DISPUTE SETTLEMENT MECHANISMS IN FREE TRADE AGREEMENTS: STRENGTHS, WEAKNESSES AND BEST PRACTICES

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<th>Full Form</th>
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<tr>
<td>AANZFTA</td>
<td>Association of Southeast Asian Nations-Australia-New Zealand Free Trade Agreement</td>
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<td>AIT</td>
<td>Agreement on Internal Trade</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>CETA</td>
<td>Comprehensive and Economic Trade Agreement</td>
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<td>CFTA</td>
<td>Canadian Free Trade Agreement</td>
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<tr>
<td>CPTPP</td>
<td>Comprehensive and Progressive Trans-Pacific Partnership Agreement</td>
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<td>CUSMA</td>
<td>Canada-United States-Mexico Agreement</td>
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<td>DG</td>
<td>World Trade Organization Director General</td>
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<td>DSM</td>
<td>Dispute Settlement Mechanism</td>
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<td>DSU</td>
<td>Dispute Settlement Understanding</td>
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<td>EU</td>
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<td>EU-Japan</td>
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<td>EU-South Korea</td>
<td>European Union-South Korea Free Trade Agreement</td>
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<td>EU-Mercosur</td>
<td>European Union-Mercosur Free Trade Agreement</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<tr>
<td>ICI</td>
<td>International Court of Justice</td>
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<td>ICSID</td>
<td>International Centre for the Settlement of Investment Disputes</td>
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<tr>
<td>JSEPA</td>
<td>Japan-Singapore Economic Partnership Agreement</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>NZ-China FTA</td>
<td>New Zealand-China Free Trade Agreement</td>
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<tr>
<td>PCA</td>
<td>Permanent Court of Arbitration</td>
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<td>RTA</td>
<td>Regional Trade Agreement</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>WTO</td>
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Executive Summary

This paper addresses the current need for effective and efficient dispute settlement mechanisms ("DSMs") in Free Trade Agreements (FTAs).\footnote{Throughout this agreement we use ‘free trade agreement’ (FTA) as an umbrella term to include bilateral, regional and multilateral trade agreements.} Canada is a party to several FTAs that include DSM chapters but rarely resorts to those DSMs to resolve trade disputes. This experience is not specific to Canada; in fact, most FTA DSMs have never been used. One reason for this may be that the World Trade Organization ("WTO") has thus far offered an effective and efficient means of resolving trade disputes with FTA partners, so FTA DSMs did not need to be used. This may not hold true going forward, however. Although trade disputes continue to be brought before WTO panels, the suspension of the WTO Appellate Body has undermined the WTO’s ability to issue final, binding decisions. In light of these developments, the reticence to use FTA DSMs may change as parties explore alternate ways to peacefully resolve disputes. If FTA DSMs are to provide a viable option, however, those mechanisms must ensure both effective and efficient resolution of disputes.

This memorandum examines several DSMs with a view to determining whether their designs lend themselves to effective and efficient dispute settlement. We focus in particular on four elements of those mechanisms that are key to the effective and efficient functioning of FTA DSMs: 1) panel selection, 2) parties’ written submissions, 3) secretariat or assistant support to panelists, and 4) implementation.

Each of these plays an important role in maintaining the effective and efficient functioning of a DSM. First, panel selection is without doubt an extremely important element in dispute settlement; after all, parties want to ensure that those who will render the decisions are well suited to do so, especially given the considerable impact that challenged trade measures can have on the domestic economy or industry. Thus, taking the appropriate time to select ad hoc panelists is understandable. However, other considerations might come into play in the panel selection process that can affect efficiency. For example, parties may try to delay or avoid appointing panelists altogether in order to put off or escape the consequences of a panel report impugning their measure(s), as well as the time and costs associated with the dispute settlement process. The panel selection procedure in the DSM should seek to address such tactics.

Second, the logistics around filing written submissions can also have an impact on DSM efficiency and effectiveness. Submission deadlines that are too generous will naturally lead to delays in securing a resolution to the dispute. By the same token, timelines that are too short will not ensure effective dispute settlement because disputing parties will not be able to prepare and respond adequately to the legal arguments of their opponents, perhaps leading to ill-considered decisions. Moreover, procedures that permit unnecessarily lengthy written submissions, can impose a significant burden on a panel and, as a consequence, delay decision-making. DSMs should seek to strike an appropriate balance.

Third, providing support to panelists can have an impact on both efficiency and effectiveness, but not all DSMs include provision for a secretariat to assist with dispute settlement. Administrative
assistance with document management, travel arrangements, locating a hearing room, and even securing translation services, can be burdensome if left to chairpersons or panelists, especially when they are working in different locations across the globe. A central secretariat might offer efficient support with such tasks, but FTA parties may differ in terms of whether and how to fund them. In addition, some panelists may find it useful to hire individuals to assist with legal research and even legal drafting, or to have a secretariat offering such support, but FTA parties may have concerns about permitting non-panelists to exercise such roles. DSMs should address assistance to panelists bearing in mind budgeting issues as well as the role the FTA parties want secretariats and panel assistants to play (or not play).

Fourth, effective implementation is essential because the overall value of a dispute settlement system will depend upon whether adopted panel or tribunal reports are duly implemented in a timely manner. An effective dispute settlement system includes mechanisms encouraging prompt compliance as well as effective remedies in case of non-compliance.

Our analysis revealed a number of best practices for achieving effective and efficient dispute settlement under FTAs. First, some degree of automaticity is advisable to maintain an efficient panel selection process. The form of automaticity can vary, however; examples include using an independent appointing authority to select one or more panelists or using selection by lot. In terms of written submissions, we suggest that short timelines for parties’ written submissions are best; however, flexibility should be provided to extend timelines where necessary. Regarding secretariat assistance for panelists, we conclude that function and budget should be clearly set out in the relevant agreement. For example, an agreement could stipulate that secretariat functions shall include registrar, administrative, and logistical support for the panelists and shall be provided by the Permanent Court of Arbitration, and each disputing party shall cover one half of the costs incurred for secretariat services and one half of the fees charged by the panelists. Lastly, to address non-compliance and slow compliance, we suggest including in the DSM a mechanism for regular surveillance through which the responding party would be required to provide regular, publicly-available reports to a third party (such as a committee of trade ministers) describing the measures it has taken to comply with the panel rulings. Delays in implementation could be addressed by adding an incentive rewarding speedier compliance.
1. Introduction

This memorandum addresses the need for efficiency and effectiveness in the dispute settlement process and seeks to provide guidance on how to craft FTA DSMs in order to achieve both of these goals. Efficiency is an important consideration because of the significant time and money associated with litigating a trade dispute. The complaining party, who is dealing with the adverse effects of a trade-restrictive measure, is particularly concerned with efficiency. Responding parties also want to avoid protracted and costly defence procedures.

However, efficient dispute settlement should not be the only concern; there is also a need to balance efficiency with other factors such as due process, ensuring that there is adequate opportunity to prepare and respond to arguments. This is because dispute settlement processes that favour efficiency at the expense of these other concerns do not necessarily lead to “high-quality panel reports”. In order to ensure fair and just outcomes that maintain the legitimacy of the dispute settlement process, DSM procedures should try to effectively balance efficiency against these other factors.

The complaining party also wants an effective process: it wants to ensure that any victory it achieves on paper translates into concrete results. A panel report that is not implemented in a timely fashion may not be worth pursuing in the first place.

To address efficiency and effectiveness in dispute settlement procedures, while keeping in mind these additional concerns, this memorandum reviews and compares various procedures across DSMs. In particular, we focus on four important elements of the dispute settlement process, each of which has a significant impact on the efficient and effective functioning of a DSM: 1) panel selection; 2) parties’ written submissions; 3) secretariat or assistant support to panelists; and 4) implementation.

We review each of these aspects in light of some of the problems they can present for efficient and effective dispute settlement. First, we explore panel selection with a view to overcoming the problem of ‘panel blocking’, whereby a disputing party refuses to appoint panelists, which can cause significant delays in the dispute settlement process. Second, under the category of parties’ written submissions, we consider how to effectively balance due process concerns with efficiency. Third, we review the assistance provided to panels by secretariats or others and the challenges of adequately funding them and ensuring that any assistance remains in the nature contemplated by the FTA parties. Fourth, under implementation, we address the two main weaknesses of the implementation phase: delay and non-compliance.

To address these four areas, we examine DSMs under the following FTAs and certain adjudicative institutions:

- African Continental Free Trade Area (“AfCFTA”)

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These DSMs were chosen for various reasons. First, we have selected five agreements to which Canada is a party (“Group A”): NAFTA, CUSMA, CETA, CPTPP and the CFTA. NAFTA and CUSMA were selected because they demonstrate the evolution in trade agreements in the North American context. CETA and the CPTPP offer examples of trade agreements to which Canada is a party that include parties outside of North America and, in the case of the CPTPP, covers a large trading region. Finally, the CFTA provides an example of an internal trade agreement between Canadian provinces and the federal government.

Second, we have selected seven agreements to which various African, Asian, European and Eastern European Countries are Parties (“Group B”): AfCFTA, AANZFTA, EU-Japan, EU-Mercosur, EU-South Korea, JSEPA and NZ-China. This group of DSMs offers a wide breadth of parties from across the globe with different levels of economic development, several of which are not Western countries. This will allow us to examine different procedures outside of the ‘North American model’ as revealed in Group A, above. 3

Finally, we also look at DSMs under four different international adjudicative institutions (“Group C”): ICSID, ICJ, PCA and the WTO. These institutions provide a point of comparison to determine if there are innovative approaches to dispute settlement within the institutional context that might be applicable to the FTA setting. 4

Our analysis is structured around the four elements of the dispute settlement process mentioned earlier: panel selection, parties’ written submissions, secretariat or assistant support to panelists, and implementation. We proceed in each section by examining the DSMs mentioned above, taking a thematic approach to the analysis according to the different procedural methods used within each element. At the end of each section, we identify ‘best practices’ for that element as revealed through our analysis. Finally, three tables summarizing the main features of the relevant

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3 This memorandum only examines AfCFTA’s panel level DSM and JSEPA’s state-to-state DSM (and not ISDS).
4 Note that panel level adjudication in the ICJ is less instructive for understanding implementation procedures under FTAs and is thus, not reviewed in this section of the memorandum. Note also that only WTO panel level adjudication is examined throughout the memorandum.
procedures for each DSM are provided at the end of every section. The DSMs in these tables are organized according to the three groups set out above.

This memorandum draws on a range of sources, including primary materials (i.e., FTA DSMs), writings by academics and practising lawyers, and website material and publications issued by international organizations. In addition, it incorporates insights from interviews with leading academics and practitioners, including former and serving panelists, FTA negotiators, those who have served in international institutions, and those who have served as counsel in international disputes. These insights reflect perspectives and experiences that may not be captured in other materials.  

2. Comparing Dispute Settlement Processes Under FTAs, RTAs and Certain Adjudicative Institutions: Strengths and Weaknesses

Most FTAs include chapters on dispute settlement. These chapters include a wide variety of mechanisms for implementing dispute settlement among the parties to those agreements. The memorandum examines a number of FTA dispute settlement mechanisms (DSMs) as well as DSMs used in several international institutions and compares them in order to assess their strengths and weaknesses in the four areas of interest identified by the beneficiary, namely panel selection, party submissions, secretariat support, and supervision of implementation.

2.1 Panel Selection Methods under FTAs, RTAs and Certain Adjudicative Institutions: An Introduction

Panel selection in FTA dispute settlement is the method by which one or more individuals are appointed to hear and decide a trade dispute between parties to the FTA. Together the individuals are often referred to as an arbitration panel or arbitration tribunal. The panel hears and determines the outcome on disputes referred to it under a particular FTA. Disputes often involve complex factual and legal issues and may relate to a wide variety of subjects and industries. Decisions rendered by a panel can have considerable impact legally and economically for an industry. Therefore, selecting appropriate individuals to serve as panelists is quite important.

The number of panelists appointed to a panel varies by DSM, but it will invariably be an odd number to avoid a tie in decision-making. Of the mechanisms included in this memorandum, panels are composed of three or five individuals. A panel is usually established following a request by the complaining party. However, the method used to compose a panel (that is, to select and appoint individuals to the panel), varies by DSM. For example, some mechanisms require the parties to come to consensus on all panelists who will serve in the dispute (ex. CETA), while others

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5 Interviewees agreed to be interviewed on either an attribution or non-attribution basis. The names of those who agreed on an attribution basis are included in Annex 2. The questions posed to each interviewee are included in Annex 3. Our full bibliography appears at the end of this memorandum.
provide for the disputing parties to each appoint a panelist (ex. CPTPP) followed by selection of the chair through agreement of the parties. Most, though not all, mechanisms call for establishment of some form of roster or list from which the parties will select panelists. As discussed below, a roster or list includes the names of individuals who are willing and able to serve on a panel if a dispute arises.

A weakness found in some FTA panel selection procedures is the ability of parties to block panel composition, known as ‘panel blocking’. This can occur where parties fail to come to consensus on the three or more persons required to serve on a panel, or fail to appoint one or more of the panelists when required to do so. If there is no procedural mechanism to address these failures, then a responding party can engage in panel blocking as a means of delaying or avoiding a challenge to its measures. Panel blocking can cause significant delays in the dispute settlement process. At times, it can even prevent a dispute from moving forward at all. As a result, addressing panel blocking in designing an FTA DSM is quite important.

Each of our interviewees indicated that some form of automaticity in panel composition is essential to avoid panel blocking. However, DS mechanisms can provide for automaticity in different ways. Given the variety of methods for incorporating automaticity into panel selection procedures, and in light of the importance of overcoming panel blocking for efficient panel composition, this section will compare and contrast the panel composition procedures found in the DSMs identified in the introduction of this memorandum. This analysis will then inform a list of best practices on efficient panel selection procedures.

This analysis below is organized according to the different methods used in DSMs to effect automaticity: ‘rosters or lists’, ‘appointment by individual party’, ‘selection by lot’, ‘selection by appointing authority’ and ‘unique other methods’. Following this, a number of best practices are provided for efficient panel selection. At the end of this section three tables detailing the panel selection procedures for each DSM are provided. The DSMs in these tables are organized according to the three groups set out in the introduction of this memorandum, namely, Group A (agreements to which Canada is a party), Group B (agreements to which various African, Asian, European and Eastern European Countries are Parties) and Group C (international adjudicative institutions).

### 2.1.1 Rosters or Lists

As mentioned above, some FTA DSMs call for the establishment of rosters or lists of names of qualified individuals from which disputing parties may (and sometimes must) select to serve as panelists in disputes. Rosters or lists can be established by the parties to the agreement or by a third-party, such as a Secretariat, for example. The number of names to be included on a roster varies from FTA to FTA. Where the FTA parties are required to establish the roster, some procedures require that the parties come to consensus on roster appointments (ex. NAFTA), while others allow parties to independently appoint individuals to the list.

Individuals appointed to rosters usually must meet specified qualifications, depending on the needs of the parties to a particular FTA. Generally, this includes experience in law and international
trade, but may include other specific qualifications as well, such as experience in labour law or environmental law when these matters are covered in the FTA, or experience as counsel or panelist in trade dispute settlement proceedings. Some FTAs specify that roster members must be independent of the FTA parties. Others indicate that roster members must comply with rules of conduct specified in the FTA.

The fact that a roster is pre-established, and therefore provides a pre-approved list of individuals from which the panel may be composed, can help to speed up the panel selection process. However, how effective a roster is in assisting the parties with panel composition is affected by how the roster is established in the first place. If, for example, there is no mechanism to appoint individuals to the roster where the FTA parties are unable to come to consensus, or if the roster expires without an effective means to re-establish it, then this opens the door to panel blocking.

These issues are highlighted further below where we have reviewed a number of agreements and institutions that use roster mechanisms as part of the panel selection process.

**NAFTA**

NAFTA was entered into by Canada, the United States and Mexico, and came into force on January 1, 1994. The main chapters address trade in goods, technical barriers to trade, investment, trade in services, intellectual property, and institutional aspects such as dispute settlement. NAFTA includes several dispute settlement mechanisms, including one governing investor-State disputes (Chapter 11), a dispute settlement mechanism replacing domestic judicial review for trade remedy matters (Chapter 19), and a mechanism governing trade disputes between states (Chapter 20). This section focuses on the NAFTA state-to-state mechanism because, unlike the other NAFTA DSMs, state-to-state dispute settlement is available in the other FTAs examined in this memorandum.

NAFTA Chapter 20 (state-to-state dispute settlement) requires that a roster of up to 30 persons be established by consensus:

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7 We note that the issue of panelist expertise is of concern in some DSMs. This issue is beyond the scope of this memorandum.


10 There are several dispute settlement chapters under the NAFTA, but this memorandum will only consider the mechanism in Chapter 20, which deals with state-to-state dispute settlement.
“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.”

Panelists are “normally” to be selected from the roster, but it is also possible to propose an individual who is not on the roster. When this occurs, the other side may exercise a peremptory challenge against the individual, thereby blocking the appointment. If a party refuses to appoint a panelist, the panelist is selected by lot from among the roster members.

The roster mechanism under NAFTA 20 can pose some problems. First, it requires the FTA parties to come to consensus on all roster appointments, but does not include a mechanism to address situations where parties are unable to agree. Second, the roster expires after a period of three years. Even if parties manage to agree on a roster initially, they must do so again before it expires. Thus, the challenge of achieving consensus and the risk of not having a roster arise a second time. Indeed, establishing and maintaining a Chapter 20 roster has been a problem: the roster has been in place during only a few of the NAFTA’s 26 years and has not existed since 2009. This has contributed to the fact that there have been only three state-to-state disputes successfully conducted under the NAFTA.

The practical problem of the NAFTA Chapter 20 roster model is best illustrated by the Mexico sugar dispute. In 2001, Mexico requested the establishment of a NAFTA Chapter 20 panel to review market access for Mexican sugar in the United States. The U.S. refused to appoint a panelist. There was no roster in place so the fallback of appointing a panelist from the roster was not available, effectively blocking panel composition as well as a means of resolving the dispute through NAFTA dispute settlement. In sum, the NAFTA roster model has not been effective for efficiently composing panels in state-to-state disputes.

CETA

CETA, a trade agreement between Canada and the European Union (EU), entered into force provisionally on September 21, 2017 (except with respect to investment protection and the international investment court) and will come into effect fully once all EU member states complete their individual ratification procedures. CETA includes chapters on trade in goods, non-tariff barriers, services, labour protection, environment, investment protection, intellectual property, government procurement, and dispute settlement.

The CETA DSM includes a roster approach. CETA calls for establishment of a Joint Committee (“CETA-JC”), which is tasked with, among other things, establishing a list of arbitrators at its first meeting. The list of 15 individuals is composed of three sub-lists: a list of five for each party,

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11 NAFTA, supra note 9 at Article 2009(1).
12 NAFTA, supra note 9 at Article 2011(3).
13 NAFTA, supra note 9 at Article 2011(1)(c).
15 The general dispute settlement chapter applies to most, but not all, chapters of the agreement. Separate mechanisms are provided for disputes dealing with investment, labour, and environmental matters.
16 CETA, supra note 6 at Articles 26.1 and 29.8(1).
and a third list of non-nationals from either party who will act as Chair.\textsuperscript{17} Parties can propose arbitrators to be included in the lists; however, it is ultimately up to the CETA-JC to establish and maintain the lists.\textsuperscript{18} Unlike under the NAFTA roster, there is no specific term for those appointed to the list.

The CETA-JC is composed of representatives from the EU and Canada and is co-chaired by the parties’ trade ministers, but the number of individuals included is not indicated. Effective panel composition is dependent on the effective functioning of the CETA-JC, because the agreement requires the CETA-JC to establish and “ensure” that the list of individuals willing and able to serve as arbitrators contains the numbers indicated.\textsuperscript{19}

The first meeting of the CETA-JC took place on September 26, 2018, but the report of the meeting did not indicate that the rosters had been established.\textsuperscript{20} Nevertheless, a list of arbitrators was approved by the EU Council on December 19, 2019; the decision states that the list is based on a draft decision of the CETA-JC, which is to come into effect upon adoption by the CETA-JC.\textsuperscript{21} The draft CETA-JC decision does not appear to have been adopted thus far.

It is too early to tell whether relying on the CETA-JC to establish and maintain the roster is an effective mechanism for ensuring efficient panel composition. No panels have been established under CETA to date so panel composition has not been attempted. CETA essentially replicates the roster consensus problem found in the NAFTA because the JC has to come to agreement on the list of 15, although one improvement is that the roster does not automatically expire as it does under NAFTA. Including ministerial level representatives on the body required to establish and maintain the list could enhance the chances that the list will actually be established and maintained. Indeed, it appears as though the JC has come up with a draft list of 15 and one party has approved it.

\textit{CPTPP}

The CPTPP is an agreement between Canada and 10 countries of the Asia Pacific region.\textsuperscript{22} It entered into force on December 30, 2018 for six countries (Canada, Australia, Japan, Mexico, New Zealand, and Singapore) and on January 14, 2019 for Vietnam. The main chapters cover trade in goods, services, trade remedies, sanitary and phytosanitary measures, investment, telecommunications, labour, environment, telecommunications, government procurement, and dispute settlement.

Within the dispute settlement chapter, the CPTPP provides that parties may establish a list of nationals or non-nationals who are willing and able to serve on a panel, referred to as a ‘party

\textsuperscript{17} CETA, supra note 6 at Article 29.8(1).
\textsuperscript{18} CETA, supra note 6 at Article 29.7(6).
\textsuperscript{19} CETA, supra note 6 at Article 29.8(1).
\textsuperscript{20} CETA Governance and Committees, CETA Joint Committee Meeting: Summary report (2018), online: <https://www.international.gc.ca.>
\textsuperscript{21} EU, Council Decision (EU) 2019/2246 of 19 December 2019 on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement, [2019] OJ, L 336/288.
\textsuperscript{22} Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.
specific indicative list’. This is a different approach than both NAFTA and CETA, which mandate that rosters be established. The fact that CPTPP does not require the parties to establish a list does not impact how efficiently the panel is composed, though. This is because the CPTPP includes procedures for composing a panel where a party does not have a list. These are discussed further under ‘Appointment by individual party’ below.

While the party specific list is not mandatory, the roster of panel chairs is required. The roster of panel chairs is a list of 15 individuals appointed by consensus who may serve as panel chairs. Each party may nominate a maximum of two individuals (of which one can be a national of any party to the agreement). The roster remains in effect for three years or until the parties constitute a new roster. If, however, the parties are unable to come to agreement upon the roster of panel chairs within 120 days from the coming into force of the CPTTP, then the Trans-Pacific Partnership Commission (‘the Commission’) must appoint individuals on the parties’ behalf within 180 days of the coming into force of the agreement. The Commission is composed of ministerial representatives from each party.

The fact that the Commission is required to appoint individuals to the roster where parties cannot agree ensures that the roster consensus problem experienced under NAFTA Chapter 20 is not replicated under the CPTPP. The procedure seems to work well: the roster of panel chairs was established on October 9, 2019. In addition, the fact that the roster does not expire and continues in effect until a new one is constituted avoids the problem encountered under the NAFTA of trying to reach consensus on a regular basis.

CUSMA

Canada, the United States and Mexico signed the CUSMA on November 30, 2018. It will come into force on July 1, 2020. CUSMA modernizes the NAFTA and includes improvements and updates in the areas of labour protection, environmental protection, intellectual property, automotive rules of origin, and state-to-state dispute settlement.

Although the CUSMA did not initially fix the problem under the NAFTA with roster establishment and panel selection, the problem was resolved in the Protocol of Amendment signed on December 10, 2019. Thus, the new DSM appears to have overcome the roster by consensus problem. The new provision (Article 31.8) provides:

“The Parties shall establish, by the date of entry into force of this Agreement, and maintain a roster of up to 30 individuals who are willing to serve as panelists. Each Party shall designate up to 10 individuals. The Parties shall endeavor to achieve consensus on the appointments. If the Parties are unable to achieve consensus by one

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23 Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Between the Governments of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, 8 March 2018, at Chapter 28: Dispute Settlement Article 28.11 (entered into force 30 December 2018) [hereinafter CPTTP] online: www.international.gc.ca.
24 CPTTP, supra note 23 at Article 28.11(5).
25 CPTTP, supra note 23 at Article 28.11(4).
26 CPTTP, supra note 23 at Article 28.11(2).
month after the date of entry into force of this Agreement, the roster shall be comprised of the designated individuals. The roster shall remain in effect for a minimum of three years or until the Parties constitute a new roster.”

By requiring only that the parties endeavor to achieve consensus and providing a fallback when this does not occur, this addresses the consensus issue under the NAFTA. In addition, by stating that the roster shall remain in effect for a minimum of three years or until the Parties constitute a new roster avoids the roster expiration problem under the NAFTA.

CFTA

The CFTA is an intergovernmental trade agreement between the federal government of Canada and each provincial and territorial government. It began as the Agreement on Internal Trade (AIT), but was modernized and came into force as the CFTA on July 1, 2017. The CFTA covers trade in goods, trade in services, investment, monopolies, government procurement, environmental protection, and labour mobility. Dispute settlement under the CFTA can be between governments or between persons and governments, although we focus on the former in this memorandum.

The CFTA provides for two rosters: one for panels and compliance panels, and another for appellate panels. Each party to the agreement is entitled to nominate up to five individuals to each roster. In addition, the Secretariat must develop supplementary lists of roster members if there are fewer than 18 bilingual members on either roster. Roster members serve for a term of five years. Once the term has expired, the party that appointed the individual must reappoint that individual or appoint a replacement.

Although each CFTA party is entitled to appoint individuals to the roster, only 6 of the 14 parties have done so as of April 2020 and, although neither roster includes 18 bilingual members, the Secretariat does not appear to have developed supplementary lists. This should not pose a practical problem with panel composition because there are currently 35 and 27 persons from which to choose panelists or appellate panelists, respectively, many of whom are bilingual.

The system whereby each party is entitled to appoint several panelists to a roster without having to obtain approval of the list appears to work well in the context of an agreement with numerous parties because the roster is readily populated by at least some parties interested in doing so. Moreover, the idea that the secretariat is to develop a supplementary list in the event the parties’ rosters do not include sufficient expertise in one of the important qualifications (in this case bilingualism) seems useful, except that in this case the secretariat has yet to fulfill this function.

28 Protocol of Amendment to the Agreement Between Canada, the United States of America, and the United Mexican States, 10 December 2019 at Article 31.8 online: https://www.international.gc.ca [hereinafter CUSMA Protocol of Amendment].
30 CFTA, supra note 6.
31 CFTA, supra note 6 at Article 1005.2 and Annex 1005.2(2).
Each of the agreements to which the EU is a party reviewed in this memorandum require a roster to be established. The EU-Japan agreement entered into force on February 1, 2019. The EU and Mercosur countries (Argentina, Brazil, Paraguay, Uruguay) reached an agreement in principle for the establishment of an FTA on June 28, 2019. Subjects covered include trade in goods, customs and trade facilitation, trade remedies, competition, state-owned enterprises, services, intellectual property including geographical indications, sanitary and phytosanitary measures, and sustainable development (in particular relating to labour and environment). As with the rest of the agreement in principle, the dispute settlement chapter has yet to be turned into legal text but there is a general framework for the mechanism. The EU-South Korea agreement was formally ratified in December 2015 and includes chapters on trade in goods, trade in services, trade remedies, customs matters, sanitary and phytosanitary measures, intellectual property, and dispute settlement.

Each of these agreements provides for a Committee to establish and maintain a list of individuals; however, the numbers required for each list varies. The EU-Japan agreement envisions a list of at least nine persons divided into three sub-lists, each composed of at least three individuals: one of EU individuals, one of Japanese individuals, and a third of non-nationals of the parties who will serve as chairpersons. The parties under the EU-Japan agreement may propose up to three individuals for the sub-list of chairpersons, but it is for the Joint Committee (“EJ-JC”), chaired by ministerial level representatives of both parties, to establish the list at its first meeting and maintain the list with the required number of individuals. On August 26, 2019, the EJ-JC established the list of arbitrators: the sub-list of EU individuals contains four names; that of Japan contains five names; and the chairs list contains six names.

Under the EU-Mercosur agreement, the Trade Committee (“EM-TC”) establishes and maintains a list of 32 individuals who are willing and able to serve as arbitrators. This list is composed of three sub-lists: a list of 12 EU-proposed individuals, a list of 12 Mercosur-proposed individuals, and list of eight non-nationals of either party who are agreed upon by both parties.

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36 The European Union–Mercosur Free Trade Agreement, Between the European Union, Argentina, Brazil, Paraguay and Uruguay, (pending entry into force) online: https://eur-lex.europa.eu/ [hereinafter EU-Mercosur].
37 European Union–South Korea Free Trade Agreement, Between the European Union and the Republic of Korean, 15 October 2009 (entered into force 1 June 2014) online: https://eur-lex.europa.eu/ [hereinafter EU-South Korea].
38 EU-Japan, supra note 34 at Article 21.9(1).
39 EU-Japan, supra note 34 at Article 21.9(1).
40 EU-Japan, Decision No 2/2019 of the Joint Committee under the Agreement Between the European Union and Japan for an Economic Partnership of 26 August 2019 on the establishment of the list of individuals who are willing and able to serve as arbitrators, [2019] online: <https://www.mofa.go.jp/mofaj/files/000510803.pdf>.
41 EU-Mercosur, supra note 36 at Article 7.3.
42 Ibid.
Similarly, the EU-South Korea agreement provides for the establishment of a Trade Committee (“ES-TC”), composed of representatives from the EU and South Korea, which must establish and maintain a list of 15 potential arbitrators. In doing so, the ES-TC includes five names proposed by each party. 43

As discussed in the ‘Selection by Appointing Authority’ section below, both the EU-Japan and EU-Mercosur agreements include procedures for composing a panel where one of the lists is not established or does not contain the required number of names. However, the EU-South Korea agreement does not provide for a procedure where the parties fail to propose individuals to serve as arbitrators. Therefore, the agreement does not include adequate procedural safeguards against panel blocking practices.

WTO/AfCFTA

The AfCFTA models its DSM on the WTO Dispute Settlement Understanding (DSU) and as a result, they are quite similar. Responsibility for dispute settlement at the WTO lies with the Dispute Settlement Body (“DSB”), a WTO body comprised of all 164 WTO members. 44 WTO dispute settlement includes panel-level (first instance) adjudication and an appeals process. At the panel level, individual members are appointed on an ad hoc basis to adjudicate each dispute.

The AfCFTA agreement includes countries from the African Union (“AU”). It came into force on May 30, 2019 for the 24 AU countries that had signed and ratified the agreement as of that date. Currently there are 28 AU states that have ratified the agreement.

Under the WTO DSU, the Secretariat maintains an ‘indicative list’ 45 of well-qualified governmental and non-governmental individuals it may – but not must -- draw upon to make proposals for panel nominations. The individuals are suggested by WTO members and approved by the DSB; the list includes over 400 names suggested by more than 70 different members. WTO members are not limited in how many individuals they nominate to the Indicative List. 46 Evidently there is no difficulty establishing a list, and the DSB approves all of those suggested for the list. 47

Like the WTO the Secretariat under the AfCFTA establishes and maintains an indicative list of individuals who may be called upon if and when a dispute arises. 48 Each state party to the AfCFTA may annually nominate two individuals to the list. 49

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43 EU-South Korea, supra note 37 at Chapter 14: Dispute Settlement Article 14.18(1).
45 WTO DSU, supra note 2 at Article 8.4.
46 WTO DSU, supra note 2 at Article 8.1. See also WT/DSB/44/Rev.48, January 13, 2020.
47 Interview of trade law practitioner with experiences on WTO [8 April 2020].
While the WTO DSB is a well-established institution, the DSM under AfCFTA is relatively new. As such, it’s not clear yet whether the AfCFTA Secretariat will encounter any difficulties in establishing and maintaining the indicative list.

**ICSID/PCA**

Established in 1966, ICSID is one of the leading institutions for the resolution of international investment disputes. As of June 30, 2019, there were 163 signatories to the ICSID Convention, of which 154 are ‘Contracting States’. ICSID offers three different procedural rules for the arbitration of investment disputes. First, ICSID can administer investment disputes under the UNICTRAL rules of procedure. Second, the ICSID Convention provides for the resolution of disputes between Member States and investors that qualify as nationals of Member States. Finally, ICSID can administer disputes which fall outside of the ICSID Convention through the ICSID Additional Facility Rules. In each set of rules, the dispute is between an investor and a state. This section focuses specifically on the ICSID Convention and the Convention Arbitration Rules because they are the institution’s own set of rules.

Established in 1899, the PCA is an international institution facilitating various forms of dispute resolution, including disputes between states. Its services include providing administrative support in international arbitrations, acting as the appointing authority or designating an appointing authority to select arbitrators for disputes, and making its facilities available to certain international tribunals. The PCA offers different procedural options. First, parties can select whatever procedural rules will fit their dispute and the PCA will conduct the arbitration in accordance with the selected rules. Second, the PCA can administer arbitration proceedings under the PCA Arbitration Rules 2012. While parties have the option of selecting rules of their choosing, parties generally use the Arbitration Rules 2012. Our focus is on the PCA Arbitration Rules 2012 because they are the institution’s own specific set of rules.

The ICSID Convention Arbitration Rules provide for a Panel of Arbitrators (“the Panel”), which is a list of individuals (“Panelists”) who may serve on arbitral tribunals. Each member state may designate up to four persons to the Panel, and over 100 have nominated one or more individuals. In addition, the Chair of the Administrative Council (a body composed of a representative from

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51 Ibid.


54 PCA Annual Report 2019, supra note 53 at 17.

55 The PCA Arbitration Rules 2012 are the newest set of procedural rules and an update on the Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States (1992). Both sets of rules remain valid, though.


each Member State to the ICSID Convention) may designate up to 10 persons to the Panel.\(^{58}\) Panelists serve for a six-year term.\(^{59}\)

The PCA maintains a list of potential arbitrators, known as “Members of the Court”.\(^{60}\) Each Member is nominated by the Contracting Parties to the PCA. Contracting Parties can nominate up to four persons.\(^{61}\) There are close to 200 names on the “Court”, put forward by 79 members.

Both ICSID and the PCA are effective at establishing and maintain their respective lists of potential panelists, which may be due to the fact that both institutions have over 100 member states that can put forward several names of their own choosing without being subject to review by any party.

Summary of Roster Procedures

The DSMs evaluated above reveal four types of roster ‘models’. The first is a roster established by party consensus (ex. NAFTA, CETA) from which panels must be composed (or where off-roster selections can be rejected). Where there is no procedure to address the situation where parties fail to come to consensus, this model opens the door to panel blocking. The problems caused by this model are exacerbated when the roster is designed to expire after a few years.

The second model is a roster established by a trade committee composed of representatives from both parties. This model can be effective to ensure a roster is established. However, where the trade committee is dependent on parties to appoint individuals in order to establish the roster, rather than establishing the roster itself, there must be procedures in place to ensure that a panel can still be composed where the roster is not established. Without such procedures in place, the parties can engage in panel blocking.

Likewise, the third model of roster, which requires establishment of the roster though party appointment, can only overcome the risk of panel blocking by ensuring that procedural safeguards are in place where parties fail to appoint roster members.

Finally, a fourth model is where rosters are established through appointments (usually unvetted) by member states of multi-party inter-governmental organizations or institutions. These result in large rosters thus facilitating panel composition.

<table>
<thead>
<tr>
<th>Roster Model Summary</th>
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<tbody>
<tr>
<td>Roster established by party consensus (NAFTA) (CETA)</td>
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<tr>
<td>Roster established by a Committee composed of representatives from the parties (CPTPP, EU-Mercosur, EU-Japan, EU-South Korea)</td>
</tr>
<tr>
<td>Roster established by party appointment without consensus (CUSMA, CFTA)</td>
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</tbody>
</table>

\(^{58}\) *ICSID Convention, supra* note 57 at Chapter 1: International Centre for Settlement of Investment Disputes Section 2: The Administrative Council Article 4.\(^{59}\) *ICSID Convention, supra* note 57 at Chapter 1: International Centre for Settlement of Investment Disputes Section 4: The Panels Article 15.\(^{60}\) Permanent Court of Arbitration, “Annex 1: Members of the Permanent Court of Arbitration” (2020), online: <https://docs.pca-cpa.org/2017/07/69c0b5ac-current-list-annex-1-members-of-the-court.pdf>;\(^{61}\) Permanent Court of Arbitration, “Members of the Court” (2020), online: https://pca-cpa.org/en/about/structure/members-of-the-court/ [hereinafter PCA Members of the Court].
2.1.2 Panelist Appointment by Individual Party

This section addresses panelist appointment by an individual disputing party, whereby procedures provide for either disputing party to appoint a panelist of their choosing, without requiring agreement from the other disputing party. In other words, consensus from both disputing parties on panel composition is not required.

Appointment by individual party procedures can be used with or without a requirement to select panelists from rosters. Some procedures, such as those that do not involve selection from rosters, provide for parties to appoint any individual of their choosing (ex. NZ-China Agreement). Other procedures require parties to appoint individuals from a roster or list (ex. CFTA), and can even require that the appointment be made from the opposing party’s list (ex. CPTPP).

Appointment by individual party procedures can be a relatively efficient way to compose panels, compared to procedures that require appointments by consensus. Consensus is difficult to achieve because disputing parties usually have different criteria in mind when selecting panelists: each side is looking for a panelist who is likely, based on expertise or experience, to support its approach to the issues in dispute. In order to ensure that parties cannot engage in panel blocking practices, however, appointment by individual party procedures should be coupled with a back-up appointment procedure to be used if a party fails or refuses to appoint a panelist as a means of delaying or avoiding dispute settlement procedures.

The discussion below addresses agreements and institutions which utilize appointment by individual party mechanisms to compose a panel.

**NAFTA**

Under NAFTA, panelists are appointed through a process of reverse selection, whereby parties select panelists from the opposing party’s roster:

“Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party…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.”[^62]

This provision requires each party to select two panelists. It is useful that the provision also provides a fallback should this procedure fail: it specifies that a panelist(s) be chosen by lot from the roster where a party fails to appoint a panelist. This seeks to ensure that a panel can be composed in spite of a party’s failure to select a panelist as required under this provision. However, this can still be problematic if, as we have highlighted under the ‘Rosters or Lists’ section of this

memorandum, the roster has not been established. Under NAFTA, there is no mechanism to address the situation where a party fails to appoint a panelist and there is also no roster established from which a default selection can occur by lot. As such, the appointment by individual party mechanism under NAFTA does not safeguard against panel blocking because of the weakness of the roster provision.

**CPTPP**

As mentioned earlier, parties to the CPTPP may establish a party-specific list of potential panelists. When a dispute arises, each disputing party appoints an individual to the panel.\(^63\) If the responding party fails to appoint a panelist\(^64\), the complaining party has the power to select the panelist from the responding party’s list:

“If the responding Party fails to appoint a panellist within the period specified in subparagraph (a), the complaining Party or Parties shall select the panellist not yet appointed…from the responding Party’s list established under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists)\(^65\).

Providing for the complaining party to select from the responding party’s list where the responding party fails to appoint a panelist provides incentive for the responding party to appoint efficiently, because it is preferable to make one’s own choices to having the opposing party choose for you.

Moreover, unlike the NAFTA, the CPTPP provides for the situation where a responding party fails to appoint a panelist and has not established a list. In this situation, the complaining party selects a panelist from the roster of panel chairs:

“If the responding Party fails to appoint a panellist within the period specified in subparagraph (a), the complaining Party or Parties shall select the panellist not yet appointed… if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists), from the roster of panel chairs established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists)\(^66\).

Providing yet another backup, if there is no roster of panel chairs established, then a panelist is chosen through random selection from a list of three candidates nominated by the complaining party.\(^67\)

Since the CPTPP provides procedures for situations where a responding party does not appoint a panelist and has failed to establish a list, it is an effective mechanism for overcoming both types of panel blocking problems that occurred under NAFTA.

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\(^63\) *CPTPP, supra* note 23 at Article 28.9(2)(a).

\(^64\) Should the complaining party fail to appoint an individual, the proceedings will lapse: *CPTPP, supra* note 23 at Article 28.9(2)(b).

\(^65\) *CPTPP, supra* note 23 at Article 28.9(2)(c)(i).

\(^66\) *CPTPP, supra* note 23 at Article 28.9(2)(c)(ii).

\(^67\) *CPTPP, supra* note 23 at Article 28.9(2)(c)(iii).
CUSMA

For both non-chair panelists and chairs, CUSMA procedures use an appointment by individual party mechanism. First, where there are only two disputing parties, the parties must endeavor to come to agreement on the appointment of a chair.\(^{68}\) Where parties are unable to agree on a panel chair, Article 31.9(1)(b) provides that a disputing party, chosen by lot, will select the chair:

“The disputing Parties shall endeavor to decide 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 decide 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.”\(^{69}\)

Similarly, within 15 days from the appointment of a chair, the two disputing parties must each appoint two citizens from the other disputing party as non-chair panelists.\(^{70}\) CUSMA provides a fallback should one party fail to appoint panelists as required; selection by lot from the other party’s roster. As noted above, CUSMA also provides a backup should a party not have designated individuals to the roster.

While the CUSMA includes an appointment by individual party mechanism, it does so through a reverse selection procedure similar to the NAFTA. Reverse selection is intended to help maintain panel independence.\(^{71}\) It also provides adequate backup procedures when the appointment process is affected by one party’s failure to appoint.

CFTA/EU-Mercosur/EU-Japan/AANZFTA/NZ-China/PCA/ICSID

Each of the CFTA, EU-Mercosur\(^{72}\), EU-Japan\(^{73}\), the PCA Arbitration Rules 2012\(^{74}\), the ICSID Convention and the Convention Arbitration Rules \(^{75}\), the AANZFTA\(^{76}\) and the NZ-China agreement\(^{77}\) provide for panelists to be appointed by each disputing party without the agreement of the other disputing party. In addition, they each require an appointing authority to appoint panelists where parties fail to do so. The procedures for an appointing authority to appoint panelists under each of these mechanisms are discussed under ‘Selection by Appointing Authority’ below.

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\(^{68}\) CUSMA Protocol of Amendment, supra note 28 at Article 31.9(1)(b).

\(^{69}\) CUSMA Protocol of Amendment, supra note 28 at Article 31.9(1)(b).

\(^{70}\) CUSMA Protocol of Amendment, supra note 28 at Article 31.9(1)(e).


\(^{72}\) EU-Mercosur, supra note 36 at Article 8.2.

\(^{73}\) EU-Japan, supra note 34 at Article 21.8(3).


\(^{75}\) ICSID Convention, supra note 57 at Chapter IV: Arbitration, Section 2: Constitution of the Tribunal Article 37.

\(^{76}\) The Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Between Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, Australia and New Zealand, 27 February 2009 at Chapter 17 Consultation and Dispute Settlement Article 11(5) (entered into force 1 January 2020) online: https://aanzfta.asean.org/ [hereinafter AANZFTA].

\(^{77}\) New Zealand–China Free Trade Agreement, Between the People’s Republic of China and New Zealand, 7 April 2008 at Article 189(2) (entered into force 1 October 2008) online: https://www.mfat.govt.nz/ [hereinafter NZ-China].
Summary of Panelist Appointment by Individual Party Procedures

The DSMs examined above reveal three types of appointment by individual party ‘models’: reverse selection with selection by lot as backup, party selection with selection by opposing party as backup, and party selection with appointing authority selection as backup. Under each of these models, appointment by individual party procedures are paired with a mechanism to ensure that panels are composed where one of the disputing parties fail to appoint a panelist. Where these models are used in DSMs that include a roster or list, the model should be accompanied by a mechanism that allows the appointment to be made even if the roster or list is not established.

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<thead>
<tr>
<th>Appointment by Individual Party Model Summary (Where a party fails to appoint a panelist…)</th>
</tr>
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<tbody>
<tr>
<td>Reverse selection with selection by lot for failure to select: A party appoints panelists who are not citizens of that party (NAFTA, CUSMA)</td>
</tr>
<tr>
<td>Party selection with selection by opposing party if failure to select (CPTPP)</td>
</tr>
<tr>
<td>Party selection with appointing authority selection if failure the panelists on the parties behalf (CFTA/EU-Mercosur, EU-Japan, AANZFTA/NZ-China/PCA/ICSID)</td>
</tr>
</tbody>
</table>

2.1.3 Selection of Panelist by Lot

Selection by lot is a method that requires one party, or an appointed individual or body, to select a panelist from a roster or list. Within the agreements reviewed in this memorandum, selection by lot procedures have not been used in and of themselves to compose a panel. That is, selection by lot procedures are generally used in conjunction with another selection procedure. Some agreements, for example, use this mechanism in situations where the parties are unable to come to consensus or fail to appoint a panelist when prescribed to do so.

Selection by lot can be an effective tool to avoid panel blocking because disputing parties generally want to maintain control over who is appointed to the panel and avoid ceding selection power to someone else. Therefore, selection by lot procedures incentivize parties to come to consensus or appoint panelists efficiently in order to avoid having a panel composed for them.

Two examples of agreements that utilize selection by lot mechanisms to compose a panel are discussed below.

NAFTA

As mentioned earlier, the arbitration panel under NAFTA is appointed through a process of reverse selection, whereby parties select panelists from the opposing party’s roster. Where a party fails to appoint the panelists, however, the panelists shall be selected by lot from the roster:

“Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party…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.”

Under this model, who will carry out the selection by lot is not specified. Nor is a backup selection procedure provided in the event there is no roster.

**CETA**

A panel under CETA is composed of three arbitrators, which the parties must agree upon within 10 days from receipt of the panel establishment request. If the parties are unable to come to agreement, the Chair of the CETA-JC selects the arbitrators, by lot, at the request of either party:

“In the event that the Parties are unable to agree on the composition of the arbitration panel within the time frame set out in paragraph 2, either Party may request the Chair of the CETA Joint Committee, or the Chair’s delegate, to draw by lot the arbitrators from the list established under Article 29.8. One arbitrator shall be drawn from the sub-list of the requesting Party, one from the sub-list of the responding Party and one from the sub-list of chairpersons. If the Parties have agreed on one or more of the arbitrators, any remaining arbitrator shall be selected by the same procedure in the applicable sub-list of arbitrators. If the Parties have agreed on an arbitrator, other than the chairperson, who is not a national of either Party, the chairperson and other arbitrator shall be selected from the sub-list of chairpersons.”

If requested to select one or more arbitrators, the CETA-JC Chair must do so as soon as possible and normally within 5 working days of the request. Unlike for NAFTA, the CETA model identifies the appointing authority (the CETA-JC). In addition, a backup procedure is provided should there be no roster: the arbitrators shall be drawn by lot from the arbitrators who have been proposed for the roster yet to be established.

**EU-Mercosur**

As previously mentioned, the EM-TC establishes and maintains a list of 32 potential arbitrators, although parties may, by mutual agreement, select as arbitrators individuals who are not on the list. This list of 32 individuals is composed of three sub-lists: a list of 12 EU-proposed individuals, a list of 12 Mercosur-proposed individuals, and list of eight non-nationals of either party who are agreed upon by both parties.

Much like CETA, the EU-Mercosur agreement provides for selection by lot by the Chair of the EM-TC where parties fail to appoint panelists:

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78 *NAFTA, supra* note 9 at Article 2011(1).
79 *CETA, supra* note 6 at Article 29.7(1)-(2).
80 *CETA, supra* note 6 at Article 29.7(1).
81 *CETA, supra* note 6 at Article 29.7(1).
82 *CETA, supra* note 6 at Article 29.7(4).
83 *EU-Mercosur, supra* note 36 at Articles 7.3 and 8.5.
84 *EU-Mercosur, supra* note 36 at Article 7.3.
“If there is no agreement on the composition within this timeframe, each party shall appoint one member of the panel from the sub-list of that party established in [paragraph 4 of Article 7] within ten (10) days from the expiry of the timeframe established in paragraph 1 of this Article. If a party fails to appoint an arbitrator within such period, and upon request of either party to the dispute, the Chairperson of the [Trade Committee] or the Chairperson's designee shall, within five days from the date of that request, select the arbitrator by lot from the sub-list of that party established in [paragraph 4 of Article 7].”\(^{85}\)

Similarly, the parties must agree to appoint a chairperson. However, where they are unable to do so, the Chair of the EM-TC selects the individual, by lot, from the eight-person list of non-nationals mentioned above.\(^{86}\)

Like CETA, the complaining party’s co-chair of the EM-TC selects arbitrators by lot from those names formally proposed for the establishment of the particular sub-list where any of the sub-lists are incomplete or not established.\(^{87}\) As a result, the EU-Mercosur FTA is effective for composing panels efficiently, without the risk of panel blocking.

**EU-Japan**

As previously mentioned, the EU-Japan agreement envisions a list of arbitrators composed of at least nine persons who will be selected jointly by the two parties. This list of nine is divided into three sub-lists, each composed of three individuals: one for the EU, one for Japan, and a third of non-nationals of the parties who will serve as chairpersons.\(^{88}\)

The EU-Japan agreement provides that the EJ-JC co-chair of the complaining party is required to make an appointment by lot where the parties fail to come to consensus:

> “If the Parties do not reach an agreement on the composition of the panel within [10 days of receipt of the request for panel establishment], each Party shall appoint an arbitrator from the sub-list for that Party established pursuant to Article 21.9 no later than five days after the expiry of the time period provided for in paragraph 2. If a Party fails to appoint an arbitrator within that time period, the Co-chair of the Joint Committee from the complaining Party shall select by lot, no later than five days after the expiry of the time period, an arbitrator from the sub-list for the Party that has failed to appoint an arbitrator established pursuant to Article 21.9.”\(^{89}\)

Similarly, if there is no agreement on a chairperson within 10 days of the request for establishment of the panel, the EJ-JC co-chair of the complaining party may be requested by either party to select the chair by lot from the sub-list of chairpersons (and may delegate this task to a representative).\(^{90}\)

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\(^{85}\) *EU-Mercosur*, *supra* note 36 at Article 8.2.

\(^{86}\) *EU-Mercosur*, *supra* note 36 at Article 8.3.

\(^{87}\) *EU-Mercosur*, *supra* note 36 at Annex 1: Rules of Procedure for Arbitration Article 13(a bis).

\(^{88}\) *EU-Japan*, *supra* note 34 at Article 21.9(1).

\(^{89}\) *EU-Japan*, *supra* note 34 at Article 21.8(3).

\(^{90}\) *EU-Japan*, *supra* note 34 at Article 21.8(4).
The main difference between the EU-Japan agreement and that of CETA or the EU-Mercosur agreement is that it provides several procedural backup arrangements to address when sub-lists are incomplete or do not exist at all. All of the backup procedures involve selection by lot except if the partial list has only one name on it, in which case that person shall be selected. These procedural safeguards ensure that a panel is still composed even if a list is incomplete or is not established. As a result, the EU-Japan agreement provides for an effective mechanism for composing panels and avoiding panel blocking.

**EU – South Korea**

The parties must compose the 3-member panel by consensus within 10 days from panel establishment. However, if they are unable to do so, the chair of the ES-TC (or the chair’s delegate) selects the panelists by lot from the roster. The chair can select all three panelists, if need be, or the remaining panelists the parties have yet to agree upon:

“In the event that the Parties are unable to agree on the composition of the arbitration panel within the time frame laid down in paragraph 2, either Party may request the chair of the Trade Committee, or the chair’s delegate, to select all three members by lot from the list established under Article 14.18, one among the individuals proposed by the complaining Party, one among the individuals proposed by the Party complained against and one among the individuals selected by the Parties to act as chairperson. Where the Parties agree on one or more of the members of the arbitration panel, any remaining members shall be selected by the same procedure.”

Providing for the ES-TC to act as an appointing authority ensures that the panel is efficiently composed, provided that the ES-TC has established a roster based on the parties’ proposals.

**CUSMA**

CUSMA provides that non-chair panelists are chosen by lot from the roster if a disputing party fails to select its panelist(s), although who does the selection is not specified. CUSMA also provides that a disputing party, chosen by lot, will select the chair where parties are unable to come to consensus:

“The disputing Parties shall endeavor to decide 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 decide 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.”

91 EU-Japan, supra note 34 at Article 21.8(5).
92 EU-South Korea, supra note 37 at Chapter 14: Article 14.5(2).
93 EU-South Korea, supra note 37 at Article 14.5(3).
94 EU-South Korea, supra note 37 at Article 14.18(1).
95 CUSMA, supra note 6 at Article 31.9(1)(e).
96 CUSMA, supra note 6 at Article 31.9(1)(b).
A backup is provided should the responding party not participate in the choosing by lot procedure: the complaining party selects the chair from the roster.

Unlike CETA, CUSMA does not use an appointing authority to select by lot. Furthermore, CUSMA does not use the selection by lot method to actually select the chair. Rather, it provides for one of the disputing parties to be selected by lot, who in turn appoints the chair. By allowing the disputing party chosen by lot to subsequently appoint a chair, the panel maintains the “legitimacy that flows from consent”. 97

CUSMA

The CFTA provides that in the event a disputing party fails to appoint a panelist from the roster within 30 days of delivery of the request for panel establishment, or if the parties fail to agree on a single panelist when they have decided to use a one-person panel, the CFTA Secretariat shall select the panelist by lot from the roster. In addition, where parties successfully appointed two panelists and these two are unable to select a chair from the roster within 10 days of their appointments, the Secretariat must select the chairperson by lot from the roster. 98

As previously discussed, the CFTA enables CFTA parties to appoint individuals to a panel roster and an appellate roster. However, CFTA does not address how panel selection is to take place if rosters have not been established. Since the CFTA does not address the situation where parties fail to establish a roster, it technically does not avoid panel blocking problems. As a practical matter, however, we note that rosters have been established.

Summary of Panelist Selection by Lot Procedures

The DSMs evaluated above reveal three types of selection by lot ‘models’. First, a panelist is chosen by lot from a roster where a party fails to appoint a panelist itself. Under this model, who actually carries out the selection by lot procedure is not specified. Therefore, this could technically result in panel blocking because the selection by lot might not take place.

The second model is utilized where an appointing authority is requested to appoint panelists because the parties were unable to come to consensus or failed to appoint panelists themselves. This method clearly sets out who carries out the selection by lot and therefore ensures that a panel can be composed efficiently.

The third model involves selecting one of the disputing parties, by lot, to make a selection where the parties fail to appoint a chair.

<table>
<thead>
<tr>
<th>Selection by Lot Model Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where parties fail to appoint a panelist, a panelist is chosen by lot from a roster (NAFTA, CUSMA)</td>
</tr>
<tr>
<td>An appointing authority makes the selection by lot because the parties were unable to make the selection (CETA, CFTA, EU-Mercosur, EU-Japan, EU-South Korea)</td>
</tr>
</tbody>
</table>

97 Porges, supra note 47 at 485.
98 CFTA, supra note 6 at Article 1005.
A disputing party is chosen, by lot, and that party subsequently appoints a chair (CUSMA)

2.1.4 Selection of Panelists by Neutral Appointing Authority

Selection of panelists by a neutral appointing authority involves delegating panel selection for one or more panelists to a third party. This is usually effected by designating the appointing authority in the FTA (ex. the Secretary General of the PCA).

Using a neutral appointing authority can be particularly effective for avoiding panel blocking because it provides a fail-safe procedure for composing a panel. Unlike a responding party, the neutral authority has no substantive interest in the underlying dispute and therefore has no interest in delaying or avoiding panel selection. Therefore, relying on a neutral third party to select panelists ensures efficiency in the selection process.

Examples of agreements and institutions reviewed in this memorandum that utilize selection by neutral appointing authority are discussed below.

AfCFTA

Under AfCFTA, where the disputing parties are unable to come to consensus on panel composition within 30 days of the establishment of a panel, either party can request the Head of the Secretariat to determine the composition of the panel:

“If no agreement is reached on the composition of a Panel within thirty (30) days after the date of the establishment of a Panel, at the request of either Party, the Head of the Secretariat, in consultation with the Chairperson of the DSB and with the consent of the disputing State Parties, shall determine the composition of the Panel by appointing the Panellists considered to be most appropriate.”

The requirement that both disputing parties must consent to the appointment of panelists by the designated appointing authority is a different approach than is provided for under other agreements where the appointing authority can step in at the request of only one party or does so automatically after the allotted time expires (ex. CETA). This could be a problem because the responding party, for example, may engage in panel blocking by refusing consent. However, there have not been any disputes under the AfCFTA to date, so it is unclear whether this will be a problem in practice.

AANZFTA

Under the AANZFTA Chapter 17 procedures, the parties each appoint a panelist. If the tribunal has not been composed within 45 days of the notice to use Chapter 17 tribunal selection procedures, either disputing party can request the Director-General of the WTO to make the

100 AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement Article 11(5).
appointment(s).\textsuperscript{101} In making the appointment(s), the Director-General may use any list of nominees exchanged by the disputing parties earlier in the selection process.

Outsourcing the appointing authority to the Director General of the WTO can be an effective way of composing a panel while also maintaining independence in the appointment process, since the appointing authority is a neutral third-party party. An interesting feature is that the appointing authority may (but not must) appoint individuals who had been proposed by the disputing parties earlier in the panel selection process.

\textit{WTO}

As noted above, the WTO DSU provides that the Secretariat shall maintain an indicative list of individuals from which panelists may (not must) be drawn. Disputing parties must select all three panelists by agreement. They may arrive at the three (or five) names on their own or with the assistance of the Secretariat, which proposes nominees for the panel based on desired qualifications indicated by the disputing parties. If the parties are unable to agree on the individuals to serve on the panel within 20 days of panel establishment, either party may request the Director-General of the WTO to select the panelists. Unlike with the AfCFTA, however, the appointing authority does not require the consent of both disputing parties in determining the composition of the panel. The Director-General must consult the disputing parties as well as the Chair of the DSB and the Chair of the relevant WTO Council or WTO Committee depending on the subject-matter of the dispute, but the Director-General appoints the panelists she/he “considers most appropriate”\textsuperscript{102}.

The panel appointment procedure in the WTO is very effective. If the parties are unable to agree on composition and one of the disputing parties requests appointment by the Director-General, composition must occur within 10 days of the request.\textsuperscript{103} Over 260 WTO panels have been composed to date, more than half by the Director-General.\textsuperscript{104}

\textit{PCA}

Under the PCA Arbitration Rules 2012, a panel is composed of either five, three or one person(s).\textsuperscript{105} If a panel is to be composed of a single arbitrator, then the parties must come to agreement on the appointment.\textsuperscript{106} Where the panel is composed of five or three persons, the parties each appoint a single arbitrator and these two individuals subsequently appoint either three or one additional arbitrator(s) (respectively), one of whom will act as the ‘presiding arbitrator’:

“If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If five arbitrators are to be appointed, the

\textsuperscript{101} AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement Article 11(7).
\textsuperscript{102} WTO DSU, supra note 2 at Articles 8.4 to 8.7.
\textsuperscript{103} WTO DSU, supra note 2 at Article 8.7.
\textsuperscript{104} Interview, supra note 47.
\textsuperscript{105} PCA Arbitration Rules 2012, supra note 74 at Article 7.
\textsuperscript{106} PCA Arbitration Rules 2012, supra note 74 at Article 8(1).
two party-appointed arbitrators shall choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.”

If a party has not made an appointment within 30 days of receiving notice of the other party’s appointment, the other party may request the appointing authority to appoint the second arbitrator. Under the Arbitration Rules 2012, the appointing authority is the Secretary General of the PCA.

Where there is disagreement between the two appointed panelists on selecting the remaining arbitrator(s), the appointing authority shall appoint the remaining arbitrator(s):

“If within 30 days after the appointment of the second arbitrator, or such other period as may be set by the International Bureau, the two arbitrators have not agreed on the choice of the remaining arbitrators and/or the presiding arbitrator, the remaining arbitrators and/or the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed under article 8, paragraph 2.”

The appointing authority uses a list-method to appoint the remaining arbitrator(s) by circulating an identical list of at least three names to both parties. The parties must then return the list to the appointing authority within 15 days having deleted any objectionable names, and numbering those remaining in order of preference. The appointing authority makes the appointment(s) based on this list. However, the appointing authority is given discretion should the process not work:

“If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.”

The Secretary General of the PCA may also appoint arbitrators under other rules of procedure if called upon to do so. The appointments can be made in two different ways. First, the Secretary General can act as the appointing authority under an agreement where he/she is designated to do so, such as through an arbitration clause. Second, the Secretary General can designate an appointing authority under the UNCITRAL Arbitration Rules who will subsequently make the appointment.

Our interview research revealed that where the PCA designates an appointing authority, that authority may receive, prior to making the appointment, indications from the disputing parties about the qualifications they are looking for in an arbitrator.
In 2019, the Secretary General of the PCA received 11 requests to act as an appointing authority and 17 requests to designate an appointing authority.\textsuperscript{114} It is unclear whether the 11 requests were made under the PCA Arbitration Rules 2012 and hence, how often parties resorted to use of an appointing authority. Nevertheless, the PCA procedures automate the use of an appointing authority and, unlike the AfCFTA, do not require the consent of both parties to select panelists. Therefore, the PCA offers an effective means of composing a panel efficiently, without the risk of panel blocking.

**Summary of Panelist Selection by Neutral Appointing Authority Procedures**

The DSMs evaluated above reveal 2 types of panelist selection by appointing authority ‘models’. Both models involve a disputing party requesting a neutral appointing authority to select one or more panelists when the disputing parties fail to reach agreement on panel selection or one of the parties fails to appoint a panelist. The two models differ in respect of the discretion afforded to the appointing authority in selecting panelists. In one model, the appointing authority must obtain the consent of both parties in composing the panel. In the other model, the appointing authority makes her or his determination without requiring the parties’ consent, but she or he receives some input from the disputing parties in terms of whom she or he selects.

The first mechanism risks panel blocking because one party can block the appointing authority from determining the composition of the panel by withholding its consent on the determination. The second method, in contrast, is an effective way of ensuring panels are composed efficiently without the risk of panel blocking because the appointing authority makes the determination without requiring the disputing parties’ consent. Moreover, the appointing authority is not restricted to choosing names from an agreed list or roster. As a result, this selection procedure is not dependent on the FTA or institution parties to agree on, or make appointments to, a roster.

<table>
<thead>
<tr>
<th>Panelist Selection by Neutral Appointing Authority Model Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointing authorities who select panelists subject to the agreement of the disputing parties (AfCFTA)</td>
</tr>
<tr>
<td>Appointing authorities who select panelists with input from disputing parties composed of representatives of the parties to the agreement (AANZFTA, WTO, PCA)</td>
</tr>
</tbody>
</table>

### 2.1.5 Unique Other Methods

We came across several panel selection procedures which were not observed in any other agreement. Each of these unique DSMs is evaluated below.

\textsuperscript{114} PCA Annual Report 2019, supra note 53 at 17.
The JSEPA provides for an appointment by individual party mechanism, but resolves the failure of a party to appoint a panelist in a unique manner. JSEPA provides for the establishment of a Consultative Committee ("the Committee"), composed of representatives from each of the parties. The Committee must also include a legal expert who has been designated by each of the parties to the agreement. The designation of the legal expert is important because he/she may be appointed as an arbitrator where the parties fail to otherwise appoint within the prescribed time:

“The Parties shall, within 30 days after the date of receipt of the request for the establishment of an arbitral tribunal, appoint one arbitrator each. If one Party fails to so appoint an arbitrator, the legal expert designated by that Party pursuant to paragraph 4 of Article 140 shall be appointed as an arbitrator.”

The appointment of a pre-selected legal expert, as opposed to another individual, is a unique approach to panel selection. It is not clear why the JSEPA pursued this approach. Curiously, the JSEPA does not include panel selection procedures for the situation where the parties fail to designate a legal expert to the Consultative Committee.

Under the AANZFTA Chapter 17 procedures, the disputing parties must first appoint one arbitrator each to a three-person tribunal. The third arbitrator, who shall serve as chair, must be agreed upon by the parties. Up until this point, the procedures under AANZFTA are not unlike many of the other DSMs evaluated in this memorandum. However, in order assist with coming to agreement on the third arbitrator, the parties may exchange a list of acceptable nominees:

“Following the appointment of the arbitrators in accordance with Paragraph 5, the Parties to the dispute shall agree on the appointment of the third arbitrator who shall serve as the chair of the arbitral tribunal. To assist in reaching this agreement, each of the Parties to the dispute may provide to the other Parties to the dispute a list of up to three nominees for appointment as the chair of the arbitral tribunal. If the Parties to the dispute have not agreed on the chair of the arbitral tribunal within 15 days of the appointment of the second arbitrator, the two appointed arbitrators shall designate by common agreement the third arbitrator who shall chair the arbitral tribunal.”

The prescribed exchange of acceptable nominees is unique to AANZFTA, although it is possible that disputing parties to other agreements reviewed in this memorandum may also engage in this process on an informal basis. We observe that in the WTO, when the Secretariat proposes nominees to the disputing parties, it usually provides a list with several names.  

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116 AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement Article 11(6).
117 Interview, supra note 47.
The AANZFTA does not use a roster so this unique method may enhance panel selection efficiency since the parties may exchange more than a single name at a time. However, we note that the parties are only required to provide up to three names. Therefore, this does not preclude the parties from proposing only one name, which would not make the process uniquely efficient.

ICJ

The ICJ is the principal judicial organ of the United Nations (UN).\textsuperscript{118} It was established in June 1945 and began work in April 1946.\textsuperscript{119} It resolves legal disputes between states and provides advisory opinions on legal issues referred to it by the United Nations.\textsuperscript{120} Legal disputes between states submitted to the ICJ are known as ‘contentious cases’, and can only include parties who are parties to the Statute of the Court or have accepted its jurisdiction.\textsuperscript{121} As of July 31, 2018, the ICJ has dealt with 148 contentious cases and delivered 128 judgements.\textsuperscript{122}

ICJ ‘panel’ selection procedures are very different from those involved in ad hoc panel selection under an FTA. This is because disputes are heard before a bench of sitting judges, known as ‘Members’ of the court, rather than an ad-hoc panel of arbitrators. Since the ICJ uses a procedure that essentially establishes a permanent ‘panel’ of judges and, with one exception detailed below, do not allow parties to select which judge will hear a dispute, there is no risk of panel blocking.

The ICJ is composed of 15 judges\textsuperscript{123} who are elected to the court by the United Nations General Assembly and Security Council.\textsuperscript{124} Members are elected for a period of nine years\textsuperscript{125} from a list of individuals nominated by the national groups of the PCA\textsuperscript{126}:

“...The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions ...”\textsuperscript{127}

A full court of at least 9 judges are required to sit on a dispute.\textsuperscript{128} However, the court can form a chamber to deal with particular kinds of cases:

\begin{itemize}
\item \textsuperscript{119} International Court of Justice, “How the Court Works” (2020), online: <https://www.icj-cij.org/en/how-the-court-works>.
\item \textsuperscript{120} International Court of Justice, “The Court” (2020), online: <https://www.icj-cij.org/en/court>.
\item \textsuperscript{121} Ibid
\item \textsuperscript{122} ICJ Yearbook 2017-2018, supra note 118 at 2.
\item \textsuperscript{123} Statute of the International Court of Justice, [18 April 1946] at Article 3, online: <https://www.icj-cij.org/en/statute> [hereinafter ICJ Statute].
\item \textsuperscript{124} ICJ Statute, supra note 123 at Article 4.
\item \textsuperscript{125} ICJ Statute, supra note 123 at Article 13.1.
\item \textsuperscript{126} Each contracting party of the PCA may nominate a maximum of four individuals as “Members of the Court”, which is a list of potential arbitrators the PCA may draw upon for disputes. The group of individuals nominated by the contracting parties to this list are considered a “national group” and may also nominate candidates to the ICJ court in addition to acting as dispute arbitrators when called upon. See: PCA Members of the Court, supra note 61.
\item \textsuperscript{127} ICJ Statute, supra note 123 at Article 4.2.
\item \textsuperscript{128} ICJ Statute, supra note 123 at Articles 25(1) and (3).
\end{itemize}
“The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.”129

Where a party to a dispute does not have a judge of its own nationality on the ICJ bench, it may choose an ad-hoc judge for that particular case and should ideally select one of the nominees from the PCA list mentioned above.130

Summary of Unique Other Procedures

Given that the procedures identified in this section constitute unique approaches, we do not group them under ‘models’. However, we note that, while unique, these procedures do not provide mechanisms for avoiding panel blocking that are any more effective than other mechanisms we have explored in prior sections.

2.2 Best Practices for Panel Selection: Practices that avoid panel blocking

As mentioned in section 2.1, a weakness encountered in panel selection under some FTAs is the ability of parties to delay or block the composition of panels because the relevant provisions call for agreement between the disputing parties on selection of panel members or because one of the disputing parties fails to appoint panelists or establish rosters from which panelists must be selected. Where there is no mechanism (such as an appointing authority) to overcome problems where parties are unable to reach consensus on panelists or where parties fail to appoint a panelist when designated to do so, parties are able to engage in panel blocking. As such, there has been significant focus on panel selection mechanisms within dispute settlement chapters of FTAs.131

The primary way that agreements can be drafted to overcome panel blocking is through introducing some form of automaticity in the panel selection process. Automaticity ensures that a panelist is chosen, regardless of consensus requirements and appointment problems mentioned above. There are a number of ways to incorporate automaticity into agreements. Some mechanisms have been illustrated above. We identify the most effective mechanisms below.

Automaticity by Lot

One method to try to overcome the panel blocking problem is selection of panelists by lot. Many dispute settlement mechanisms under FTAs use this feature for situations where the disputing parties are unable to agree or fail to appoint a panelist. For example, the EU-Japan agreement specifies:

129 ICJ Statute, supra note 123 at Article 26(1)
130 ICJ Statute, supra note 123 at Article 31.
“...If a party fails to appoint an arbitrator within that time period, the Co-chair of the Joint Committee from the complaining party shall select by lot...an arbitrator from the sub-list for the Party that has failed to appoint an arbitrator...”132

When utilizing selection by lot, it is important to specify precisely who is responsible for the selection. If an FTA does not specify which party is responsible or refers only to ‘the parties’, this significantly weakens the selection procedure.133 This is because if no one is designated to do the selection, either no one will do it or, if one of the disputing parties seeks to do it, the other party may object to the process as *ultra vires* the agreement.

Furthermore, selection by lot usually necessitates a pre-established list (unless it is indicated that arbitrators do not have to be chosen from a list). Within the agreements reviewed in this memorandum, selection by lot procedures have not been used in and of themselves to compose a panel. That is, selection by lot procedures are generally used in conjunction with another selection procedure, such as selection from a roster. Where parties fail to establish a list or roster from which panelists are to be selected, some other mechanism would be required to designate the ‘lot’ from which a selection is to be made. This undermines the strength of utilizing selection by lot for effective panel selection procedures.

<table>
<thead>
<tr>
<th>Automaticity by Lot is Effective When:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The party or individual responsible for selection by lot is specified precisely in the text of the agreement</td>
</tr>
<tr>
<td>Where a roster or list must be established for panel selection purposes and is established</td>
</tr>
</tbody>
</table>

**Automaticity by Appointing Authority**

An effective method for efficiently composing a panel is the use of a neutral appointing authority, such as the Director-General of the WTO or the Secretary General of the PCA, to select panelists when one of the disputing party requests them to do so.134 Where the Director-General of the WTO or the Secretary General of the PCA act as the appointing authority for the selection of panelists, they do so as a third-party, unrelated to the disputing parties themselves. This facilitates the selection process, because they do not have an interest in the substance of the dispute. The Director-General of the WTO has been designated as the appointing authority in a number of FTAs. In addition to serving as an appointing authority under the PCA Arbitration Rules 2012, the Secretary-General of the PCA can also be called upon to act as appointing authority under various procedural regimes set forth in agreements unrelated to the PCA, or to designate an appointing authority who in turn is to make a panelist appointment. However, not all disputing parties may be willing to delegate panel selection authority to an outside body, preferring to control the process themselves. Depending on the party, this may not be a preferred procedure.

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132 *EU-Japan*, supra note 34 at Article 21.8(3).
133 *Chase*, supra note 131 at 27.
134 As mentioned in the introduction to this memorandum, disputing parties using the PCA are free to select the procedural rules of their choosing. The PCA can arbitrate disputes using the PCA Arbitration Rules 2012 or may use other procedural rules that the parties agree to. The PCA Arbitration Rules 2012 provide for the Secretary General of the PCA to act as the appointing authority under these rules. See: PCA Annual Report 2019, *supra* note 53 at 14.
Where an FTA does use a neutral appointing authority, it is advisable to formalize this in some manner. For example, where an agreement specifies use of an appointing authority, the agreement should be specific about who is to serve as the appointing authority and in what circumstances, such as on request of either party. In addition, it would be useful to set forth whether the appointing authority should consult with the disputing parties before making his selection, or whether she or he should consider the names exchanged by the parties at an earlier stage of the process in making his selection.

In addition to including provisions that allow for an it appointing authority to select panelists in certain situations, the ability of appointing authorities to select individuals efficiently can be supplemented by provisions that provide a back-up mechanism when one appointing method fails. Thus, a provision might give the appointing authority sole appointing-making power should a selection method involving collaboration between the appointing authority and the disputing parties fail. Under the PCA rules, for example, if disputing parties are unable to come to agreement on a sole arbitrator, the initial method is for the appointing authority to communicate an identical list of potential arbitrators to each party. The parties must return the list to the appointing authority within fifteen days having deleted rejected name(s). If this mechanism fails, the PCA rules provide for the appointing authority to use their discretion in selecting the arbitrator:

“If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.”

Such a provision could be crafted so that the appointing authority would have final decision-making power to choose any individual or choose someone off a specified list. The Secretary-General of the PCA in the provision above appears to have discretion to appoint anyone, although presumably it would be someone from the list he/she/they circulated earlier to each party.

### Automaticity by Appointing Authority is Effective When:

<table>
<thead>
<tr>
<th>Condition</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>The appointing authority is a neutral third party</td>
<td></td>
</tr>
<tr>
<td>The appointing authority is specifically designated as such under the agreement, such as through an arbitration clause within the agreement</td>
<td></td>
</tr>
<tr>
<td>The appointing authority has sole discretion to select panelists(s) as a fail-safe mechanism where all other procedures have been exhausted.</td>
<td></td>
</tr>
</tbody>
</table>

**Automaticity through appointment by individual party**

Where parties prefer not to use appointing authorities, automaticity could alternatively be included in DSM procedures by using an appointment by individual party mechanism. In particular, providing for a party to appoint panelists where the other party fails to do so, as the CPTPP does, may be particularly effective. One interviewee noted that parties would much prefer to appoint a panelist of their own choosing and are incentivized to do so where subsequent procedures may

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135 Chase, *supra* note 131 at 27.
136 See the model arbitration clauses provided by the PCA at Permanent Court of Arbitration, “Model Clauses and Submission Agreements” (2020), online: <https://pca-cpa.org/en/model-clauses-and-submission-agreements/>.
remove this consent element. As a result, the method used under the CPTPP would be particularly effective because not only does it deny the party who failed to appoint a panelist the ability to consent to a panelist’s appointment, but it also favours the other party. This is because it allows that other party to appoint a panelist who, although on the other party’s roster, reflects that party’s assessment of who will best serve its interest in the dispute.

138 Interview of trade law practitioner with experience on EU agreements [15 April 2020].
<table>
<thead>
<tr>
<th>Agreement</th>
<th>NAFTA</th>
<th>CETA</th>
<th>CPTPP</th>
<th>CUSMA</th>
<th>CFTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Parties</td>
<td>3</td>
<td>3</td>
<td>11</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Number of Panelists</td>
<td>5</td>
<td>3</td>
<td>3</td>
<td>5 (unless parties agree to three-member panel)</td>
<td>3 (unless parties agree to one-member panel)</td>
</tr>
<tr>
<td>Are there rosters or Pre-Established Lists?</td>
<td>Yes – 30 individuals Appointed by consensus Selection of panelist is “normally” from roster Peremptory challenge within 15 days if not on roster</td>
<td>Yes – 15 individuals Established by CETA Joint Committee Sub-list of 5 from each disputing Party Sub-list of 5 neutrals for chair</td>
<td>Yes – 15 individuals for chair and no specific number for each party’s specific list Roster of panel chair appointed by Parties no later than 120 days after entry into force, if no agreement appointed by Commission within 180 days Specific list appointed by each Party</td>
<td>Yes – 30 individuals Appointed by consensus Selection of panelist is from roster</td>
<td>Yes, at most 5 appointed by each party</td>
</tr>
<tr>
<td>Timeline for establishing a roster/list and do they expire?</td>
<td>Must be established on the date of entry into force Timeline: 3 years and maybe reappointed</td>
<td>No expiry Must be established at first meeting after agreement enters into force</td>
<td>Chairs: 3 years or until a new one is constituted</td>
<td>Establishment of the date of entry into force Timeline: 3 years or until a new one is constituted</td>
<td>No</td>
</tr>
<tr>
<td>What happens where there is failure to establish a roster?</td>
<td>It is possible to block panel composition</td>
<td>The chair of Joint Committee chooses by lot from names proposed from other list(s)</td>
<td>The disputing Parties nominate 3 candidates from which chair is randomly selected within 60 days OR A disputing party may elect to have the chair appointed from those 3 candidates by an independent 3rd party</td>
<td>There is always an established roster unless it has never been established upon entry into force</td>
<td>Not specified</td>
</tr>
<tr>
<td>Selection of non-chair panelists by Agreement?</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>No, unless parties agree to a one-member panel.</td>
</tr>
<tr>
<td>Process of non-chair panel selection:</td>
<td>Within 15 days of the selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party</td>
<td>One arbitrator from the sub-list of the requesting Party and one from the sub-list of the responding Party and one from the sub-list of the Chairpersons</td>
<td>Within 30 days after the delivery of the request, each Party shall appoint a panelist and notify each other of those appointments</td>
<td>Within 15 days of the selection of the chair, each Party shall selection two panelists who are citizens of the other disputing Party</td>
<td>Within 30 days from the date of request to establish panel, each party appoints one member from roster. If the parties agree to a one-member panel, parties must</td>
</tr>
<tr>
<td>If failure to agree on non-chair panelists?</td>
<td>Selected by lot from roster who are citizens of the other disputing Party</td>
<td>(SAME AS NON-SELECTION OF CHAIR) either Party may request the Chair of the Joint Committee to draw by lot from sub-lists Selection within 5 working days</td>
<td>If failure by the Complaining Party, the dispute settlement proceeding lapse after 20 days If failure by the Responding Party within 20 days, the complaining Party within 35 days select the panelist from roster of panel chairs, or if no roster, random selection from list of 3 candidates nominated by Complaining Party</td>
<td>Selected by lot from roster who are citizens of the other disputing Party</td>
<td>Secretariat selects by lot from roster where parties fail to appoint or fail to agree for one-member panel</td>
</tr>
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</tr>
<tr>
<td>Selection of Chair by agreement?</td>
<td>Yes</td>
<td>Yes (same as other panelists)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes, among selected panelists</td>
</tr>
<tr>
<td>Process of Chair selection:</td>
<td>Within 15 days of the delivery of the request for the establishment of the panel</td>
<td>Within 10 days from the sub-list of the Chairpersons</td>
<td>Within 35 days or by the time the second panelist is chosen, whichever is longer</td>
<td>Within 15 days of the delivery of the request for the establishment of the panel</td>
<td>Within 10 days from the date of the last appointed panelist</td>
</tr>
<tr>
<td>If failure to agree on Chair:</td>
<td>The disputing Party chosen by lot within 5 days cannot be a citizen of that Party</td>
<td>Either Party may request Chair of the Committee to draw by lot from each sub-list(s)</td>
<td>The two appointed panelists will appoint from roster of panel chairs within 35 days after the selection of the second panelist or the request of the establishment of the panel, whichever is longer</td>
<td>The disputing Party chosen by lot within 5 days cannot be a citizen of that Party</td>
<td>The secretariat will select by lot from roster. Cannot be a panelist appointed to the roster by one of the disputing parties or is a resident of a disputing party’s province</td>
</tr>
<tr>
<td>Is there provision for selection of chairs/panelist by a non-disputing party?</td>
<td>No</td>
<td>Yes, after 10 days either party may request Chair of Joint Committee to draw by lot from sub-lists Selection within 5 working days</td>
<td>Yes, a disputing party may elect after 55 days to have the chair appointed from the roster of panel chairs and specific lists by an independent 3rd party. If 3rd party selection does not occur within 60 days, random selection from roster of panel chairs and specific lists within further period of 5 days.</td>
<td></td>
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</tr>
<tr>
<td>Agreement</td>
<td>EU-Japan</td>
<td>EU-MERCOSUR</td>
<td>AfCFTA</td>
<td>AANZFTA</td>
<td>EU-South Korea</td>
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<td>----------------</td>
</tr>
<tr>
<td><strong>Number of parties</strong></td>
<td>29</td>
<td>32</td>
<td>29 (to date)</td>
<td>12</td>
<td>29</td>
</tr>
<tr>
<td><strong>Number of panelists</strong></td>
<td>3</td>
<td>3</td>
<td>3 if 2 parties 5 if more than 2</td>
<td>3 (unless agreed otherwise)</td>
<td>3</td>
</tr>
<tr>
<td><strong>Are there rosters or pre-established lists?</strong></td>
<td>Yes, list of at least 9 established by the JC: ▪ 2 sub-lists for each party consisting of at least 3 ▪ 1 sub-list with at least 3 non-nationals who will act as chairperson The JC can establish an additional list of individuals that may be used to compose the panel.</td>
<td>Yes, established by the TC. List of 32. Must include 3 sub-lists: ▪ 12 EU proposed individuals. ▪ 12 MERCOSUR proposed individuals. ▪ 8 non-nationals agreed to by both parties.</td>
<td>Yes, established by Secretariat</td>
<td>No</td>
<td>Yes, list of 15 established by TC Disputing parties shall each propose 5 individuals to be included in the list and the parties shall also select 5 non-nationals of either parties as the Chair</td>
</tr>
<tr>
<td><strong>Timeline for establishing a roster/list and do they expire?</strong></td>
<td>Established at 1st meeting of JC. JC must meet within 3 months of coming into force No expiry</td>
<td>Established within 6 months from date of coming into force No expiry</td>
<td>Members may nominate 2 individuals the list No expiry</td>
<td>N/A</td>
<td>Established no later than 6 months No expiry</td>
</tr>
<tr>
<td><strong>What happens where there is failure to establish a roster?</strong></td>
<td>Non-Chair: ▪ If sub-list of a party = 2 individuals, parties appoint from incomplete list within 5 days from panel establishment ▪ If sub list of a party = 1, that individual will act as arbitrator. ▪ Where sub-list = no individuals, the complaining party JC co-chair selects, by lot, an arbitrator from those formally proposed by the party Chair:</td>
<td>The Chair of the TC of the complaining party draws arbitrators by lot from an incomplete list or the names formally proposed by the parties</td>
<td></td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>
- Where chair sub-list = 2 individuals, then complaining party JC co-chair selects by lot within 5 days from request of either party
- Where chair sub-list = 1 individual, then same process as non-chair above
- Where chair sub-list is not established, then same process as non-chair above

<table>
<thead>
<tr>
<th>Is selection of non-chair panelists by agreement?</th>
<th>Yes</th>
<th>Yes</th>
<th>No</th>
<th>Yes</th>
<th>No</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Process of selecting non-chair panelists:</td>
<td>Parties must agree within 10 days after receipt of the request for panel establishment.</td>
<td>Parties must agree within 10 days after receipt of the request for panel establishment.</td>
<td>Secretariat proposes prospective panelists Parties cannot oppose except for compelling reason</td>
<td>Parties must first agree to the procedures for panel composition. If the parties fail to agree on a set of procedures, any party can request that Chapter 17 procedures are used Within 10 days from receipt of the above request, the complaining party must appoint 1 panelist Within 20 days from receipt of the above request, the responding party must appoint 1 panelist</td>
<td>By agreement within 10 days of request for panel establishment</td>
<td>Within 30 days of panel establishment, each party must appoint one arbitrator</td>
</tr>
<tr>
<td>If failure to agree on non-chair panelists?</td>
<td>Each party appoints one arbitrator from the sub-list of that party within 5 days from panel establishment If no appointment is made, Co-Chair of JC from complaining party selects by lot from sub-list of party who failed to</td>
<td>Parties appoint one arbitrator from sub-list of that party within 10 days from panel establishment If no appointment is made, TC can select, by lot, the arbitrator by</td>
<td>If no agreement after 30 days of panel request, either Party can ask Chairperson of Dispute Settlement Body (DSB) to appoint the panelists, The N/A</td>
<td>Either party may request the chair of TC to select members by lot from the list If 3 panelists must be</td>
<td>If a party fails to appoint a panelist, the party’s legal expert appointed to the Consultation Committee is appointed as an arbitrator</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Within 30 days from panel establishment, either party may request that the Director-General of the WTO appoint</td>
<td>Within 15 days, parties each appoint one member of the panel</td>
</tr>
</tbody>
</table>

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<p>| Selection of Chair by agreement? | Yes | Yes | Not specified | Yes | Yes | Yes | Yes |
| Process of Chair selection: | Agreement by parties within the 10 days from panel establishment | Agreement by parties within the 10 days from panel establishment | N/A | Parties must come to agreement within 15 days from the notice to use Chapter 17 procedures. Parties may each exchange a list of 3 nominees to help in coming to consensus | Same as non-chair | Each party prepares and exchanges a list of 5 individuals whom the party accepts as the 3rd panelist. a) if there is only 1 common name on the last, that person becomes the 3rd panelist. b) if more than 1 common name, the parties consult and choose between the mutual names. c) if the parties cannot agree per (b), there is no common name or the agreed upon individual cannot serve, the 2 appointed panelists choose the 3rd. d) if the 2 appointed panelists cannot agree then appointment made by random selection from names on both lists | Selected by agreement between the parties within 30 days of panel establishment |
| If failure to agree on Chair: | Upon request of either party, complaining party co-chair of JC selects by lot from chair sub-list within 5 days from date of request. | Either party may request TC chairperson to select TC chooses by lot from sub-list within 5 days from date of request. | N/A | The 2 appointed arbitrators agree on a third. If there is failure to agree, either party may request the Director General of the WTO to compose the panel | Same as non-chair | Within 30 days from panel establishment, either party may request that the Director-General of the WTO appoint tribunal member(s) |</p>
<table>
<thead>
<tr>
<th>Question</th>
<th>Yes, by the Joint Committee (composed of representatives from both parties to the agreement)</th>
<th>Yes, by the Trade Committee (composed of representatives from both parties to the agreement)</th>
<th>Yes, the Secretariat and Chairperson of the Dispute Settlement Body</th>
<th>Yes, the Director General of the WTO</th>
<th>Yes, by the Trade Committee (composed of representatives from both parties to the agreement)</th>
<th>No</th>
<th>Yes, the Director General of the WTO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment must be made within 30 days of request</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Agreement:</td>
<td>PCA</td>
<td>WTO</td>
<td>ICSID</td>
<td>ICJ</td>
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</tr>
<tr>
<td><strong>Number of parties</strong></td>
<td>122 Contracting Parties</td>
<td>164 members</td>
<td>154 Contracting States</td>
<td>193 members</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Number of panelists</strong></td>
<td>5, 3 or 1</td>
<td>Normally 3 Excepciónnally 5</td>
<td>Sole or any uneven number agreed to by parties</td>
<td>15 judges who are elected, however 9 at a minimum</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Are there rosters or pre-established lists?</strong></td>
<td>Yes, a list of individuals who are appointed to a ‘Members of the Court’ list of potential arbitrators</td>
<td>Yes WTO Secretariat maintains a list of persons (“Indicative List”), from which panelists may (but not must) be drawn</td>
<td>Yes a ‘Panel of Arbitrators’</td>
<td>Yes</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Contracting states can nominate up to four persons</td>
<td></td>
<td></td>
<td>Each Contracting Party (Member State) may designate to the Panel four persons of any nationality</td>
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</tr>
<tr>
<td>Appointed for a 6-year term</td>
<td></td>
<td></td>
<td>The Chairman may designate ten persons to each Panel. Panelists serve for 6 years (and can be renewed)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Timeline for establishing a roster/list and do they expire?</strong></td>
<td>Not specified</td>
<td>WTO Members regularly propose names for inclusion in the list</td>
<td>N/A</td>
<td>The Secretary General of the UN requests a nomination list be developed 3 months before the election date</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>What happens where there is failure to establish a roster?</strong></td>
<td>Secretary General has discretion to appoint panelists</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Is selection of non-chair panelists by agreement?</strong></td>
<td>Yes for 1 No for 3 or 5</td>
<td>Yes</td>
<td>Parties can decide to come to consensus on arbitrators if agreed to.</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Process for selecting non-chair panelists:</strong></td>
<td>With sole arbitrator, parties must agree within 30 days after receipt from all other parties of arbitrator proposals With 3 or 5, each party appoints one arbitrator</td>
<td>Parties must agree on panelists within 20 days from the date the panel is established.</td>
<td>If the appointment of non-chair arbitrators is not determined through another method agreed upon by the parties, then the parties will each appoint 1 non-chair arbitrator</td>
<td>A President and Vice President are elected by the court</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>If failure to agree on non-chair panelists?</strong></td>
<td>If parties fail to agree on sole arbitrator, the appointing authority can make the appointment If a party fails to appoint an arbitrator where there are 3 or 5 arbitrators, a</td>
<td>If parties cannot agree on 3 panelists, either party can request DG to select them, DG must do so within 10 days of request.</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
party can request the appointing authority to make the appointment

To make the selection, the appointing authority:
- Communicates identical list of 3 individuals to each party.
- Parties have 15 days to return list with any objectionable name(s) crossed off and remaining individuals numbered in order of preference.
- Appointing authority selects an individual at the end of the 15-day period in accordance with this order of preference.

If for any reason, the individual cannot be selected through the list method indicated above, the appointing authority has discretion to select an individual.

<table>
<thead>
<tr>
<th>Selection of Chair by agreement?</th>
<th>Yes – by the appointed arbitrators</th>
<th>Yes</th>
<th>Parties can decide to choose president of tribunal by consensus.</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>If failure to agree on Chair:</td>
<td>The appointing authority selects the individual using same list-method used for appointing panelists if two arbitrators have not done so within 30 days of the second arbitrator appointment</td>
<td>DG selects entire panel including chair if requested to do so by 1 of disputing parties</td>
<td>If the appointment of the president is not determined through another method agreed upon by the parties, the Chairman appoints from Panel of Arbitrators</td>
<td>N/A</td>
</tr>
<tr>
<td>Is there provision for selection of chairs/panelist by a non-disputing party?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes, the Chairman of the Administrative Council</td>
<td>N/A</td>
</tr>
</tbody>
</table>
2.3 The Logistics of Submission Filing under FTAs, RTAs and Certain Adjudicative Institutions: An Introduction

Most FTA DSMs include provisions for regulating the filing of parties’ submissions. This frequently includes rules governing the number of written submissions required, when briefs must be filed, what those submissions must include, when evidence must be filed, and whether subsequent written submissions will be accepted following initial and rebuttal briefs.

This section focuses on three particular aspects of submission filing: timelines for written submissions, the length of written submissions, and whether amicus curiae submissions are accepted. We examine these in particular because all of them can have an impact on the efficiency of a dispute settlement process. We recognize, however, that efficiency in DSMs is not the only goal one should strive for in designing a good system. Excessively tight timelines on submissions, for example, may not lead to a fair and just outcome. This is because concerns such as due process, including providing adequate time for disputing parties to prepare submissions, are important factors in achieving a fair and just outcome. Therefore, focusing solely on efficiency at the expense of due process when it comes to filing submissions may not necessarily lead to an effective dispute settlement outcome.

In light of these considerations, this section of the memorandum will consider how efficiency and due process are balanced under a number of different DSMs. The analysis is organized around the three aspects of submissions mentioned above: ‘timelines for written submissions’, the ‘length of written submissions’, and ‘acceptance of amicus curiae briefs’. Following this, we identify a number of best practices addressing effective submission filing. At the end of this section, three tables detailing the submission filing procedures for each DSM are provided. The DSMs in these tables are organized according to the three groups of FTAs and institutions identified in the introduction to this memorandum, namely, Group A (agreements to which Canada is a party), Group B (agreements to which various African, Asian, European and Eastern European Countries are Parties) and Group C (international adjudicative institutions).

2.3.1 Timelines for Written Submissions

Written submissions provide each party with an opportunity to make their case or respond to a party’s claims. Typically, initial submissions by the complaining party include the party’s claim(s), the legal basis for the claim(s), the relevant facts and any available supporting evidence. Likewise, the defending party’s initial submissions will include the relevant facts, supporting evidence, and legal arguments. Some DSMs provide for a second round of written submissions in the form of rebuttal briefs before the hearing, or supplementary written submissions after the hearing. In addition, DSMs often allow the panel to pose written questions to the parties, to which the parties respond in writing. In some instances, parties are permitted to comment on each other’s supplementary submissions or written replies to questions. A DSM can set out specific timelines for each of these submissions or it may allow the panel to fix the timeline.

Providing for multiple opportunities to make written submissions can be an effective mechanism for upholding due process in the settlement of disputes because it ensures that parties are provided
sufficient opportunity to make their case and to respond to claims against them. However, providing for additional written submissions beyond initial briefs does cost extra time and money for the parties and may unnecessarily prolong the dispute settlement process. Therefore, achieving an effective balance between due process and efficiency in dispute settlement procedures is important.

The various ways that DSMs set timelines for written submissions are examined below.

NAFTA/CETA/CFTA/CUSMA

The NAFTA, CETA and the CFTA rules of procedure each provide a specified timeframe for parties’ written submissions. NAFTA requires initial submissions by the complaining party within 10 days from the date the panel is composed.\footnote{Model Rules of Procedure for Chapter Twenty, North American Free Trade Agreement at Rule 7 (entered into force 1 January 1994) online: https://www.nafta-sec-alena.org/ [hereinafter NAFTA Rules of Procedure].} Responding party submissions must be filed within 20 days from receipt of the complaining party’s initial submission.\footnote{NAFTA Rules of Procedure, supra note 139 at Rule 7.} The NAFTA does not provide for pre-hearing rebuttal submissions, although it does permit the parties to file supplementary written submissions 10 days after the close of the hearing.\footnote{NAFTA Rules of Procedure, supra note 139 at Rule 32.} In addition, the panel is permitted to pose written questions to the parties at any point during the proceeding, and the parties shall provide a written reply.\footnote{NAFTA Rules of Procedure, supra note 139 at Rules 31 and 32.}

CETA requires that the complaining party provide its initial submission within 10 days after the panel has been established.\footnote{CETA, supra note 6 at Annex 29 Rules of Procedure Rule 10.} The responding party must submit its initial submission within 21 days from receipt of the complaining party’s initial submission.\footnote{CETA, supra note 6 at Annex 29 Rules of Procedure Rule 10.} Much like NAFTA, the CETA does not provide for pre-hearing rebuttal submissions, but does allow parties to submit supplementary written submissions within 10 days from the date of the hearing.\footnote{CETA, supra note 6 at Annex 29 Rules of Procedure Rule 35.} In addition, CETA also provides for the panel to pose questions in writing.\footnote{CETA, supra note 6 at Annex 29 Rules of Procedure Rule 36.} Unlike NAFTA, however, the parties are required to provide each other with their written response to the panel’s questions so that each party may provide written comments on the other party’s reply.\footnote{CETA, supra note 6 at Annex 29 Rules of Procedure Rule 37.}

Under the CFTA, initial party submissions are required within 45 days from the date of panel establishment.\footnote{CFTA, supra note 6 at Annex 1007.1 and 1024 Rule 35.} The responding party has 45 days from receipt of the complaining party’s submission to file its brief.\footnote{CFTA, supra note 6 at Annex 1007.1 and 1024 Rule 36(c).} The CFTA provides that the panel may allow further written submissions, and the panel determines the date that these additional submissions are due.\footnote{CFTA, supra note 6 at Annex 1007.1 and 1024 Rule 37.}

Under both CETA and the CFTA, the timeframe for the complaining party’s submission begins once the panel has been established; NAFTA, in contrast, sets the timeframe around panel
composition. Panel establishment is usually an automatic step following receipt of a request for panel establishment from the complaining party. Panel composition usually refers to appointing the persons who sit on the panel, which is not an automatic step and depends on actions by the parties and sometimes action by an appointing authority. Thus although panel establishment can happen rather quickly, panel composition could, and often does, take some weeks if not months. This means that the complaining parties under CETA and CFTA could be required to file initial submissions before the panel is composed. Hence this type of timeline is flawed since it does not take into account possible delays in composing a panel that extend beyond the deadlines for filing submissions.

The CUSMA rules of procedure have not yet been finalized. As a result, CUSMA does not currently specify details on filing deadlines for written briefs.

**CPTPP**

Under the CPTPP rules of procedure, the complaining party is required to file its initial submissions within 10 days after the panel is composed, which is consistent with the timelines observed under NAFTA.\(^{151}\) Unlike NAFTA, CETA or the CFTA, however, the CPTPP provides that, within 10 days of the panel being composed, the panel will issue a timetable for the proceedings after consulting with the disputing parties.\(^{152}\) This “normally shall” follow the timelines outlined in the chart below.\(^{153}\)

Under the CPTPP, parties are also permitted to file rebuttal submissions and must submit these within 21 days of receiving the initial submission (for the complaining party), and 21 days of receiving the rebuttal submission (for the responding party).\(^{154}\) In addition, provided that the panel agrees, parties may file additional written submissions within 10 days after the hearing(s).\(^{155}\) The CPTPP also provides for written questions from the panel, which must be delivered within three days from the last hearing.\(^{156}\) Where one party files additional written submissions or submits a written reply to a panel question, the other disputing party is permitted to provide written comments on these submissions and must do so within 17 days of the last hearing.\(^{157}\)

Since a dispute has yet to arise under the CPTPP, it is difficult to determine what circumstances permit deviating from the timeline provided for in the “normal” schedule. However, providing for the panel to issue the timetable after its composition following consultation with the parties and to alter the timelines identified in the “normal” schedule permits flexibility, which could allow for adjustment depending on the nature of the claims and number of parties involved in the dispute.

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\(^{152}\) *CPTPP Rules of Procedure, supra* note 151 at Rule 16.

\(^{153}\) *CPTPP Rules of Procedure, supra* note 151 at Rule 16.

\(^{154}\) *CPTPP Rules of Procedure, supra* note 151 at Rule 16(c) and (d).

\(^{155}\) *CPTPP Rules of Procedure, supra* note 151 at Rule 60.

\(^{156}\) *CPTPP Rules of Procedure, supra* note 151 at Rules 16(f) and 58.

\(^{157}\) *CPTPP Rules of Procedure, supra* note 151 at Rules 16(h), 59 and 60.
Like the NAFTA, CETA and the CFTA rules of procedure, the EU-Japan, EU-South Korea, and EU-Mercosur agreements each provide a specified timeframe for parties’ written submissions. The EU-Japan and EU-South Korea agreements both require the complaining party to file written submissions within 20 days from panel establishment.158 In addition, both require the responding party to file its initial submissions within 20 days from receipt of the complaining party’s submission.159 Both agreements provide for additional written submissions within 10 days of the last hearing.160 In addition, both provide for written questions from the panel, and an opportunity for the parties to comment on each other’s written responses.161 Neither of these agreements specifies a specific time period for when parties must submit these comments; however, both agreements indicate that the panel may “modify any time limit applicable in the proceedings or … make any other procedural or administrative adjustment”.162

Under the EU-Mercosur agreement, the timelines are set at 30 days from panel establishment for the complaining party, and 30 days from receipt of the complaining party’s submission for the responding party.163 Just like the EU-Japan and EU-South Korea agreements, the EU-Mercosur agreement provides for additional submissions from the parties within 10 days after the date of the hearing.164

As discussed with the timelines under CETA and the CFTA, the timelines for the complaining party’s written submission under these three agreements run from the date of panel establishment. As previously noted, this approach is flawed since it does not take into account that there could be delays in composing a panel that extend beyond the deadlines for filing submissions, which means the parties could be required to file submissions before the panel is composed.

NZ-China/ICSID/ AANZFTA/PCA

Like the CPTPP, the NZ-China agreement, the ICSID Convention and Convention Arbitration Rules, the AANZFTA, and the PCA Arbitration Rules 2012 each requires the panel or tribunal to fix a timeline. The ability of the panel to set the timeline provides for greater flexibility than where an agreement prescribes a predetermined timeline. With this flexibility, the panels may be able to effectively balance efficiency and due process because they can set the timeline based on the nature of the claims and the number of parties involved in the dispute.

Unlike the CPTPP, however, neither the NZ-China agreement nor the ICSID Convention and Convention Arbitration Rules provides for a timeline that a panel “normally shall”165 follow.

159 EU-Japan Rules of Procedure, supra note 159 at Annex 3 Rule 10; EU-South Korea, supra note 37 at Annex 14-B Article 4.
160 EU-Japan Rules of Procedure, supra note 159 at Annex 3 Rule 26; EU-South Korea, supra note 37 at Annex 14-B Article 7(11).
161 EU-Japan Rules of Procedure, supra note 159 at Annex 3 Rule 28 and 29; EU-South Korea, supra note 37 at Annex 14-B Article 8(1) and (2).
162 EU-South Korea, supra note 37 at Annex 14-B Article 5(6).
163 EU-Mercosur, supra note 36 at Annex 1 Rule 15.
164 EU-Mercosur, supra note 36 at Annex 1 Rule 43.
165 CPTPP Rules of Procedure, supra note 151 at Rule 16.
Under the NZ-China agreement, the panel must establish rules of procedure within 14 days from the date of its composition that allow for both parties to submit initial briefs. Under the ICSID Convention and the Convention Arbitration Rules, the parties file written submissions within a timeline set by the tribunal. These include a ‘memorial’ filed by the requesting party, a ‘counter-memorial’ filed by the other party, and rebuttal submissions.

While the AANZFTA and PCA Arbitration Rules 2012 do not prescribe a detailed timeline, they do provide some requirements that the panel must meet when fixing the timeline. Under the AANZFTA, the tribunal is required to provide each party sufficient time to prepare their submissions. In addition, an initial submission is required from the complaining party within 14 days of tribunal establishment. The responding party submission is required 21 days from receipt of the complaining party’s submission. Subsequent written submissions are permitted. Under the PCA Arbitration Rules 2012, the total time period for filing party submissions should not exceed 45 days, although extensions may be granted where justified. Further written statements by the parties can be accepted at the discretion of the tribunal.

WTO

The DSU provides a “proposed timetable” for panel work including timelines for filing party submissions, which can be amended by the panel following consultations with the parties. However, the panel is required to balance efficiency with the need for “high-quality panel reports”. The proposed timetable has proved to be unrealistic in practice because the timeline for each step is too tight. As a result, the practice has developed where each panel develops ‘Working Procedures’ in consultation with the parties for each dispute that stipulate the timelines for filing submissions and address issues such as preliminary ruling briefing, written questions and answers, and post-hearing submissions.

AfCFTA

The AfCFTA provides for the panel to fix a timeline for the proceedings. In doing so, the panel is required to set precise time limits for written submissions and parties are explicitly required to comply with them:

“In determining the timetable for the proceedings of the Panel, the Panel shall, within ten (10) working days, upon the expiry of the seven (7) days referred to in paragraph 2, set precise time limits for written submissions by the Parties to a dispute. Parties to a dispute shall comply with the set time limits.”

166 NZ-China, supra note 77 at Article 191(1)(b).
170 PCA Arbitration Rules 2012, supra note 74 at Article 25.
172 WTO DSU, supra note 2 at Appendix 3(12) and Article 12.1.
173 WTO DSU, supra note 2 at Article 12.2.
174 Interview, supra note 47.
As mentioned in the panel selection section above, the AfCFTA DSM procedures are modelled on the WTO DSU. As such, the AfCFTA procedures for written submissions follow closely those of the WTO. The AfCFTA proposed timetable for disputes is almost identical to the proposed timetable for WTO panel proceedings. While a dispute has not yet been brought under the AfCFTA DSM, parties and panels may likely find that, similar to the WTO, the proposed timeline is unrealistic.

**ICJ**

The ICJ determines the number and order of filing of pleadings and the timelines for submission of written pleadings by both parties. Practice directions note that the Court “discourage[s]” the practice of simultaneous deposit of pleadings. While the timeline is ultimately up to the Court, the Rules provide that time limits “shall be as short as the character of the case permits” and, uniquely, that any agreement between the parties shall be taken into account in setting these time-limits. The Court may extend any time limit if it is satisfied there is adequate justification. The ICJ does not permit further documents to be submitted after the close of written submissions unless the opposing party consents or the Court deems the documents necessary.

**Summary of Timeline Procedures for Written Submissions**

The DSMs evaluated above reveal three types of timeline ‘models’. Under the first model, the DSM sets out specific timelines for written submissions. Doing so is intended to ensure that a dispute is resolved in a timely fashion. Our interviews revealed that parties generally meet these deadlines in practice, although it must be borne in mind that there has been little or no practice under some of these agreements.

The second model provides for the panel to fix a timeline for each proceeding, sometimes after consultation with the disputing parties. Under this model, there is no timeline set out for the proceeding that the panel “normally shall” follow, although there may be requirements to follow parts of it (ex. initial submissions are required within a certain number of days, but the panel determines the timeline for subsequent submissions). This method provides for ample flexibility in setting the timeline. This may be advantageous where there are multiple parties or the dispute deals with numerous claims and/or complex legal issues and a ‘one-size-fits-all’ approach to submissions is not ideal.

Finally, the third model provides for the panel to fix the timeline for the proceedings, but also identifies a proposed timeline or a timeline that the panel “normally shall” follow. Providing suggested timelines while also permitting the panel to adjust the timelines where necessary

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177 AfCFTA, supra note 48 at Annexes to the Protocol on the Rules and Procedures on the Settlement of Disputes Annex 1, Article 12.
180 ICJ Rules, supra note 178 at Article 44(3).
181 ICJ Rules, supra note 178 at Article 44(2).
182 ICJ Rules, supra note 178 at Article 44(2).
183 ICJ Rules, supra note 178 at Articles 56(1) and 56(2).
184 Interview of David Gantz [16 March 2020].
provides flexibility in the process to account for due process considerations but also encourages panels to conduct proceedings within a timeline considered by the parties that negotiated the agreement to be appropriate in most circumstances. Therefore, this method would appear to be more effective than the previous two models in upholding due process while also allowing for disputes to be settled efficiently.

<table>
<thead>
<tr>
<th>Submission Timeline Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific timelines are set out, calculated by date of panel establishment (NAFTA, CETA, CFTA, EU-Japan, EU-South Korea, EU-Mercosur)</td>
</tr>
<tr>
<td>Once composed, the panel fixes a timeline (no timeline is set out in the agreement) (NZ-China, AANZFTA, ICSID, PCA)</td>
</tr>
<tr>
<td>Once composed, the panel fixes a timeline bearing in mind a timeline that it “normally shall” follow) (CPTPP, WTO, AfCFTA)</td>
</tr>
</tbody>
</table>

2.3.2 Length of Written Submissions

Some DSMs regulate the length of parties’ written submissions, while others do not. One way to do this is by setting a word or page limit, which is not uncommon in the practice of some domestic courts. A DSM can also include provisions specifying that a panel must ensure that disputes are settled fairly and efficiently. A panel might determine that fair and efficient settlement of disputes necessitates regulating the length of submissions in order to avoid delays associated with filing and responding to lengthy written submissions. However, where the length of parties’ written submissions are regulated, careful consideration should be given to these parameters. Word or page limits, for example, that constrict the party’s submissions too much may not allow the parties to adequately address complex legal issues. Therefore, provisions on submission length should carefully balance efficiency with due process.

Examples of DSMs that regulate the length of party submissions are outlined below.

WTO

The DSU does not provide for word or page limits on written submissions, but a practice has developed whereby page limits are imposed with respect to executive summaries. These limits are set forth in the Working Procedures established by each panel, which are subject to comment by the parties, and tend to follow a standard number of pages. The parties’ executive summaries are appended to panel reports, thus eliminating the need to include lengthy sections in panel reports setting forth parties’ positions which then have to be translated before the panel report is issued. Providing restrictions on some elements of a party’s submission, while not on others (i.e. substantive arguments) may be an effective way of encouraging efficiency while also ensuring that parties will not be restricted in putting forth their positions and thereby upholding due process.

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185 Interview, supra note 47.
AfCFTA

The AfCFTA does not explicitly provide for specific word or page limits for written submissions. However, the panel is bound under Article 15(1) to ensure that its procedures are sufficiently flexible to allow for an effective and timely resolution of a dispute.\(^{186}\) This broad language could conceivably permit the panel to impose word or page limits, or regulate submission length in some other manner. Since the language is broad, it allows the panel to be flexible and, where it deems necessary, set limits on the length of submissions depending on the nature of the claims and legal issues before it. Nevertheless, given the practice we have observed of DSMs not imposing a maximum length on parties’ written submissions, we believe that a panel is unlikely to impose such limits without conferring first with the disputing parties.

PCA

Like the AfCFTA, the PCA does not provide for page or word limits for written submissions. However, the arbitral tribunal is required to conduct proceedings in a manner that avoids unnecessary delay and expense and allows for a fair and efficient dispute resolution process.\(^{187}\) This language is very similar to the language in the AfCFTA and permits the same kind of flexibility we referred to above.

ICJ

Like the rules under the AfCFTA and the PCA, the Rules of the Court of the ICJ do not provide for word or page limits on submissions. The parties are encouraged, however, to keep written pleadings as concise as possible.\(^{188}\) Practice directions refer to “an excessive tendency towards the proliferation and protraction of annexes to written pleadings” and parties are “urge[d] to append … only strictly selected documents.”\(^{189}\) Unlike under the AfCFTA and the PCA, the rules and directions do not state explicitly that the panel is to maintain an efficient and fair dispute settlement process. Instead, it directly encourages the parties to keep submissions concise. This provision may not be as effective for encouraging efficiency as others identified above since the panel cannot impose length requirements.

Summary of Procedures for Submission Length

The DSMs evaluated above reveal four types of ‘models’ for addressing submission length or that could conceivably be used to address the length of submissions. The first model does not provide for restrictions on submission length. The majority of DSMs utilize this model, which ensures due process is respected, but does not address efficiency in any way. One interviewee suggested that imposing limits on submissions is not appropriate in procedures involving sovereign states as disputing parties, unless they agree.\(^{190}\)

\(^{186}\) AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes Article 15(1).
\(^{187}\) PCA Arbitration Rules 2012, supra note 74 at Article 17(1).
\(^{188}\) ICJ Practice Direction, supra note 179 at Practice Direction III.
\(^{189}\) ICJ Practice Direction, supra note 179 at Practice Direction III.
\(^{190}\) Interview, supra note 113.
The second model incorporates a provision that requires the panel to maintain a fair and efficient dispute settlement process. This may be an effective mechanism for maintaining both efficiency and due process because it requires a panel to maintain a fair process as well as an efficient one. It avoids a one-size-fits-all approach to restricting length. Where a dispute gives rise to complex and/or numerous legal claims, a generous page limit, for example, may allow the parties to adequately address the issues. Under this ‘fair and efficient’ model, the panel can set restrictions that meet the needs of a particular dispute. We acknowledge, however, that we are not aware of a panel that has used this type of provision to impose a length limit on a written submission.

The third model encourages the parties to keep their submissions concise. The ability of this model to adequately address efficiency will depend on how seriously the parties take the ‘encouragement’. One interviewee informed us that ICJ submissions generally tend to be very lengthy so this may not be an effective mechanism for achieving efficiency.

Finally, the fourth model imposes length restrictions on some parts of a submission (ex. executive summaries) but not on others (ex. substantive arguments), which may be effective for balancing due process with efficiency. We note that the only example of this model that we have studied achieves this through a process that involves the disputing parties, which suggests that the parties have agreed to the limits imposed. It is also noteworthy that the limits are imposed on submissions of lesser importance.

<table>
<thead>
<tr>
<th>Submission Length Model Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>No restrictions on submission length (NAFTA, CETA, CPTPP, CFTA, EU-</td>
</tr>
<tr>
<td>Mercosur, EU-Japan, EU-Korea, AANZFTA, NZ-China, JSEPA, ICSID)</td>
</tr>
<tr>
<td>Provisions that require the panel to provide for a fair and efficient</td>
</tr>
<tr>
<td>dispute settlement process (CFTA, AfCFTA, PCA)</td>
</tr>
<tr>
<td>Provisions that encourage the parties to keep submissions as concise</td>
</tr>
<tr>
<td>as possible (ICJ)</td>
</tr>
<tr>
<td>Restrictions on some aspects of a party’s submission (WTO)</td>
</tr>
</tbody>
</table>

2.3.3 Acceptance of Amicus Curiae Briefs

*Amicus curiae* submissions are written briefs by non-disputing participants, generally from civil society. Some DSMs explicitly allow for *amicus* submissions while others are silent on the matter. Allowing for *amicus* briefs can enhance transparency and also the legitimacy of a dispute settlement process because they allow for consideration of information not in the possession of the disputing parties as well as of views outside of those of the disputing parties. As such, they can assist to clarify factual and legal issues. However, including *amicus* submissions in the dispute settlement process can also result in delays and increased costs to the parties because the panel and the disputing parties have to review these submissions (which may be quite numerous) and may have to address issues raised therein. Moreover, since not all domestic legal systems recognize amicus procedures, some FTA parties may object to them in principle. Therefore, DSM procedures should carefully balance the benefits of *amicus* submissions against these detractions.

Examples of DSMs which allow for *amicus curiae* submissions are outlined below.
CETA/CPTPP/CUSMA

CETA, CPTPP, and CUSMA provide for *amicus curiae* briefs.\textsuperscript{191} CETA provides for unsolicited briefs and stipulates they must be no longer than 15 pages.\textsuperscript{192} Providing for a specified page limit on *amicus* briefs can help to ensure the parties and panel are not unduly burdened by lengthy submissions. Unlike CETA, CUSMA provides for consideration of requests for *amicus curiae* submissions, but does not guarantee they will be received and considered by the panel.\textsuperscript{193}

Similar to CUSMA, CPTPP accepts *amicus* requests, but does not guarantee their acceptance.\textsuperscript{194} *Amicus* submission requests under the CPTPP must specify how the submission contributes to the resolution of the dispute:

> “explain how the non-governmental entity’s written views will contribute to resolving the dispute and why its views would be unlikely to repeat factual or legal arguments that a participating Party has made or can be expected to make, or why it brings a perspective that is different from that of the participating Parties”\textsuperscript{195}

If accepted, the panel will set a timeline for submission and maximum length for the brief. This should be no later than 21 days before the hearing, and normally be no longer than 10 pages in length.\textsuperscript{196} Thus unlike CETA, the CPTPP provides detailed procedures for allowing *amicus* submissions. These details may help *amici* to adhere more closely to the legal and factual issues under consideration in their submissions and therefore ensures that they effectively contribute to the settlement of the dispute.

EU-Japan/EU-South Korea/EU-Mercosur

Each of the EU-Japan, EU-South Korea and EU-Mercosur agreements provide for unsolicited *amicus curiae* submissions. The EU-Japan and EU-South Korea agreements require *amicus curiae* submissions to be filed within 10 days of panel establishment and both set a 15-page limit.\textsuperscript{197} The EU-Mercosur agreement requires *amicus curiae* submissions to be filed within five days of panel establishment and sets a limit of 22,500 typed characters.\textsuperscript{198} Setting specific page or character limits for *amicus* submissions helps ensure that the dispute settlement process is conducted efficiently.

WTO

The DSU does not refer specifically to *amicus curiae* briefs, which has led some members to argue that they are prohibited. Indeed, following the Appellate Body’s adoption and publication of

\textsuperscript{191} CPTPP Rules of Procedure, *supra* note 151 at Rule 63(e).
\textsuperscript{192} CETA, *supra* note 6 at Annex 29 Rules of Procedure Rule 44.
\textsuperscript{193} CUSMA, *supra* note 6 at Article 31.11(e).
\textsuperscript{194} CPTPP Rules of Procedure, *supra* note 152 at Rule 64.
\textsuperscript{195} CPTPP Rules of Procedure, *supra* note 152 at Rule 63(c).
\textsuperscript{196} CPTPP Rules of Procedure, *supra* note 152 at Rule 64.
\textsuperscript{198} EU-Mercosur, *supra* note 36 at Annex 1 Rule 54 and 55(a).
procedures for submission of *amicus curiae* briefs in the dispute *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, the WTO General Council held a meeting in November 2001 at the request of Egypt on behalf of developing country members to discuss whether *amicus* briefs should be received or solicited. Most WTO members were of the view that as there was no specific provision regarding *amicus* briefs, such briefs should not be accepted. Other members thought that such briefs could be used in some cases, but it was for WTO members and not the Appellate Body to determine procedures for their acceptance. Only the United States considered that the Appellate Body had acted appropriately. There was no consensus on the matter at the meeting, nor has one developed since.

Nevertheless, the Appellate Body did rule in 1998 (i.e., before the General Council meeting in 2001) that panels are entitled to accept *amicus* briefs by virtue of Article 13(2) of the DSU, which provides that panels may seek information from any relevant source. Although this ruling addresses whether or not *amicus* submissions can be received, it did not address procedures (length, timeline, etc.) for filing them.

*Amicus* briefs are often filed in WTO disputes, although some WTO members are still opposed to them. One expert we interviewed said the lack of rules around *amici* briefs is problematic because it is impossible to control the timing of their submission or any other aspects about them, such as their length and transparency as to who is funding the submission and drafting the briefs. The expert opined that it would be useful, therefore, for the WTO membership to decide either that such briefs are acceptable and under what circumstances, or that they are not acceptable.

**ICJ**

The Statute of the Court does not refer explicitly to *amicus curiae* submissions. However, the court is authorized to request and receive “information relevant to the case before it” from public international institutions. Practice directions indicate that where an international nongovernmental organization submits a written document in an advisory opinion case on its own initiative, the document will not be considered as part of the case file and ‘shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements ….”

Unlike DSMs discussed above, which permit unsolicited *amicus* submissions to be considered as part of a case file, the ICJ court does not. The Court considers only those submissions that it has specifically requested. It is not clear how often the Court makes such requests or whether the ICJ approach has any effect on efficiency of the dispute settlement process.

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202 Interview, supra note 47.
203 *ICJ Statute*, supra note 123 at Article 34(2).
204 *ICJ Practice Direction*, supra note 179 at Practice Direction XII.
The tribunal may allow a person or entity that is not a party to the dispute to file a written submission, but the tribunal must consult with the disputing parties before doing so. The tribunal must ensure that such submissions do not “unduly burden or unfairly prejudice” either party. This approach thus requires the tribunal to safeguard efficiency of the process.

Summary of Amicus Curiae Procedures

The DSMs evaluated above reveal three ‘models’ for addressing amicus curiae submissions. The first model does not address amicus briefs at all. This can lead to problems (as illustrated in the WTO subsection above) if FTA parties have different views on their acceptability. It can also lead to undisciplined filing in terms of length and timing of such submissions.

The second model provides for unsolicited amicus briefs and, in most instances, specifies a page limit for them. This provides certainty and an orderly process for the disputing parties and the amici.

The third model provides for amicus briefs, but only where the parties and/or the panel consents to their submission. This final model may be most effective. On the one hand, it ensures that amicus briefs do not overburden the dispute settlement process by giving the disputing parties an opportunity to provide views on their submission including length and timing, and it allows the panel to set specific parameters on amicus submissions (e.g. specifying that a submission should not repeat the factual and legal arguments a disputing party will make). On the other hand, it allows for third-party participation, which may enhance the outcome of the dispute settlement process by providing information or a perspective not otherwise provided by the disputing parties.

<table>
<thead>
<tr>
<th>Amicus Curiae Model Summary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amicus curiae briefs are not addressed (AfCFTA, AANZFTA, NZ-China, JSEPA, WTO, PCA,)</td>
</tr>
<tr>
<td>Unsolicited amicus curiae briefs are provided for and some disciplines are applied (CETA, EU-Japan, EU-South Korea, EU-Mercosur,)</td>
</tr>
<tr>
<td>Amicus curiae briefs are provided for but their acceptance is only with consent (CUSMA, CPTPP, ICSID, ICJ)</td>
</tr>
</tbody>
</table>


206 ICSID Arbitration Rules, supra note 203 at Rule 37.
2.4 Best Practices for Submission Filing: Practices that permit flexibility

Efficiency of a dispute settlement process can be affected by the timelines permitted for filing submissions and by lengthy written submissions. When timelines are drawn out over lengthy periods, and/or when parties file submissions of several hundred pages, these can lead to delays in the dispute settlement process. In many cases, delays cost claimants’ money because they are adversely affected by a challenged measure that remains in place during proceedings, and/or because of legal fees or resources that need to be devoted to the dispute.

While efficiency may be a leading priority in some areas of the dispute settlement process (such as in panel selection), it must be balanced with due process concerns when considering the time needed to prepare and file submissions. Such concerns might be especially acute when developing country parties are involved, because they may be faced with lack of experience in dispute settlement procedures and/or with limited resources, both of which can affect the time is needed in preparing submissions. With this need for balance between efficiency and due process in mind, the discussion below considers effective submission filing practices.

Timelines for Written Submissions

Under the DSMs explored in this memorandum, tight deadlines for parties’ submissions were imposed: timelines ranged from 10 days to 45 days for filing either initial or supplementary submissions. These timelines have proven to be unrealistic in some cases. For example, the timeline proposed in Appendix 3 of the WTO DSU is never followed in practice and panels routinely develop alternative longer timelines in consultation with the disputing parties.

Parties generally abide by the submission timelines in practice (meaning the timelines set forth in Working Procedures developed for each dispute in the case of WTO panels).207 Our interviews revealed that where it is permitted, extensions are usually granted but are typically short (days or weeks).208

It might be tempting, in an effort to achieve efficiencies, to seek to impose very tight deadlines for the submission of written pleadings and to forbid extensions. However, this will not necessarily achieve efficiencies or a good result. Disputes involving numerous claims, complex legal issues of first impression, and multiple parties usually involve extensive pleadings and volumes of supporting evidence and, while the complaining party has the opportunity to prepare well in advance of commencing dispute settlement proceedings, responding parties cannot do so.209 Practicalities and due process concerns likely will lead panels to extend unrealistic deadlines in such circumstances. Panels might also extend proceedings with requirements for filing post-hearing memoranda because the submissions did not adequately cover all of the issues and arguments.210 This would defeat the very purpose of the tight timelines.

This is not to say that timelines in FTAs need to be longer than the ranges we found in the DSMs we examined. Not all disputes require extensive briefing and short timeframes encourage parties to be efficient in their submissions, while long timeframes may encourage the opposite. The approach we recommend is to impose short timeframes as guidelines, and to permit the panel to

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207 Interview of trade law practitioner with experience on WTO, NAFTA, and PCA [16 April 2020].
208 Interview, supra note 184.
209 Interview of Nicolas Lamp [17 March 2020].
210 Interview, supra note 47.
devise tailored timelines as appropriate. This is best done not by the panel alone, but in consultation with the parties, leaving the final decision on the timeline with the panel.

Page or Word Limits

One method of ensuring that parties prepare concise submissions is to impose page or word limits.\textsuperscript{211} However, this approach presents difficulties. First, the complexity of a particular dispute in terms of factual and legal issues involved might demand very detailed submissions. If parties were forced to limit their submissions in this instance, both due process and the ability of panelists to effectively determine the outcome of the matter may be negatively affected. In other disputes, detailed submissions may be unnecessary. As a result, it would be difficult to come up with a hard and fast rule to apply in every circumstance.

Second, if the dispute settlement mechanism provides for the conduct of disputes in different languages, a word or page count will affect some language submissions differently. For example, the French language is often more specific than the English language, so writing in French might use more words than writing in English.\textsuperscript{212}

We note that most of the people we interviewed did not consider that parties’ submissions are generally too long. Moreover, one interviewee mentioned that while it may be appropriate for courts to impose limits on submissions (and domestic courts often do), this is not appropriate in the case of ad hoc panels convened by agreement of state parties.\textsuperscript{213} This sentiment was borne out when the WTO Appellate Body canvassed WTO members about the possibility of the Appellate Body imposing page limits on submissions to that body. The WTO membership did not support the idea.\textsuperscript{214} However, WTO panels and the Appellate Body impose page limits on executive summaries of submissions that must be filed and that are appended to dispute settlement reports. This is not provided for in the DSU but WTO members have accepted this practice.\textsuperscript{215}

As an alternative to imposed length limits, disputing parties can come to agreement on a case-by-case basis on page or word limits. This occurred under ICSID’s dispute settlement mechanism.\textsuperscript{216}

While imposing broad page or word limits is not our favoured approach, doing so for certain types of submissions may be an effective way of balancing due process with efficiency. This might be done by giving parties free rein on initial submissions, but implementing page or word limits on submissions addressing matters of jurisdiction, for example.\textsuperscript{217}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{212} Interview, supra note 47.
\item \textsuperscript{213} Interview, supra note 113.
\item \textsuperscript{214} Interview, supra note 47.
\item \textsuperscript{215} Interview, supra note 47.
\item \textsuperscript{216} Interview, supra note 184.
\item \textsuperscript{217} Interview, supra note 113.
\end{itemize}
\end{footnotesize}
<table>
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<tr>
<th>Agreement</th>
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<th>CETA</th>
<th>CPTPP</th>
<th>CUSMA</th>
<th>CFTA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timelines for initial and rebuttal submission</strong></td>
<td>Complaining party initial submission - no later than 10 days after panel is composed&lt;br&gt;Responding party initial submission – no later than 20 days after initial Written Submission&lt;br&gt;Pre-hearing rebuttal submissions are not provided for</td>
<td>Complaining Party - No later than 10 days after the establishment of the panel&lt;br&gt;Responding Party - No later than 21 days after the delivery of the initial submission</td>
<td>Complaining Party - No later than 10 days after composition of the panel has been notified&lt;br&gt;Responding Party - No later than 28 days after initial written submission&lt;br&gt;Complaining party rebuttal – 21 days after responding party initial submission&lt;br&gt;Responding party rebuttal - 21 days after complaining party rebuttal submission</td>
<td>Not yet specified</td>
<td>Complaining party - within 45 days from the date of the panel establishment request&lt;br&gt;Complaint Recipient – within 45 days of the complaining party’s submission</td>
</tr>
<tr>
<td><strong>Length of submissions</strong></td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not yet specified</td>
<td>Not specified.</td>
</tr>
<tr>
<td><strong>Are additional submissions allowed?</strong></td>
<td>Supplementary written submission – within 10 days of hearing&lt;br&gt;The panel may address written questions to the parties</td>
<td>Supplementary written submission – within 10 days of hearing&lt;br&gt;The panel may address written questions to the parties</td>
<td>The panel may address written questions to the parties&lt;br&gt;With permission of the panel, supplementary written submissions within 10 days from the last hearing</td>
<td>Not yet specified</td>
<td>The panel may address written questions to the parties</td>
</tr>
<tr>
<td><strong>Are Amicus Curiae submissions allowed?</strong></td>
<td>No</td>
<td>Yes, unsolicited non-governmental entities within 10 days of panel establishment&lt;br&gt;No longer than 15 pages</td>
<td>Yes, if a request for submissions is accepted, the panel sets a date for submissions that is no later than 21 days before the hearing.&lt;br&gt;Normally no more than 10 pages</td>
<td>Yes, the panel will consider requests from non-governmental entities to makes submissions</td>
<td>No.</td>
</tr>
<tr>
<td>Agreement</td>
<td>EU-Japan</td>
<td>EU-MERCOSUR</td>
<td>AfCFTA</td>
<td>AANZFTA</td>
<td>EU-South Korea</td>
</tr>
<tr>
<td>--------------------</td>
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<td>-----------------------------</td>
<td>---------------------------</td>
<td>------------------------------------------</td>
</tr>
</tbody>
</table>
| **Timelines for initial submission** | Complaining party within 20 days after panel establishment
Responding party within 20 days of receipt of complaining party submissions | Complaining party within 30 days after the date of panel establishment
Responding party within 30 days of receipt of complaining party submissions | The panel sets a timetable for the proceedings within 7 days after composition
The timetable must include precise time limits for written submissions | Complaining party within 14 days after panel establishment
Responding party within 21 days of receipt of complaining party submissions | Complaining party must submit no later than 20 days after panel establishment
Responding party must submit no later than 20 days after panel establishment | Not specified | The panel establishes rules of procedure within 14 days of panel composition that allow for initial submissions |
| **Length of submissions?** | Not specified | Not specified | Not specified | Not specified | Not specified | Not specified | Not specified |
| **Are additional submissions allowed?** | Supplementary written submission – within 10 days of hearing
The panel may address written questions to the parties | Supplementary written submission – within 10 days of hearing
The panel may address written questions to the parties | Determined by panelists | Not specified | Supplementary written submission – within 10 days of hearing
The panel may address written questions to the parties | Not specified | Not specified | Not specified |
| **Are Amicus Curiae submissions allowed?** | Yes, unsolicited within 10 days of panel establishment
Maximum 15 pages | Yes, unsolicited within 5 days of panel establishment
No longer than 22,500 typed characters | No
Only third parties with substantial interest and accepted by the disputing parties may file written submissions | No
Only third parties with substantial interest may file written submissions | Yes, unsolicited within 10 days of panel establishment
Maximum 15 pages | Not specified | Not specified |

Table 5: Submission Filing Procedures in FTAs and RTAs to which African, Asian, European and Eastern European Countries are Parties (Group B)
Table 6: Submission Filing Methods Used in Certain Adjudicative Institutions (Group C)

<table>
<thead>
<tr>
<th>Agreement</th>
<th>PCA</th>
<th>WTO</th>
<th>ICSID</th>
<th>ICJ</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Timelines for initial submission</strong></td>
<td>Panel determines the timeline for statement of claim and defence, but should not exceed 45 days</td>
<td>Typically: complaining Party 3-6 weeks, responding Party 2-3 weeks after the Complaining Party’s submission, and receipt of written rebuttals of the parties 2-3 weeks. However, panels can and do amend these timelines after discussion with the parties.</td>
<td>Determined by the tribunal</td>
<td>Timelines for pleadings (‘memorials’) are fixed by the court</td>
</tr>
<tr>
<td><strong>Length of submissions?</strong></td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
<td>Not specified</td>
</tr>
<tr>
<td><strong>Are additional submissions allowed?</strong></td>
<td>Determined by the panel</td>
<td>A reply and rejoinder may be filed, but only where the parties agree or the tribunal deems it necessary</td>
<td>Not specified</td>
<td>Additional documents are not accepted after written proceedings without opposing party consent or where the court determines the document(s) are necessary</td>
</tr>
<tr>
<td><strong>Are Amicus Curiae submissions allowed?</strong></td>
<td>Not specified.</td>
<td>Not specified</td>
<td>Yes.</td>
<td>Not specified</td>
</tr>
</tbody>
</table>
2.5 Role of the secretariat in dispute settlement: An Introduction

Recourse to dispute settlement mechanisms found in FTAs has been rare. Only three cases were heard under NAFTA Chapter 20 since its establishment in 1994, and, although Canada has requested consultations with the US on three occasions since 2016, no disputes have been filed under the NAFTA state-to-state DSM since 2001. Internationally, even though there are hundreds of FTAs in force, only a handful of state-to-state disputes have been filed under them. Indeed, since 2000, only 13 requests for consultations have come to light. The reasons for this are probably many and varied, including that the DSM under the WTO proved to be highly successful in its first 25 years and recourse to FTA dispute settlement was not needed. Given the paucity of disputes under FTAs, the utility of maintaining a functioning secretariat to assist with FTA disputes, which can be very costly for FTA countries, is questionable. It is also difficult to gauge what role if any an FTA secretariat should play in disputes given the limited experience to date.

Nevertheless, there appears to be a sudden increase in FTA cases, with two requests for consultations served in 2018 and four in 2019. Moreover, some suggest that the suspension of operations at the WTO Appellate Body could lead WTO members to lose faith in the efficacy of WTO dispute settlement and to look elsewhere to resolve their trade disputes. Do these two circumstances suggest a new era for FTA trade dispute settlement? It is too early to say. However, it may be wise to prepare for one and therefore to consider, among other things, whether the current approach to secretariat support for disputes under FTAs ensures efficient and effective dispute settlement proceeding.

Secretariats can play an important and sometimes overlooked role in the overall operation of DSMs. A panel without secretariat support might well be more expensive than expected and may take longer to resolve disputes than anticipated because panel members devote billable time dealing with administrative matters: for example, they either have to rely on support staff located in multiple locations for logistical and administrative assistance (i.e. hearing room booking, document production, engaging experts, securing translation services, making flight arrangements, obtaining travel authorities), which can be inefficient, or they may have to take care of these matters themselves, adding time to the hours billed to the case. Another type of support a secretariat might provide is to assist panelists and arbitrators with legal research and drafting of reports, which can significantly reduce the time a panelist or arbitrator devotes to these tasks. However, this type of support might raise concerns that the secretariat is taking on more of the adjudicator’s role than intended by the treaty drafters.


220 Eight out of the 13 complaints mentioned were initiated within the last three years.
The following analysis considers the types of secretariat support provided for under a number of trade agreement DSMs as well as in some DSMs administered under the auspices of international adjudicative institutions. Our research revealed that secretariat assistance is provided under one of three models: ‘a Secretariat established and funded by the FTA Parties’, ‘a Permanent Secretariat Housed Within an International Governmental Organization’, and ‘no Secretariat and the responding disputing party is responsible for administrative support’. The three approaches are compared in three tables at the end of the section, organized according to the three models. This section is followed by a section on “best practices” gleaned from our research.

2.5.1 Secretariats Established and Funded by the FTA Parties

Under this model, the secretariat might have a joint secretariat and single budget or separate national sections with separate budgets managed by each FTA party. The latter approach offers the advantage that FTA parties do not need to negotiate in the course of developing the DSM issues such as the design or staffing of a joint permanent secretariat. The individual FTA parties have control over the design, structure, cost, and staffing of their secretariat section. Having a national secretariat section for each party can also be a desirable way to reduce costs as the respective parties may be able to use one secretariat to support DSMs under several FTAs, especially given that DSMs of most FTAs are rarely used.

One disadvantage of the “separate national section approach” is the risk of undue influence, or at least the perception thereof, by the funding party in the DSM operations. Another concern is that not all FTA parties will take the same approach to funding and staffing their respective sections. This risk having one (or more) national sections functioning very well, while others struggle. An underfunded secretariat section may not be able to provide adequate or timely support. Moreover, if the secretariat section has functions unrelated to supporting the FTA DSM, it may not be able to accord sufficient priority to its DSM support functions because of competing demands of its other functions. Although this may arise in jurisdictions with funding limitations, it may also arise where available funding is not an issue, but the FTA party chooses not to give such institutions priority, depriving them of adequate funding and staff. Such an approach risks the overall proper functioning of the DSM.

Another disadvantage of the national section model identified by some scholars is that informal benefits such as “institutional memory” will only develop in the more experienced secretariat section. Assisting a panel is challenging due to the fact that the secretariat must consider the interests of the disputing parties, the panelists, and the NAFTA as an institution in general. Additionally, many NAFTA dispute settlement proceedings require an extensive record of confidential and non-confidential documents, many of which may need to be destroyed after the dispute is over. The experience has not been easy, even for the US and Canadian secretariat sections, which had developed experience under the Canada-US FTA (CUSFTA). Without experience and institutional memory of the secretariat and its staff, an efficient dispute settlement process might be even more difficult to achieve.

221 Supra note 47.
222 Supra note 47.
223 Interview of Debra Steger [13 March 2020].
224 Supra note 47.
The analysis below will examine both approaches.

**NAFTA/CUSMA**

There is one Secretariat comprising three national sections under the NAFTA: the US, Canada, and Mexico each have their own national section funded by the respective country in their departments of commerce or foreign trade.\(^{225}\) The national sections are designed to be “mirror-images” of each other.\(^{226}\)

The Canadian section was a stand-alone office until 2010 when it was integrated into the Department of Foreign Affairs and International Trade (now Global Affairs Canada). Its mandate was extended to serve Canada’s other free trade agreements (i.e., with Chile, Costa Rica, and Israel). The Mexican and US sections also have responsibility for the NAFTA as well as other FTAs to which those countries are party.\(^{227}\)

The mandate of the NAFTA Secretariat is set forth in NAFTA Article 2002.3, stipulating the following in terms of providing assistance to panels:

“The Secretariat shall… provide administrative assistance to … panels and committees established under Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters), in accordance with the procedures established pursuant to Article 1908, and … panels established under [Chapter 20], in accordance with procedures established pursuant to Article 2012 …”.

(In this memorandum, we have focused on state-to-state DSMs and do not consider here procedures under NAFTA chapters 11, 14 or 19.) Rule 61 of the Model Rules of Procedure for Chapter Twenty describe the role of the Secretariat as follows:

“The responsible section of the Secretariat shall:

\(a\) provide administrative assistance to the panel and any scientific review board;

\(b\) compensate, and provide administrative assistance to, experts, panelists and their assistants, members of scientific review boards, interpreters, translators, court reporters or other individuals that it retains in a panel proceeding;

\(c\) make available to the panelists, on confirmation of their appointment, copies of the Agreement and other documents relevant to the proceedings, such as the Uniform Regulations and these Rules; and

\(d\) retain indefinitely a copy of the complete record of the panel proceeding.”

The “responsible section of the Secretariat” is defined in Rule 2 as the section of the Secretariat of the party complained against.\(^{228}\)

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\(^{225}\) *NAFTA, supra* note 9 at Articles 2002(1) and 2002(2).

\(^{226}\) *NAFTA Secretariat, Overview*, 2014 update, online: <www.nafta-sec-alaena.org/Home/About-the-NAFTA-Secretariat>.


This model ensures that there is a body of individuals providing administrative support for every dispute, but each party controls the establishment, operation, and costs of its own section of the Secretariat. As noted above, if one of the national sections is not adequately funded or staffed, this could pose problems in providing adequate support to panels. Our interviews revealed that the Secretariat does not provide legal assistance to individual panelists, but each panelist may hire an assistant (paid per day) to conduct legal research, draft documents, and sometimes prepare translations. The type of assistance provided will depend upon the experience of the individual assistant.

Interviewees and academic literature revealed that there has been consistent underfunding of the US section of the Secretariat, but that this has not been the case with the Canadian and Mexican sections. As mentioned earlier in this section, underfunding or refusing to allocate enough resources to the secretariat risks the overall proper functioning of the DSM. In one NAFTA dispute, the Canadian section of the Secretariat provided assistance to the US section by sharing the administrative workload. In other cases, US panels were suspended temporarily because the US section of the Secretariat was underfunded and as a consequence was unable to service the panels. On more than one occasion, the Canadian section of the Secretariat provided assistance and offer administrative support when the US section of the Secretariat was extremely overwhelmed. Finally, not having an efficient secretariat to assist panelists can lead to extreme inconvenience. One interviewee revealed that the panelists were not reimbursed fully for expenses incurred for travel for many months after the dispute was concluded due to inefficiencies and lack of proper staffing.

We thought it useful to point out that the rules on language used in NAFTA panel proceedings have caused some problems. Chapter 20 allows parties to choose the language in which they will make and in which they wish to receive written submissions, as well as the language in which they will make and in which they wish to hear oral argument. A panelist may also request translation and interpretation. The responsible section of the Secretariat must arrange for translation of submissions and the panel report as well as for the interpretation of oral arguments. The party requesting the translation of a written submission is responsible for paying the costs, but the costs for translating the final report and any other documents and for interpretation are borne by the parties equally. Rule 54 states that any time period applicable to a panel proceeding “shall

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229 NAFTA, supra note 9 at Articles 2002(2)(a) and (b).
230 Interview of Debra Steger [13 March 2020].
231 Interview of Debra Steger [13 March 2020] and Interview of David Gantz [16 March 2020].
232 Ibid.
233 Ibid.
234 Supra note 47.
235 Supra note 47 and Interview of Debra Steger [13 March 2020].
236 Resolution of Trade Disputes under NAFTA's Chapter 19.
237 Interview of Debra Steger [13 March 2020].
238 Interview of Kevin Banks [March 24, 2020].
240 Ibid.
241 Ibid Rule 55.
be suspended” during the translation period. One interviewee\textsuperscript{242} and some scholars\textsuperscript{243} believe that language differences negatively affect the efficiency of a dispute as parties or panelists wait for documents to be translated and conversations to be interpreted. In some US-Mexico disputes, panelists overcame the language difference by conducting some informal deliberations in French because it was their only common language.\textsuperscript{244} In other cases, panelists hired their legal assistants based on whether the assistant was fluent in a particular language.\textsuperscript{245} Perhaps the open-ended language in Rule 54 is too broad and parties should agree, in the context of preparing panel timelines, on time limits when faced with translation requirements.

Although the main function of the NAFTA Secretariat is to provide administrative and logistical assistance to panels, Article 2002 also requires the Secretariat to provide assistance to the NAFTA Free Trade Commission and to other committees and groups established under the NAFTA, as well as to “otherwise facilitate the operation” of the NAFTA.\textsuperscript{246} This may create tension between assisting the panelists while at the same time meeting other demands from their respective governments who control and maintain the management and salary of the Secretariat.

The CUSMA is expected to come into force on July 1, 2020 and will supersede the NAFTA.\textsuperscript{247} Similar to the NAFTA, the CUSMA provides for a Secretariat comprised of three national sections with each party responsible for its own section’s operation and costs. The CUSMA Secretariat will perform functions similar to those performed by the NAFTA Secretariat.\textsuperscript{248} Canadian implementing legislation for the CUSMA provides that the Canadian section of the NAFTA Secretariat is continued for the purpose of providing administrative assistance to dispute settlement panels.\textsuperscript{249}

\textit{CFTA}

The CFTA utilizes an independent and neutral intergovernmental body known as the ‘Internal Trade Secretariat Corporation’ (ISTC) that is headed by a Managing Director.\textsuperscript{250} The Secretariat was established under the Agreement on Internal Trade (AIT)\textsuperscript{251} – the predecessor to CFTA - and its functions are continued under the CFTA.\textsuperscript{252} The Managing Director receives general guidance on the administration and operation of the ISTC from the Board of Directors composed of a representative of each CFTA party.\textsuperscript{253}

\begin{itemize}
  \item \textsuperscript{242} Interview of Kevin Banks [24 March 2020].
  \item \textsuperscript{243} Supra note 47.
  \item \textsuperscript{244} Supra note 47.
  \item \textsuperscript{245} Interview of David Gantz [16 March 2020].
  \item \textsuperscript{246} The Commission is NAFTA’s central institution and it supervises the implementation and further elaboration of the Agreement. \textit{See also}: Canada, \textit{NAFTA Free Trade Commission May update 2016}, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-alaceleb2.aspx?lang=eng>.
  \item \textsuperscript{247} Protocol Replacing the NAFTA with the CUSMA, para. 1; Canada-United States-Mexico Agreement Implementation Act, section 7(a).
  \item \textsuperscript{248} \textit{CUSMA}, supra note 6 at Article 30.6.
  \item \textsuperscript{249} Canada-United States-Mexico Agreement Implementation Act, section 12 and \textit{CUSMA}, supra note 6 at Article 30.6.
  \item \textsuperscript{250} \textit{CFTA}, supra note 6 at Article 1102(1).
  \item \textsuperscript{251} The Agreement on Internal Trade, between Canada, Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan, 1995 [hereinafter AIT], Article 1603.
  \item \textsuperscript{252} \textit{CFTA}, supra note 6 at Article 1102(1).
\end{itemize}
The Secretariat supports CFTA committees and working groups, is involved in government procurement processes, and provides assistance during internal trade negotiations.\textsuperscript{254} It also provides administrative support for dispute settlement proceedings, including by making arrangements for oral hearings and meetings of the Presiding Body (panel), maintaining the record of each proceeding, forwarding copies of relevant documents to disputing parties, and providing for interpretation and translation of documents and submissions, hearings, and reports of the panel.\textsuperscript{255} There is no provision for the Secretariat to provide substantive assistance to the panel.

Unlike NAFTA Secretariat, the CFTA Secretariat is responsible for preparing its own annual operating budget. It is developed by the Managing Director who sends it to the Trade Committee for review and approval. The CFTA receives 50% of its operating budget from the federal government and the other 50% from the provincial and territorial governments.\textsuperscript{256} The respective provincial/territorial share is determined by the size of the population relative to the total population of Canada in accordance with the most recent national census.\textsuperscript{257}

The Secretariat appears to have more autonomy in budget and staffing matters than the NAFTA Secretariat sections do. This has several advantages, the most notable being that it will be able to allocate funds and develop staffing plans based on its understanding and appreciation of its operations and the services it is expected to provide. An early study of the Secretariat that serviced the AIT found that not only were the services provided cost-efficient, but the Secretariat managed to reduce its overall expenditure and streamline its services by transitioning into an in-house payroll system, preparing its own annual reports and summaries, and offering printing services internally rather than outsourcing them.\textsuperscript{258} The CFTA Secretariat’s relative autonomy in financial and administrative matters as compared to what happens in the national sections of the NAFTA Secretariat seems desirable not only in terms of facilitating the delivery of the required services, but also in terms of seeking to ensure that services remain as cost-efficient and streamlined as possible.

\textit{Summary of Secretariats Established and Funded by the FTA Parties}

As noted earlier in this memorandum, very few disputes have been brought under the DSMs of FTAs, with states generally preferring to resort to dispute settlement under the WTO. As a result, thus far it has not proved to be cost-effective to fund a secretariat to serve individual FTA DSMs. Although the NAFTA Secretariat started out servicing only the NAFTA, it now services numerous FTAs entered into by the three NAFTA parties. In addition, maintaining a stand-alone secretariat has also proved to be too costly: the NAFTA parties all house their national sections of the NAFTA Secretariat within an existing government department. Each FTA party is responsible for funding its own national section of the Secretariat, with the result that they are not similarly resourced. This has caused some difficulties in terms of management of disputes.

\begin{thebibliography}{99}
\bibitem{254} Interview of Debra Steger [13 March 2020].
\bibitem{256} \textit{CFTA}, supra note 6 at Article 1102(3).
\bibitem{257} \textit{Ibid.}
\end{thebibliography}
The NAFTA Secretariat provides administrative and logistical support to dispute settlement panels, but no legal research or drafting is carried out. The same is true for the CFTA Secretariat. However, unlike the NAFTA, where there are three separate sections of the Secretariat operating independently, the CFTA has a single, stand-alone secretariat funded by all FTA parties. It seems to have more autonomy in terms of its budget and operations than the NAFTA sections do, which could be beneficial in terms of achieving cost-effectiveness. However, each party will have a say in these matters, which could be cumbersome.

Under both the NAFTA and the CFTA, parties set out the specific role and function of the secretariat. Thus, if parties wish to circumscribe the role of the secretariat and limit it to administrative duties, it is useful to do so explicitly in the text of the FTA itself. It is also useful to articulate in the FTA the funding model for the secretariat. There are strengths and weaknesses of the two approaches addressed above.
2.5.2 A Permanent Secretariat Housed Within an International Governmental Organization

The permanent model consists of housing a Secretariat within a permanent international institution. The WTO secretariat in Geneva is an example of this model, where approximately 600 staff members support the WTO members by providing technical and professional support to the various councils and committees, providing technical assistance to developing countries, monitoring and analyzing developments in world trade, and providing legal assistance to adjudicative bodies in the dispute settlement process.\(^{259}\) Secretariat funding comes from the 164 members’ annual fees.

This model of secretariat will be answerable to the membership as a whole and not to individual members. This may contribute to supporting the overarching goal of the proper functioning and legitimacy of the DSM. Nevertheless, support to individual members is permitted in circumscribed cases. In the WTO, for example, the secretariat is specifically mandated to assist parties in the composition of panels by proposing names of potential panelists.\(^{260}\) In addition, the WTO secretariat is mandated to make available a qualified legal expert from the WTO technical cooperation services to provide assistance with disputes to developing country Members, although such assistance is quite limited because it must ensure continued impartiality of the secretariat.\(^{261}\) In the case of the PCA and ICSID, they offer non-member states the possibility of receiving tailored Secretariat services in dispute settlement that best fit the disputing parties’ needs. One trade law scholar has suggested that a permanent secretariat could provide assistance to roster members outside the context of a particular dispute, such as providing resource materials on request about the FTA and international trade more generally.\(^{262}\) Secretariats can also organize conferences and workshops to discuss institutional issues and suggest improvements.\(^{263}\) However, our interview with a trade expert revealed that some FTA members would be hesitant about promoting this function because it goes beyond the treaty drafters’ intentions in crafting the role of the secretariat and this may raise political issues.\(^{264}\)

One weaknesses of this model are cost. Maintaining a permanent secretariat requires an on-going source of financial commitment, typically from the member states of the FTA or treaty. The cost of maintaining a permanent institutional secretariat will usually be too high for FTA/treaty parties unless there are several parties coupled with a significant number of disputes being brought on a regular basis. Even in large institutions where funding comes from a large group of members and is relatively secure, ensuring sufficient funding is allocated to assistance to dispute settlement is cannot be taken for granted because members may control how the Secretariat’s overall funding is spent. In the WTO, for example, the Budget Committee can veto allocating resources to certain functions in the WTO.\(^{265}\)


\(^{260}\) \textit{WTO DSU}, supra note 2 at Article 8.6

\(^{261}\) \textit{WTO DSU}, supra note 2 at Article 27.2


\(^{263}\) \textit{Ibid.}

\(^{264}\) Interview of trade law practitioner with experience in WTO dispute settlement [8 April 2020].

\(^{265}\) Interview on a non-attribution basis.
Secondly, the permanent model secretariat might lend itself more readily to providing more than administrative and logistical support to panelists in the resolution of disputes. The WTO and ICJ secretariats carry out legal tasks on top of their administrative roles, as does the PCA secretariat staff. These institutional secretariats include legally trained personnel. This is not the case for most FTAs, where the secretariats are limited to carrying out tasks such as facilitating communication, document exchange, and facility booking for the parties and panelists. Some panelists may find legal assistance provided by secretariats useful, while disputing parties may consider this type of assistance risky because secretariats may acquire more influence than FTA parties intended them to have.

The analysis below will examine different approaches to the model of a secretariat housed within a permanent institution.

**ICJ**

The ICJ is the principal judicial organ of the United Nations. It has its own Registry/secretariat, which is independent from the United Nations Secretariat. The registry is the permanent administrative secretariat of the court and it is accountable to the ICJ alone. It is headed by a Registrar who is appointed by the Court for a seven-year term and may be re-elected. The costs of the secretariat are borne by the United Nations.  It is funded through mandatory fees from UN member states and voluntary contributions.

The Court Registry consists of several departments and divisions and is comprised of about 100 individuals. It includes a Department of Legal Matters, which manages case files, prepares documents for distribution to members of the Court, acts as secretariat to drafting committees, drafts orders and other legal texts as requested, and carries out legal research on points of law. In addition, each member of the Court is assisted by an “Associate Legal Officer/Law Clerk” who carries out legal research and works with the member of the Court on pending cases.

The Registrar’s administrative role involves keeping the General List of cases and recording documents in case files, managing case proceedings, attending, and preparing reports or minutes of meetings of the Court, and signing all judgments and orders of the Court. The Registrar also manages the Court’s budget and finances and supervises all administrative tasks such as printing and translation. The Registrar is also responsible for the preparation of cases for consideration by the Court and assists the committee appointed by the Court to draft the text of judgments and advisory opinions. If the Court is to meet at a place other than at its seat in The Hague, the Registrar makes the necessary arrangements. The Registrar communicates the judgments of the Court to the disputing parties.

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267 ICJ, Instructions for the Registry, Articles 40 and 45.
268 ICJ, Instructions for the Registry, Articles 46(1) and 46(2).
269 Ibid.
270 Ibid.
271 Ibid.
272 ICJ, Instructions for the Registry, Article 3(1).
273 ICJ, Instructions for the Registry, Article 8.
The ICJ’s secretariat is particularly interesting because it provides insight into what a permanent secretariat with both legal and administrative functions look like.

**PCA**

The PCA’s Secretariat, the International Bureau, consists of legal and administrative staff. It provides legal and administrative support to panels. It provides registry services including serving as a channel for communications and safeguarding documents.\(^\text{273}\) It can also provide financial administration, logistical and technical support for meetings and hearings, make travel arrangements, and provide general secretarial and linguistic support.\(^\text{274}\) Disputing parties may use the PCA even if they are not parties to its treaty.\(^\text{275}\) The disputing parties pay their own expenses and they share the expenses of the Tribunal equally.\(^\text{276}\) Some interviewees are concerned about the transferability of PCA support because the International Bureau has no experience in assisting with FTA disputes.\(^\text{277}\) Other interviewees argue that the staff does not have to have expertise in trade law to provide logistical and administrative services to arbitrators deciding trade disputes.\(^\text{278}\)

**ICSID**

The Secretary-General of ICSID is the legal representative and principal officer of the International Centre for the Settlement of Investment Disputes. For investor-States disputes, the ICSID Secretariat provides procedural assistance throughout the entire dispute settlement process.\(^\text{279}\) It acts as a registrar in proceedings by receiving, reviewing, and registering requests for arbitration. It organizes and assists in hearings, provides financial administration services, and provides other administrative support as requested by tribunals.\(^\text{280}\) For non-ICSID cases, depending on the disputing parties’ needs, the Secretariat’s role may vary from organization of hearings to full administrative services.\(^\text{281}\) There is no membership fee to join ICSID but ICSID charges disputing parties an annual fee (currently US$42,000) that is usually borne by the disputing parties equally.\(^\text{282}\) The fee covers the remuneration and expenses of staff members assigned to a case, including the Secretary who assists with hearings and the financial management of the case account. Interpretation, court reporting, room rentals and other costs are also paid by the disputing parties.\(^\text{283}\) Our interviews with experts revealed that while some ICSID secretariat staff members have legal experience, they only provide administrative assistance to ICSID tribunals and do not conduct legal research for tribunal members.\(^\text{284}\) However, tribunal members are entitled to hire their own assistants to conduct legal research and do legal drafting.

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\(^{274}\) *Ibid.*


\(^{276}\) Convention for the Pacific Settlement of International Disputes, Article 85.


\(^{281}\) *Ibid.*


\(^{283}\) *Ibid.*

\(^{284}\) Interview of Matthew Kronby [25 March 2020].
As mentioned above, the WTO includes a Secretariat of some 600 staff who perform a variety of functions including assisting with disputes. The WTO DSU provides that the Secretariat shall assist panels “especially” on the legal, historical, and procedural aspects of disputes and shall also provide secretarial and technical support. There are two divisions in the WTO Secretariat that assist panels: the Rules Division assists panels hearing disputes on trade remedy matters (subsidies, dumping, and safeguards), while the Legal Affairs Division assists panels with disputes on all other matters. The members of those divisions are primarily lawyers, although a few members of the Rules Division are economists. In addition, experts from other divisions (usually non-lawyers) will be called upon to assist panels with particular questions related to the experts’ area of expertise. For example, a member of the division dealing with sanitary and phytosanitary matters will often assist panels dealing with such issues.

Our interviews with experts revealed that the WTO Secretariat generally provides extensive assistance to panels, although it varies somewhat depending on the expertise of the particular panelists. The Secretariat serves as a registrar and takes care of logistical and administrative matters such as organizing hearings and travel arrangements. Assistance can also include conducting legal research, advising on previous WTO decisions, analyzing parties’ submissions, and supporting panelists in the hearings. Secretariat staff often draft decisions or parts of decisions for panels, although always in accordance with detailed instructions provided by the panel in question. Panelists will normally review and edit such drafts extensively.

One expert observed that one reason the WTO Secretariat has developed the practice of providing extensive assistance to WTO panels is that WTO panelists are, for the most part, not professional arbitrators and therefore they are not accustomed to assessing and adjudicating legal arguments and writing legal reasons for decisions. They are often senior diplomats with little or no experience in the role of adjudicator. Moreover, they are not as familiar as Secretariat staff members are with the extensive procedural practice that has developed over 25 years of dispute settlement. Finally, WTO adjudicators are usually extremely occupied with the demands of busy day jobs. Extensive secretariat assistance in these circumstances was probably inevitable and appears to make sense.

There is disagreement among our interviewees on whether FTA DSMs will be used more often now that the WTO dispute settlement mechanism has been weakened with the shuttering of its Appellate Body. Some argue that there is no reason to believe FTAs will be used often. The WTO panel level is still functioning well, and members are continuing to rely on this proven method of resolving international trade disputes. Moreover, although there are numerous FTAs, not all members have FTAs with each other and therefore, WTO dispute settlement may be the

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285 WTO DSU, supra note 2 at Article 27.1
286 Interview of trade law practitioner with experience in WTO dispute settlement [8 April 2020].
287 Interview of trade law practitioner with experience in WTO dispute settlement [8 April 2020].
288 Interview of David Gantz [16 March 2020].
289 Interview of trade law scholar with experience in NAFTA dispute settlement [16 March 2020], Interview of Matthew Kronby [25 March 2020].
only dispute resolution option available. Others point out that the two recent EU disputes with Ukraine and the SACU suggest that FTAs are starting to be used more often and that this trend will continue.

AfCFTA

The AfCFTA came into force in May 2019 and its secretariat is currently hosted by Ghana. It is modelled after the WTO secretariat, which means the secretariat is housed in a permanent institution. The Protocol on Rules and Procedures on the Settlement of Disputes states that the secretariat is responsible for assisting panels “especially on legal, historical and procedural aspects” of disputes and is to provide “secretarial support.” In addition, the Protocol states that “[i]n order to accomplish the functions under Article 28 of this Protocol, the Secretariat shall avail experts with extensive experience in international trade law to assist the Panellists.” The intention of this provision is somewhat unclear because it refers to assisting Panellists, yet Article 28 refers to the Secretariat providing legal advice and assistance to state parties who request it. The AfCFTA DSM has yet to be engaged.

It is unclear when the AfCFTA’s Secretariat will be functional because the African Union still has to overcome some issues including finalizing the Secretariat’s structure, setting out staff rules and regulations, and calculating its budget. Some of the ways the AfCFTA will fund the initial startup of its Secretariat are from the $10m pledged by Ghana’s president, contributions from the African Union, and international funding agencies.

Summary for A Permanent Secretariat Housed within an International Governmental Organization

All of the organizations discussed above have numerous members. In addition, in all but one (AfCFTA) of the organizations discussed above, several disputes are filed every year, so it is cost-effective to have a permanent secretariat to handle them. Moreover, the hearings of all these institutions but one (ICJ) are conducted by ad hoc panels or tribunals that require the assistance of a secretariat not only for the logistical and legal support during a dispute, but also for administrative support to maintain the overall function of the panel or tribunal. Under these circumstances, a budgetary commitment from members of the organization to support the DSM is justified. This is in contrast to the model described in the previous section, where FTA membership is not large, and disputes are rare.

While it is not clear why, in recent years, some parties chose to proceed under an FTA DSM when they could have resorted to the familiar and well-established WTO DSM, some have suggested that parties may desire the less formalistic and expeditious FTA dispute settlement

290 Interview of trade law scholar with experience in NAFTA dispute settlement [16 March 2020]., Interview of Matthew Kronby [25 March 2020].
291 Ibid.
293 AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes Article 29(3).
296 EU-SACU and EU-Ukraine.
procedures. Others hypothesize it is a reaction to the recent US decision to block WTO Appellate Body appointments and the consequent risk that it will no longer be possible to obtain a final ruling under the WTO DSM. If the purpose of resorting to FTA DSMs is for greater efficiency in the overall dispute settlement process, modelling a secretariat after a multinational institution that provides assistance on more than administrative support may achieve the opposite effect.

2.5.3 No Secretariat Support

As this memorandum stated before, maintaining a secretariat can be a financial strain for countries when there is only a small amount of cases heard under FTAs. Another reason FTA parties may choose not to provide for a secretariat to assist panels may be the fear of ‘role creep’, where the Secretariat’s role goes beyond the FTA drafter’s intention as they build up experience and institutional memory. Yet, avoiding the assignment of a Secretariat or its specific functions may be detrimental to the overall efficiency and functionality of an FTA. Under the absence of Secretariat support, either the responding party becomes responsible for administrative support, the panelists opt to hire assistants, or the parties have a provision that allows secretariat support through mutual agreement, such as the case with EU-Japan.

Where there is no secretariat to manage disputes, FTAs tend to assign the responding party in a dispute with the responsibility for providing administrative and logistical support. In addition, the dispute settlement hearing generally takes place in the responding party’s territory. In all the FTA’s that assign administrative support to the responding party, they always specify the task of organizing the hearing. Assignment of these matters to the responding party may raise concern in terms of the potential conflict of interest: the responding party may be seen to have interests adverse to ensuring an efficient dispute settlement process. The fear of unreasonable or purposeful delay is an understandable concern. However, during our conversations with interviewees, this issue was not mentioned. Perhaps it is too early to tell, as most FTA DSMs have yet to see a dispute. Moreover, even when there is a delay caused by an administrative body, such as the Canada-US NAFTA dispute mentioned in the previous section, the cause of delay was a lack of structure and proper funding.

Some FTAs make provision for panelists to hire assistants, which might make up for the lack of help from a formal secretariat. Usually, however there are no specifics about assistants set forth in the FTA, including about qualifications of panel assistants, the type of assistance provided, or the remuneration to be provided to assistants. If the assistant is a law student, for example, the type of assistance provided will be different from that which would be provided by an experienced legal associate. Our conversations with interviewees who had experiences with panel assistants revealed contrasting opinions on this topic. One of our interviewees has always had good experience working with panelassistants who helped with disputes under Chapter 11 of NAFTA (Investor-State dispute settlement); the interviewee often hired students who understood the law and were fluent in the disputing party’s language. Our conversation with another interviewee said they

298 CETA, CPTPP, EU-South Korean, EU-Mercosur, EU-Japan.
299 Interview of David Gantz [16 March 2020].
could not afford to hire an assistant even for translation services because the remuneration rate for such assistance was very low ($15 US/hour).\textsuperscript{300} In the end, not only did they have to rely on Google Translate for document translation, but the efficiency and effectiveness of the proceeding were impeded significantly\textsuperscript{301}, partly due to these administrative and logistical obstacles.\textsuperscript{302} Lastly, sometimes secretariats will be selected on an ad hoc basis as disputes arise. This may be an attractive and cost-saving approach for some parties, but as this memorandum will detail in the best practices – other considerations section, our interviewees are cautious about the transferability of ad hoc Secretariats due to the lack of trade expertise and divergent party intentions on the role of the secretariat.

**CETA**

CETA does not provide for a secretariat because the EU preferred not to have one.\textsuperscript{303} However, the Rules of Procedure for arbitration provide that the responding party is in charge of the logistical administration of the arbitration proceedings, in particular the organization of hearings, and notes that the parties shall bear equally the administrative expenses of the arbitration proceedings as well as the remuneration of travel expenses of the arbitrators and their assistants.\textsuperscript{304} While the agreement does not refer explicitly to allowing arbitrators to appoint their own assistants, the Rules refer to arbitrators’ assistants and define an assistant as “a natural person who, under the terms of appointment of an arbitrator conducts research for or provides assistance to the arbitrator”.\textsuperscript{305} It is unclear what the “terms of appointment” means, but from our conversation with an interviewee, this could refer to the appointment letter or agreement signed by the panelist upon appointment to serve on a dispute. During our interview, we discovered that for most EU agreements, the panelists are considered temporary workers who not only need to be engaged through a public procurement procedure, but the panelists also have to negotiate additional contract terms and request additional funding if they wish to hire assistants, and sometimes issues of currency evaluation arise.\textsuperscript{306} In addition, the panelists and their assistants are also required to obtain work permits before the panel is formally composed.\textsuperscript{307} These hurdles are avoided in institutional secretariats discussed in the previous section.

**CPTPP**

The CPTPP does not provide for a secretariat and the responding party is to establish a responsible office\textsuperscript{308} to provide administrative assistance to the panel and the disputing parties. The office’s responsibilities are, among others, arrange payment of remuneration, organize and coordinate logistics required for hearings, retain permanently a complete record of the panel proceedings, and

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\textsuperscript{300} Interview of Kevin Banks [24 March 2020].
\textsuperscript{301} The Request by Guatemala for a Preliminary Ruling started in late 2014 and the final report of the panel was issued mid-2017.
\textsuperscript{302} Ibid.
\textsuperscript{303} Interview of Matthew Kronby [25 March 2020].
\textsuperscript{304} CETA Annex 29-A, Rule 2.
\textsuperscript{305} CETA Annex 29-A, Rule 1.
\textsuperscript{306} Interview on a non-distribution basis.
\textsuperscript{307} Ibid.
\textsuperscript{308} CPTPP Rules of Procedure Definition.
“act in a strictly impartial manner”. Despite this last responsibly, the responsible office does not appear to be covered by the Code of Conduct annexed to the Rules of Procedure. There are no specified qualifications for the responsible office’s employees. The definitions for authorized employees simply describe the individuals as “including interpreters, translators, court reporters or other individuals that it retains for the purposes of a panel proceeding”.

The Rules of Procedure allow panelists to hire one assistant to provide research, translation, or interpretation support, although the parties may agree to allow the panelist to hire an additional assistant due to exceptional circumstances. The assistant is paid at a rate of one-fifth the rate for a panelist.

Even though the CPTPP has yet to see a dispute, some evidence suggests that a dedicated Secretariat is needed. For example, the absence of a body responsible for an administrative function meant that when the CPTPP Commission held its first meeting in January 2019, it had to manage its own meeting. Given that there are currently 11 member states in the CPTPP with different legal traditions and different levels of economic development, case management could become an issue without a secretariat or other administrative body to administer dispute settlement procedures.

EU – South Korea

Dispute settlement panels are not assisted by a secretariat, but references are made in the Rules of Procedure to “assistant”, which is defined as “a person who, under the terms of appointment of an arbitrator, conducts researches or provides assistance”. The responding party is responsible for “logistical administration of dispute settlement proceedings, in particular, the organization of hearings”, unless the parties agree otherwise. Parties share the expenses associated with disputes, including the expenses of arbitrators.

EU-Mercosur

Under the EU-Mercosur agreement, the responding party is in charge of the logistical administration of dispute settlement hearings. Similarly, to the agreements discussed above, the Rules of Procedure refer to arbitrators’ assistants and define an assistant as “a person who, under the terms of appointment of an arbitrator, conducts research or provides assistance to that arbitrator”. The chairperson of the panel is responsible for some of the functions normally carried out by a secretariat. For example, the chairperson is responsible the internal and external communications of the panel, including the notifications between the parties and the panel. The Chairperson is also

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309 CPTPP Rules of Procedure, Responsible Office, Rule 89(a-g).
310 CPTPP Rules of Procedure Definition.
311 CPTPP Rules of Procedure, Rule 94.
312 Ibid.
313 EU-South Korea FTA, Annex 14-B, Rules of Procedure for Arbitration, Rule 1(1).
314 EU-South Korea FTA, Annex 14-B, Rules of Procedure for Arbitration, Rule 1(2).
315 EU-South Korea FTA, Annex 14-B, Rules of Procedure for Arbitration, Rule 1(2).
responsible for maintaining the file of the proceedings.\textsuperscript{318} The Chairperson’s involvement in the communication and document management of the proceeding might make the process appear, on its face, more objective because objectivity is one of the qualifications for panelists whereas the responding party is presumed to be an interest-driven party. However, asking the Chairperson to perform administrative roles on top of the adjudicative obligations may have the opposite effect to achieving efficiency.

\textbf{AANZFTA}

No secretariat support for dispute settlement panels is provided for in the agreement, although the arbitral tribunal is permitted to retain “such number of assistants, interpreters or translators, or designated note takers as may be required”.\textsuperscript{319} The parties must designate contact points for the delivery of submissions and other documents exchanged in disputes. Each disputing party bears the cost of its appointed arbitrator and its own expenses and legal costs for the dispute, and the costs of the chair of the tribunal and other expenses associated with the dispute are borne in equal parts by the disputing parties.\textsuperscript{320}

\textbf{EU-Japan}

Under the EU-Japan agreement, the parties have the option of designating their own office that shall be responsible for the administration of dispute settlement procedures or of jointly entrusting an external body to provide administrative support for disputes\textsuperscript{321}. The expenses of the panel, including remuneration of the arbitrators, are paid by the disputing parties in equal shares\textsuperscript{322}. The Rules of Procedure refer to arbitrators’ assistants, who are defined as “a person who, under the terms of appointment of an arbitrator, conducts research or provides assistance to that arbitrator”.\textsuperscript{323}

This agreement is still pending enforcement so it is unclear how the process will work in practice. If parties do not agree to hire a Secretariat, it is possible that one party with less interest in the dispute may choose not to designate an office to be responsible for the dispute or may choose to have a smaller support body than the other disputing party for a particular dispute.\textsuperscript{324} There is the option for parties to appoint an individual as “contact point” but the responsibilities of the contact point only include communication and document delivery between the parties.\textsuperscript{325}

\textsuperscript{318} EU-Mercosur Agreement, Annex I, Rules of Procedure for Arbitration, Rules 11 and 12.
\textsuperscript{319} AANZFTA, supra note 76 at Annex on Rules of Procedure for Arbitral Tribunal Proceedings Rule 4.
\textsuperscript{320} AANZFTA, supra note 76 at Chapter 17, Articles 19 and 20.
\textsuperscript{321} EU-Japan Rules of Procedure, supra note 159 at Article 21.25(2).
\textsuperscript{322} EU-Japan Rules of Procedure, supra note 159 at Article 21.29.
\textsuperscript{323} EU-Japan Rules of Procedure, supra note 159 at Annex I, Rule I.1(e).
\textsuperscript{324} Interview of Debra Steger [13 March 2020].
\textsuperscript{325} EU-Japan Rules of Procedure, supra note 159 at Article 22.6.
Dispute settlement tribunals are not assisted by a secretariat. There is little information on dispute settlement procedures in the dispute settlement chapter of the agreement, although it is noted that expenses of the tribunal, including remuneration of tribunal members, are borne by the disputing parties in equal shares unless the parties agree otherwise.

**Summary for No Secretariat Support**

The majority of FTAs discussed in this section do not provide for secretariat support for dispute settlement panels or tribunals. Having no secretariat at all means that disputing parties will need to take on numerous tasks in addition to the extensive effort that must be devoted to legal strategies and pleading. The responding party will usually be tasked with much of this burden, often including managing the secure (electronic) registry, securing space for document storage, renting hearing space and adequate-sized equipped (WiFi) meeting rooms, booking hotel rooms, and contracting for interpretation services; these efforts will be more complex if meetings take place in a foreign jurisdiction. Other duties may include managing press inquiries, arranging for public attendance at hearings, and arranging security especially in the event of protests. One interview revealed that the engagement of panelists was very time consuming and delayed the expected launch of a panel because numerous issues arose in connection with procurement laws and regulations related to engaging panelists in different jurisdictions, obtaining necessary work permits and travel documents for attendance at hearings, currency conversions required to ensure equivalent remuneration of panelists, etc. A standing secretariat can take care of these matters.

We pointed out above that some FTAs require the Chairperson of the panel to organize communications and document filing and to maintain the official file for the dispute. These duties can be more onerous than one might suppose. Some FTAs permit the panelists to hire assistants to do a variety of tasks, from administrative duties, to translation, to legal research, and more. However, our conversations with interviewees revealed that variations in assistant qualifications, panelists’ limited budgets, and complex procurement, contract and other regulatory issues might make this neither a desirable nor sustainable approach for securing adequate assistance with FTA DSMs.

Lastly, parties might choose to establish their own secretariat offices or jointly agree to hire an external organization to provide administrative support. It is difficult to assess how this might work because there is no experience to draw upon to date. However, some concerns were raised by interviewees who thought this approach might not be a good one because the ad hoc secretariat would be unfamiliar with trade law generally and the FTA obligations in particular, meaning their research capacity could be limited. Nor would an ad hoc secretariat necessarily be familiar with the parties’ procurement laws and regulations, work permit requirements, or contracting rules, with the result that the disputing parties might have to take on many of the administrative tasks normally handled by secretariats who assist with FTA dispute settlement.

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326 NZ-China, supra note 77 at Article 192. Although the agreement was recently updated and negotiations were concluded in October 2019, the text of the new agreement is not yet available online. The New Zealand-China FTA Upgrade Outcomes Document does not refer to any updates to the dispute settlement provisions: see Outcomes Document.

327 JSEPA, supra note 115 at Article 148.
**Secretariat Model Summary**

<table>
<thead>
<tr>
<th>Model 1: Single secretariat that is either centralized or divided into separate party-run sections (NAFTA, CUSMA, CFTA)</th>
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</thead>
<tbody>
<tr>
<td>Model 2: Housed within a permanent governmental institution (ICJ, PCA, WTO, ICSID, AfCFTA)</td>
</tr>
<tr>
<td>Model 3: No secretariat support (CETA, CPTPP, EU-Mercosur, EU-South Korea, EU-Japan, AANZFTA, NZ-China, JSEPA)</td>
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</tbody>
</table>

2.6 Best Practices for The Role of Secretariats: Specific FTA Provisions Addressing the Secretariat’s Role as well as Budget Responsibilities, and Cautious Approach to Outsourcing the Secretariat Role

A review of selected FTAs and institutions reflects considerable divergence in approach with respect to the use (or not) of secretariats to assist with dispute settlement. All of our interviewees agreed that some form of secretariat support is necessary for FTA disputes to function efficiently and effectively, and one interviewee explained that panel procedures were hampered and delayed significantly due to the lack of any support of an administrative and logistical nature. While the interviewees could not agree on which factor should take priority, it is clear that having specific and precise provisions regarding the secretariat’s functions and responsibilities in relation to assistance with dispute settlement as well as clear provisions addressing its budget (adequacy, control) is both contribute to the effective functioning of a secretariat. These points are discussed below.

**A Clear Role for the Secretariat**

Some of the FTAs examined in this memorandum do not specify clearly or adequately what role is to be exercised by the secretariat when assisting with dispute settlement. One consequence of vague or absent provisions on the role of the secretariat is ‘role creep”. As the dispute settlement secretariat gains experience with disputes over the years, a secretariat’s responsibilities may gradually increase, especially when the ad hoc panelists have little or no experience serving as adjudicators. Thus, over time, a secretariat’s role may increase from providing procedural assistance to exercising influence over the decision-making process, simply because the secretariat builds up knowledge, experience and institutional memory. If the treaty drafters intended the secretariat to have only an administrative role, this may raise concerns.

Some panelists hire assistants to help them in carrying out their dispute settlement duties, especially when the secretariat offers insufficient administrative help or there is no secretariat assistance at all. Some agreements refer to the hiring of assistants but do not address what their functions should be; others do not mention the possibility of hiring assistants. Our conversations with interviewees revealed that assistants provide different kinds of help, ranging from carrying out basic administrative duties to translating documents to conducting legal research and even

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[328] Interview of Kevin Banks [24 March 2020].
drafting. The interviews also suggested that the qualifications of the assistant (i.e., law student or experienced associate or someone who is not legally trained) vary from panelist to panelist. In addition, some interviewees observed that a panelist’s limited budget for hiring assistants and complex procurement and contract issues might make this route neither a desirable nor sustainable method for securing adequate assistance for panelists in carrying out their duties.

Although an issue of a different order, we note that the absence of a secretariat for the CPTPP even created difficulties with communications during the negotiation stage and when organizing the first Commission meeting. This may signal challenges to come when a dispute arises.

We recommend that parties set out in the FTA the specific role they want the secretariat to play or not play in assisting with dispute settlement and that every FTA include a bespoke code of conduct for the secretariat to follow. If parties wish to circumscribe the role of the secretariat and limit it to administrative duties, they can do so in the text of the FTA itself. If FTA DSMs do get used more often in the future, parties may wish develop rules of procedure and include additional responsibilities for the secretariat. The key purpose of this recommendation is to set a foundation that ensures the right framework and that mechanisms are in place for efficient and effective FTA DSMs.

<table>
<thead>
<tr>
<th>Clear Secretariat Role:</th>
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<tbody>
<tr>
<td>Specify secretariat functions in FTAs and provide the possibility to add duties in future</td>
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</table>

Specific Mandate to Develop and Manage Budget

The general consensus from interviewees and secondary sources was that North American and EU parties are generally hesitant about creating an institutional structure for the FTA secretariat. This is understandable due to cost considerations and the small number of disputes usually bought under FTA DSMs. However, drawing lessons from the US-Guatemala dispute and being mindful of the recent increase in FTA disputes under EU FTAs, it may be wise to consider what should be done from a budget perspective to maintain a strong and reliable secretariat because our research suggests it is crucial to the proper functioning of dispute resolutions.

In 2005, it was reported that the Canadian section of the NAFTA maintained a Secretariat of eight to 15 staff members with an annual budget of $2 million, that the Mexican section had an annual budget of between $1 to $2 million for 7 to 16 Secretariat members, and that there were three staff members in the US NAFTA Secretariat section costing an average of $1 million. Today, the Canadian Section of the NAFTA Secretariat is housed in the Trade Agreements Secretariat of Global Affairs Canada. There are three employees: The Director and NAFTA Secretary, the Registrar, and the Deputy Registrar. One explanation offered by interviewees for the consistent underfunding of the US NAFTA secretariat section was that its Secretariat’s expenses are mixed with the US’s International Trade Administration. In other words, the Secretariat does not have a


330 Ibid.

separate line item in the budget so it must compete with other departmental priorities for funds. The same appears to be true for the other sections now.

The UN and WTO secretariats are funded through members’ annual fees and hence is reasonably secure. However, if members have veto rights over if and how the funds are allocated to dispute settlement functions, this can pose difficulties.

Drawing inspiration from the recommendation of former US NAFTA Secretary James R. Holbein 332, we recommend that for centralized secretariats with separate sections – i.e., the NAFTA model - each section should have the same number of staff members and the same average annual budget (adjusted for currency differences). Only then will there be assurances that the dispute settlement function will not be undermined by uneven support for dispute settlement panels. To achieve this, the Secretariat section should have its own line item in the national budget rather than burying its budget under a shared government department budget. If the NAFTA Secretariat sections are to be “mirror images” of each other, not only should the sections’ functions be similar, but their budgets should be as well. The drawback of this recommendation is that it depends on all sections’ governments making the same decisions about staffing and budgets, and there is no way to ensure this actually happens. Moreover, not all sections will necessarily have the same amount of work because the volume of cases each section will have to handle will vary. One section may be very busy, while the other two may not be.

The next recommendation applies to all FTA DSMs. Following the CFTA approach, the parties should set out clear budgetary responsibility in the FTA itself, like under the CFTA Secretariat, where the Secretariat is required to prepare and manage its own budget and submit it to the Trade Committee or Trade Commission or an independent body for review and approval. This should help ensure adequate funding based on informed budget proposals. The CFTA example has shown that this can work well, including in finding effective ways to reduce costs through innovative methods.

Lastly, we draw inspiration from the Caribbean Court of Justice, which is supported by a trust fund of US$100 million that is administered by an independent Board of Trustees. 333 The purpose of this trust fund is to ensure that “expenditures of the Court, including the remuneration of the Judges, is not dependent on the disposition of governments”. 334 The Caribbean Court’s trust fund was established through contributions from the private sector and civil society. We acknowledge that this type fund will not be possible or even desirable to establish in the context of an FTA given potential conflicts of interest and general distrust of international trade agreements by civil society, but we do believe that emulating the idea of an independent board to oversee the secretariat’s funding should be considered. This type of oversight would eliminate uneven resourcing of different sections of a de-centralized secretariat and could minimize holding hostage the approval of the secretariat’s budget by an FTA party unhappy with a panel report or the actions of an adjudicative body.

332 Ibid.
334 Ibid.
Selectivity in Outsourcing from Institutions

Outsourcing or Ad hoc Option
Under the ad hoc model we discussed provided for under the EU-Japan agreement, parties do not have the flexibility of creating a secretariat tailored to the needs of the particular FTA DSM. Instead, they have to accept the available services the institutions provide. However, the cost of hiring secretariat assistance on an ad hoc basis likely would be less than maintaining a full-time secretariat, especially if disputes do not arise often. In these circumstances, FTA parties can dedicate their funding as disputes arise.

Disputing parties may have more flexibility when turning to institutions with permanent, experienced secretariats like the PCA and ICSID. Under ICSID, parties have the option of choosing how much administrative support they would like to receive. For example, the ICSID Secretariat can offer basic logistical and organizational support or a full administrative assistance role through the entire dispute process similar to that provided in ICSID Convention cases. The PCA has a schedule of fees and costs; disputing parties can assess the cost per hour by looking at the staff list under the “Registry Services provided by the International Bureau”. Disputing parties can also contact bureau@pca-cpa.org for estimates.

Trade disputes may take a long time and PCA’s service fee of € 60/hour for Secretarial/Clerical services may still be too expensive for some developing countries. As a result, parties may turn to other external bodies within their own countries for administrative support and the problem of undue influence from the perception of being funded by a disputing party is a concern. Additionally, if parties wish to rent hearing rooms, technology, facilities, or other non-transferable services, they will have to travel to one of the locations (albeit there are many) where the PCA or ICSID have facilities or host arrangements, which may not be desirable if the parties’ original intention for hiring an ad hoc secretariat is to save money.

Even when cost savings might argue for resorting to an ad hoc secretariat, we cannot assume that the services of these ad hoc secretariats are easily transferrable. As two of our interviewees pointed out, the PCA and ICSID Secretariats do not have experience dealing with trade matters. However, as other interviewees observed, the staff does not have to have expertise in trade law to provide logistical and administrative services to arbitrators. One interviewee noted that even if

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335 ICSID Secretariat Online: https://icsid.worldbank.org/en/Pages/about/Secretariat.aspx
336 About Us, “Fees and Costs” Permanent Court of Arbitration (2018), online: <https://pca-cpa.org/feesand-costs/> [hereinafter Fees and Costs, PCA].
337 Ibid.
338 About Us, “Fees and Costs” Permanent Court of Arbitration (2018), online: <https://pca-cpa.org/feesand-costs/> [hereinafter Fees and Costs, PCA].
339 Interview of Matthew Kronby [25 March 2020], Interview of trade law practitioner with experience in WTO, NAFTA, and PCA dispute settlement [16 April 2020].
340 Interview of trade law practitioner with experience in WTO, NAFTA, and PCA dispute settlement [16 April 2020].
the WTO agreed to outsource its Secretariat, it is unclear whether the services will be transferable to an FTA setting\textsuperscript{341} where rules and procedures are different. Another question is whether ad hoc secretariats can manage large disputes with large numbers of participants.

Finally, we observe that outsourcing was a concern during the CPTPP negotiations when negotiators contemplated outsourcing administrative assistance from the Asia-Pacific Economic Cooperation Secretariat.\textsuperscript{342} There was concern about stretching the APEC Secretariat too thin, as well as unease about conflict of interest given the membership of the CPTPP and APEC is not the same\textsuperscript{343}.

<table>
<thead>
<tr>
<th><strong>Outsourcing as an option:</strong></th>
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<tbody>
<tr>
<td>May provide costs savings</td>
<td></td>
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<tr>
<td>However, it offers less flexibility and may raise conflict of interest concerns</td>
<td></td>
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</tbody>
</table>

\textsuperscript{341} Interview of trade law practitioner with experience in WTO dispute settlement [8 April 2020].

\textsuperscript{342} Supra 302.

\textsuperscript{343} Supra 302.
Table 7: Secretariat Established and Funded by the Parties

<table>
<thead>
<tr>
<th>Agreement</th>
<th>NAFTA</th>
<th>CUSMA</th>
<th>CFTA</th>
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<tbody>
<tr>
<td>Secretariat Support?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>If no secretariat, how is administration handled?</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Description of duties</td>
<td>Assist the trade commission and provide administrative assistance to panels</td>
<td>Assist the trade commission and provide administrative assistance to panels</td>
<td>Provides administrative and operational support to the Ministerial Committee on Internal Trade, its Chair, and other committees or working groups under the Agreement. Also administers the dispute resolution process</td>
</tr>
<tr>
<td>Permanent Secretariat Support</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Are the Parties responsible for the cost?</td>
<td>Yes – each party is responsible for their own secretariat operations</td>
<td>Yes – each party is responsible for their own secretariat operations</td>
<td>The Government of Canada contributes to 50% of the annual and the provinces collectively contribute the remaining 50%</td>
</tr>
<tr>
<td>Agreement</td>
<td>ICJ</td>
<td>PCA</td>
<td>ICSID</td>
</tr>
<tr>
<td>-----------</td>
<td>-----</td>
<td>-----</td>
<td>-------</td>
</tr>
<tr>
<td><strong>Secretariat Support:</strong></td>
<td>Yes – the Registrar</td>
<td>Yes - the International Bureau</td>
<td>Yes – Art. 9-11</td>
</tr>
<tr>
<td><strong>Description of Duties</strong></td>
<td>Keep the General List of cases and record documents in case files, manage case proceedings, attend and prepare reports/minutes of meetings of ICJ, and sign all judgments/orders of the Court. Communicating the judgments of the Court to the disputing parties and assist with travel arrangements if the Court is to meet outside The Hague. The Department of Legal Matters is responsible for file management, document preparation to Court members, acts as secretariat to drafting committees, drafts orders and other legal texts as requested, and carry out legal research on points of law. Associate Legal Officer/Law Clerk assists each member of the Court on pending cases and conducts legal research.</td>
<td>Filing and correspondence, financial administration, scheduling dates and booking locations for hearings. Assist with travel agreements. File transcription, recording, interpretation, translation.</td>
<td>For investor-States disputes: providing procedural assistance, acting as registrar in proceedings. Administrating the finances of each case. Organizing and assisting in hearings, providing financial administration services, and providing other administrative support as requested by tribunals. For non-ICSID cases: the duties may vary from organizations from hearings to full administrative services, depending on the disputing parties’ needs.</td>
</tr>
<tr>
<td><strong>Are the Parties responsible for the cost?</strong></td>
<td>No, the costs are borne by the United Nations and the budget is managed by the Registrar. Each party pays its own expenses and borne the expenses of the Tribunal equally. The International Bureau has a schedule of fees and costs.</td>
<td>Yes, for both ICSID and non-ICSID cases, ICSID charges an annual fee (currently US$42,000) that covers time spent by all ICSID members, including the Secretary, of a case. The disputing parties borne this fee equally. Parties need to contact ICSID for costs if they wish to select limited assistance by the Secretariat.</td>
<td>Yes, the costs are borne by the WTO.</td>
</tr>
</tbody>
</table>
### Table 9: No Secretariat

<table>
<thead>
<tr>
<th>Agreement</th>
<th>CETA</th>
<th>CPTPP</th>
<th>EU- South Korea</th>
<th>EU-MERCOSUR</th>
<th>AANZFTA</th>
<th>EU-Japan</th>
<th>JSEPA</th>
<th>NZ-China FTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secretariat Support:</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes, if parties agree to it</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td><strong>If no secretariat, how is administration handled:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The responding party is in charge of the logistical, organization, and administration process of the dispute</td>
<td>The responding party is in charge of setting up a responsible office for the proceeding of the dispute</td>
<td>The responding party is responsible for logistical administration of hearings.</td>
<td>The chair is responsible for managing the file proceedings as well as communication between the parties and the panel.</td>
<td>Parties must designate contact points for delivery of submissions and other documents exchanged in disputes.</td>
<td>Each party must establish an office to be responsible for the administration of the dispute settlement.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>The panelists may hire their own assistants</td>
<td>The panelists may hire their own assistants</td>
<td>The panelists may hire their own assistants</td>
<td>The panelists may hire their own assistants</td>
<td>The panelists may hire their own assistants, interpreters, translators, or designated notetakers.</td>
<td>The panelists may hire their own assistants.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Description of duties</strong></td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td>No – Assistants hired by the panelists may conduct research and provide assistance.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Permanent Secretariat Support</strong></td>
<td>No – disputing parties share the travel, lodging, and general expenses of the arbitrators</td>
<td>N/A</td>
<td>Expenses of the tribunal, including remuneration of tribunal members, are borne by the disputing parties equally.</td>
<td>Remuneration and expenses of arbitrators are determined by the Trade Committee at its first meeting.</td>
<td>Parties bear the cost of its appointed arbitrator and the legal costs for the dispute.</td>
<td>Expenses of the tribunal, including remuneration of tribunal members, are borne by the disputing parties equally.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Are the Parties responsible for the cost?</strong></td>
<td>Yes – disputing parties share the travel, lodging, and general expenses of the arbitrators</td>
<td>N/A</td>
<td>Expenses of the tribunal, including remuneration of tribunal members, are borne by the disputing parties equally.</td>
<td>Remuneration and expenses of arbitrators are determined by the Trade Committee at its first meeting.</td>
<td>Parties bear the cost of its appointed arbitrator and the legal costs for the dispute.</td>
<td>Expenses of the tribunal, including remuneration of tribunal members, are borne by the disputing parties equally.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>and their assistants’ expenses equally</td>
<td>If no such arrangement is made, the rate of the arbitrator is determined in accordance with WTO practices.</td>
<td>associated with the dispute are borne by the disputing parties equally.</td>
<td>parties equally.</td>
<td>parties equally.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
2.7 Supervision of implementation: the challenge of addressing the effectiveness of DSMs: An Introduction

Implementation provisions address one of the most important and arguably most challenging aspects of the international dispute settlement: effective resolution of disputes. The overall effectiveness of a dispute settlement system is only achieved if adopted panel or tribunal reports are duly implemented in a timely manner. Implementation provisions seek to ensure that a panel or arbitral tribunal’s report and recommendations are complied with and put into effect.

The approach to implementation in FTA DSMs varies. Some DSMs are based on diplomatic or political settlement of disputes, while others provide more rules around the process. Nevertheless, most FTAs’ implementation provisions have three stages. The first stage allows the responding party a reasonable period of time in which to eliminate the non-conforming measure or nullification or impairment caused by that party’s measure. In the case of non-compliance by the responding party, the second stage allows the complaining party to suspend obligations owed to the responding party under the FTA or receive compensation from the responding party. In the last stage, if the panel determines that the responding party has eliminated the non-compliant measures, it requires the complaining party to reinstate the suspended benefits.

There are two major problems with implementation. The first is that it often occurs with considerable delay and, in some cases, does not occur at all. The second major problem is that there are several possible ways to implement a panel report: the complete withdrawal of a measure without replacement, the modification of a measure, and finally, the replacement of the measure with another measure. Both of these problems suggest that serious consideration should be given to (i) improving the monitoring of compliance through surveillance, and (ii) improving the remedies available in the event of non-compliance. These two considerations will be discussed in more detail in the Best Practices Section found below.

The following section will consider how implementation of decisions is addressed under a number of trade agreements and in connection with disputes administered under the auspices of different international institutions. It provides a short summary of each agreement’s or institution’s strengths and weaknesses regarding implementation, followed by a table summarizing the relevant provisions of each agreement and organization discussed.

2.7.1 Most FTAs Permit Compliance Within a Reasonable Period of Time

One of the key features in most FTA compliance provisions is affording the responding member a reasonable period of time to comply with a ruling. Once a panel finds a party to be in violation of its obligations under the relevant agreement, if prompt compliance is not practicable, the

346 CETA, supra note 6 at Article 29.14(1).
347 CPTPP, supra note 23 at Article 28.21(2).
responding party is afforded a reasonable period of time to eliminate the non-conformity or nullification or impairment. Under most agreements and DSMs administered by institutions, the reasonable period of time can be proposed either by the responding party or determined through mutual agreement by the disputing parties. If the parties are unable to agree on a reasonable period of time for compliance, in most agreements the matter will be referred to arbitration to determine the time period. In some agreements, however, if the parties fail to agree on a reasonable period of time, the complaining party is not obliged to seek arbitration of the compliance period and may proceed without the need for approval to suspend the application of the benefits owed to the responding party (ex. NAFTA/CUSMA).

While, strictly speaking, the ability for the responding party to take a reasonable period of time to comply is an exception to be used only in circumstances where immediate compliance is impracticable, in practice the respondent generally does not comply immediately and instead takes advantage of doing so within what is determined to be a reasonable period of time. Thus, the exception has turned into the rule. The reason for this is apparent when taking into account the practical implications of a panel’s determination on a party, especially in cases where compliance requires structural adjustments to a party’s domestic laws. However, some experts suggest that the reasonable period of time provisions could be used more effectively, with arbitrators prescribing shorter periods of time for compliance. These experts argue that six months to one year is often enough to navigate the domestic political processes and other steps needed to implement the rulings of a panel or an arbitral tribunal.

A comparative analysis of agreements and institutions that provide specific procedures on compliance within a reasonable period of time is outlined below.

**NAFTA**

Unlike most FTAs discussed below, NAFTA does not explicitly envision giving the responding party a reasonable period of time in which to comply with the panel ruling. Under NAFTA Chapter 20 (state-to-state dispute settlement), Article 2018 requires the disputing parties to agree on the resolution of the dispute that “normally shall conform” with the determinations and recommendations of the panel. Under Article 2019, if the parties are unable to reach agreement on a mutually satisfactory resolution within 30 days after the issuance of the panel report, the complaining party may suspend the application of the benefits owed to the responding party until the parties can reach an agreement on the resolution of the dispute.

In this light, one expert characterized the panel determination as having a “facilitating role” as opposed to “authoritatively resolving the dispute”, and argued that the panel acts as a “political troubleshooting institute rather than as an independent arbitral body”.

349 Stoll & Steinmann, supra note 345 at 410.
350 Ibid at 411.
352 NAFTA, supra note 9 at Article 2018(1).
354 Ibid at 1042.
In sum, while the NAFTA provides a short period for parties to resolve a dispute before permitting retaliation and may thus encourage quick implementation, it allows the parties to agree on a resolution of the dispute that does not necessarily conform with the panel determination, or even avoid it completely through payment of compensation.

**CETA**

Under CETA, if “immediate compliance is not possible”, the responding party is given 20 days from receipt of the final report to inform the complaining party and the CETA Joint Committee (“CETA-JC”) of the period of time it requires for compliance.\(^{355}\) If the parties do not agree on the “reasonable period of time” to comply, the complaining party has 20 days following the respondent’s notification about the time required to request that the reasonable period of time for compliance be determined through arbitration. The arbitral panel must issue a decision within 30 days.\(^{356}\) Ultimately, the period of time from receipt of the panel report to the decision on the reasonable period of time for compliance could take about 70 days (20 + 20 + 30), which is more than twice the period parties have to resolve the dispute under NAFTA and potentially begin retaliation.

**CPTPP**

The CPTPP calls for immediate compliance unless this is “not practicable”, and allows the responding party a reasonable period of time to comply with the ruling. Disputing parties must endeavor to agree on a reasonable period of time but if they cannot do so within 45 days after the presentation of the final report, any party may, within an additional 15 days, request the chair of the panel to determine the reasonable period of time through arbitration. The chair will make the determination within 90 days of the request, and “shall take into consideration that the reasonable period of time should not exceed 15 months from the presentation of the final report”, although the time can be longer or shorter “depending upon the particular circumstances”.\(^{357}\)

In sum, the complaining party could wait about 150 days (45+ 15 + 90) before knowing how much time the respondent will have to comply with the ruling, and the compliance period will follow after that. Thus far, there have been no disputes brought under the CPTPP, so it is too soon to assess how well or efficiently the system works.

**CUSMA**

Similar to the NAFTA, Article 31.18 of the CUSMA requires the disputing parties to agree on a resolution of the dispute, be it through the elimination of the non-conformity or the nullification or impairment, or another remedy. However, the CUSMA provides 45 days for the parties to come to agreement before retaliation may begin, which is 15 days longer than the period stipulated under the NAFTA.\(^{358}\)

\(^{355}\) CETA, supra note 6 at Article 29.13(1).

\(^{356}\) CETA, supra note 6 at Article 29.13(2).

\(^{357}\) CPTPP, supra note 23 at Article 28.19.

\(^{358}\) CUSMA Protocol of Amendment, supra note 28 at Article 31.18.
Article 1010 of the CFTA records the parties’ agreement that prompt resolution of disputes is important for the benefit of all parties. Similar to other FTAs, a dispute is resolved by removing, amending, or not implementing the measure that is inconsistent with the party’s obligation under the agreement. Upon receipt of the panel report, the responding party may notify the complaining party that it has complied with respect to the matters addressed in the panel report. If the complaining party does not object within 30 days, the responding party is deemed to have complied.

One year after the issuance of the report, the complaining party may request a meeting of the Committee, which must convene within 30 days to discuss with the complaining party “the option of taking retaliatory measures”. Thereafter, the complaining party can proceed to retaliate. Thus the CFTA provides for a relatively long period before retaliation is possible, namely one year plus 30 days.

**EU-Mercosur/EU-Japan/EU-South Korea**

Each of the agreements to which the EU is a party reviewed in this memorandum requires the responding party, no later than 30 days after issuance of the panel report, to notify the complaining party of the time it will require for compliance. If there is disagreement between the parties on the reasonable period of time for compliance, the complaining party has 20 days from such notice to request the original panel to determine the length of the reasonable period of time. However, each agreement imposes a different time limit for the panel to make its determination:

- EU-MERCOSUR requires the panel to issue its ruling within 20 days of the submission of the request;
- EU-South Korea requires the panel to issue its ruling within 20 days of the request (or 35 days if a member of the original panel is no longer available);
- EU-Japan requires the original panel to notify its determination within 30 days of the date of the request.

This means that the EU agreements examined in this memorandum envision a period of 70 to 80 days before the period for compliance is determined.

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359 This section deals only with the CFTA provisions on government-to-government dispute resolution and does not cover person-to-government dispute resolution.
360 CFTA, supra note 6 at Articles 1010(1) and 1010(2).
361 CFTA, supra note 6 at Article 1010(7).
362 CFTA, supra note 6 at Articles 1013(1) and 1013(3).
363 EU-Mercosur, supra note 36 at Article 15(2).
364 EU-Mercosur, supra note 36 at Articles 16(1) and 16(2).
365 EU-Mercosur, supra note 36 at Article 16(2).
366 EU-South Korea, supra note 37 at Article 14.9(3).
367 EU-Japan, supra note 34 at Article 21.20(2).
The AfCFTA and the WTO DSU both require responding parties to comply promptly with legal rulings and both systems include detailed compliance procedures. Under both systems, the responding party must inform the Dispute Settlement Body (DSB) of its intentions in respect of compliance at a meeting of the DSB held within 30 days after the adoption of the panel report. If immediate compliance is not practicable, the responding party is afforded a reasonable period of time to comply.\footnote{AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 21.}

Under both systems, the reasonable period of time may be proposed by the responding party, provided that the DSB approves the proposal. Alternatively, the reasonable period of time can be decided through mutual agreement by the parties within 45 days of the date of the adoption of the report or, in the absence of agreement, a period of time determined through binding arbitration to be carried out within 90 days after adoption of the report. Both the AfCFTA and the WTO DSU provide guidance for the arbitrator stipulating that the reasonable period of time should not exceed 15 months from the date of adoption of the panel report, although it is permissible to award a shorter or longer period depending upon the particular circumstances at play.\footnote{WTO DSU, supra note 2 at Article 21 and AfCFTA, supra note 48 at Article 24(3).} Although there is no experience to date under the AfCFTA, there have been close to 40 such arbitrations conducted under the WTO.

Under these two agreements, therefore, it should take between 45 and 90 days from adoption of the report to know what the compliance period will be. This assumes, however, that these timelines will be followed and we know from experience in the WTO that in almost all cases, they were not. (No disputes have been pursued so far under the AfCFTA.) This is because disputing parties often need more than 45 days from the report’s issuance to seek to arrive at an agreement on the reasonable period of time or it may take several weeks or months to decide to pursue arbitration and then select an arbitrator.\footnote{Interview on a non-attribution basis.}

While the WTO has been considered one of the most effective international dispute settlement systems ever implemented, it is not as effective as it used to be in terms of achieving prompt compliance with results. There are a number of reasons for this but according to experts, one of them relates to the length of the reasonable period of time granted by arbitrators for implementation. For those experts, although compliance is to be effected immediately unless this is impracticable, the word “immediately” is usually overlooked. Hence these experts suggest that one way to shorten the compliance period under the WTO is for arbitrators to impose relatively short periods of time (such as six months as opposed to the average 11 1/2 months) for compliance.\footnote{James Bacchus & Simon Lester, supra note 351.}
NZ-China

Similar to the other FTAs in this memorandum, where the tribunal makes a finding that a measure is inconsistent with the agreement, the responding party must eliminate the measure immediately, but if that is not practicable, it shall implement the findings in the report within a reasonable period of time.\textsuperscript{372}

The disputing parties shall mutually determine the reasonable period of time within 45 days of the release of the report but if the parties cannot agree, either party may refer the matter to the original arbitral tribunal, which shall determine the reasonable period of time following consultation with the parties. The tribunal has 60 days to make the determination, although this can be extended by up to 30 days.\textsuperscript{373} All told, the prescribed timeframe of between 105 and 135 days to determine the reasonable period of time is longer than under the CETA, the EU agreements, the WTO and the AfCFTA, but shorter than under the CPTPP.

JSEPA

Similar to requirements in all FTAs examined in this memorandum, the award of the arbitral tribunal must be complied with promptly. The responding party has 20 days from the issuance of the report to notify the complaining party of the period of time it requires to implement the award. This period may:

- extend to 12 months “only if” administrative or legislative measures have to be taken; and
- be extended or shortened if the parties agree that special circumstances justify it.

If the complaining party considers the period notified to be unacceptable, the parties enter into consultations no later than 10 days after the receipt of the request to try to reach agreement on the compliance period. If no agreement is reached within 20 days, either party may refer the matter to the original arbitration tribunal, which must issue its award within 60 days.\textsuperscript{374}

Taken together, the procedures under the JSEPA provide for a period of 110 days before the compliance period is determined, which is similar to the period under the NZ/China agreement.

AANZFTA

As with other FTAs examined above, a responding party is afforded a reasonable period of time to comply with the arbitral tribunal’s report if implementation cannot take place immediately. The responding party has 30 days from issuance of the report to notify the complaining party of the time it needs to implement the report. If the disputing parties cannot agree on the time period within 45 days from the issuance of the report, either party may request that the matter be determined by the chair of the arbitral tribunal. This request must be made no later than 120 days from the issuance of the report (unless the parties agree otherwise) and the chair’s decision must be rendered within 45 days from the date of the request. A guideline of 15 months maximum is

\textsuperscript{372} NZ-China, supra note 77 at Article 195.
\textsuperscript{373} NZ-China, supra note 77 at Article 196.
\textsuperscript{374} JSEPA, supra note 115 at Articles 147.1, 147.4 and 147.9.
stipulated in the agreement, although the time may be shorter or longer depending upon particular circumstances.\textsuperscript{375}

Under these proceedings, it can take between 90 (45 + 45) and 165 (120 + 45) days to obtain a decision on the reasonable period of time for the responding party to comply with the award. This is a relatively long period when compared with other agreements examined in this memorandum.

\textit{ICSID}

Under ICSID, the award of the tribunal is immediately payable by the award debtor.\textsuperscript{376} However, Article 52 of the ICSID Convention allows either party to seek annulment of the award for reasons related to the tribunal exceeding its powers or failing to follow fundamental procedural rules. This request must be filed within 120 days after the award was rendered. The committee chosen to hear the annulment application may stay enforcement of the award pending its decision. Similarly, enforcement of the award may be stayed if a party requests interpretation of the award under Article 50 or revision of the award under Article 51.

\textit{PCA}

PCA awards are final and binding and “shall be carried out without delay.”\textsuperscript{377} The rules do not address the time period for compliance.

\textit{ICJ}

Article 60 of the Statute of the ICJ states that the judgment of the Court is final but nothing is stipulated in the Statute or in the Rules of Court with respect to providing time for compliance.

\textit{Summary of the reasonable period of time procedures}

The DSMs evaluated above reveal two models with respect to the time permitted to responding parties to comply with rulings. Under most DSMs we considered, compliance is to be effected immediately but if this is not practicable, the respondent is permitted a reasonable period of time to comply. That period of time may be determined by agreement of the parties or, failing that, by arbitration. The timeline permitted for these procedures ranges from 70 days to 165 days. Under the second model (NAFTA and CUSMA), a relatively short period (30 days or 45 days) is provided for the disputing parties to reach agreement on resolution of the dispute and there is no provision for agreeing on or granting the responding party a reasonable period of time to comply. The CFTA does not fit into either model and stands on its own, while the DSMs under ICSID, the PCA, and the ICJ did not address the period of time for compliance.

\textsuperscript{375} AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement at Article 15.6.
\textsuperscript{377} PCA Arbitration Rules 2012, supra note 74 at Article 34(2).
Time for Compliance Model Summary

| Model 1 (CETA, CPTPP, EU-Mercosur, EU-Japan, EU-South Korea, AfCFTA, WTO, NZ-China, JSEPA, AANZFTA): reasonable period of time for compliance is determined by agreement of the parties or through arbitration taking 70 to 165 days |
| Model 2 (NAFTA, CUSMA): no compliance period is envisioned and parties must reach agreement on resolution within a very short period of time |

2.7.2 Compliance Review

Compliance review procedures allow for a disputing party to request the adjudicating body to review and/or monitor the implementation measures and processes taken by the responding party. Under most FTA DSMs, compliance review can take place either before or after a complaining party has had recourse to temporary remedies for non-compliance by the responding party. However, in political/diplomatic models of dispute settlement, there is no specific procedure for monitoring compliance (ex. NAFTA, CUSMA).

NAFTA

The NAFTA does not contain any specific provisions on compliance review.

CUSMA

CUSMA provides for compliance proceedings in the event that a responding party considers that it has eliminated the non-conformity with the CUSMA found by the panel. In such case, the responding party may request that the original panel be reconvened to consider the matter. The panel has 90 days from the time it reconvenes in which to determine the issue and if it determines that the non-conformity has not been eliminated, the complaining party may suspend benefits. The agreement does not say so explicitly but the provision is crafted in a way that suggests it addresses compliance only once retaliation procedures have begun.

CETA

Under the CETA, compliance proceedings can be undertaken before or after suspension of obligations occurs. Thus, if there is a disagreement between the parties about the existence or consistency with the agreement of a measure taken to comply with a ruling before suspension of obligations, the matter must be referred by the complaining party to the original arbitration panel for determination within 90 days of the request. Suspension of obligations is not permitted during the arbitral process. Only if the arbitration panel determines that compliance has not occurred is the complaining party entitled to suspend obligations or receive compensation.

When suspension of obligations has occurred and the responding party takes measures to comply with the panel ruling, the responding party may request an end to the suspension of obligations. If the parties do not reach agreement on whether compliance has been achieved within 60 days from

378 Chase, supra note 131 at 34.
379 CUSMA, supra note 6 at Article 31.19(3).
the request, the responding party can request the arbitration panel to rule on compliance within 90 days of that request. Suspension of obligations must be terminated if the panel rules that there has been compliance.\textsuperscript{380}

**CPTPP**

Under the CPTPP, if the responding party has received a notice from the complaining party that it intends to suspend benefits following the parties’ inability to agree on compensation, and the responding party considers that it has complied with the original ruling, the responding party may refer the matter of compliance to the original panel, which shall decide the issue within 90 days. Only if the panel determines that the non-conformity has been eliminated may the complaining party suspend benefits.\textsuperscript{381}

If suspension of benefits has already occurred and a responding party considers that it has eliminated the non-conformity, it may refer the matter of compliance to the panel, which must decide the matter within 90 days. If the panel determines that the responding party has eliminated the non-conformity, the complaining party must reinstate the suspended benefits promptly.\textsuperscript{382}

**CFTA**

The CFTA provides for compliance review under two possible scenarios. Under one approach, the responding party can request a compliance proceeding if it has notified the complaining party that it has complied with the ruling and the complaining party objects to that notice within 30 days of receiving it. Compliance review may also take place one year after the issuance of a panel report. In such case, a disputing party may request that the panel be reconvened as a compliance panel to determine whether the responding party has come into compliance. If there is a determination that there has not been compliance, the panel must issue a monetary penalty order.\textsuperscript{383}

**EU-Mercosur/EU-South Korea/EU-Japan**

These three agreements contain compliance review provisions similar to those under the CETA and CPTPP described above.

Under the EU-Mercosur agreement, the responding party is required to notify the complaining party and the Trade Committee of the action it has taken to comply prior to the expiry of the period for implementation. If the parties disagree on the existence or conformity with the award of the notified measure, the complaining party shall refer the matter to the original arbitration panel, which must issue a decision on compliance within 45 days.\textsuperscript{384}

Compliance review is also possible after retaliation has occurred. Under this procedure, the responding party notifies the complaining party of the measures it has taken to comply with the

\begin{itemize}
  \item \textsuperscript{380} CETA, supra note 6 at Articles 29.14 and 29.15.
  \item \textsuperscript{381} CPTPP, supra note 23 at Article 28.20(5).
  \item \textsuperscript{382} CPTPP, supra note 23 at Articles 28.21(1), and 28.21(2).
  \item \textsuperscript{383} CFTA, supra note 6 at Articles 1010(9), 1010(10) and 1010(11).
  \item \textsuperscript{384} EU-Mercosur, supra note 36 at Article 17.
\end{itemize}
original ruling following suspension of concessions or following the application of temporary compensation. The complaining Party must terminate the suspension or the application of compensation within 30 days. \[385\] If, however, the parties disagree on whether or not the notified measure brings the responding party into compliance, the matter can be referred to the arbitration panel by either party within 30 days of the responding party’s notification of compliance, and the panel must issue a ruling within 45 days. If the panel finds there has been compliance, the suspension of concessions or compensation must be terminated. \[386\]

The compliance provisions under the EU-South Korea are identical to those under the EU-Mercosur agreement except that the EU-South Korea agreement makes provision for an extension of time in the event one of the original panelists is not available to sit on the compliance panel. Instead of a 45-day time period, the panel has 60 days to make the determination. \[387\]

EU-Japan Economic Partnership Agreement are almost identical to those under the EU-Mercosur and EU-South Korea agreements, except that for pre-retaliation compliance, the panel has 90 days to make a decision (as opposed to 45 days under the EU-Mercosur and EU-Japan agreements). Post-retaliation compliance review is the same as under the EU-Mercosur and EU-Korea agreements. \[388\]

**WTO/AfCFTA**

Similar to other DSMs described above, both the WTO and the AfCFTA provide that if there is disagreement between the disputing parties as to the existence or consistency with obligations of measures taken to comply with the original ruling, the issue of compliance shall be decided by the original panel, if possible. The panel has 90 days within which to issue its report (a timeline that is never met in the WTO context and has never been tested in the AfCFTA context). \[389\]

The WTO and the AfCFTA also offer a unique approach to compliance review. One of the main strengths of the AfCFTA and WTO DSMs is that regular surveillance of implementation is carried out by the members of the organization sitting as the DSB. The DSB is mandated to:

> “maintain surveillance of implementation of rulings and recommendations of the Panels and Appellate body; and … authorize the suspension of concessions and other obligations under the Agreement”. \[390\]

The issue of implementation in each dispute is placed on the monthly agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time to comply, and remains there “until the issue is resolved”. Moreover, the responding party must provide a status report regarding progress in implementation in the particular dispute, both in writing and

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385 EU-Mercosur, supra note 36 at Article 19.
386 EU-South Korea, supra note x at Articles 14.10(3) and 14.12(3).
387 Ibid.
388 EU-Japan, supra note 34 at Articles 21.21(2), 21.21(3) and 21.23(2).
390 AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 5(3)(c) and (d); WTO DSU, supra note 2 at Article 2.1.
orally at the DSB meeting every month. In the WTO, the status report must provide the progress with implementation; under the AfCFTA, the report must contain the extent of the implementation, the issues affecting the implementation, and the period of time required by the responding party for full compliance. This surveillance mechanism may contribute to the WTO’s very high compliance record. Among our interviewees, some agreed that having a regular surveillance mechanism can help with implementation because the responding party may wish to avoid being “named and shamed” on a monthly basis. However, other interviewees indicated that over time, the status report has become less effective and often does not provide much information on the true degree of progress (or lack of it) in implementation.

As observed by one of the experts we interviewed, this type of oversight is not possible in a bilateral FTA because only the two parties involved in the dispute would form the oversight body, which means it would have no impact on the responding party. This contrasts sharply with the system under the WTO and the AfCFTA, where the oversight is carried out by the DSB composed of many members who were not involved in the dispute and hence do not have a direct stake in implementation. These disinterested parties would be better placed to sanction non-compliance.

**NZ-China/AANZFTA**

All three of these agreements include compliance review provisions that may be invoked before or after suspension of concessions.

The NZ-China agreement contains similar provisions to many of those described above (e.g., CETA, EU-Mercosur, EU-South Korea, EU-Japan). Article 197 requires the parties to refer to an arbitral tribunal if the parties disagree on the existence or consistency with the agreement of measures taken by the responding party to comply with the ruling. The panel must provide its decision within 60 to 90 days of the referral of the matter. If suspension of concessions has begun and the responding party considers that it has eliminated the non-conformity, it may so notify the complaining party and the latter must promptly stop suspension of concessions. If, however, there is disagreement between the parties as to whether compliance has been achieved, the issue may be referred to the original tribunal to decide. The tribunal will have 60 days to do so and if it determines that compliance has occurred, the complaining party must promptly stop the suspension of concessions.

The compliance provisions under the AANZFTA are similar to those under the NZ-China agreement except that more detail is provided about the conduct of the proceedings and the tribunal makes a preliminary ruling within 75 days and a final ruling within 90 days. Identical compliance procedures may be requested by the responding party after the right to suspend concessions has been exercised and the responding party considers that it has complied with the ruling.

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393 Interview with expert on non-attribution basis. There is, as yet, no experience under the AfCFTA.
394 Interview with expert on non-attribution basis.
395 Interview with expert on a non-attribution basis.
396 NZ-China, supra note 77 at Articles 197 and 199.
397 AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement at Articles 16, 17(10)(b) and 17(11).
Under the JSEPA, if the complaining party considers that the measures taken by the responding party to comply with the original award do not comply with it, the complaining party may request consultations to resolve the matter and if no resolution is found within 30 days from the expiry of the compliance period, either party may refer the matter to an arbitral tribunal. If the tribunal confirms that the responding party has failed to comply with the award, procedures for retaliation may begin. The agreement does not say so explicitly but the provision is crafted in a way that suggests it addresses compliance only once retaliation procedures have begun.

ICSID/PCA/ICJ

There are no compliance review procedures in the ICSID Convention, the PCA Arbitration Rules, or the ICJ Statute or Rules of Procedure.

Summary of the compliance review procedures

The DSMs evaluated above reveal four models for compliance review procedures. Some DSMs do not address compliance review. The CUSMA and the JSEPA do not say so explicitly but the provisions are crafted in a way that suggests they address compliance only once retaliation procedures have begun and the responding party objects on the basis of having eliminated the non-conformity. Most of the FTAs we examined provide for compliance review both before and after the implementation of temporary remedies (compensation or suspension of obligations or concessions). Compliance review generally takes the form of referral to the original arbitration panel to decide whether or not measures taken to comply with the original award did in fact exist or in fact comply with the award. Finally, the WTO and the AfCFTA share a unique feature whereby the members of the agreement meeting as a Dispute Settlement Body maintain surveillance over progress with implementation at monthly meetings where the responding party must report on progress or problems with implementation.

Only the WTO DSM has been used sufficiently often to provide any lessons learned on whether the available compliance procedures work well. WTO members regularly seek to have a panel reconvened to determine if the measures taken to comply exist or have achieved compliance. Most of the time, this process is invoked before suspension of concessions is authorized. One criticism of this process is that it can add considerable time to the dispute settlement process and to the time before relief in the way of temporary remedies are available to the complaining part. However, the WTO system of monthly surveillance by the DSB is considered a useful means of imposing pressure on the respondent to come into compliance. 399

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398 JSEPA, supra note 115 at Articles 147.3 and 147.4
399 Non-attribution interview.
2.7.3 Temporary Remedies in Case of Non-Compliance

As the analysis below will reveal, most FTAs have provisions related to temporary remedies in the case of non-compliance. The purpose of temporary remedies is to allow parties to take action against injurious treatment by another party on a temporary basis until the inconsistent measures are withdrawn or brought into compliance with the relevant agreement. Most FTAs analyzed in this memorandum, require the parties to enter into negotiations or consultations in an attempt to reach a mutually acceptable decision on the remedies to be provided. If the Parties are unable to reach agreement, the matter can either be referred to a panel or, in some cases, the complaining party will be able to automatically suspend the application of benefits owed to the responding party.

However, remedies have been a problem area both in FTAs and in the WTO. One of the problems is their “prospective nature”, meaning that the retaliation timetable begins only when the level of nullification caused by non-compliance is determined. In other words, the complaining party is not compensated for the period during which the impugned measure was in place or even from the period when it was determined to be inconsistent with the relevant agreement. Thus, retaliation may begin only long after the harm caused by the inconsistent measure began. Some have advocated for a partially retrospective system that would allow for remedies to be calculated to begin from an earlier moment in the dispute settlement proceedings, as this could serve as an incentive for responding parties to comply more promptly rather than prolonging procedures in order to push ahead the date for retaliation.

A comparative analysis of all the agreements and institutions that provide specific procedures on temporary remedies in the case of non-compliance is outlined below.

**NAFTA/CUSMA**

Our research revealed that the NAFTA and the CUSMA have the shortest time limit before the adoption of temporary remedies in the event of non-resolution of the dispute. As mentioned above in the reasonable period of time section, if the disputing parties are unable to mutually agree on a resolution of the dispute that “normally shall conform” to the panel ruling within 30 days, the NAFTA permits the complaining party to suspend the application of the benefits owed to the

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responding party until such time as they have reached agreement on a resolution of the dispute. The CUSMA has a similar provision, except that the parties have 45 days to agree on a resolution of the dispute. In both agreements, if the responding party considers that the level of benefits proposed to be suspended is “manifestly excessive”, it can request the original panel to rule on this matter. The panel must issue its determination within 60 days under the NAFTA (unless the parties agree otherwise) and 90 days under the CUSMA. In addition, under the CUSMA, if the panel decides that the responding Party has not eliminated the non-conformity, the complaining Party shall continue the temporary remedy in line with the panel’s determination of the right level of suspension.

Compared with other FTAs discussed below, NAFTA and CUSMA allow the complaining party to take retaliatory measures comparatively soon after the final report is issued (30 days or 45 days) and do not afford much time to the disputing parties to come to an agreement with respect to a resolution to the dispute. In this way, NAFTA and CUSMA may eliminate delays in compliance encountered in most dispute settlement systems.

However, a troubling aspect of the NAFTA is the language of Articles 2018 and 2019, which requires the Parties to reach an agreement that “normally shall conform with the determinations and recommendations of the panel”. This is in contrast with the much stronger language under the WTO DSU, for example, that underlines the importance of strict compliance: “[p]rompt compliance with recommendations or rulings … is essential in order to ensure effective resolution of disputes to the benefit of all Members.” In addition, under the NAFTA and the CUSMA, it is possible to resort to compensation “in lieu of removal of the non-conforming measure”. However, under the WTO, compensation is voluntary and clearly does not constitute full compliance:

“Compensation [is a] temporary measure … available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, . . . compensation [is not] preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary ….”

CETA

Unlike the NAFTA and the CUSMA, CETA is definitive in disciplining strict compliance with the panel report. CETA requires the responding party to “take any measure necessary” to comply with the report. However, suspension of obligations (i.e., retaliation) under CETA can begin only after the reasonable period of time (whatever it is determined to be) expires.

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401 NAFTA, supra note 9 at Article 2019.1 and CUSMA, supra note 6 at Article 31.19(3).
402 NAFTA, supra note 9 at Article 2019.4; CUSMA, supra note 6 at Article 31.18(1).
403 NAFTA, supra note 9 at Articles 2018, 2019(1), 2019(3) and 2019(4); CUSMA, supra note 6 at Article 31.19(1), 31.19(3) and 31.19(4).
404 NAFTA, supra note 9 at Article 2018(1).
405 WTO DSU, supra note 2 at Article 21.1.
406 Huntington, supra note 344 at 424.
407 WTO DSU, supra note 2 at Article 22.1.
408 CETA, supra note 6 at Article 29.12.
If the responding party fails to notify the time it will require for compliance within 20 days of the issuance of the final report, or if the reasonable period of time for compliance has expired and the responding party has not come into compliance, the complaining party can have recourse to temporary remedies: it will be entitled to suspend obligations equivalent to the level of impairment caused by the violation, or receive compensation. The complaining party can implement suspension 10 working days after notifying the respondent that it intends to do so, unless the respondent requests arbitration to determine the appropriate level of suspension. The arbitration panel must make the determination on the level of suspension within 30 days of the request for arbitration, after which the complaining party will be entitled to suspend obligations equivalent to the amount determined. These time periods (as short as 30 days or as much as 60 days after the compliance period has expired) are tighter than that under some FTAs and under the WTO and therefore may be perceived as more advantageous to the complainant because it encourages early compliance and provides for suspension of obligations in a shorter time frame. This assumes, of course, that these tight timeframes will actually be met in practice. To date there has been no recourse to the CETA DSM.

Like under most FTAs, suspension of obligations is temporary and must be discontinued when the offending measure has been withdrawn or brought into conformity with CETA obligations.

Another mechanism that could make the CETA approach a preferred alternative to that offered under WTO dispute settlement is the partial retrospective effects of retaliation under CETA. Under the DSU, remedies are only of a “prospective nature”, such that, as mentioned above, the retaliation timetable starts only once the level of nullification is determined. This provides an incentive to the responding party to conduct itself so that it delays retaliation measures as long as possible. However, when a complaining party seeks to suspend obligations under CETA equivalent to the level of nullification cause by the violation, the level of nullification is calculated starting from the date of notification of the final report rather than, as under the WTO, from the date the level of nullification is determined. This “partially retrospective nature” of the remedy may be a disincentive to the responding party under CETA from “procedural foot dragging” in complying with the final report.

CPTPP

Under the CPTPP, once the reasonable period of time for compliance has expired or the responding party has indicated that it does not intend to comply, parties have 45 days to agree on compensation. If no agreement is reached, the complaining party may suspend benefits after an additional 30 days (total 75 days from the end pf the period of compliance). The responding party has the right to challenge the level of suspension through arbitration, which will push out the time to begin retaliation to the date the arbitral decision is delivered (about an additional 90 days).

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409 CETA, supra note 6 at Article 29.14(1).
410 CETA, supra note 6 at Articles 29.14(5) and 29.14(6).
411 CETA, supra note 6 at Articles 29.14(7) and 29.14(8).
412 CETA, supra note 6 at Article 29.14(1).
413 William J. Davey, “Compliance Problems in WTO Dispute Settlement” (2009) 42:1 Cornell Int. LJ
414 CETA, supra note 6 at Article 29.14(1)
415 CPTPP, supra note 23 at Articles 28.20(2), 28.20(3) and 28.20(5).
is also possible to avoid suspension of benefits for a maximum of 12 months (unless extended) if the responding party pays a monetary assessment.\textsuperscript{416}

Thus, similar to the CETA and the WTO, the disputing parties under the CPTPP can negotiate temporary compensation instead of immediate compliance; the same is true if the respondent indicates that it does not intend to eliminate the non-conformity. While this may be attractive to some complainants and, in cases where the responding party is not financially strong, may be an incentive to comply sooner, it provides the wrongdoer with a handy alternative to compliance.\textsuperscript{417}

It also provides a way for rich violators to avoid complying with their obligations. It is important to bear in mind, however, that compensation and the suspension of concessions are usually temporary remedies and should not be treated as compliance with a panel award. This is made clear in Article 28.20(15):

\begin{quote}
“compensation, suspension of benefits and the payment of a monetary assessment shall be temporary measures. None of these measures is preferred to full implementation through elimination of the non-conformity or the nullification or impairment.”
\end{quote}

\textit{CFTA}

Under Article 1013 of the CFTA, if the panel determine that a measure is inconsistent with the agreement and has not been resolved within one year from the date of issuance of the original report,\textsuperscript{418} the complaining party may, after discussing the matter with the Committee on Internal Trade and the passing of an additional period of 30 days, suspend benefits of equivalent effect to the offending measure, or take retaliatory measures of equivalent effect until such time as a mutually satisfactory resolution of the dispute is achieved.\textsuperscript{419} Each disputing party may request that the panel be reconvened within 30 days to determine whether the retaliatory measures or suspension of benefits are manifestly excessive\textsuperscript{420} or to determine whether the responding party has complied with the matters addressed in the report.\textsuperscript{421}

A strength of the CFTA is the unique requirement for the complaining party to “discuss” with the Internal Trade Committee the option of taking retaliatory action. This might prevent or decrease the possibility of excessive retaliatory action. Other FTAs do not require the complaining party to discuss the option of retaliatory action with a committee.\textsuperscript{422}

Another unique aspect of the CFTA is that it removes access to the dispute resolution mechanism if there is non-compliance. A party cannot initiate new proceedings if a compliance panel has determined that there has been non-compliance by that party and that party has not brought itself

\begin{flushleft}
\textsuperscript{416} CPTPP, supra note 23 at Articles 28.20(7), 28.20(8) and 28.20(10).
\textsuperscript{418} CFTA, supra note 6 at Article 1013(1).
\textsuperscript{419} CFTA, supra note 6 at Article 1013(3).
\textsuperscript{420} CFTA, supra note 6 at Article 1013(5).
\textsuperscript{421} CFTA, supra note 6 at Article 1013(7).
\textsuperscript{422} CFTA, supra note 6 at Article 1013(3).
\end{flushleft}
into compliance within 180 days of the issuance of the compliance report. This applies even if the party has had benefits suspended or retaliatory measures imposed against it.423

**EU-Mercosur/ EU-South Korea**

The temporary suspension provisions under the EU-Mercosur and EU-South Korea agreements are quite similar, although there are minor differences among them. Under these agreements, upon the panel’s determination that the responding party has taken no measures to comply or the measures taken are not compliant with the arbitral award, the responding party shall, if requested by the complaining party, present an offer for temporary compensation.424

If the complaining party decides not to request an offer for compensation, or if such request is made and no agreement is reached between the parties within 30 days after the end of the reasonable period of time for compliance, the complaining party may, upon notification to the responding party and the Trade Committee, suspend concessions or other obligations.425

If the responding party considers the level of suspension to be excessive, it can request the original panel to reconvene to rule on the matter within 30 days from receipt of notification of the concessions to be suspended. The panel will have 30 days to issue its ruling. During this time, the complaining party is not permitted to suspend concessions.426 Finally, suspension of obligations shall be temporary.427

A unique feature of the EU-South Korea agreement is the provision of an option for the complaining party to suspend obligations through increasing its tariff rates to the level applied to other WTO Members on a volume of trade to be determined “in such a way that the volume of trade multiplied by the increase of the tariff rates equals the value of the nullification or impairment.”428 Having this feature might clarify what is the appropriate level of suspension and eliminate or reduce complaints about excessive levels of suspensions taken by complaining parties.

**EU-Japan**

Under Article 21.22(1) of the Agreement, the complaining party can request the responding party to enter into consultations with a view to agreeing on compensation or an alternative arrangement if:

- the original panel finds the measure taken to comply by the responding party is inconsistent with the relevant provisions of the Agreement, or;
- the responding party fails to notify any measures taken to comply before the expiry of the reasonable period of time, or;
- the responding party notifies the complaining party that it is impracticable to comply with the final report within the reasonable period of time.

423 CFTA, supra note 6 at Article 1033(2)(b).
424 EU-Mercosur, supra note 36 Dispute Settlement chapter at Article 18; EU-South Korea, supra note 37 at Article 14.11(1).
425 EU-Mercosur, supra note 36 Dispute Settlement chapter at Article 18.2; EU-South Korea, supra note 37 at Article 14.11(2).
426 EU-Mercosur, supra note 36 Dispute Settlement Chapter at Article 18.4; EU-South Korea, supra note 37 at Article 14.11(4).
427 EU-Mercosur, supra note 36 Dispute Settlement Chapter at Article 18.5; EU-South Korea, supra note 37 at Article 14.11(6).
428 EU-South Korea, supra note 37 at Article 14.11(3).
If the complaining party chooses not to pursue compensation or other arrangement or if agreement cannot be reached on either of these within 20 days, the complaining party may notify the responding party that it intends to suspend concessions and shall specify the level of suspension. Suspension may be implemented within 15 days unless the responding party objects to the level of suspension and requests within 15 days that the original panel determine the appropriate level of suspension. The panel has 30 days to decide the matter and concessions may not be suspended during the arbitration period. Suspension of concessions is temporary and must be discontinued once the inconsistency has been removed or an alternative arrangement has been agreed.\textsuperscript{429}

\textit{WTO/AfCFTA}

Under both the WTO and AfCFTA agreements, if the responding party fails to bring the measure found to be inconsistent with the agreement into compliance, it must, if requested and no later than the expiry of the reasonable period of time for compliance, enter into negotiations with the complaining party to develop mutually acceptable compensation. If the parties are unable to agree within 20 days, the complaining party may request authorization from the DSB to suspend concessions.\textsuperscript{430}

If the responding Party objects to the level of suspension proposed, the matter is referred to arbitration by the original panel, if possible. The panel is to issue its decision within 60 days of the expiry of the reasonable period of time.\textsuperscript{431} Thereafter, the complaining party must request authorization from the DSB to retaliate at the level determined by the panel.\textsuperscript{432} As with other agreements, suspension of concessions is temporary and may only be applied until the inconsistent measure is removed or brought into compliance with the relevant agreement.\textsuperscript{433}

\textit{NZ-China}

The NZ-China agreement is addresses temporary remedies in the same way as many of the FTAs discussed above. If there is non-compliance within the reasonable period of time, the parties enter onto negotiations on compensation and seek to reach agreement within 30 days. If they do not reach agreement, the complaining party may suspend concessions with a 30-day notice.\textsuperscript{434}

As with other agreements, the level of suspension must be equivalent to the level of impairment caused by the offending measure\textsuperscript{435} and the responding party can object to the level proposed. In

\textsuperscript{429} EU-Japan, supra note 34 at Article 21.22.
\textsuperscript{430} AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 25.4; WTO DSU, supra note 2 at Article 22.2.
\textsuperscript{431} AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 25.8; WTO DSU, supra note 2 at Article 22.6.
\textsuperscript{432} AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 25.9; WTO DSU, supra note 2 at Article 22.7.
\textsuperscript{433} AfCFTA, supra note 48 at Protocol on the Rules and Procedures on the Settlement of Disputes at Article 25.2; WTO DSU, supra note 2 at Article 22.8.
\textsuperscript{434} NZ-China, supra note 77 at Articles 198.1 and 198.22.
\textsuperscript{435} NZ-China, supra note 77 at Article 198.4(a)(b).
such case, the arbitral tribunal will determine whether the level of concessions is excessive within 60 days.\textsuperscript{436}

\textit{JSEPA}

If the responding party fails to comply with the arbitral tribunal’s award within the reasonable period of time for compliance and this has been confirmed by a compliance panel, the complaining party may, within 30 days of such confirmation and a 30-day notice to the responding Party, notify the responding party of its intention to suspend the application of benefits.\textsuperscript{437}

Alternatively, the parties can negotiate compensation or an alternative arrangement if the responding party considers that compliance with the original award is impracticable. The timeline for implementing the compensation or other arrangement must also be agreed. If no agreement is reached within 30 days, the matter may be referred to arbitration. If the responding Party fails to implement the compensation or alternative arrangement within the implementation period, the complaining party can suspend concessions after 30 days’ notice.\textsuperscript{438} As under other agreements, the responding party objects to the level of suspension, it may request consultations with the complaining party within 10 days. If the parties fail to resolve the matter within 30 days, either Party can refer the matter to an arbitral tribunal.\textsuperscript{439}

\textit{AANZFTA}

Similar to FTAs discussed above, if there is a failure to comply, the responding party shall, if requested by the complaining party, enter into negotiations with a view to agreeing on compensation. If the parties are unable to reach agreement within 30 days, the complaining party may notify the responding party of its intention to suspend the application of benefits equivalent to the level of impairment and will have the right to begin suspension within 30 days.\textsuperscript{440} The responding party can object to the level of suspension and may request the arbitral tribunal to reconvene to consider the matter and provide its assessment. within 30 days.\textsuperscript{441} Suspension of concessions is temporary and may only be applied until such time as the responding party comes into compliance or a mutually satisfactory solution has been reached.\textsuperscript{442}

\textit{ICSID/PCA/ICJ}

The ICSID Convention, the PCA Arbitration Rules, and the ICJ Statute and Rules of Court do not have provisions relevant to this section.

\textit{Summary of temporary remedies/suspension of concessions in the case of non-compliance procedures}

\textsuperscript{436} NZ-China, supra note 77 at Articles 198(2), 198(4) and 198(6).
\textsuperscript{437} JSEPA, supra note 115 at Articles 147.5 and 147.7
\textsuperscript{438} JSEPA, supra note 115 at Articles 147.2, 147.6, and 147.7.
\textsuperscript{439} JSEPA, supra note 115 at Articles 147.7 and 147.8.
\textsuperscript{440} AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement at Article 17.2 and 17.3.
\textsuperscript{441} AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement at Article 17.10(b).
\textsuperscript{442} AANZFTA, supra note 76 at Chapter 17 Consultation and Dispute Settlement at Article 17.9.
We would make four observations based on our survey of FTA DSMs above. First, most of the FTAs we examined provide that disputing parties may seek to negotiate temporary compensation in the event of non-compliance, which may remain in place only until such time as compliance is achieved. Under the NAFTA and CUSMA, however, compliance can be a resolution to the dispute in itself.

Second, all of the agreements we examined except the NAFTA and the CUSMA permit suspension of concessions by the complaining party following the respondent’s failure to come into compliance within a determined ‘reasonable period of time’ to comply, and in each case the responding party can challenge the level of suspension through arbitration. The NAFTA and CUSMA do not provide for a reasonable period in which the responding party must come into compliance before retaliation procedures can begin, although both agreements allow the responding party to challenge the level of suspension as exceeding the level of nullification and impairment.

Third, only the WTO, AfCFTA and CFTA impose an intermediary step between (i) failure of the respondent to comply within a set period of time, or the determination on the appropriate level of compensation through arbitration, and (ii) the start of suspension of concessions. In the WTO and AfCFTA, the complainant needs to obtain authorization to suspend concessions from a third party – namely the DSB. Under CFTA, the complaining party does not have to obtain authorization but it does have to discuss the matter of suspension with the International Trade Commissions before it proceeds with retaliation.

Fourth, the CETA is unique in providing for partially retrospective retaliation. Most FTAs we examined provide for prospective suspension of concessions in that the retaliation timetable starts from the date the level of nullification is determined. Under the CETA, retaliation may be authorized for the period starting from the date of notification of the final panel report.

It is difficult to draw clear lessons from all of this because there have been so few cases under FTA DSMs. The only FTA DSM we examined where there has been considerable activity is the WTO, where about 200 original panel reports plus over 40 compliance panel reports have been circulated. There have been 38 “reasonable period of time” arbitrations, 38 awards in arbitrations regarding the level of suspension, and 22 authorizations from the DSB to suspend successions. Thus, it appears that WTO members have made regular use of these post-report procedures, but have not done so in most disputes.

We would categorize the temporary remedies/suspension of concessions models as follows:

<table>
<thead>
<tr>
<th>Temporary Remedies/Suspension of Concessions Models</th>
<th>CETA, CPTPP, EU-Mercosur, EU-South Korea, EU-Japan, WTO, AfCFTA, NZ-China, JSEPA, AANZFTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation is temporary measure only</td>
<td>CETA, CPTPP, EU-Mercosur, EU-South Korea, EU-Japan, WTO, AfCFTA, NZ-China, JSEPA, AANZFTA</td>
</tr>
<tr>
<td>Compensation is resolution in itself</td>
<td>NAFTA, CUSMA</td>
</tr>
<tr>
<td>Suspension of concessions following failure to come into compliance within ‘reasonable period’</td>
<td>CETA, CPTPP, EU-Mercosur, EU-South Korea, EU-Japan, WTO, AfCFTA, NZ-China, JSEPA, AANZFTA</td>
</tr>
</tbody>
</table>
of time’ to comply + possible challenge to level
of suspension through arbitration

| Intermediary step between (i) failure to comply within a set period of time, or determination of level of compensation through arbitration, and (ii) start of suspension of concessions | WTO, AfCFTA, CFTA |

2.8 Best Practices for Supervision of Implementation

As mentioned in section 2.7, the main weakness of implementation procedures under FTA DSMs is the considerable time it takes for a responding party to implement the decision of a panel or tribunal, especially when the measure is modified or replaced as opposed to being withdrawn.\(^\text{443}\) This is evident both in the text of the agreements and in practice.\(^\text{444}\) Most DSMs we examined require the responding party to implement panel or tribunal decisions immediately, but in virtually every case, disputing parties go through a series of procedures at different stages of implementation, such as the determination of the reasonable period of time to comply, compliance review, possibly negotiation and agreement on temporary remedies, and sometimes suspension of concessions. While these procedures are often necessary because immediate compliance is usually not practicable and parties often disagree on whether or not compliance has in fact taken place, in practice they lead to considerable delay before the claimant receives any concrete result. In other words, in most cases the implementation process has taken longer than originally foreseen in the agreements.

This following section identifies three ‘best practices’ that could minimize the problem of inherent delay within each stage of the implementation process. The three best practices are: (i) imposition of shorter compliance periods by arbitrators, (ii) regular surveillance of progress with compliance (ex. WTO, AfCFTA), and (iii) improving temporary remedies by requiring shorter time periods before the application of sanctions is permitted (ex. NAFTA, CUSMA), permitting retrospective sanctions (CETA), and increasing sanctions over time (ex. EC in US FSC).

**Prompt Compliance Periods Imposed by Arbitrators**

Most FTAs stress the importance of “prompt” compliance with panel or tribunal reports (ex. CFTA, CPTPP, WTO). However, practice has proven that prompt compliance has turned into an exception as opposed to a rule. One method to try to minimize compliance time is for arbitrators to impose shorter periods of time permitted for compliance in their awards.\(^\text{445}\) WTO scholars argue that a period of six months to one year generally provides enough time to implement WTO rulings and recommendations.\(^\text{446}\) When arbitrators need to determine a reasonable period of time to comply, the guideline set forth in the agreement (ex. 15 months in WTO, CETA, AfCFTA) should

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\(^{444}\) Interview with expert on non-attribution basis.

\(^{445}\) Interview with expert on non-attribution basis.

be treated as an outer limit, with shorter periods where possible. Although WTO arbitrators have only awarded in excess of 15 months on one occasion (and only by one week), the average period of time awarded has been a bit longer than 11 months. A six-month period has been awarded only once.\textsuperscript{447} WTO Article 21.3 cases indicate that arbitrators regularly refer to ‘particular circumstances’ such as dire economic circumstances in the implementing member or especially complex implementation measures to justify a period of implementation longer than 15 months, as permitted under DSU Article 21.3(c). In US-Gambling, the arbitrator “contested the assertion that the terms ‘reasonable’ and ‘shortest’ period of time are interchangeable” and argued that it would be “inconvenient to assume that arbitrators should always look for the shortest period of implementation”.\textsuperscript{448} Nevertheless, arbitrators can have an instrumental role in achieving more prompt compliance by imposing shorter periods of time for compliance when possible.

\begin{tabular}{|l|}
\hline
\textbf{Implementation is More Effective When:} \\
Prompt Compliance Periods Are Imposed by Arbitrators \\
\hline
\end{tabular}

\textit{Regular Surveillance of Progress with Compliance}

An effective method to increase the efficacy of dispute settlement procedures is regular surveillance, as implemented in the WTO and the AfCFTA. Under Article 21.6 of the WTO and Article 24.8 of the AfCFTA, after six months following the establishment of the reasonable period of time, the issue of implementation is placed on the agenda of the Dispute Settlement Body (DSB) meeting and remains on the monthly agenda until the issue is resolved.\textsuperscript{449} More importantly, 10 days prior to and during each meeting, the responding party must provide the DSB with a detailed status report on implementation of the panel report in question. We acknowledge, however, that WTO practice has shown that the status reports do not always provide the specific information required to fully know the status of compliance. This problem has been addressed in the AfCFTA, Article 24.9:

“…the State Party concerned shall provide the DSB with a detailed status report which shall contain among others:

(a) the extent of the implementation of the ruling(s) and recommendation(s);
(b) issues if any, affecting the implementation of the rulings and recommendations;
(c) the period of time required by the State Party concerned to fully comply with implementation of the ruling(s) and recommendation(s).\textsuperscript{450}

Having a mechanism for regular surveillance of compliance can be an incentive to discourage delays in compliance. It is not unreasonable to assume that parties would want to report that they are bringing their inconsistent measures into compliance as soon as practicable, especially as they

\textsuperscript{447} WTO DSU, supra note 2 at Article 21.
\textsuperscript{449} WTO DSU, supra note 2 at Article 21.6 and AfCFTA, supra note 48 at Article 24.8.
\textsuperscript{450} AfCFTA, supra note 48 at Article 24.9.
would hope that responding parties do the same when they are the complaining party. The surveillance mechanism can also provide transparency about the steps taken by the responding party to eliminate the non-conformity. Most FTAs do not provide for a mechanism for overseeing the status of implementation. In some FTAs, however, communication about the status of compliance can be done if requested by the complaining party throughout the reasonable period of time (ex. CETA).\footnote{CETA, supra note 6 at Article 29.14(1).}

In addition to regular surveillance by the DSB, other bodies can help enhance the implementation process. For example, Article 24.5 of the AfCFTA provides that:

“The Secretariat shall keep the DSB informed of the status of the implementation of decisions made under this Protocol.”\footnote{AfCFTA, supra note 48 at Article 24.5.}

<table>
<thead>
<tr>
<th>Implementation is More Effective When:</th>
</tr>
</thead>
<tbody>
<tr>
<td>There is a regular Surveillance of Progress through (an administrative or an adjudicative) oversight body</td>
</tr>
</tbody>
</table>

*Improving Available Remedies and Conditions in Which Sanctions May Be Imposed*

Retaliation appears as the last resort available to the complaining party in case of non-compliance and is rarely used even when authorization has been granted by the panel. Nevertheless, retaliation can induce compliance.\footnote{Geraldo Vidigal, “Why Is There So Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement” (2017).} Similar to the problems mentioned above, delay is the major weakness at this stage of implementation process. The three models below are identified as the best practices to minimize this problem.

**(a) Short Period Before Ability to Apply Sanctions**

The NAFTA provides the shortest time frame between the receipt of the final panel report by the parties and the application of retaliatory measures. Under Article 2019.1:

“… if the Party complained against has not reached agreement with the complaining Party on a mutually satisfactory resolution … 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.”\footnote{NAFTA, supra note 9 at Article 2019.1.}

There is no obligation under NAFTA for the parties to agree on a reasonable period of time for the responding party to comply. This contrasts sharply with other FTA DSMs (except the CUSMA, which is similar except it provides for 45 days as opposed to 30 days) and DSMs under the auspices of the institutions we reviewed. In other DSMs, the responding party is afforded a
reasonable period of time to comply with the panel ruling and if the parties disagree on the reasonable period of time, this is referred to arbitration. Nor does the NAFTA provide for adjudicative procedures where the parties disagree on whether measures taken by the responding party to eliminate the non-conformity exist or are consistent with the responding party’s obligations. Unlike under the NAFTA, in most disputes, sanctions can only be applied by the complaining party after completing these additional adjudicative procedures. Moreover, in some cases (i.e., WTO, AfCFTA, CFTA), authorization or discussion is also required before sanctions may be imposed.

### Implementation is More Effective When:

| There is a short period before the complaining party’s ability to apply sanctions |

#### (a) Retrospective Remedies

Unlike the WTO, where the temporary remedies are prospective (calculated from the end of the reasonable period of time), Article 29.14(1) of the CETA allows for retrospective remedies, stating that:

“… the level of the nullification and impairment shall be calculated starting from the date of notification of the final report to the parties.”

This allows the complaining party to include in the calculation of retaliation the period prior to the end of the reasonable period of time, instead of being able to include only the time following the expiry of the reasonable period of time. This means a longer period during which the nullification and impairment occurred can be counted for purposes of determining how much retaliation is permitted, which means a higher amount of retaliation. As a result, it provides an incentive for the responding party to comply promptly because the “cost of non-compliance would increase”, which “would help offset the political opposition to implementation”. In contrast, the prospective model in most FTAs and the WTO may encourage the responding party to use all procedural means to delay implementation so that it can put off for as long as possible both changing its impugned measure and the period during which nullification and impairment will be calculated. To minimize this problem, any remedy should be calculated from an early period in the adjudicative process (ex. date of panel establishment).

### Implementation is More Effective When:

| There is an option for retrospective or partially retrospective remedies |

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455 *CETA, supra* note 6 at Article 29.14(1).


457 *Ibid* at 126.
(b) Increasing Sanctions Over Time

Another method to increase the efficacy of DSMs is to increase sanctions over time. An example of this may be found in the case of US–Tax Treatment for Foreign Sales Corporations, where the European Communities (now EU) imposed a trade sanction on the U.S (in the form of import duties) starting at five percent and rising by one percent each month. While the size of the FSC sanctions created an incentive for compliance, this method can be used in other cases to minimize the extent of delay and encourage more speedy compliance.

<table>
<thead>
<tr>
<th>Implementation Can Be More Effective:</th>
</tr>
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<tbody>
<tr>
<td>If the complaining party has an option to increase sanctions over time</td>
</tr>
</tbody>
</table>

**Table 10: Supervision Methods in FTAs and RTAs to which Canada is a Party**

<table>
<thead>
<tr>
<th>Agreement</th>
<th>NAFTA</th>
<th>CETA</th>
<th>CPTPP</th>
<th>CUSMA</th>
<th>CFTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interim Report?</td>
<td>Yes. Within 90 days following the selection of the last panelist</td>
<td>Yes. Within 150 days of the establishment of the arbitration panel</td>
<td>Yes. Within 150 days and in cases of urgency 120 days after the date of the appointment of the last panelist</td>
<td>Yes. Within 150 days after the date of the appointment of the last panelist</td>
<td>Yes.</td>
</tr>
<tr>
<td>Final award timeline:</td>
<td>Yes. Within 30 days of presentation of the initial report</td>
<td>Yes. Within 30 days of the interim report</td>
<td>Yes. Within 30 days after the presentation of the initial report</td>
<td>Yes. Within 30 days of the presentation of the initial report</td>
<td>Yes. Within 25 days of the Report</td>
</tr>
<tr>
<td>Timeframe for compliance:</td>
<td>Within 30 days from receipt of a final report the Parties shall attempt to agree on the resolution of the dispute</td>
<td>No later than 20 days after the receipt of the final report by the Parties, the responding Party shall inform the other Party and the Joint Committee of its intention to comply</td>
<td>Parties to agree on a reasonable period of time within 45 days after the presentation of the final report</td>
<td>Within 45 days from receipt of a final report the Parties shall attempt to agree on the resolution of the dispute</td>
<td>The responding Party has one year to comply</td>
</tr>
<tr>
<td>Where there’s disagreement on the timeframe for compliance:</td>
<td>Within 30 days from the panel’s decision, the complaining Party may suspend the application of benefits to the Party complained, until such time as they have reached agreement on a resolution</td>
<td>The requesting Party may request in writing the arbitration panel to determine the length of the reasonable period of time, within 20 days of the receipt of the notification by the responding Party</td>
<td>Within 60 days of the presentation of the final report, any Party can refer the matter to the Chair to determine through arbitration</td>
<td>If unsuccessful after 45 days, the complaining Party can suspend the obligations to the responding Party</td>
<td>The Complaining Party can include the reasons for its objection within 30 days after the notice of the final report</td>
</tr>
<tr>
<td>Is there a review of measures taken?</td>
<td>Not Specified.</td>
<td>After the midpoint in the reasonable period of time, and at the request of the requesting Party, the responding Party can make itself available to discuss the steps it is taking to comply.</td>
<td>Either party may refer the matter of compliance to the original panel</td>
<td>Not Specified.</td>
<td>One year within the issuance of the panel report, a party may request the panel to reconvene to determine whether the responding party has complied with the matters in the report</td>
</tr>
<tr>
<td>Procedure where there is disagreement over the existence or conformity with compliance measures:</td>
<td>The Parties can request the Commission to establish a panel to determine whether the suspended benefits by the Complaining Party is excessive</td>
<td>The matter shall be referred to the arbitration panel through written request. If the panel find non-compliance by the responding Party, the requesting Party may implement suspension of benefits within 10 days after the date of notification by the responding Party. The requesting Party should notify the responding Party and the CETA Joint Committee.</td>
<td>The requesting Party can request the panel to reconvene to consider the matter.</td>
<td>Parties can request the panel to reconvene. The panel to present its determination in 90 days or 120 days.</td>
<td>The compliance panel determines whether there has been compliance and if not, it issues a monetary penalty order.</td>
</tr>
<tr>
<td>Supervision over temporary remedies in cases of non-compliance:</td>
<td>Not Specified.</td>
<td>At any time, the requesting Party may request the responding Party to provide an offer for temporary compensation and the responding Party shall present such offer.</td>
<td>The responding Party shall notify the panel by a written notice of the measure taken to eliminate the non-conformity. If the panel determines the measures acceptable the complaining Party shall promptly reinstate any benefits.</td>
<td>Not Specified.</td>
<td>Disputing parties may request the panel to reconvene within 30 days to determine whether the retaliatory measures or suspension of benefits are manifestly excessive or to determine whether the responding party has complied with the matters addressed in the report.</td>
</tr>
<tr>
<td>Review of measures taken to comply after the suspension of obligations</td>
<td>Not Specified.</td>
<td>The responding Party to notify the other Party and the Committee and request an end to the suspension. If Parties do not reach an agreement, within 60 days of the date of receipt of the notification, the requesting Party can request the panel to rule on the matter.</td>
<td>The responding Party refers the matter to the panel through a written notice. If the panel finds the responding Party has eliminated the non-conformity, the requesting party shall reinstate benefits promptly.</td>
<td>Not Specified.</td>
<td>Either party may request the panel to be reconvened to determine whether the responding party has complied with the matters addressed in the report.</td>
</tr>
<tr>
<td>Agreement</td>
<td>EU-Japan</td>
<td>EU-MERCOSUR</td>
<td>AfCFTA</td>
<td>AANZFTA</td>
<td>EU-South Korea</td>
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</tr>
<tr>
<td><strong>Interim Report?</strong></td>
<td>Yes. Within 120 days following the establishment of the panel.</td>
<td>Yes. Within 90 days following the establishment of the panel.</td>
<td>Yes. Deadline determined by the panel</td>
<td>Yes. At least 4 weeks before the deadline of the final report</td>
<td>Yes, within 90 and no later than 120 days of the date of establishment of the panel</td>
</tr>
<tr>
<td><strong>Final award timeline:</strong></td>
<td>30 days after the issuance of the interim report.</td>
<td>120 days following the establishment of the panel.</td>
<td>60 days from the date the final Panel report is circulated to the parties</td>
<td>Established by the panel but should not exceed 9 months, unless the parties agree</td>
<td>Within 120 and no later than 150 days of the date of the establishment of the panel</td>
</tr>
<tr>
<td><strong>Timeframe for compliance:</strong></td>
<td>The defending party must notify the complaining party of a reasonable time period for compliance.</td>
<td>The responding Party shall notify the Complaining Party of the reasonable period of time it requires If immediate compliance is not possible the defending party must notify the complaining party within 30 days after the final award was issued.</td>
<td>Not specified – “Parties shall promptly comply”</td>
<td>Within 30 days of the final report the responding party shall notify the complaining Party of its intention to comply</td>
<td>No later than 30 days, the responding Party shall notify the Complaining Party and the Trade Committee of the time it will require for compliance</td>
</tr>
<tr>
<td>Where there's disagreement on the timeframe for compliance:</td>
<td>The Complaining Party can request the original panel to determine the length of the reasonable period of time. Request must be within 20 days of receiving notice from the defending party of the proposed timeline. A decision will be given within 30 days of the request.</td>
<td>The panel determines a reasonable time period at the request of the complaining party. Request must be within 20 days of receiving notice from the defending party of the proposed timeline. A decision will be given within 20 days of the request.</td>
<td>The arbitrator to decide: Should not exceed 15 months</td>
<td>Within 45 days, any Party can ask the Chair to determine a time shall not exceed 15 months</td>
<td>Within 20 days, the Complaining Party can request in writing the original arbitration panel to determine the length of time</td>
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</tr>
<tr>
<td>Is there a review of measures taken?</td>
<td>The responding Party should inform the Complaining Party of progress of compliance at least one month prior to expiry of the reasonable period of time.</td>
<td>Not Specified.</td>
<td>Secretariat informs the DSB on implementation status Any disputing party can raise implementation issue any time following their adoption of the panel report</td>
<td>Any party may ask for a Compliance Review Tribunal after (whichever is earlier): The expiry of the reasonable period of time; or a notification to the Complaining Party by the complying party that it has complied with the obligation</td>
<td>The responding Party to notify the Complaining Party and the Trade Committee before the end of the reasonable period of time of any measure that it has taken to comply with the arbitration panel ruling</td>
</tr>
<tr>
<td>Procedure where there is disagreement over the existence or conformity with compliance measures:</td>
<td>The panel can review any measures taken by the defending party at the request of the complaining party. The panel will issue a ruling in 90 days from the date of referral.</td>
<td>The Complaining Party may refer the matter to the original arbitration panel. The panel will issue a ruling in 45 days from the date of referral.</td>
<td>Complying party can request for: A new proposed timeline for the DSB to approves the proposal; or In the absence of such approval, within 45 days; or in the absence of such agreement, a period of time determined through binding arbitration within 90 days.</td>
<td>Either party can request the arbitral tribunal to be reconvened to decide the matter.</td>
<td>Panel shall issue its ruling within 45 days</td>
</tr>
<tr>
<td>Supervision over temporary remedies in cases of non-compliance:</td>
<td>The panel can review the complaining party’s suspension of concessions or other obligations upon request of the defending party. The request to review must be received within 15 days from the date that the defending party received notice from the complaining party of the temporary remedies it will undertake. The panel will make its decision within 30 days of the request.</td>
<td>The responding party shall notify the complaining party of any measure it has taken to comply.</td>
<td>Either party can request an arbitration panel to rule on the matter. The panel present a decision within 45 days from the request.</td>
<td>The complaining party may ask the DSB to impose temporary measures such as compensation and suspension of concessions. The temporary measures must be equivalent to the level of the nullification or impairment.</td>
<td>If no satisfactory compensation has been agreed within 30 days of the date of a request made, the complaining party may at any time thereafter notify the responding party its intention to suspend concessions or other obligations equivalent to the level of nullification and impairment 30 days.</td>
</tr>
<tr>
<td>Date of the request.</td>
<td>If a panel determines that the measure taken to comply is consistent, the suspension of concessions or the application of compensation shall be terminated no later than 15 days after the date of decision.</td>
<td>If the Parties agree compliance has taken place, the complaining Party to terminate the suspension within 30 days of the receipt of the notification by the responding party.</td>
<td>The DSB meetings will monitor compliance.</td>
<td>Not Specified.</td>
<td>The responding Party to notify of the measures taken.</td>
</tr>
</tbody>
</table>

| **Review of measures taken to comply after the suspension of obligations** |

<p>| Review of measures taken to comply after the suspension of obligations | If a panel determines that the measure taken to comply is consistent, the suspension of concessions or the application of compensation shall be terminated no later than 15 days after the date of decision. | If the Parties agree compliance has taken place, the complaining Party to terminate the suspension within 30 days of the receipt of the notification by the responding party. | The DSB meetings will monitor compliance. | Not Specified. | The responding Party to notify of the measures taken. | Responding Party to provide a written notice to the complaining party. If Complaining party disagrees, may refer the matter to the original tribunal within 60 days, otherwise must promptly stop the suspension. | Not Specified. |</p>
<table>
<thead>
<tr>
<th>Agreement</th>
<th>PCA</th>
<th>WTO</th>
<th>ICSID</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interim Report?</td>
<td>Not specified</td>
<td>Within a period of time set by the panel.</td>
<td>Not Specified</td>
</tr>
<tr>
<td>Final award timeline:</td>
<td>Not specified</td>
<td>Shall not exceed 6 months from the date</td>
<td>Not Specified</td>
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<td></td>
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<td>of the composition of the panel.</td>
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<tr>
<td>Timeframe for compliance:</td>
<td>Parties should carry out all awards</td>
<td>The “losing” Member shall inform the DSB,</td>
<td>No time frame for the compensation</td>
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<td></td>
<td>without delay.</td>
<td>at a meeting 30 days after the adoption</td>
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<td>of the report(s) of its intention to</td>
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<td></td>
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<td>implement the recommendation</td>
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<td>If immediate compliance not possible, the</td>
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<td>implementing Member has a reasonable</td>
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<td>period of time for achieving that</td>
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<tr>
<td>Where there’s disagreement on the timeframe</td>
<td>Not specified</td>
<td>The burden is on the implementing Party</td>
<td>If a disputing Party does not agree with</td>
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<td>for compliance:</td>
<td></td>
<td>to demonstrate the timeline is not enough</td>
<td>the scope of an award, it may request an</td>
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<td>interpretation of the award by an</td>
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<td>application in writing addressed to the</td>
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<td>Secretary-General.</td>
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<td>The application shall be made within 90</td>
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<td>days after the discovery of such fact and</td>
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<td>in any event within three years after the</td>
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<td>date on which the award was rendered</td>
</tr>
<tr>
<td>Is there a review of measures taken?</td>
<td>Not specified</td>
<td>Yes</td>
<td>Not Specified</td>
</tr>
<tr>
<td>Procedure where there is disagreement over</td>
<td>Not specified</td>
<td>Resort to the original panel</td>
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<td>the existence or conformity with compliance</td>
<td></td>
<td>Panel to circulate its report within 90</td>
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<tr>
<td>measures:</td>
<td></td>
<td>days</td>
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<tr>
<td>Supervision over temporary remedies in cases</td>
<td>Not specified</td>
<td>Enter into negotiations with a view to</td>
<td>Not Specified</td>
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<td>of non-compliance:</td>
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<td>developing mutually acceptable</td>
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<td>compensation</td>
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<td>If not compensation agreed within 20</td>
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<td>days, the party with the authorization</td>
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<td>of DSB may suspend the application of</td>
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<td>the Member concerned of concessions or</td>
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<td>other obligation under the covered</td>
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<td></td>
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<td>agreements</td>
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<tr>
<td>Review of measures taken to comply after the</td>
<td>Not Specified</td>
<td>a compliance panel determines that a</td>
<td>Not Specified</td>
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<td>suspension of obligations</td>
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<td>responding party has brought itself</td>
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<td>into compliance but does not specify</td>
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<td>whether the measures taken by the</td>
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<td>complaining Party should be terminated</td>
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</table>
3. Conclusion

We observed at the outset of this memorandum that FTA DSMs have thus far been used rarely but that, in light of developments in the WTO dispute settlement mechanism where the Appellate Body is no longer able to function, FTA parties may wish to turn more readily to FTA DSMs to resolve their trade disputes. In this light, we set out to identify how to ensure that FTA DSMs are designed to achieve both effective and efficient dispute settlement. We examined in particular four elements of FTA dispute settlement proceedings in this respect: 1) panel selection, 2) parties’ written submissions, 3) secretariat or assistant support to panelists, and 4) implementation. Our analysis revealed a number of general conclusions that can be drawn about ways to achieve effectiveness and efficiency in FTA DSMs.

First, some degree of automaticity in panel selection procedures is required in order to avoid the problem of ‘panel blocking’. Effective DSMs for avoiding panel blocking include those that incorporate back-up procedures (ex. appointment by individual party coupled with selection by appointing authorities where the first procedure fails).

Second, procedures that allow for flexibility in filing written submissions ensure that disputes can be resolved efficiently and effectively, while still respecting due process. Short, prescribed timelines for filing written submissions that also allow the panel to grant extensions where necessary best accommodate the range of possible considerations that might arise. Disputes involving complex legal claims with multiple parties, for example, may require longer time frames in order to ensure due process in the filing and responding to submissions. Imposing a page or word limit as a hard and fast rule is not recommended. The nature of disputes can vary greatly and this one-size-fits-all approach may negatively affect a disputing party’s ability to marshal its arguments or defend its actions.

Third, a secretariat with clearly identified functions and operating budget set forth in the FTA itself is recommended. A foundational framework built into FTAs regarding the functions of the secretariat is not only useful for panelists and disputing parties who will receive the assistance, but it also circumvents possible biases that may arise from panelist-hired assistants or from responding parties being the designated party to administer support. Moreover, the secretariat should be empowered to prepare its own budget, which could be subject to oversight by a neutral body. This will avoid undue influence by FTA parties in deciding how much (or how little) funding to allocate and will disable parties who wish to redirect funds when they are unhappy with dispute settlement results.

Fourth, procedures that address and minimize the delay at each stage of implementation phase will improve the overall efficiency and effectiveness of a dispute settlement system. Regular surveillance throughout the reasonable period of time for compliance by an adjudicative or administrative body would provide transparency and serve as an incentive for prompt compliance in order to avoid being exposed as delinquent in complying with panel rulings. Other effective measures to discourage delays in implementation include retrospective remedies, which would mean calculating nullification and impairment from an early date (ex. date of panel establishment) as opposed to the current approach of prospective remedies commencing only after the level of suspension is determined. Lastly, increasing sanctions over time can also be an effective
mechanism to encourage more speedy compliance. An effective dispute settlement system can incorporate a combination of these procedures to ensure prompt and successful compliance.

The best practices we identified in our analysis are summarized in the table below.

Table 13: Summary of Best Practices

<table>
<thead>
<tr>
<th>Best Practice</th>
<th>Advantages</th>
<th>Disadvantages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Panel Selection</td>
<td></td>
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<tr>
<td>Automaticity by Lot</td>
<td>Safeguards against panel blocking by providing a default mechanism where parties fail to reach consensus or fail to appoint</td>
<td>Reduces parties’ control over the appointment of panelists since parties do not get to select a particular individual</td>
</tr>
<tr>
<td>Automaticity through Appointment by Individual Party</td>
<td>Overcomes the difficulties of achieving consensus; can also serve as an effective tool to induce parties to appoint panelists where they are called on to do so instead of foregoing the opportunity to the other party.</td>
<td>Can result in panel blocking where appointment by individual party is not coupled with a back-up procedure to address the situation where parties may fail to appoint</td>
</tr>
<tr>
<td>Automaticity by Appointing Authority</td>
<td>Most effective mechanism for composing panel and avoiding panel blocking</td>
<td>Some parties to an FTA may be reluctant to give authority to an outside third party</td>
</tr>
<tr>
<td>Written Submissions</td>
<td></td>
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<tr>
<td>Short prescribed timelines with the option for panels to adjust</td>
<td>Ensures parties will generally follow prescribed timelines but permits flexibility where needed (ex. complex legal disputes, multiple parties, etc.)</td>
<td>Short timelines may not be realistic in practice</td>
</tr>
<tr>
<td>No page limits</td>
<td>Due process is upheld because parties will have adequate opportunity to make arguments, especially where there are complex legal issues at stake</td>
<td>Parties may not produce concise submissions, which might overburden the panel and prevent quick resolution of the dispute</td>
</tr>
<tr>
<td>Secretariats and Other Assistance Provided to Panels</td>
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<td></td>
</tr>
<tr>
<td>Specify secretariat role in FTA and provide possibility to add duties in future</td>
<td>There is clarity on what kind of assistance will/should be provided to panelists</td>
<td>Does not necessarily work with ad hoc secretariats (depends on flexibility of the ad hoc institution)</td>
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<td></td>
<td>Avoids ‘role creep’</td>
<td>Parties may not want to renegotiate again because it is time consuming and can open up other agreed text</td>
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<td></td>
<td>The FTA parties can adjust depending on how frequent the DSM is used</td>
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<tr>
<td>Designate in FTA secretariat’s responsibility to prepare and manage own budget with neutral oversight body</td>
<td>The secretariat knows best what its resource requirements are and can best assess where and how funds should be allocated</td>
<td>FTA secretariats housed in government departments may be subject to budgeting procedures that will not allow for this</td>
</tr>
<tr>
<td></td>
<td>Circumvents risk of undue influence by FTA parties</td>
<td>Could lead to increased budgets</td>
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<tr>
<td></td>
<td></td>
<td>FTA parties will not want to give up full oversight over budget</td>
</tr>
<tr>
<td></td>
<td></td>
<td>FTA secretariats housed in government departments may be subject to budgeting procedures that will not allow for this</td>
</tr>
<tr>
<td>Act cautiously in outsourcing secretariat functions: Hiring assistants &amp; ad hoc secretariats</td>
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</tbody>
</table>

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<table>
<thead>
<tr>
<th><strong>Panelists hire their own assistants/translators</strong></th>
<th><strong>Speeds up the process because panelists are not occupied dealing with administrative arrangements</strong></th>
<th><strong>May raise impartiality concerns unless proper Code of Conduct imposed</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Legally trained assistants can undertake legal research and drafting</td>
<td>May act as an “extra” panelist if contribute to legal drafting</td>
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<tr>
<td></td>
<td>Can provide translation services where translators are familiar with the terms of art, which will enhance the translation.</td>
<td>Not every panelist can afford it because panelist fees may be very limited and may not adequately cover even the panelists’ time</td>
</tr>
<tr>
<td><strong>Hire ad hoc secretariats from institutions such as ICISD or PCA or other international organization</strong></td>
<td><strong>More cost effective than permanent secretariat when there are few disputes and gives more flexibility to the parties in terms of level of services required</strong></td>
<td><strong>Unequal resources among FTA parties might mean some parties will outsource secretariats while others will try to handle things in house, resulting in mixed level of service depending upon which party is required to provide the secretariat services for the dispute in question</strong></td>
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<tr>
<td></td>
<td></td>
<td>Institutions may be perceived as biased in favour of a disputing party if only one of the disputing parties is a member of the particular institution</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Cannot assume the transferability of skills and knowledge (eg., no trade law expertise or familiarity with specific procedures)</td>
</tr>
<tr>
<td><strong>Implementation</strong></td>
<td><strong>Arbitrators impose shorter periods of time for compliance</strong></td>
<td><strong>Arbitrators will take into account particular circumstances in each case (such as dire economic situation in a developing country)</strong></td>
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<tr>
<td></td>
<td>Eliminate overly lengthy compliance periods</td>
<td>Arbitrators have been complying with time periods permitted under FTAs and will not see a need to reduce below periods provided for by the FTA parties</td>
</tr>
<tr>
<td></td>
<td>Encourage prompt compliance by requiring the responding party to provide a “status report” regularly from the moment the period of compliance is determined</td>
<td>Having a (adjudicative or administrative) body to oversee the implementation can be administratively demanding and costly</td>
</tr>
<tr>
<td><strong>Regular surveillance by an oversight body throughout the compliance period</strong></td>
<td><strong>Retrospective Remedies (calculated from a date prior to the time when retaliation is authorized)</strong></td>
<td><strong>Sanctions are generally not retroactive</strong></td>
</tr>
<tr>
<td></td>
<td>Provides an incentive for prompt compliance because delaying implementation procedures does not mean the retaliation period will start only after retaliation is authorized</td>
<td>Calculating retrospective remedies may be complicated</td>
</tr>
<tr>
<td><strong>Increasing sanctions over time</strong></td>
<td>Prevents the responding party from continuing to delay compliance</td>
<td>Lengthy process to reach this point, which can be costly</td>
</tr>
</tbody>
</table>
ANNEX 1: Background on the Selected Agreements and Institutions

(i) Institutions

International Centre for Settlement of Investment Disputes ("ICSID")
Established in 1966, ICSID is one of the leading institutions for the resolution of international investment disputes. As of June 30, 2019, there were 163 signatories to the ICSID Convention, of which 154 are ‘Contracting States’.460 In 2019, 52 new cases were registered, 59 case proceedings were concluded, and 306 cases were administered461. This number reflects the large number of international investment agreements in force today.

International Court of Justice ("ICJ")
The ICJ is the principal judicial organ of the United Nations (UN).462 It was established in June 1945 and began work in April 1946.463 It resolves legal disputes between states and provides advisory opinions on legal issues referred to it by the United Nations.464 Legal disputes between states submitted to the ICJ are known as ‘contentious cases’, and can only include parties who are parties to the Statute of the Court or have accepted its jurisdiction.465 As of July 31, 2018, the ICJ had dealt with 148 contentious cases and delivered 128 judgements.466

World Trade Organization (WTO)
The WTO was established in 1995 and is the successor of the GATT. Responsibility for dispute settlement lies with the Dispute Settlement Body (“DSB”), a WTO body comprised of all WTO members.467 WTO dispute settlement includes panel-level (first instance) adjudication and an appeals process. While individual members are appointed on an ad hoc basis to adjudicate each dispute at the panel level, WTO appeals are adjudicated by a permanent panel of seven members known as the Appellate Body (“AB”). As of April 30, 2020, the DSB had established a total of 295 panels and adopted 195 panel reports and 122 Appellate Body reports.468

Permanent Court of Arbitration ("PCA")
Established in 1899, the PCA is an international institution facilitating various forms of dispute resolution, including disputes between states. Its services include providing administrative support in international arbitrations, acting as the appointing authority or designating an appointing authority to select arbitrators for disputes, and making its facilities available to certain international tribunals.469

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460 ICSID Annual Report 2019, supra note 50.
461 Ibid.
462 Supra note 118.
463 Supra note 120.
464 Supra note 190.
465 Supra note 190.
466 Supra note 118.
467 Supra note 44.
468 For a complete list of the numbers of disputes by stage in the proceedings, on a yearly basis at https://www.wto.org/english/tratop_e/dispu_e/dispubrief_e.htm
469 Supra note 54.
(ii) FTAs and RTAs

North American Free Trade Agreement ("NAFTA")
NAFTA was entered into by Canada, the United States and Mexico, and came into force on January 1, 1994. The main chapters address trade in goods, technical barriers to trade, investment, trade in services, intellectual property, and institutional aspects such as dispute settlement. NAFTA includes several dispute settlement chapters including between states. It will be superceded by the Canada-United States-Mexico Agreement (CUSMA) in July 2020.

Comprehensive Economic and Trade Agreement ("CETA")
CETA is a trade agreement between Canada and the European Union (EU). The agreement entered into force provisionally on September 21, 2017 (except with respect to investment protection and the international investment court). CETA includes chapters on trade in goods, non-tariff barriers, services, labour protection, environment, investment protection, intellectual property, government procurement, and dispute settlement.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP")
The CPTPP is an agreement between Canada and 10 countries of the Asia Pacific region, namely Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. It entered into force on December 30, 2018 for six countries (Canada, Australia, Japan, Mexico, New Zealand, and Singapore) and on January 14, 2019 for Vietnam. The trading union represents 495 million consumers and 13.5% of global GDP, offering Canada access to key markets in Asia and Latin America. The main chapters cover trade in goods, services, trade remedies, sanitary and phytosanitary measures, investment, telecommunications, labour, environment, telecommunications, government procurement, and dispute settlement.

Canada-United States-Mexico Agreement ("CUSMA")
Canada, the United States and Mexico signed the CUSMA on November 30, 2018. CUSMA will supersede the NAFTA and includes changes in the areas of labour protection, environmental protection, intellectual property, automotive rules of origin, and state to state dispute settlement. Unlike the NAFTA, it does not include chapters on investor-State dispute settlement between Canada and the United States. Nor does it address government procurement. All three parties have ratified the agreement and it is expected to enter into force in the summer of 2020.

European Union-Japan Free Trade Agreement ("EU-Japan")
The EU-Japan agreement entered into force on February 1, 2019. Some of the main chapters of the agreement include trade in goods, services, trade remedies, customs matters, sanitary and phytosanitary measures, intellectual property, sustainable development, and dispute settlement.

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470 NAFTA, supra note 9 at Article 2203.
471 CETA, supra note 6.
473 CUSMA, supra note 6.
475 EU-Japan, supra note 34.
European Union-Mercosur Free Trade Agreement (“EU-Mercosur”)  
The European Union (EU) and Mercosur countries (Argentina, Brazil, Paraguay, Uruguay) reached an agreement in principle for the establishment of an FTA on June 28, 2019. Subjects covered include trade in goods, customs and trade facilitation, trade remedies, competition, state-owned enterprises, services, intellectual property including geographical indications, sanitary and phytosanitary measures, and sustainable development (in particular relating to labour and environment). As with the rest of the agreement in principle, the dispute settlement chapter has yet to be turned into legal text but there is a general framework for the mechanism.

Canadian Free Trade Agreement (“CFTA”)  
The CFTA is an intergovernmental trading agreement between the Federal government and each provincial and territorial government. It began as the Agreement on Internal Trade (AIT), but was updated and came into force as the CFTA on July 1, 2017. The CFTA covers trade in goods, trade in services, investment, monopolies, government procurement, environmental protection, and labour mobility. Dispute settlement under the CFTA can be between governments or between persons and governments.

African Continental Free Trade Area (“AfCFTA”)  
The AfCFTA is a recent and ambitious agreement among African Union (AU) countries including South Africa, Namibia, Sierra Leone, Ethiopia, and Kenya. The agreement came into force on May 30, 2019 for the 24 AU countries that had signed and ratified the agreement as of that date; currently there are 28 AU states that have ratified the agreement. The agreement will not only create a unified market for goods and services, but also for investment, competition, and intellectual property within the African continent. The agreement’s DSM is modelled after the WTO.

ASEAN-Australia-New Zealand Free Trade Area (“AANZFTA”)  
Australia, New Zealand and ASEAN Member States came to an agreement for the establishment of an FTA in January 2010. The agreement was updated in 2015 as part of the Australian government’s commitment to keep its FTAs up to date. The AANZFTA agreement includes chapters on trade in goods, trade in services, investment, intellectual property, competition and consumer protection, e-commerce, and government procurement.

European Union-South Korean Trade Agreement (“EU–South Korea”)  
The EU-South Korea agreement is the first FTA signed by the EU and an Asian country. It lifted more trade barriers than any previous agreement the EU was a party to before 2011. The EU-South Korea agreement includes chapters on trade in goods, trade in services, trade remedies, customs matters, sanitary and phytosanitary measures, intellectual property, and dispute settlement.

477 EU-Mercosur, supra note 36.
479 CFTA, supra note 6.
480 Gerhard Erasmus, “Does the AfCFTA have a clear design and will it live a Life of its own?” (18 November 2019), online: https://www.tralac.org/publications/article/14317-does-the-afcfta-have-a-clear-design-and-will-it-live-a-life-of-its-own.html
481 AANZFTA, supra note 76.
New Zealand-China Free Trade Agreement (NZ-China FTA”)
The NZ-China FTA is the first agreement China has entered into with a developed country. As a result of the agreement, China is now New Zealand’s largest trading partner. Two-way trade (exports and imports of goods and services) has tripled from $9 billion in 2008 when the agreement was signed to over $32 billion in 2019. The two countries are also actively negotiating and upgrading the scope of the agreement to better reflect the two countries’ relationship and economic needs. The NZ-China agreement includes chapters on trade in goods, trade in services, investments and competition, and digital economy.482

Japan-Singapore Economic Partnership Agreement (“JSEPA”)
The JSEPA, signed in 2002, is a major milestone for both parties. It was Japan’s first free trade agreement at the time, and Singapore’s first with a major trading partner (which covers 96% of Singapore’s trade volume with Japan). A revised JSEPA was later signed in 2007.483 JSEPA includes chapters such as trade in goods and services, customs, investment, movement of natural persons, competition, and dispute settlement.

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482 NZ-China, supra note 77.
ANNEX 2: Interviewees

Professor Kevin Banks
   Associate Professor; Director, Centre for Law in the Contemporary Workplace, Queen’s University
   FTA panelist
   Interviewed on March 24, 2020

Mr. Rambood Behboodi
   Partner, King & Spalding, Geneva
   FTA Chapter 20 counsel, WTO litigator, WTO Rules Division dispute settlement lawyer
   Interviewed on March 19, 2020

Professor David Gantz
   Samuel M. Fegtly Professor of Law; Director Emeritus, International Economic Law and Policy Program, University of Arizona
   FTA Chapter 11, Chapter 19, Chapter 20 panelist
   Interviewed on March 16, 2020

Mr. Matthew Kronby,
   Partner, Borden Ladner Gervais, Toronto
   FTA negotiator, WTO litigator
   Interviewed on March 25, 2020

Professor Nicolas Lamp
   Assistant Professor, Queen’s University
   WTO Appellate Body dispute settlement lawyer
   Interviewed on March 17, 2020

Professor Debra Steger
   Professor Emerita, University of Ottawa
   FTA Chapter 19 panelist, WTO panelist
   WTO DSU negotiator
   Interviewed on March 13, 2020

*4 individuals were interviewed on a non-attribution basis
ANNEX 3: Interview Questions

Panel Selection

1. In what role(s) have you served in WTO/FTA/other dispute settlement procedures? (Panel Chair? Panelist? Appellate Body Member? Secretariat? Disputing party representative?)

2. How long did it take to compose the panel in which you were involved? Was selection by agreement between the disputing parties or by some other method?

3. From your perspective, did the FTA (or other agreement) panel selection procedures ensure efficient panel selection?

4. What problems arose in the panel selection process, if any?

5. If problems arose in the panel selection process, were they resolved and if so, how?

6. If you have been a member of multiple panels or have been involved in panel selection for different fora, which dispute settlement mechanisms were effective at panel selection and which were not, and why?

7. Do you have any other comments you would like to share regarding your experiences with panel selection?

8. Some FTAs provide that appointing authorities shall select panelists of disputing parties cannot agree on panel selection. How can parties ensure the impartiality of these appointing authorities?

Submissions & Correspondence

1. Did the parties to X dispute file within the timeframes prescribed in the FTA (or relevant agreement)?

2. If the parties did not file within the prescribed timeframes, were the timeframes agreed through other arrangements? If so, please explain how those arrangements were determined (i.e., agreed upon, imposed by panel, etc.).

3. Were there extensions granted to the parties for making submissions, and if so, how long were the extensions? (Approximate responses such as 1 month or several weeks will suffice.)

4. Do you consider that parties’ written submissions are too long?

5. Should there be page or word limits for written submissions? If yes, how do you think they should be determined? By agreement with the parties? If not, please explain why.
6. Should the hearing take place only after all submissions have been filed (i.e. initial submissions, rebuttals)? Or do you think having a hearing after each exchange of submissions is preferable?

7. Is sequential submission filing more effective than simultaneous submission filing?

8. When should the record close for submissions? Should parties be able to file new evidence at the hearing after all written submissions have been filed?

Role of Secretariat

1. Given cost concerns of funding a full-time secretariat for a bilateral dispute settlement mechanism that might be used only on an intermittent basis, would it be appropriate to have a multilateral secretariat that would serve several FTA dispute settlement mechanisms? How should it be funded? Are there drawbacks to a multilateral secretariat and if so, what are they?

2. If a multilateral secretariat is not the answer, and it is preferred to have individual FTA parties staff and pay for their own secretariats, does this raise concerns about impartiality? What if a party does not adequately fund its own secretariat?

3. FTA dispute settlement mechanism have not been used very often. This may be because the WTO dispute settlement mechanism has proved to be very successful at resolving trade disputes. Given that the WTO dispute settlement mechanism has been weakened by the shutdown of the WTO Appellate Body, do you think that FTA dispute settlement mechanisms will be used more frequently in the future? If not, why not?

4. Should an FTA secretariat have only an administrative function (e.g., registrar, logistical and travel arrangements), or should it have both administrative and legal (e.g., legal research, drafting) roles? Should a secretariat function be limited to an administrative role in order to save staff costs?

5. Concern has been expressed that if a secretariat has a legal research and/or drafting role, there a risk that it will have undue influence on panel decisions? Do you agree? Can this be addressed through effective rules of conduct applicable to secretariat staff? Are there other ways of addressing this concern?

6. How should translation services be provided to assist panels where FTAs provide for multi-language dispute settlement? Should a secretariat outsource translation services as needed? Is there a risk this will lead to underfunding? Is it desirable/cost-effective for a secretariat include translation units staffed by professionals who are familiar with trade issues and with drafting legal documents?
Supervision of Implementation

1. Unlike the WTO, the NAFTA does not have a mechanism for party surveillance of implementation of panel rulings. Do you think this could affect the likelihood of implementation? Do you think implementation might be slower because there is no institutional surveillance?

2. Do you think party surveillance serves as an incentive to parties to negotiate “mutually acceptable” levels of compensation? Could it serve to encourage achieving agreement on compensation more quickly?

3. Do you think including in FTAs rules governing implementation (e.g., timelines, reporting on progress, arbitration procedures to determine compensation) is more or effective than leaving implementation to traditional diplomatic (unspecified) processes?
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