would be contrary to what is written in NAFTA.

236. Furthermore, the negotiators of NAFTA apparently considered very carefully the character, purpose, mode of preparation and adoption of reservations and their Phase-Out liberalization commitments. The very title of Annex I conveys the will of the Parties: "Reservations for Existing Measures and Liberalization Commitments." The Reservations under analysis included a Sector, Sub-Sector, Industry Classification, Type of Reservation, Level of Government, Measures, Description, Phase-Out.44 There are no ambiguities. The reservations and their liberalization are very well identified. The Parties agreed not only which reservations were acceptable for them but also Phase-Out commitments concerning the reservations. The wording is lucid and comprehensive.

237. Moreover, the Panel is aware that the reservations in Land Transportation included in Annex I are contrary to the principal objective of NAFTA as established in its Preamble, and are also obstacles to achieving the concrete objectives agreed upon in Article 102(1). Presumably, such reservations were intended as a necessary structural element that was essential to assist in establishing a Free Trade Area, the ultimate goal of NAFTA.45 In this context, the Panel recalls an old legal principle expressed in Latin as *exceptio est strictissimae applicationis* that has been utilized to signify that reservations to treaty obligations are to be construed restrictively.46

43 Section (c) sets forth other rules if the Measures element is not so qualified, but is not controlling here.

44 *See* complete text in paragraph 230**.**

45 NAFTA Article 101 provides: The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area.

46 *See* Interpretation of Article 79 of the 1947 Peace Treaty (French/Italian Conciliation Commission) XIII, UNRIAA 397*; Case Concerning Certain German Interests in Upper Silesia* PCIJ, Series A, No. 7, 56 and *Free City of Danzig case,* PCIJ Series A/B, No. 65, 71.

238. The Panel recognizes that the Phase-Out provisions concerning the reservations must be given full legal force over all other elements of Annex I. This legal rule is firmly grounded in international law. The Permanent Court of International Justice declared that a treaty provision must take precedence over a general rule of international law.47 More recently, this principle has been adopted by the WTO Appellate Body, which upheld the Panel's decision that the precautionary principle could not be used to override the explicit wording of treaty obligations.48

239. Thus, the Panel finds that implementation of the very concrete Phase-Out provisions of the Reservations in this case is not conditioned by any other element.49 If the Parties had wished to establish any mode of subsequent acceptance or condition to the liberalization commitments agreed on in the Phase-Out elements of Annex I, they would have or could have used other wording. It is the opinion of the Panel that the Phase-Out provisions in Annex I must prevail over all other elements of Annex I. The United States has failed to demonstrate the existence of any valid legal ground for its non-compliance with NAFTA Liberalization Commitments regarding Land Transportation Services and Investment in Annex I.

240. Under these circumstances, the phase-out obligations of the United States under Annex I with regard to cross-border trucking services and investment prevail unless there is some other provision of NAFTA that could supersede these obligations. It is to those other provisions that the Panel now turns.

C. Services

241. The key issue in services, in the view of the Panel, is whether the United States was in breach of Articles 1202 (national treatment for cross-border services) and 1203 (most-favored-nation treatment for cross-border services) of NAFTA by failing to lift its moratorium on the processing of applications by Mexican owned trucking firms for authority to operate in the U.S. border states. Given the expiration on December 17, 1995 of the Annex I reservation that the United States took to allowing cross-border trucking, the maintenance of the moratorium must be justified either under the language of Articles 1202 and 1203, or by some other provision of NAFTA, such as those found in Chapter Nine (standards) or by Article 2101 (general exceptions). As neither Party asserts that Annex I itself contains an exception that would otherwise justify U.S. actions, and as the United States has declined to rely on Chapter Nine as a defense, as stated earlier, the Parties rest their positions in large part on their interpretation of Articles 1202, 1203 and 2101.

1. Positions of the Parties

47 *Wimbledon* (1923), P.C.I.J. Rep., Ser. A, No.1.

48 *EC Measures Concerning Meat and Meat Products (Hormones*), WTO Appellate Body AB-1997-4, WT/DS26/AB/R/WT/DS48/AB/R, at 253 (January 16, 1998).

49 "Conditions should be implied only with great circumspection; for if they are implied too readily, they would become a serious threat to the sanctity of a treaty." McNair, op.cit. 436.

242. **The United States** argues that Mexico's truck transportation regulatory system does not maintain the same rigorous standards as the systems in the United States and Canada, and that therefore the "in like circumstances" language in Article 1202 means that "service providers [in Mexico] may be treated differently in order to address a legitimate regulatory objective."50 Further, since the Canadian regulatory system is "equivalent" to that of the United States, it is not a violation of most-favored-nation treatment under Article 1203 for the United States to treat Canadian trucking firms which are "in like circumstances" vis-a-vis U.S. trucking firms in a more favorable manner than Mexican trucking firms.51 The United States also suggests the applicability of Article 2101, which provides a general exception to other NAFTA obligations and may be invoked for "measures necessary to secure compliance with laws or regulations . . . relating to health and safety and consumer protection."52 The United States has not sought to justify its actions under Chapter Nine, but both Mexico and Canada have raised issues under that Chapter, which as a result is addressed briefly, *infra*.

243. **Mexico** vigorously contests the U.S. interpretation of Articles 1202 and 1203, without contending that the Mexican regulatory system is equivalent to that of the United States and Canada.53 According to Mexico, Mexican trucking firms are entitled to the same rights as U.S. carriers under U.S. law, that is "consideration on their individual merits and a full opportunity to contest the denial of operating authority."54 Any other approach is a violation of Articles 1202 and 1203. During NAFTA negotiations, both governments understood that motor carriers would have to comply fully with the standards *of the country in which they were providing service*. However, the obligations of the Parties were not made contingent upon completion of the standards-capability work program55 or the adoption of an identical regulatory system in Mexico.56 Anticipating a U.S. defense that did not materialize, Mexico explained that the United States cannot rely on Chapter Nine, because the United States failed to justify its moratorium under the procedural requirements of that chapter.57 Nor can the United States rely on Article 2101, because the Article 2101 exception applies only to measures that are necessary to secure compliance with laws or regulations that are otherwise consistent with NAFTA, and no such laws or regulations exist here.58 Thus, the blanket denial of access is not justified under any provision of NAFTA.

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50 USCS at 2.

51 USCS at 2-3.

52 USCS at 40.

53 Mexico also argues that adoption of an identical motor carrier regulatory system cannot properly be made a condition of NAFTA implementation. MIS at 64.

54 MIS at 75.

55 MIS at 74-75; emphasis added.

56 MIS at 64.

57 MPHS at 3, 9-12.

58 MIS at 87-89.

244. **Canada**, which exercised its right to participate in accordance with Article 2013, essentially agrees with Mexico, insisting that the major issue in interpreting Article 1202 is a comparison between a foreign service provider providing services cross-border (here, from Mexico into the United States), and a service provider providing services domestically. Canada also contends that a "blanket" refusal by the United States to permit Mexican carriers to obtain operating authority to provide cross-border truck services would necessarily be less favorable than the treatment accorded to U.S. truck services providers in like circumstances.59 (…)

2. The Panel's Analysis

246. Article 1202 provides in pertinent part: "1. Each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers."60 Similarly, Article 1203 states: "Each Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to service providers of any other Party or of a non-Party."61

247. (…) In its most succinct terms, the disagreement between the United States on the one hand, and Mexico and Canada on the other, is over whether the "in like circumstances" language (or some other limitation on or exception to national treatment and most-favored-nation treatment) permits the United States to deny access to all Mexican trucking firms on a blanket basis, regardless of the individual qualifications of particular members of the Mexican industry, unless and until Mexico's own domestic regulatory system meets U.S. approval. (…) This disagreement in turn rests on the interpretation and scope of the "in like circumstances" language, that is, whether the comparison may be applied to "service providers" on a blanket country-by-country basis or instead must be applied to individual service provider applicants.

248. Article 1202 requires each Party to accord to service providers of another Party treatment that is no less favorable than it accords, in like circumstances, to its own service providers. Given that under U.S. law the United States treats operating authority applications received from U.S. (and Canadian) -owned and -domiciled carriers on an individual basis, the blanket refusal of the United States to review applications for operating authority from Mexican trucking service providers on an individual basis suggests inconsistency with the U.S. national treatment obligation (and from most-favored-nation treatment, given that Canadian carriers are also treated on an individual basis).

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59 CS at 3.

60 Emphasis supplied.

61 Emphasis supplied.

249. The Panel, in interpreting the phrase "in like circumstances" in Articles 1202 and 1203, has sought guidance in other agreements that use similar language. The Parties do not dispute that the use of the phrase "in like circumstances" was intended to have a meaning that was similar to the phrase "like services and service providers," as proposed by Canada and Mexico during NAFTA negotiations.62 Also, the United States contends, and Mexico does not dispute, that the phrase "in like circumstances" is not substantively different from the phrase "in like situations," as used in bilateral investment treaties.63 (…) Again, the Parties do not differ on the general principle that differential treatment may be appropriate and consistent with a Party's national treatment obligations.

(…)

251. (…), the Panel observes that similar national treatment obligations have been interpreted, in the GATT *Section 337* case, to permit the imposition of some requirements concerning imports that are different from those imposed on domestic products;64 identical treatment is not necessarily required with regard to treatment of intellectual property violations relative to imported goods compared to domestically produced goods. Yet, the Panel in *Section 337* also recognized that formally identical requirements for imports may in fact provide less favorable treatment in specific circumstances.65

(…)

254. It is not disputed that the United States prohibits consideration of applications from most Mexican service providers to supply truck transportation services from Mexico to points in the United States outside the border commercial zone.66 Yet, the obligation of NAFTA Article 1202 is to provide no less favorable treatment to service providers of Mexico. It appears from uncontested facts that the United States is not doing so.(…) Certain Mexican drayage carriers are permitted to provide services only within the narrow border commercial zones, and are wholly prohibited from providing service to other points in the United States. (…)

255. However, in all other circumstances comprising Mexican trucking service providers– presumably hundreds or even thousands of firms–those Mexican service providers have been denied access to the U.S. border states since December 17, 1995, despite the requirements of Annex I and Articles 1202 and 1203.

256. Thus, the provision of no less favorable treatment to these very limited Mexican service providers fails to satisfy the obligation to provide no less favorable treatment to other trucking service providers of Mexico, who remain subject to the moratorium. The U.S. blanket refusal to review requests for operating authority from other Mexican trucking firms, because of safety concerns, is inconsistent with these prior exceptions to the moratorium, as well as with U.S. treatment of U.S. domestic trucking service providers.

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62 MRS at 12.

63 USSS at 6-8.

64 *U.S. - Section 337 of the Tariff Act of 1930*, L/6439 - 36S/345 (Nov. 7, 1989) (Panel Report), para. 5.31.

65 *Id.,* para. 5.11.

66 MIS at 1-4; USCS at 20.

257. Therefore, absent other justification, the moratorium imposed by the United States on the processing of applications since December 17, 1995, would constitute a *de jure* violation of the national treatment obligation in Article 1202. However, the United States asserts justification under the terms "like circumstances," and the proposed interpretation to include differential treatment for legitimate regulatory objectives related to safety.

258. (…), the Panel is also aware of Chapter One, Article 102. Article 102(2) of NAFTA clearly states that "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law." The first of NAFTA's listed objectives is to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties."67 These objectives are elaborated more specifically through the principles and rules in NAFTA, including national treatment. Further, the provisions of the Agreement are required to be interpreted in light of the objectives and applicable rules of international law. Given these requirements, and the use of the same term in the FTA, the Panel is of the view that the proper interpretation of Article 1202 requires that differential treatment should be no greater than necessary for legitimate regulatory reasons such as safety, and that such different treatment be equivalent to the treatment accorded to domestic service providers. With regard to objectives, it seems unlikely to the Panel that the "in like circumstances" language in Articles 1202 and 1203 could be expected to permit maintenance of a very significant barrier to NAFTA trade, namely a prohibition on cross-border trucking services.

259. Similarly, the Panel is mindful that a broad interpretation of the "in like circumstances" language could render Articles 1202 and 1203 meaningless. If, for example, the regulatory systems in two NAFTA countries must be substantially identical before national treatment is granted, relatively few service industry providers could ultimately qualify. Accordingly, the Panel concludes that the U.S. position that the "in like circumstances" language permits continuation of the moratorium on accepting applications for operating authority in the United States from Mexican owned and domiciled carriers is an overly-broad reading of that clause.

260. The United States also suggests that Article 2101 allows the United States to refuse to accept applications from Mexican trucking service providers because of safety concerns. The Panel's view that the "in like circumstances" language, as an exception, should be interpreted narrowly, applies equally to Article 2101. Here, the GATT/WTO history, liberally cited by the Parties, and the FTA language, noted earlier, are both instructive. Although there is no explicit language in Chapter Twelve that sets out limitations on the scope of the "in like circumstances" language, the general exception in Article 2101:2 invoked by the United States closely tracks the GATT Article XX language, and is similar to the FTA proviso limiting exceptions to national treatment to situations where "the difference in treatment is no greater than necessary for ... health and safety or consumer protection reasons."68

261. Thus, Article 2101:2 provides in pertinent part:

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67 NAFTA, Art. 102(1)(a).

68 USCFTA, Art. 1403.3(a).

> Provided that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on [international] trade between the Parties, nothing in . . . Chapter Twelve (Cross-Border Trade in Services) . . . shall be construed to prevent the adoption of enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement, including those relating to health and safety and consumer protection.

262. Under Article 2101, therefore, safety measures adopted by a Party—such as the moratorium on accepting applications for U.S. operating authority from Mexican trucking service providers—may be justified only to the extent they are "necessary to secure compliance" with laws or regulations that are otherwise consistent with NAFTA. Here again, the GATT/WTO jurisprudence proves helpful in determining what "necessary" means.

(…)

265. In *Reformulated Gasoline,* the WTO's Appellate Body determined that the chapeau of Article XX, prohibiting GATT-inconsistent measures from being unjustifiable discrimination or a disguised restriction on trade, required that a Party adopt measures reasonably available to it that were the least inconsistent with the GATT. Instead of imposing less favorable regulatory structures on foreign refiners exporting gasoline to the United States, the United States might have pursued cooperative agreements with the governments of Venezuela and Brazil.69

266. This suggests, by analogy, that the United States did not, in the actions it took prior to December 17, 1995, make a sufficient effort to find a less trade-restrictive measure than continuation of the moratorium to address its safety concerns.

267. In *Shrimp*, the WTO Appellate Body rejected the rigid standard through which U.S. officials determined whether certain other countries would be certified as having sea turtle protective fishing methods, effectively granting or refusing other countries' right to export shrimp to the United States. According to the Appellate Body, "it is not acceptable in international relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members."70 The Appellate Body also rejected the idea that one member could attempt to dictate another member's regulatory policies by refusing access to the dictating member's market, where that access was otherwise required under the GATT. In the instant case, Mexico objects to the U.S. moratorium and legal position as implying that only adoption by Mexico of a truck regulatory regime fully compatible with that of the United States would require the United States to lift the moratorium.71

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69 *Reformulated Gasoline,* Part IV, at 24-28.

70 *Shrimp*, para. 164, emphasis in original.

71 MIS at 74-75.

268. Here also, there is no evidence in the record that the United States considered more acceptable, less trade restrictive, alternatives, except to the extent that it does so for specific Mexican service providers exempted from the moratorium.

269. The Panel is generally in agreement with Mexico that, consistent with the GATT/WTO history and the text of Article 2101, in order for the U.S. moratorium on processing of Mexican applications for operating authority to be NAFTA-legal, any moratorium must secure compliance with some other law or regulation that does not discriminate; be necessary to secure compliance; and must not be arbitrary or unjustifiable discrimination or a disguised restriction on trade.72

270. Also, if under the GATT/WTO jurisprudence a Party is "bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other . . . provisions,"73 in this NAFTA case, the United States has failed to demonstrate that there are no alternative means of achieving U.S. safety goals that are more consistent with NAFTA requirements than the moratorium. In fact, the application and use of exceptions would appear to demonstrate the existence of less-restrictive alternatives.

(…)

276. With regard to most-favored-nation treatment under Article 1203, essentially the same considerations are relevant as with national treatment under Article 1202, discussed in detail above. If the "in like circumstances" language means that the foreign regulatory system must be equivalent or identical to the U.S. system, and the United States has concluded that the Canadian system meets this criterion,74 the United States would be justified in discriminating in favor of Canadian trucking firms. However, if "in like circumstances" does not permit this treatment, Article 1203 is violated as well as Article 1202, since U.S. and Canadian carriers are treated in the same manner (individually) while Mexican carriers are treated differently. This is true with regard to any possible departures from most-favored-nation treatment based on other provisions of NAFTA, such as Article 2101, again as discussed earlier.

(…)

278. Based on these considerations, and noting the previously discussed objectives of NAFTA in facilitating increased trade in services, the Panel is of the view that the U.S. refusal to consider applications is not consistent with the obligation to provide national treatment. Thus, the continuation of the moratorium beyond December 18, 1995, was a violation of the national treatment and most-favored-nation provisions of Articles 1202 and 1203, respectively, in that there is no legally sufficient basis for interpreting "in like circumstances" as permitting a blanket moratorium on all Mexican trucking firms. Nor is the departure from national treatment and most-favored-nation treatment under these Articles justified under Article 2101.

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72 MPHS at 23; *see Section 337*, para. 6.31.

73 MPHS at 25, *quoting Section 337*, para. 5.26.

74 USCS at 19.

D. Investment

279. The issue before this Panel with regard to investment is to determine whether the failure by the U.S. government to take appropriate regulatory actions to eliminate the moratorium on Mexican investments in companies providing international transportation by land constitutes a breach of Articles 1102, 1103 and 1104 of NAFTA, which provide:

> **Article 1102: National Treatment**
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. . . .
>
> **Article 1103: Most-Favored-Nation Treatment**
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> **Article 1104: Standard of Treatment**
> Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

280. The U.S. reservations with respect to existing measures from obligations imposed by Articles 1102 (national treatment in investment, services and related matters) and 1103 (most-favored-nation treatment in investment, services and related matters) are contained in Annex I, which in the case of investments establishes that: "The moratorium has the effect of being an investment restriction because enterprises of the United States providing bus or truck services that are owned or controlled by persons of Mexico may not obtain ICC operating authority." The phase-out element of the reservation states that:

> A person of Mexico will be permitted to establish an enterprise in the United States to provide:
> (a) three years after the date of signature of this Agreement [December 18, 1995], truck services for the transportation of international cargo between points in the United States; and

(b) seven years after the date of entry into force of this Agreement [January 1, 2001], bus services between points in the United States.

The moratorium will remain in place on grants of authority for the provision of truck services by persons of Mexico between points in the United States for the transportation of goods other than international cargo.

1. Positions of the Parties

281. **Mexico** argued that, in implementing the moratorium, the United States has distinguished between carriers based on the nationality of their ownership or control, denying Mexican owned carriers national treatment (compared to U.S.-owned carriers) and most-favored-nation treatment (as Canadian carriers are subject to no such restrictions). U.S. law and regulations, as applied by the United States, authorize motor carriers and motor private carriers domiciled in Mexico, but owned or controlled by persons of the United States (or persons of Canada), to be granted operating authority to provide interstate transportation of property.75 The above regulatory framework remains in place nearly five years after the phase-out date provided in Annex I.76

282. The **United States** argued that Mexico has failed to establish a *prima facie* violation of Chapter Eleven investment obligations. The United States contends that it was the United States, not Mexico, that sought the removal of investment restrictions during NAFTA negotiations. U.S. trucking firms had, and continue to have, the capital necessary to engage in cross-border investments. By contrast, Mexican firms have expressed concern regarding competition from the better capitalized U.S. firms. The United States claims that Mexico does not even allege that there is any interest on behalf of Mexican nationals to invest in U.S. trucking firms.77

283. The United States also argued that Mexico has not shown that any Mexican national meets the definition of "investor" in Chapter Eleven and thus Mexico has failed to establish a *prima facie* case of violation by the United States of its Chapter Eleven investment obligations. Since Mexico has not alleged the existence of any Mexican national or enterprise that seeks to make, is making or has made an investment in a U.S. trucking firm, as defined by Article 1139, Mexico has not met its burden of proof.78

(…)

2. The Panel's Analysis

(…)

75 MIS at 81. 49 U.S.C. § 10922 (m)(2)(b)(iv) and (v) provided that: "if the person to be issued the certificate of registration during the moratorium is a foreign motor carrier (or a foreign motor private carrier) domiciled in the foreign country or political subdivision and owned or controlled by persons of the United States, such certificate may only authorize such carrier to provide interstate transportation of property (including exempt items) by motor vehicle."

76 MIS at 3.

77 USCS at 55.

78 USCS at 55-56.

286. Here, Mexico has asserted and the United States has conceded that U.S. laws and regulations authorize the Department of Transportation to deny a newly created U.S.-domiciled carrier with Mexican investment the opportunity to obtain operating authority. Current U.S. regulatory policy also prohibits the acquisition of an existing U.S. carrier that already had operating authority, because of the requirement for the applicant to certify that the applicant is not a Mexican national, nor owned or controlled by Mexican nationals. Under these circumstances, an application filed by a Mexican carrier would be futile.

(…)

288. When a Panelist asked, "But what you're saying is, that until a Mexican company requests the opportunity, say, to buy a U.S. carrier and is denied that opportunity, . . . there's no case, even if you have a rule that says if they apply they are going to be turned down?," the representative of the United States responded, "That's almost it. It's a little more subtle than that."79

289. Long-established doctrine under the GATT and WTO holds that where a measure is inconsistent with a Party's obligations, it is unnecessary to demonstrate that the measure has had an impact on trade. For example, GATT Article III (requiring national treatment of goods) is interpreted to protect expectations regarding competitive opportunities between imported and domestic products and is applicable even if there have been no imports.80 Moreover, it is well-established that parties may challenge measures mandating action inconsistent with the GATT regardless of whether the measures have actually taken effect.81

290. Furthermore, Article 2004 of NAFTA allows the Parties to initiate the dispute settlement procedures with "respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of [the treaty], or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of [the treaty]." The Panel is not faced with a case brought in the context of NAFTA Annex 2004, which authorizes a Party to have recourse to the dispute settlement procedure where it considers that benefits one Party could reasonably have expected to accrue to it have been nullified or impaired by a measure that is not inconsistent with NAFTA.82

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79 TR at 194.

80 For example, a GATT Working Party Report on Brazilian Internal Taxes noted: "[the majority of the members of the Working Party] took the view that the provisions of the first sentence of Article III, paragraph 2, were equally applicable, whether imports from other contracting parties were substantial, small or non-existent." *See* WORLD TRADE ORGANIZATION, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 128 (6th ed. 1995). *See also Japan - Taxes on Alcoholic Beverages*, AB-1996-2 (Appellate Body) (4 Oct. 1996) at Section F.
"[T]he purpose of Article III [which requires national treatment of goods] "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production'." Toward this end, Article III obliges Members . . . to provide equality of competitive conditions for imported products in relation to domestic products. . . . [I]t is irrelevant that "the trade effects" of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."

81 *See, e.g., United States - Taxes on Petroleum and Certain Imported Substances*, in which the Panel stated: "The general prohibition of quantitative restrictions under Article XI . . . and the national treatment obligation of Article III . . . have essentially the same rationale, namely to protect expectations of the contracting parties as to the competitive relationship between their products and those of the other contracting parties. Both Articles are not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade." 34S/136 (adopted June 17, 1987), at 160, para. 5.5.5, *reprinted in* Analytical Index at 133.

82 Annex 2004, emphasis added. Annex 2004 was intended to mirror the GATT practice of allowing claims for "non-violation nullification or impairment" of benefits.

291. The Panel finds that Mexico has met the requirement of Rule 33 of the Model Rules by establishing a *prima facie* case of inconsistency with NAFTA. The deprivation of the right to obtain operating authority to U.S. companies owned or controlled by Mexican nationals and the prohibition on allowing Mexican investors to acquire U.S. companies that already have operating authority, on its face, violates the straight-forward provisions of NAFTA Articles 1102 and 1103.

292. Because the United States expressly prohibits the above mentioned investment, this Panel finds such prohibitions as inconsistent with NAFTA, even if Mexico cannot identify a particular Mexican national or nationals that have been rejected. A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face, less favorable than the treatment accorded to U.S. truck service providers in like circumstances, and is contrary to Article 1102. Where there have been direct violations of NAFTA, as in this case, there is no requirement for the Panel to make a finding that benefits have been nullified or impaired; it is sufficient to find that the U.S. measures are inconsistent with NAFTA.

293. The applicability of Chapter Nine of NAFTA to this proceeding has been discussed in the Services section, *supra*. It is sufficient to note here that Chapter Nine does not apply to measures affecting investment,83 and there is no provision of Chapter Nine that could be read as either incorporating or overriding the national treatment obligation for investment. Similarly, the general exceptions contained in Article 2101(2) apply only to trade in goods (Part Two), technical barriers to trade (Part Three), cross-border trade in services (Chapter Twelve) and telecommunications (Chapter Thirteen), and thus cannot affect the U.S. obligations under Chapter Eleven.

294. Accordingly, the Panel determines that in connection with investments by Mexican nationals in U.S. companies established to provide trucking services for the transportation of international cargo between points in the United States, no circumstances exist that would justify differential treatment from U.S. (or Canadian) investors and investments under NAFTA's Chapter Eleven national treatment and most-favored-nation obligations.

VII. FINDINGS, DETERMINATIONS AND RECOMMENDATIONS

A. Findings and Determinations

295. On the basis of the analysis set out above, the Panel unanimously determines that the U.S. blanket refusal to review and consider for approval any Mexican-owned carrier applications for authority to provide cross-border trucking services was and remains a breach of the U.S. obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1202 (national treatment for cross-border services), and Article 1203 (most-favored-nation treatment for cross-border services) of NAFTA. An exception to these obligations is not authorized by the "in like circumstances" language in Articles 1202 and 1203, or by the exceptions set out in Chapter Nine or under Article 2101.

296. The Panel unanimously determines that the inadequacies of the Mexican regulatory system provide an insufficient legal basis for the United States to maintain a moratorium on the

83 NAFTA, Article 901. - *Limited scope of Chapter Nine to measures affecting trade in goods and certain services*. NAFTA, Article 915 limits the scope of the service coverage to land transportation and telecommunications services.

consideration of applications for U.S. operating authority from Mexican-owned and/or domiciled trucking service providers.

297. The Panel further unanimously determines that the United States was and remains in breach of its obligations under Annex I (reservations for existing measures and liberalization commitments), Article 1102 (national treatment), and Article 1103 (most-favored-nation treatment) to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo within the United States.

298. It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the Panel imposing a limitation on the application of safety standards properly established and applied pursuant to the applicable obligations of the Parties under NAFTA. Furthermore, since the issue before the Panel concerns the so-called "blanket" ban, the Panel expresses neither approval nor disapproval of past determinations by appropriate regulatory authorities relating to the safety of any individual truck operators, drivers or vehicles, as to which the Panel did not receive any submissions or evidence.

B. Recommendations

299. The Panel recommends that the United States take appropriate steps to bring its practices with respect to cross-border trucking services and investment into compliance with its obligations under the applicable provisions of NAFTA.

300. The Panel notes that compliance by the United States with its NAFTA obligations would not necessarily require providing favorable consideration to all or to any specific number of applications from Mexican-owned trucking firms, when it is evident that a particular applicant or applicants may be unable to comply with U.S. trucking regulations when operating in the United States. Nor does it require that all Mexican-domiciled firms currently providing trucking services in the United States be allowed to continue to do so, if and when they fail to comply with U.S. safety regulations. The United States may not be required to treat applications from Mexican trucking firms in exactly the same manner as applications from U.S. or Canadian firms, as long as they are reviewed on a case by case basis. U.S. authorities are responsible for the safe operation of trucks within U.S. territory, whether ownership is U.S., Canadian or Mexican.

301. Similarly, it may not be unreasonable for a NAFTA Party to conclude that to ensure compliance with its own local standards by service providers from another NAFTA country, it may be necessary to implement different procedures with respect to such service providers. Thus, to the extent that the inspection and licensing requirements for Mexican trucks and drivers wishing to operate in the United States may not be "like" those in place in the United States, different methods of ensuring compliance with the U.S. regulatory regime may be justifiable. However, if in order to satisfy its own legitimate safety concerns the United States decides, exceptionally, to impose requirements on Mexican carriers that differ from those imposed on U.S. or Canadian carriers, then any such decision must (a) be made in good faith with respect to a legitimate safety concern and (b) implement differing requirements that fully conform with all relevant NAFTA provisions.

302. These considerations are inapplicable with regard to the U.S. refusal to permit Mexican nationals to invest in enterprises in the United States that provide transportation of international cargo

within the United States, since both Mexico and the United States have agreed that such investment does not raise issues of safety.

(…)

IV. Extraordinary Challenge Committee (2004)

ARTICLE 1904 EXTRAORDINARY CHALLENGE PURSUANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

Secretariat File No. ECC-2004-1904-01USA

OPINION AND ORDER OF THE EXTRAORDINARY CHALLENGE COMMITTEE

A. INTRODUCTION

(…)
[2] The Request asked for an ECC to review the decisions and final order of the binational panel ("Panel") in the softwood lumber dispute. The Panel had held that there was no substantial evidence to support the finding by the International Trade Commission ("Commission"), an administrative agency of the United States, that the importation of certain softwood lumber from Canada in the period under investigation posed a threat of material injury to an industry in the United States. After two remands to the Commission for reconsideration, the Panel remanded the matter for a third time, directing the Commission to render a decision not inconsistent with the Panel's conclusion, namely that the evidence on the record did not support a finding of a threat of material injury.

(…)
[4] Having considered all of these submissions and reviewed the documentary material filed in this proceeding, the ECC has decided for the reasons that follow to deny this challenge and to affirm the order of the Panel of October 12, 2004.

B. HISTORY OF THE PROCEEDINGS

[5] The dispute over the importation of Canadian softwood lumber into the United States has a long history and its resolution is of great importance to the parties. For present purposes, however, the chronology starts with the final determination of the Commission, dated May 16, 2002 ("*Final Determination*"), holding that, from 1999 through 2001 (or, possibly, the first quarter of 2002), the importation of softwood lumber had not been shown to have caused present material injury to domestic producers, but had been shown to pose a threat of future material injury.

[6] The Commission's positive threat determination was referred by the Canadian Parties to a binational panel. In its decision of September 5, 2003 ("*Panel Decision I*"), the Panel concluded that the Commission's conclusion with respect to the threat of future material injury was not supported by substantial evidence. The Panel remanded the matter to the Commission to reconsider on the basis of the existing record, and gave the Commission 100 days in which to

issue its redetermination. On December 15, 2003, the Commission issued its decision ("*Commission Remand Determination I*").

[7] On April 19, 2004, the Panel rendered its second decision ("*Panel Decision II*"). (…) However, it also identified issues on which, in its view, substantial evidence was still lacking. It gave the Commission 21 days, or not later than May 10, 2004, to complete its review and render its redetermination. (…)

[9] (…)The Commission rendered its second remand determination on June 10, 2004 ("*Commission Remand Determination II*").

[10] In a decision of August 31, 2004 ("*Panel Decision III*"), the Panel held that *Commission Remand Determination II* had provided neither new evidence from the record nor further analysis to support the Commission's findings on the issues remanded to it. Accordingly, the Panel remanded the matter to the Commission for redetermination in a manner not inconsistent with its reasons, namely, that there was no substantial evidence supporting the Commission's finding that the importation of softwood lumber was a material threat to producers in the United States.

[11] Accordingly, on September 10, 2004, the Commission entered a negative threat determination ("*Commission Remand Determination III*") as directed by *Panel Decision III*. On October 12, 2004, the Panel affirmed *Commission Remand Determination III*.

C. THE BASES OF THE EXTRAORDINARY CHALLENGE

[12] The United States bases its challenge, and asks the Committee to vacate the Panel's decisions and its order of October 12, 2004, on the following grounds:

> (i) the Panel's refusal to permit the Commission to reopen the record when the case was remanded to it for the second time;
> (ii) the Panel's failure to provide adequate time for the Commission to respond to the issues raised in *Panel Decision II*;
> (iii) the Panel's failure to apply the substantial evidence standard when reviewing the Commission's determinations that the importation of softwood lumber presented a threat of material injury to domestic producers;
> (iv) the Panel's direction to the Commission in *Panel Decision III* to enter a negative threat determination; and
> (…)

[13] The United States alleges that, in committing errors (i) to (iv), the Panel "manifestly exceeded its powers, authority or jurisdiction" in contravention of NAFTA Article 1904.13(a)(iii). It also alleges that, by participating in the deliberations of the Panel when a reasonable person would think that he would not be impartial, Mr. Mastriani "was guilty of bias or materially violated the rules of conduct" contrary to NAFTA Article 1904.13(a)(i). Further, the United States asserts that each of the above alleged errors "has materially affected the Panel's

decision and threatens the integrity of the binational panel review process", contrary to NAFTA Article 1904.13(b).

D. THE RELEVANT NAFTA PROVISIONS AND THE ROLE OF THE ECC

[14] The following provisions of the NAFTA are relevant to the functions and powers of both the binational Panel and this ECC.
(…)

North American Free Trade Agreement

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

...

13. Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:

> (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
> (ii) the panel seriously departed from a fundamental rule of procedure, or
> (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and
> (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process, that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.
>
> …
>
> **Annex 1904.13 - Extraordinary Challenge Procedure**
>
> ...
>
> 3. Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established, and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.
>
> ...

(…)
[17] The ECC must determine these issues in light of Article 1904.3, the effect of which is to require the Panel to conduct its review of the Commission's determinations in accordance with "the general legal principles" that the United States Court of International Trade ("CIT") would apply when reviewing a decision of the Commission.

(…)

[19] Together, these three limitations on the ECC's jurisdiction give effect to the intention of the NAFTA Parties that, in the interests of the timely resolution of disputes, the ECC should apply a less intrusive level of scrutiny of panels than that applied by a domestic appellate court when deciding an appeal from a court that had reviewed a decision of an administrative agency. Rather, the ECC has the more modest, but crucially important role of correcting aberrant panel decisions and aberrant conduct by panelists. See *Live Swine from Canada*, No. ECC-93-1904-01 USA (April 8, 1993) at 7-8.

[20] Binational panels and ECCs are intended to perform different functions. This is indicated by their composition. Members of panels are, for the most part, lawyers (including judges and former judges); qualifications include a general familiarity with international trade law: Annex 1901.2(1). Members of ECCs, on the other hand, are drawn from a roster of senior judges and former judges (Annex 1904.13(1)); familiarity with international trade law is not stated to be a qualification for appointment to an ECC.

[21] While ECCs do not perform a traditional appellate court role, they are a significant element of the NAFTA dispute resolution process as a substitute for a domestic appeal court. (…)

[23] Thus, it is agreed that it is not the function of this ECC to decide if there was substantial evidence to support the Commission's finding that the importation of the goods in dispute posed a threat of material injury to domestic producers. In determining whether the Panel exceeded its authority by failing to apply the appropriate standard of review, this ECC is limited to ensuring that the Panel selected the appropriate standard of review *and* followed the review methodology that the CIT would apply in reviewing a decision of the Commission for lack of substantial evidence.

E. ISSUES AND ANALYSIS

Issue 1: Did the Panel manifestly exceed its authority by denying the Commission's motion for leave to reopen the record?
(…)

[41] In light of the case law referred to above (including *Nippon IV* which, admittedly, was decided after the Panel's final decision, and is currently being appealed to the Federal Circuit), and of the importance of expeditiousness in the resolution of international trade disputes arising under NAFTA, we are not persuaded that the applicable law of the United States is so clearly settled that the Panel manifestly exceeded its authority when it refused to permit the Commission to reopen the record in formulating its response. We tend to agree with the submission advanced at the hearing by counsel for the Coalition that binational NAFTA panels have a residual discretion to remand to the Commission for reconsideration on the record. However, we do not agree that the Panel exercised its discretion on the facts before it in a manner that can be characterized as manifestly in excess of its authority.

Issue 2: Did the Panel manifestly exceed its authority by giving the Commission insufficient time to respond to *Panel Decision II*?
(…)

[49] Given the length of time already taken by the Commission in making the investigation prior to the *Final Determination* and in rendering *Commission Remand Determination I,* the relatively narrow issues to be reconsidered on the basis of the record, and panels' control of their process, the Panel cannot be said to have given so much weight to the need for expeditiousness, and so little, or no, weight to the other considerations (including the complexity of the issues), as to render its exercise of discretion manifestly in excess of its authority.

Issue 3: Did the Panel exceed its jurisdiction by failing to apply the substantial evidence standard when reviewing the Commission's findings of fact?
(…)

The Standard of Review

[51] The standard of review to be applied by the Panel is the standard of review applied by the Court of International Trade (CIT) when it reviews decisions of the Commission. See NAFTA Article 1904.3, NAFTA Annex 1911 - Country-Specific Definitions "Standard of Review" (b). That standard of review asks whether the Commission's conclusions were supported by substantial evidence and were in accordance with law (19 U.S.C. 1516a(b)(1)(B)(i)).
(…)

[54] (…) NAFTA Article 1904.13(a)(iii) provides that the ECC is to review Panel decisions to determine whether the Panel manifestly exceeded its jurisdiction by failing to apply the appropriate standard of review. Where there has been a failure to apply the appropriate standard of review amounting to a manifest excess of jurisdiction, NAFTA Article 1904.13(b) provides that the ECC must consider whether that failure has materially affected the Panel's decision and threatens the integrity of the binational panel review process.

[55] It is important to repeat that in reviewing the Panel's decision, greater deference is required of the ECC than of an appellate court. As previously noted, while the bar cannot be set so high that an Extraordinary Challenge can never succeed, it is reserved for truly egregious situations.
(…)

United States Parties' Arguments on the Panel's Failure to Apply the Substantial Evidence Standard
(…)
<u>Export Orientation</u>

(…)
[94] In our respectful view, the substantial evidence standard did not permit the Panel to reject, without explanation, the Commission's detailed and rational explanation of its changed opinion.

Conclusion
[116] We have found that the Panel failed to apply the substantial evidence standard of review in respect of the issue of export orientation. We need not decide whether the Panel manifestly

exceeded its authority when, in a complex case, it failed to apply the appropriate standard to one, subsidiary finding. This is because the Panel's error did not materially affect its decision.
(…)

[118] (…) The Panel's error applies to only one component of the Commission's subsidiary finding of a substantial increase in subject imports. Even if this constituted substantial evidence of a likely substantial increase in subject imports, this finding alone, absent valid price effect and market share determinations, does not lead to the Commission's ultimate conclusion of threat of material injury to the United States industry. Hence, it is not an error that goes to the fundamental determination necessary to be made.
(…)

Issue 4: Did the Panel exceed its authority in *Panel Decision III* by directing the Commission to enter a negative threat determination?

[120] In *Panel Decision III*, the Panel remanded the case and directed (at 7) the Commission to make, within 10 days, "a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of threat of material injury".

[121] The United States Parties initially took the position that, because fact-finding was exclusively within the jurisdiction of the Commission, the Panel had no power to direct the Commission to enter a particular determination after a remand for lack of substantial evidence when there were still live issues to be decided. However, an obvious difficulty with this argument is that it allows for the possibility of never-ending remands for reconsideration. In the absence of any satisfactory legal answer to this problem, counsel for the Office of the United States Trade Representative ultimately modified his position by submitting that a panel could cut short the process by directing a particular determination, if the Commission were intransigent by unreasonably insisting that a resolved issue was still alive. However, this was not, he said, our case.

[122] (…) [I]t is agreed that a panel's power is similar to that of the CIT, which, like other courts performing judicial review functions, is *normally* limited to remanding an administrative agency's decision for reconsideration in a manner not inconsistent with the court's decision, and does not authorize the court to, in effect, reverse the agency's decision: see *SEC v. Chenery Corp*. 318 U.S. 80 (1943).

[123] However, it is also clear that a court need not remand when to do so "would be an idle and useless formality", and that "*Chenery* does not require that we convert judicial review of agency action into a ping-pong game": *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 767 note 6 (1969), *per* Brennan J. (…)

[129] Since the ECC's function is confined to deciding whether the Panel manifestly exceeded its authority, we may not second guess its conclusion that remanding to the Commission for another reconsideration was futile. In our view, it is sufficient for us to find that it was open to the Panel on the law and the facts before it to reach the conclusion that it did. We conclude that, since the Commission's review was confined to the record and that it had the benefit of

submissions of the parties, it was not unreasonable for the Panel to conclude that the Commission was unlikely to be able to make good the deficiencies that the Panel had identified in the Commission's reasons, even though the Commission had satisfied the Panel that some of the findings identified in *Panel Decision I* were in fact supported by substantial evidence.

[130] The Panel's conclusion in *Panel Decision III* that the Commission refused to accept its review authority is supported by the Commission's insistence in its reasons in *Commission Remand Determination II* that the Panel had overstepped its authority by finding the facts for itself and by substituting its view of the facts for that of the Commission. (…)

[132] In brief, we conclude that, in view of the discretion of reviewing courts in the United States, including the CIT, to remand with specific instructions "in rare circumstances", and the importance attached by NAFTA to the expeditious resolution of disputes, the Panel cannot be said in *Panel Decision III* manifestly to have exceeded its authority on the facts before it when it remanded to the Commission with instructions to enter a decision consistent with its decision that the evidence on the record does not support a threat of material injury.
(…)

F. CONCLUSIONS

[187] For these reasons, the ECC concludes that,

> (a) the Panel did not manifestly exceed its powers, authority or jurisdiction in refusing to permit the Commission to reopen the record in preparing its responses, in setting the time limits within which the Commission had to respond to *Panel Decision II*, or in ordering the Commission to enter a negative threat determination;
>
> (b) except on the issue of export orientation, the Panel did not exceed its powers, authority or jurisdiction by failing to apply the appropriate standard of review;
>
> (c) on the issue of export orientation, the Panel's failure to apply the appropriate standard of review was not material; (…)

[188] In light of these conclusions (except with regard to the Panel's finding of no substantial evidence on the finding on issue export orientation), it is not necessary for us to determine whether, if the Panel had committed any of the errors alleged, they would have been material to the Panel's decision or threatened the integrity of the binational panel review process.

(…)

Additional Resources and References (Optional Reading)

John H. Jackson et al., International Economic Relations (2002), Ch. 11 (pp 470-472)

Ch. 11-3. NAFTA : Selected Issues

* * *

(1) Constitutional Concerns

The authors note that the binational panel review enshrined in Chapter 19 may raise the following constitutional questions in the US Constitution:

> *"First, the "transfer" of appellate jurisdiction from the Court of International Trade and the Court of Appeals for the Federal Circuit -both Article III courts- to a binational panel, has led some commentators to argue that the panel mechanism impermissibly deprives litigants of judicial review by an Article III court. Second, the "Appointments Clause" vests the power to appoint "officers of the United States" with the President, subject to Senate confirmation, except for "inferior officers" who may be appointed by Department heads."*

(2) Extraordinary Challenges and the Standard of Review

The authors highlight a sensitive standard of review issue embedded in the "Extraordinary Challenge Committee". They note that:

> *"The extraordinary challenge committee may review the actions of panels for misconduct or conflict of interest on the part of a panelist, for failure to follow appropriate procedures, or for exceeding their authority as by failing to apply the correct standard of review. NAFTA attempts to reduce the degree to which the extraordinary challenge committee may be influenced by politics by requiring that all committee members have judicial experience. Whether these provisions will suffice to ensure a reality and a perception of fairness and unbiasedness remains to be seen."*

David Lopez, Dispute Resolution Under NAFTA: Lessons from the Early Experience, 32 Tex. Int'l L.J. 163 (1997)