WTO Dispute Resolution Panels: Failing to Protect Against Conflicts of Interest

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INTRODUCTION

The December 15, 1993 adoption of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) marked the culmination of seven years of negotiations. The Agreement includes the establishment of a long awaited governing body, the World Trade Organization (WTO). The WTO, implemented by Congress on December 8, 1992,

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3. 1 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 7 (Terence P. Stewart ed., 1993) [hereinafter URUGUAY ROUND NEGOTIATIONS]. The Uruguay Round negotiations opened in Punta del Este, Uruguay, on September 22, 1986. Id. at 1.

4. Agreement Establishing the Multilateral Trade Organization, opened for signature Dec. 15, 1993, 33 I.L.M. 13 [hereinafter WTO]. "Multilateral Trade Organization" (MTO) was changed to "World Trade Organization" (WTO) in all Uruguay Round documents. Id. The text of the WTO reads in part that the parties to the agreement resolve to "develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all the results of the Uruguay Round of multilateral trade negotiations. . . ." WTO pmbl.; see LENORE SEK, CONG. RES. SERV.,
will provide the legal mechanism that the GATT Contracting Parties envisioned since the International Trade Organization (ITO) was drafted in 1947.6

TRADE NEGOTIATIONS: THE URUGUAY ROUND 6 (1994) (defining the WTO as an "umbrella body," overseeing the Uruguay Round of GATT); The World Trade Organization and U.S. Sovereignty: Hearing Before the Senate Comm. on Foreign Relations, 103d Cong., 2d Sess. (1994) (statement of John H. Jackson, Professor of Law, University of Michigan) [hereinafter WTO Hearing] (describing the WTO as a "mini-Charter"). The WTO incorporates the Uruguay Round agreements into a procedural and institutional framework. Id. GATT practices and institutional ideology will transfer to the WTO in a form more easily accessible to attorneys, governments and the public. Id. Furthermore, the recent GATT maintains separate identities for procedural rules and institutional concepts. Id.

5. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (December 8, 1994). Implementation of the WTO followed months of political posturing. See GATT: Senate Finance Committee Ends Review of GATT Bill, Set to Consider Amendments, INT'L TRADE DAILY (BNA) (July 22, 1994) available in WESTLAW, BNA-BTD database (stating the Clinton Administration's proposal to put the WTO ratification legislation on "fast track" authority); Trade Talks: Quad Ministers Discuss Transition to WTO, But Break No New Ground, INT'L TRADE DAILY, Sept. 13, 1994, available in WESTLAW, BNA-BTD database (reporting that the United States, Canada, Japan, and the European Union emphasized at a two day trade summit, that they were committed to the ratification of the Uruguay Round by the January 1, 1995 deadline); But see, e.g., Hill's Patience Waning on GATT Bill, NAT'L J. CONG. DAILY A.M., July 13, 1994, at 1 (reporting that the Clinton Administration was in danger of losing Democratic support for implementation of the Uruguay Round because of attempts to solicit support from Republicans); Bob Davis, Clinton to Drop "Fast-Track" Bid in GATT Pact, WALL ST. J., Sept. 13, 1994, at A2 (stating that the Clinton Administration abandoned "fast-track" legislation for the WTO to increase the agreement's chances of passing through Congress). The United States Trade Representative, Mickey Kantor, predicted that the WTO would move through Congress rapidly since the "fast-track" authority had been dropped. World Trade Pact to Move Fast, Kantor Asserts, WALL ST. J., Sept. 14, 1994, at A20 [hereinafter Trade Pact to Move Fast].

6. See KENNETH W. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION, 10-14 (1970) (concluding that the failure to implement the ITO was the result of the United States' dissatisfaction with the terms of the agreement); LONG, supra note 2, at 1 (commenting that the intended role of the ITO was to work with the World Bank and the International Monetary Fund to expand and reestablish international trade); JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 9-17 (1990) (discussing that the ITO's failure to fill a gap in international economic institutions following the 1944 Bretton Woods conference, led to the acceptance of GATT as the primary trade organization). Although GATT was initially ineffective in managing global trade and was laden with "birth defects," it evolved into a mechanism that successfully governed the growing complexities of trade. WTO Hearing, supra note 4.
A key provision in the WTO is the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Understanding). The Understanding modifies earlier GATT dispute settlement mechanisms, such as the panel procedure, and establishes an appeals process for panel decisions. The panel procedure provides shorter timetables for the adjudication of disputes and creates more binding decisions than were previously available under GATT. The appeals process grants a party the opportunity to have a panel report reviewed by a Standing Appellate Body. Nonetheless, whether the new dispute resolution procedure can effectively govern trade disputes is an issue that has ignited controversy.

7. WTO, supra note 4, annex II.
8. Id. annex II, arts. 6-16.
9. Id. annex II, arts. 17-23. A thorough discussion of the WTO appellate procedure is beyond the scope of this comment and will only be mentioned in relation to its possible role in recommended changes to the panel procedure. See generally id. (governing panel decision appeals).
10. See id. annex II, art. 6.1 (directing the Dispute Settlement Body (DSB) to convene within 15 days of a party's request for a panel); id. annex II, arts. 8.5, 8.7 (stating that if the disputants cannot agree on the composition of a panel within twenty days of the establishment of a panel procedure, the Director-General will appoint the panelists); id. annex II, art. 12.8 (providing a general six-month guideline for the completion of the panel process, tolling at the time the panel composition commences).
11. See id. annex II, art. 16.4 (stating that unless a party appeals a panel decision or the decision is blocked by a consensus of the GATT Contracting Parties, the panel's report shall be adopted within 60 days).
12. See infra notes 29-33 and accompanying text (discussing the lengthy panel process in early GATT disputes).
13. WTO, supra note 4, annex II, arts. 17-20. The Appellate Body is composed of seven members and is established by the DSB. Id. annex II, art. 17.1. Three of the seven members will serve, in rotation, on each case. Id. The Appellate Body will reflect a broad representation of WTO members. Id. annex II, art. 17.3. Furthermore, Appellate Body members are directed to "stay abreast" of dispute settlement procedures and other WTO activities. Id.
14. See Helene Cooper, World Trade Organization Created by GATT Isn't the Lion of Its Foes or the Lamb of Its Backers, WALL ST. J., July 14, 1994, at A12 (reporting that the rhetoric from both sides of the WTO debate is not necessarily an accurate assessment of the WTO). Critics of the WTO have voiced concerns over what effect the new Understanding's binding panel process will impose on disputing parties. Id. Proponents of the WTO welcome the changes in the panel procedure and view the new procedure as an effective tool that ultimately will give GATT the procedural reinforcement it now lacks. Letter from Michael Kantor, United States Trade Representative, to United States Senators and Congressmen 1-4 (Apr. 29, 1994) [here-
Since GATT's conception, the Contracting Parties have continued to negotiate and amend the Agreement by addressing the problems of timely delays and vague, unenforceable of panel decisions. Nevertheless, an important area not addressed satisfactorily by the Parties is the issue of conflicts of interest and bias in the panel process. These conflicts arise when a panel member assigned to a dispute is financially, politically or personally tied to a sector or industry that is the subject of the dispute. This comment discusses the lack of substantive conflict of interest provisions in the Understanding by analyzing the current rules and suggesting the adoption of more rigid conflict of interest safeguards based upon existing models.

Part I of this comment examines the growth of the dispute settlement panel procedure under GATT, discussing an early case that illustrates the weaknesses in the procedure. Part II examines the WTO and the panel procedure under the new Understanding, emphasizing the limited conflict of interest provisions. Part III discusses the conflict of interest guidelines in the United States-Canada Free Trade Agreement (CAFTA) as a possible model for the WTO and examines the strengths and weaknesses of the CAFTA rules. Part IV recommends changes in the WTO panel procedure and suggests the adoption of some of the key conflict of interest provisions from CAFTA.

I. THE DEVELOPMENT OF GATT DISPUTE SETTLEMENT PANEL PROCEDURES

A. OVERVIEW

When GATT was conceived in 1947, Article XXIII constituted the

15. See infra notes 24-42 and accompanying text (discussing dispute resolution panel weaknesses in an early GATT case).

16. See infra notes 97-103 and accompanying text (explaining the failure of the WTO to adequately provide for inevitable conflicts of interest among panel members).

17. See infra notes 178-82 and accompanying text (illustrating the conflicts of interest that arise when non-governmental trade panelists have vested interests in the specific industry involved in a dispute).

18. GATT, supra note 2. Article XXIII, paragraph 1 states in pertinent part: If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded . . . the contracting party may . . . make written proposals to the other contracting party or
primary dispute adjudication provision. In 1955, GATT members adopted a panel procedure directing a five or seven member panel to issue a report based on the panel's recommendations to resolve the dispute. A consensus among the leading GATT members regarding the meaning and intent of the Agreement resulted in the effective adjudication of a majority of early panel decisions. Furthermore, cooperation by respondent governments in the dispute resolution process aided in the successful implementation of early panel decisions. After the first ten years, however, the use of the panel procedure diminished, due in part to increasing opposition by respondents. One particular dispute, known as the DISC case, tested the limits of GATT's informal panel procedure and illustrated the need for a settled dispute resolution process.

B. THE DISC CASE

A dispute concerning the United States Domestic International Sales Organization (DISC) revealed some of the weaknesses of the GATT dispute settlement process. DISC, a United States tax law, enabled...
qualifying exporters to avoid federal taxes on certain export earnings.\footnote{26} In 1972, the European Community (EC) filed a claim with GATT alleging that the tax incentives operated as a subsidy in violation of GATT rules.\footnote{27} The United States subsequently filed counterclaims against Belgium, the Netherlands and France, claiming that these nations' tax laws similarly violated GATT.\footnote{28}

Establishing a panel for the dispute became a cumbersome and extended process.\footnote{29} The United States requested that a certain number of panel members be experts in tax law.\footnote{30} The parties were concerned

\footnote{26. 26 U.S.C. §§ 991-997 (1982 & West Supp. 1988)). 27. United States Tax Legislation (DISC), Report of the Panel to the Council of Representatives, Nov. 12, 1976, \textit{reprinted in} 23 BISD 98 (1977) [hereinafter DISC Report]. 28. Income Tax Practices Maintained by France, Report of the Panel Presented to the Council of Representatives, Nov. 12, 1976, \textit{reprinted in} 23 BISD 114 (1977) [hereinafter France Report]; Income Tax Practices Maintained by Belgium, Report of the Panel Presented to the Council of Representatives, Nov. 12, 1976, \textit{reprinted in} 23 BISD 127 (1977) [hereinafter Belgium Report]; Income Tax Practices Maintained by The Netherlands, Report of the Panel Presented to the Council of Representatives, Nov. 12, 1976, \textit{reprinted in} 23 BISD 137 (1977) [hereinafter Netherlands Report]. A preliminary procedure in a GATT dispute is consultations between the parties. GATT, supra note 2, art. XXII, para. 1. After consultation proceedings failed and months of procedural delays followed, the parties agreed upon a panel procedure. \textit{See} Hudec, supra note 25, at 1462 (opining that the agreement for panel adjudication marked a "victory" for the complaining party). 29. \textit{See} Hudec, supra note 25, at 1464 (reporting that the DISC panel took almost three years to assemble). The United States felt that if a panel decided that DISC violated GATT provisions, it would be doubtful that the same panel would consider the tax laws of the three European countries valid. Jackson, supra note 25, at 762. Although United States officials preferred a decision in favor of their position, they maintained that if the panel was going to consider DISC a subsidy in violation of GATT laws, then the tax laws of France, Belgium, and the Netherlands should also be found illegal. \textit{Id}. The European delegates objected to the creation of one panel to hear the four individual complaints and continued to press for four separate panels. \textit{Id}. 30. Hudec, supra note 25, at 1464; \textit{see} Jackson, supra note 25, at 762 (stating that experts have traditionally been GATT officials).}
with locating neutral experts.\textsuperscript{31} Ultimately, after nearly three years of inaction following the filing of the dispute,\textsuperscript{32} a five member panel was picked to hear the four claims.\textsuperscript{33} The panel consisted of three GATT delegation officials from Geneva and two tax experts from the EC.\textsuperscript{34} Nonetheless, the United States was less concerned about conflict of interest problems than if the experts were government employees, arguably more susceptible to national influences.\textsuperscript{35}

The panel deliberated for approximately ten months and handed down similar findings for each of the four disputes.\textsuperscript{36} The reports defined DISC and the EC parties' tax laws as export subsidies under the applicable GATT provisions.\textsuperscript{37} All four decisions, however, were vague and incomplete.\textsuperscript{38}

\footnotesize{31. Jackson, supra note 25, at 762-63; see Hudec, supra note 25, at 1465 (stating that the DISC case is an illustration of how pressures for neutral panel choices cause lengthy delays in procedure). The United States, wanting to establish a precedent for bringing in outside experts, continued to press for the use of non-governmental panel members. Jackson, supra note 25, at 762-63. The United States had voiced concerns about the EC's influence on GATT during the time of the DISC case. Id. at 763. Because of the EC's influence, the DISC panel was aware that, regardless of the outcome, a panel report that went against EC interests would be difficult to enforce. Id.

32. See ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 88 (1993) (asserting that the delay in the procedure was the result of a number of unexpected political circumstances).

33. Hudec, supra note 25, at 1464.

34. See DISC Report, supra note 27, at 98 (listing the panel members as L. J. Mariadeson, Counselor, Permanent Mission of Sri Lanka Geneva (Chairman); W. Falconer, Director of Trade Policy, Department of Trade and Industry, Wellington; T. Gabrielson, Counsellor of Embassy, Permanent Delegation of Sweden to the European Communities, Brussels; F. Forte, Professor of public finance, University of Turin; and A. R. Prest, Professor of Economics of the Public Sector, London School of Economics).

35. Jackson, supra note 25, at 763.

36. DISC Report, supra note 27, at 98; France Report, supra note 28, at 114; Belgium Report, supra note 28, at 127; Netherlands Report, supra note 28, at 137.

37. DISC Report, supra note 27, at 98, 112; France Report, supra note 28, at 114, 125; Belgium Report, supra note 28, at 127, 135; Netherlands Report, supra note 28, at 137, 145; see GATT, supra note 2, art. XVI, para. 4. (defining export subsidies). Article XVI states that:

contracting parties shall cease to grant either directly or indirectly any form of subsidy on the export of any product other than a primary product which subsidy results in the sale of such product for export at a price lower than the comparable price charged for the like product to buyers in the domestic market.

Id.

38. Jackson, supra note 25, at 764. Although the specific dynamics that went
Conceivably, the reports may have been intentionally vague as a result of outside influences on panel members. Furthermore, the panel was aware that if either party disagreed with the decisions, the reports could be blocked unilaterally. Whatever the reasons, if the case was decided under the WTO, the parties would have been unable to block the reports and inequitable decisions may have resulted from a biased panel. The parties would then be bound to accept the rulings and either amend their laws or face trade sanctions.

C. THE TOKYO ROUND

The Tokyo Round attempted to resolve some of the problematic issues inherent in the panel procedure. The negotiations addressed panel delays and the importance of securing impartial panels. The decisions of the panel are not known, certain factors may have been responsible for the vague reports. See Hudec, supra note 25, at 1468-69 (explaining that the reports were obscure partly because the panel had engaged in the style of decision making that had developed in dispute procedures over the years). The panel intentionally refrained from stating its intent directly and left its decision open to interpretation by the parties and other GATT members in proceedings following the panel report. Id.; see also Hudec, supra note 32, at 74 (explaining that the commonplace “diplomatic” form of decisions rendered through the time of the DISC case was declining).

39. Jackson, supra note 25, at 764. Some commentators have suggested that the DISC panel may have been subject to “political compromises.” See id. (discussing speculations relating to why the panel reports may have been incomplete and vague).

40. See Hudec, supra note 25, at 1486 (suggesting that the panel wanted to find DISC in violation of GATT subsidy rules while exonerating the EC countries). A decision that ruled against DISC and not against the three EC nations was not a practical consideration because it would have been ultimately blocked by the United States. Jackson, supra note 25, at 763.

41. See Jackson, supra note 25, at 764 (discussing ways the DISC panel may have been influenced).

42. See infra notes 91-94 and accompanying text (explaining the consequences a party may face under the binding panel provisions of the WTO).


44. See JACKSON, supra note 19, at 96 (explaining that the “Group Framework Committee” set out to improve the dispute settlement process and to examine existing procedures).

45. See Robert E. Hudec, GATT Dispute Settlement After the Tokyo Round: An Unfinished Business, 13 CORNELL INT'L L.J. 145, 147-48 (1980) (stating that concerns that insufficient dispute resolution provisions were weakening the effectiveness of GATT were a primary issue in Tokyo Round negotiations).
resulting document, the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance (the Tokyo Round Understanding)\(^{46}\) partially modified the dispute resolution procedures in an attempt to amend the weaknesses of previous GATT practices.\(^{47}\) The Tokyo Round Understanding did not substantially alter dispute resolution procedures.\(^{48}\) Instead, it simply codified existing informal practices.\(^{49}\)

The Tokyo Round Understanding did not provide any substantive solutions for the delaying tactics in panel procedures, but it did establish a time frame for panel composition.\(^{50}\) In practice, however, the parties were ultimately responsible for minimizing lengthy panel delays.\(^{51}\) Since the Tokyo Round, the panel composition process has not experienced the delays endured in the DISC case.\(^{52}\) As will be discussed further,\(^{53}\) the success of any recommended modifications to the current WTO dispute resolution process will partially depend on adhering to the timetables codified during the Tokyo Round and refined in the current Understanding.\(^{54}\)

The Tokyo Round Understanding provided little in the way of conflict of interest rules.\(^{55}\) The limited conflict of interest provisions codified in

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47. JACKSON, supra note 19, at 96-97. See U.S. INT’L TRADE COMM’N, REVIEW OF THE EFFECTIVENESS OF TRADE DISPUTE SETTLEMENT UNDER THE GATT AND TOKYO ROUND AGREEMENTS, Pub. 1793 (Report to the Committee on Finance, U.S. Senate, on Investigation No. 332-212 under Section 332(g) of the Tariff Act of 1930) (1985) [hereinafter USITC REVIEW] (discussing the vulnerability of the panel process to delaying tactics by the parties).

48. USITC REVIEW, supra note 47, at 27.

49. Id.

50. Tokyo Round Understanding, supra note 46, para. 11. The Understanding required that a panel “should be constituted as promptly as possible and normally not later than thirty days” from the time that the parties request the establishment of the panel. Id.


52. See William J. Davey, Dispute Settlement in GATT, 11 FORDHAM INT’L L.J. 51, 84 (1987) (stating that following the Tokyo Round, delaying tactics have not been a substantial problem).

53. See infra note 204 and accompanying text (recommending rigid adherence to panel procedure timetables to ensure the effective implementation of suggested conflict of interest provisions).

54. See generally WTO, supra note 4, annex II, arts. 6.1-12.12 (listing panel procedure time limits).

55. See Tokyo Round Understanding, supra note 46, para. 11 (stating that citi-
the Tokyo Round Understanding were transferred to the WTO in essentially the same form. While the current rules should prevent most biases that result from panelists' national loyalties, the provisions are insufficient for the prevention of other types of conflicts that will inevitably occur under the WTO Understanding.

D. THE URUGUAY ROUND

With increasing globalization, national interdependence, and the proliferation of trade, a new round of negotiations became crucial to the success of GATT. The increased need for intellectual property rules and for provisions governing services hastened the initiation of the new round. In 1986, the Punta del Este Declaration, a statement of negotiating objectives that mandated the Uruguay Round, reflected the necessity of a more efficient GATT dispute settlement procedure. The Negotiating Group on Dispute Settlement stated that strengthening the rules governing panel procedures and increasing enforcement of panel decisions would be its primary objectives. The negotiating group

zens of a party to a dispute cannot be panel members for that dispute). Paragraph 14 of the Understanding states that panel members should "serve in their individual capacities and not as government representatives, nor as representatives of any organization" and that governments shall "not give them instructions nor seek to influence them as individuals with regards to matters before a panel." Id. para. 14.

56. Tokyo Round Understanding, supra note 46, paras. 11, 14. Paragraphs 11 and 14 of the Tokyo Round Understanding contain virtually the identical conflict of interest language as articles 8.3 and 8.7 of the WTO Understanding. WTO, supra note 4, annex II, arts. 8.3, 8.7. See infra notes 97-104 and accompanying text (explaining the current conflict of interest provisions in the WTO Understanding).

57. See infra notes 104-10 and accompanying text (discussing conflicts that may arise between panelists and the subject matter of disputes).


60. Id.


62. URUGUAY ROUND NEGOTIATIONS, supra note 3, at 7.

63. Punta del Este Declaration, supra note 61, at 1623. The Declaration reads in part: "In order to ensure prompt and effective resolution of disputes to the benefit of all contracting parties, negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process." Id.

64. URUGUAY ROUND NEGOTIATIONS, supra note 3, at 58; see Henry R. Nau, Domestic Trade Politics: An Overview in DOMESTIC TRADE POLITICS AND THE URU-
again at
tempted to resolve some of the past infirmities of the panel procedure, including the delays in the composition of panels and the possibility of conflicts of interest among panel members.

The Uruguay Round negotiators stressed the importance of including non-governmental experts in the pool of eligible panelists. The Tokyo Round mentioned the use of non-governmental panelists, but its rules were contradictory. In 1984, as the need for more trade specialists grew, the Contracting Parties agreed upon the creation of a roster of non-governmental panelists. The Uruguay Round negotiating group understood that the addition of more non-governmental experts would alleviate some of the difficulties in finding expert panel members by providing a broader pool of individuals.

Establishing a more expansive list of panelists presumably shortens the panel composition process by simplifying the search for qualified experts. A consequence of expanding the list of non-governmental panelists is the increased likelihood that an expert may have a conflict of interest. The need for non-governmental trade experts to settle technical disputes invariably involves the use of panelists that are the most likely to have a vested interest in the subject matter of the dispute.

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65. Uruguay Round Negotiations, supra note 3, at 58.
67. Uruguay Round Negotiations, supra note 3, at 58; see Hudec, supra note 32, at 100 (asserting that the DISC case demonstrated that a more efficient dispute settlement procedure would necessitate a stronger role for trade attorneys).
68. Tokyo Round Understanding, supra note 46, para. 11. Paragraph 11 of the Tokyo Round Understanding states that “[t]he members of a panel would preferably be governmental.” Id. Paragraph 13, however, states that “[i]n order to facilitate the constitution of panels” a list of eligible “governmental and non-governmental” individuals should be maintained. Id. para. 13.
69. Hudec, supra note 25, at 1466.
71. Uruguay Round Negotiations, supra note 3, at 58.
72. Hudec, supra note 25, at 1465.
73. See infra notes 137-42 and accompanying text (discussing the difficulties of preventing conflicts of interest when trade attorneys are empaneled for disputes involving private industries).
74. See infra notes 137-42 and accompanying text (explaining that the usage of
With the Uruguay Round negotiations delayed because of conflicting positions on dispute settlement issues, Director-General Arthur Dunkel released his draft Protocol to the Final Act in December of 1991. Negotiations on a number of contentious issues continued for the following two years and finally concluded on December 15, 1993, when the Uruguay Round was adopted by consensus, thereby establishing the WTO and a presumably improved GATT dispute settlement mechanism.

II. THE WORLD TRADE ORGANIZATION

A. OVERVIEW OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING DISPUTES

The WTO is the institutional framework and legal mechanism encompassing GATT and controlling the administration and operation of related agreements. Consequently, a debate has erupted concerning
issues related to the voting structure and the dispute resolution procedure. Since the WTO does not allow reservations, members must

filled with misunderstanding, disinformation, [and] miscalculations" as the NAFTA debate was); Nancy Dunne, U.S. Test for a "Dead Fish" Theory, FIN. TIMES, May 25, 1994, at 5 (commenting that opponents of the WTO, including Ralph Nader and Representative Newt Gingrich, span a broad political spectrum).

82. See WTO, supra note 4, arts. IX, X (mandating that decision making and amendments to the WTO are made by consensus, and in cases where a consensus cannot be reached, decisions and most amendments are put to a three-fourths majority vote). Amendments to the following provisions must be made by consensus: WTO arts. IX and X; arts. I and II of GATT, Annex 1A; art. II:1, Annex 1B of the General Agreement on Trade in Services (GATS); art. 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) including Annex 1C, Trade in Counterfeit Goods. Id. art. X. The voting structure in GATT has historically been a hybrid based upon unanimity and majority voting, although the voting structure in the WTO reflects unanimity in the amendment and decision processes and majority voting if there is a lack of consensus. See generally Stephen Zamora, Voting in International Economic Organizations, 74 AM. J. INT'L L. 566 (1980) (examining voting structures of international organizations).

83. See Cooper, supra note 14, at A12 (reporting that the binding effect of the WTO panel procedure is among the most contentious areas of debate). Opponents of the WTO claim that countries intending to challenge U.S. laws will attempt to use the panel procedure to secure favorable decisions. Statement of Kevin L. Kearns, President, United States Business and Industrial Council (June 13, 1994) (on file with The American University Journal of International Law and Policy). Kevin L. Kearns is the founder of Save Our Sovereignty, an organization comprised of business leaders opposing the WTO. UNITED STATES BUS. INDUS. COUNS., BUSINESS LEADER ANNOUNCES FORMATION OF "SAVE OUR SOVEREIGNTY" TO OPPOSE WORLD TRADE ORGANIZATION (1994) [hereinafter SAVE OUR SOVEREIGNTY] (on file with The American University Journal of International Law and Policy). Consumer interest groups suggest that the European Union (EU) is specifically targeting United States food safety laws. PUBLIC CITIZEN AND THE ENVTL. WORKING GROUP, TRADING AWAY FOOD SAFETY at iv (1994) [hereinafter TRADING AWAY FOOD SAFETY] (on file with The American University Journal of International Law and Policy). The EU has stated that the complex regulatory standards imposed by the United States severely impede market access. SERVICES OF THE EUROPEAN COMMISSION, REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 55 (1994) (on file with The American University Journal of International Law and Policy). Technically, if the EU files a dispute under the new Understanding and a panel finds in their favor, the United States will have to amend its food safety regulations or face trade sanctions. See Mark Memmott, Opponents Say Deal Jeopardizes U.S. Interest, U.S.A. TODAY, June 27, 1994, at 4B (statement of Ralph Nader) (charging that the WTO "subordinates all sorts of U.S. laws to the dictates of foreign trade"); WTO, supra note 4, annex II, art. 22 (outlining the rules governing compensation and the suspension of concessions in the event a panel decision is not implemented).

Save Our Sovereignty asserts that American sovereignty will be endangered
accept all terms and provisions as written.\textsuperscript{85} Thus, the Contracting Parties, by acceding to the Agreement, agree to the terms of the dispute settlement process.\textsuperscript{86}

The Understanding on Rules and Procedures Governing Disputes is because the WTO will impose an obligation on the United States to change its laws and regulations to conform with panel decisions. \textit{SAVE OUR SOVEREIGNTY, supra}; see James Gerstenzang, \textit{GATT Brings Clinton Threat of New Trade Controversy}, L.A. TIMES, July 5, 1994, at B5, B6 (commenting that the sovereignty debate is potentially one of the most emotional aspects surrounding the WTO); Samuel Francis, \textit{The Choice is Your Country or Their GATT}, WASH. TIMES, June 28, 1994, at A20 (statement of Dan R. Bucks, Executive Director, Multistate Tax Commission) (arguing that a WTO ruling favoring foreign taxpayers could result in overturning United States state tax laws if the laws are considered "unjustified discrimination"). \textit{But see USTR Letter, supra note 14, addendum II, at I (responding that U.S. sovereignty cannot be affected by adverse panel rulings because only Congress and the Executive Branch have the power to change the laws); Sovereignty Warnings Simplistic, supra note 81, at 738 (statement of Rufus H. Yerxa, Deputy United States Trade Representative) (asserting that fears that the WTO will threaten U.S. sovereignty are "arcane and largely irrelevant").}

Another concern of WTO opponents is the confidentiality of panel deliberations. \textit{TRADING AWAY FOOD SAFETY, supra, at 81-82; see Trade Pact to Move Fast, supra note 5, at A20 (reporting that an organization of newspaper editors established through the Freedom Forum First Amendment Center at Vanderbilt University argues that Americans have a "constitutional right to access" to the dispute resolution deliberations that will be impeded by the secretive nature of the process). Article 14.1 states that "panel deliberations shall be confidential." \textit{WTO, supra note 4, annex II, art. 14.1.}

\textsuperscript{84} W.T.O, supra note 4, annex II, art. 16.5. Historically, the number of reservations that have been asserted in multilateral treaties have been in the minority. \textit{See generally John K. Gamble, Jr., Reservations to Multilateral Treaties: A Macroscopic View of State Practice, 74 AM. J. INT'L L. 372 (1980) (finding that only 15% of the 1164 multilateral conventions that entered into force between 1919 and 1971 contained reservations).}

\textsuperscript{85} W.T.O, supra note 4, annex II, art. 16.5. Opponents of the WTO claim that because developing countries have the same voting power as the United States and control 83% of the vote in the WTO, the United States will consistently be outvoted in WTO decisions. \textit{SAVE OUR SOVEREIGNTY, supra note 83. The United States Trade Representative, however, emphasizes that voting would only take place as a "fall back" procedure in the event no consensus is reached. USTR Letter, supra note 14, addendum I, at 2. Furthermore, the USTR asserts that the adoption of any amendments that are contrary to the United States' position would be tantamount to terminating trade relations between the United States and WTO members. Id. at 4. Therefore, the USTR indicates that because any severance of trade relations with the United States would create severe instability in world markets, forcing an unacceptable WTO amendment on the United States is extremely unlikely. Id.}

\textsuperscript{86} W.T.O, supra note 4, annex II, art. 8.
the most comprehensive GATT dispute resolution mechanism since GATT's conception. The new dispute process inherited many of the early GATT dispute mechanisms such as consultation, good offices, conciliation and mediation. Moreover, the Understanding incorporated amendments to the panel procedure and the appellate process.

One of the Understanding's most important substantive changes to the panel procedure is the adoption of panel reports. For the first time since the creation of the panel process, a panel report can no longer be blocked unilaterally. Once a panel report is adopted, the losing party is obligated to implement the recommended changes within a reasonable time or risk trade sanctions in the form of suspended concessions or cross retaliation. Thus, because of the serious trade consequences that can result from the binding panel process, it will be one of the most closely scrutinized provisions in the WTO.

Consequently, insuring impartial panel decisions will be a critical issue. Understandably, a panelist's possible vested interest in a dispute is an issue that must be addressed to ensure the fair adjudication of disputes. The Understanding, however, includes only limited conflict of

87. GATT, supra note 2.
88. WTO, supra note 4, annex II, art. 4.7. Parties to a dispute may first enter into consultation proceedings under Article 4 of the Understanding. If a dispute cannot be settled by consultation within sixty days, the complaining party may request a panel at that time or at any time, regardless of whether or not consultations have been attempted. id.
89. Id. annex II, art. 5. Good offices, conciliation and mediation proceedings may be requested voluntarily, by any party to a dispute at any time. Id. annex II, art. 5.3.
90. Id. annex II, arts. 6-16.
91. Id. annex II, arts. 17-21.
92. Id. annex II, art. 16.
93. Id. annex II, art. 16.4. A panel report may only be blocked by a consensus. Id. Furthermore, a panel report may be appealed, but the Appellate Report can also only be blocked by consensus. Id. annex II, art. 17.14.
94. Id. annex II, arts. 21-22; see The GATT Lady Sings, supra note 81, at 595 (statement of John H. Jackson, law professor, University of Michigan) (reporting that under the Constitution, the United States has the power to reject panel decisions in extreme cases even though the rejection would be inconsistent with the United States' obligations to the international community).
95. See The GATT Lady Sings, supra note 81, at 595 (statement of Duane L. Burnham, Chairman and Chief Executive Officer, Abbott Laboratories) (recommending that the WTO dispute settlement procedures be closely monitored once they take effect).
96. See infra notes 200-37 and accompanying text (recommending the strengthening of current WTO conflict of interest provisions).
interest provisions that were imported from the Tokyo Round with little modification.\textsuperscript{97}

B. CONFLICT OF INTEREST PROVISIONS AND WEAKNESSES

1. Citizenship Requirements

The most evident conflict of interest provision is Article 8.3 which prevents citizens of one of the parties in a dispute from serving on the panel.\textsuperscript{98} The Understanding also prohibits a government from instructing or influencing panel members on issues related to a dispute.\textsuperscript{99} Realistically, shielding panel members from the economic and political influences of their governments may be impossible.\textsuperscript{100} Moreover, while the current provisions may minimize the likelihood of nationalistic bias or a government's influence on a panelist,\textsuperscript{101} the WTO has not adequately protected against conflicts of interest that are unrelated to a panel member's national allegiance.

One of the reasons for this apparent omission may be that historically, panel members were government officials.\textsuperscript{102} Thus, preventing a gov-

\begin{itemize}
\item \textsuperscript{97} WTO, \textit{supra} note 4, annex II, arts. 8.3, 8.9; Tokyo Round Understanding, \textit{supra} note 46, paras. 11, 14.
\item \textsuperscript{98} WTO, \textit{supra} note 4, annex II, art. 8.3. Members of customs unions and common markets are similarly ineligible to serve on a panel if their trading bloc is a party to the dispute. \textit{Id.} annex II, art. 8.3, n.6. Individuals from third parties with an interest in a dispute are similarly ineligible. \textit{Id.} annex II, art. 8.3. A third party member must voluntarily notify the DSB of any interest they may have in the dispute. \textit{Id.} annex II, art. 10.2. Furthermore, the Understanding requires that the interest is "substantial." \textit{Id.} Attempting to identify the parties who have not voluntarily expressed their interest and ascertaining whether that interest is "substantial" is a difficult and complicated process. Plank, \textit{supra} note 51, at 67. The Secretariat must analyze a third party member's market structure and philosophies on trade as well as ascertaining whether the party competes in the specific sector or industry involved in the dispute. See \textit{id.} at 67-68 (describing the "delicate" process of identifying third party members).
\item \textsuperscript{99} WTO, \textit{supra} note 4, annex II, art. 8.9.
\item \textsuperscript{100} See Jackson, \textit{supra} note 66, at 42 (describing as inevitable the influence of governments' economic trade policy and diplomatic relationships over their panel members).
\item \textsuperscript{101} WTO, \textit{supra} note 4, annex II, arts. 8.3, 8.9.
\item \textsuperscript{102} See Donald E. deKieffer, \textit{GATT Dispute Settlements: A New Beginning in International Trade Law}, 2 NW. J. INT'L L. & BUS. 317, 323 (1980) (commenting that the Secretariat's roster of panelists has historically been composed of Swiss and Scandinavian civil servants); Jackson, \textit{supra} note 6, at 64 (discussing that the Tokyo Round Understanding provided for the permissive use of non-governmental panel members but preferred governmental individuals); Jackson, \textit{supra} note 66, at 42 (stat-
Government from directing or influencing one of its officials is an understandable safeguard. The trend has been to increase the list of non-governmental individuals on the panel rosters.103

A non-governmental panel member will have the same Article 8.3 citizenship restrictions as a governmental panelist.104 Governments are thereby similarly prohibited from influencing or instructing a non-governmental panelist if the individual is a citizen.105 The nature of trade disputes,106 however, creates conflict of interest problems that are more complex than the WTO’s elementary citizenship safeguards107 can effectively prevent. Globalization and the proliferation of multinational organizations create interests that span beyond an individual’s citizenship.108 A non-governmental panel member with no citizenship ties to a party in a dispute could conceivably have an interest in the outcome of the dispute.109 Because a substantial number of non-governmental trade experts are private sector attorneys affiliated with firms that represent various international industries,110 an attorney sitting on a panel is

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103. deKieffer, supra note 102, at 323; see Hudec. supra note 19, at 59-60 (predicting a need for outside experts for panel rosters instead of government officials). Some GATT officials suggest the use of non-governmental experts as a primary source for panel rosters. See Plank, supra note 51, at 70 (describing a proposal to rely on more non-governmental experts in an attempt to “professionalize” the GATT panel and lend credibility to a panel’s neutrality). The new Understanding merely provides that panels may be composed of qualified “governmental and/or non-governmental members.” WTO, supra note 4, annex II, art. 8.1. A panel can include, but is not limited to, individuals who have been panelists or presented a case before a panel, senior trade policy officials from any WTO member state, representatives to the WTO, GATT or any related committee regarding any GATT agreement, and trade scholars. Id.

104. WTO, supra note 4, annex II, art. 8.3. The prohibitions of article 8.3 apply to all citizens of nations or customs unions that are involved in a dispute. Id.

105. Id.

106. See infra notes 137-139 and accompanying text (discussing the need for technical experts in antidumping and countervailing duty disputes).

107. WTO, supra note 4, annex II, arts. 8.3, 8.9.


109. See infra notes 178-183 (discussing the two CAFTA panelists in the softwood lumber case who were attorneys employed by firms representing Canadian lumber interests).

110. See Christopher J. Murphy, Canada-U.S. Free Trade Resolution Dispute Mechanism Panel Procedure: Will They Hold?, 4 TRANSNAT’L L. 585, 600 (1991) (discussing the inevitable conflicts international trade attorneys will have with the subject matter of trade disputes).
inevitably going to have a vested interest in the outcome of a dispute.\footnote{111}{Id.}

2. The Parties' Objection Rights

A key mechanism ensuring the composition of an impartial panel is a party's right to object to panel nominees.\footnote{112}{WTO, supra note 4, annex II, art. 8.6.} When the Secretariat proposes a panelist, a party can only oppose the nomination for "compelling reasons."\footnote{113}{Id.} While the text of the Understanding does not define the compelling reasons requirement, past practice reveals the establishment of an accepted standard.\footnote{114}{Plank, supra note 51, at 71.} A party's belief that a panelist may be biased has often constituted a compelling reason.\footnote{115}{Id.} Parties have rejected proposed panelists based merely upon the belief that the individual would not vote in the party's favor.\footnote{116}{Id.} Nonetheless, past practice suggests that panel members relied on the safeguard provision to influence panel composition more than to prevent individual conflicts of interest.\footnote{117}{Id.} Furthermore, there is no guarantee that previous interpretations will define future standards.\footnote{118}{See JACKSON, supra note 6, at 68 (stating that panel reports are not binding even though subsequent panels may view the decisions as having a "persuasive effect").} If the parties thus continuously object to nominations and are unable to agree on the panel composition, the minimal conflict of interest safeguards contained in this provision will become ineffective.\footnote{119}{WTO, supra note 4, annex II, art. 8.7.}

3. Role of the Director-General

If the parties do not agree on the panel composition within twenty days, the Director-General becomes responsible for appointing a panel.\footnote{120}{Id.} The Understanding mandates that the Director-General choose the "most appropriate" panelists following consultations with the parties, the chairman of the Dispute Settlement Body (DSB), and the chairman of
the committee or council handling the dispute.\textsuperscript{121} Regardless of whether the Director-General appoints a panel based upon the required consultations, trade officials have suggested that the panel will be susceptible to the Director-General's subjective influences.\textsuperscript{122} Moreover, since the Understanding does not have an oversight mechanism to prevent the Director-General from appointing a biased panel, consultations may have little efficacy in preventing conflicts of interest. Once the panel composition procedure defaults to the appointment stage, the parties are powerless to reject panel nominees and must accept the Director-General's selections.\textsuperscript{123}

III. THE UNITED STATES-CANADA FREE TRADE AGREEMENT

A. DISPUTE SETTLEMENT PROVISIONS

The lack of more substantive conflict of interest provisions in the new Understanding is surprising since one of the models for the WTO dispute settlement procedure,\textsuperscript{124} the United States-Canada Free Trade Agreement,\textsuperscript{125} provides relatively comprehensive conflict of interest rules.\textsuperscript{126} The verbatim adoption of the CAFTA provisions, however,

\textsuperscript{121} Id.
\textsuperscript{122} See Cooper, supra note 14, at A12 (reporting that a Clinton Administration official believed "[t]hings could get stacked" if the Director-General was solely responsible for the panel composition). The Clinton Administration official was concerned that placing the decision making power in the hands of the Director-General could result in biased panel appointments. Telephone Interview with Helene Cooper, Reporter, Wall Street Journal (Aug. 2, 1994).
\textsuperscript{123} See WTO, supra note 4, ann. II, art. 8.7 (stating that the Chairman shall inform members of panel appointments, but failing to provide for appeal of such selections).
\textsuperscript{124} See Jeffrey J. Schott, U.S. Policies Toward the GATT: Past, Present, Prospective, in GATT AND CONFLICT MANAGEMENT: A TRANSATLANTIC STRATEGY FOR A STRONGER REGIME 39 (Reinhard Rode ed., 1990) (describing the use of the CAFTA dispute settlement mechanism during the Uruguay Round negotiations as a model for improving the GATT dispute settlement procedure); URUGUAY ROUND NEGOTIATIONS, supra note 3, at 58 (discussing the input from the United States, Canada, and Mexico in the Uruguay Round dispute settlement negotiations).
\textsuperscript{126} Id. chs. 18, 19. Cf. E.C. Official Opposes U.S. Lawmakers' Proposal to Create U.S.-E.C. Dispute Panel, 6 INT'L TRADE REP. (BNA) No. 3, at 62, 63 (Jan. 18, 1994) (discussing the possibility of developing a dispute resolution procedure between the European Community and the United States, similar to the one established in Chapter 19 of CAFTA).
would not necessarily remedy every WTO conflict of interest issue. There are fundamental differences between the dynamics of dispute resolution in bilateral and multilateral systems. One important difference is that in bilateral arrangements like CAFTA, the pool of panelists is invariably limited to the two party states.\textsuperscript{127} Furthermore, although the CAFTA conflict of interest provisions are significantly stronger than those in the WTO, the CAFTA dispute procedure is not without flaws.\textsuperscript{128}

1. Chapter 18 Conflict of Interest Rules

Chapter 18 of CAFTA establishes the primary panel procedure for general disputes arising under the Agreement.\textsuperscript{129} Much like the WTO, the CAFTA procedure directs the parties to enter into consultations followed by a panel procedure in the event that consultations fail.\textsuperscript{130} While a Chapter 18 panel decision normally will not have the same binding effect as panel decisions under the WTO,\textsuperscript{131} the conflict of interest rules under Chapter 18 are similar to the WTO provisions.\textsuperscript{132} Thus, Chapter 18 requires only that panelists not be affiliated with a party or receive instructions from a party.\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{127} See Murphy, supra note 110, at 600 (explaining that the binational system of CAFTA contributes to inevitable national interest conflicts when panelists are drawn from the two countries involved in a dispute); see also infra notes 186-88 and accompanying text (explaining the possible national interest bias of Canadian judges in the softwood lumber case).
\item \textsuperscript{128} See generally Murphy, supra note 110, at 598-615 (describing the difficulties experienced under the Chapter 19 provisions governing peremptory challenges, conflicts of interest, and extraordinary challenges).
\item \textsuperscript{129} See CAFTA, supra note 125, arts. 1804, 1807 (discussing consultations and panel procedures respectively).
\item \textsuperscript{130} Id.
\item \textsuperscript{131} See id. art. 1807, para. 7 (allowing for contingency that panel report not be published if commission so chooses). The intent of Chapter 18 is to allow the parties to pursue the satisfactory settlement of disputes without resorting to retaliatory measures. Michael Krauss, The Record of the United States-Canada Binational Dispute Resolution Panels, 6 N. Y. INT'L L. REV. 85 (1993).
\item \textsuperscript{132} Compare CAFTA, supra note 125, art. 1807, para. 1 (containing conflict of interest rules for Chapter 18 panel procedures) with supra notes 98-105 and accompanying text (discussing WTO conflict of interest provisions).
\item \textsuperscript{133} See CAFTA, supra note 125, art. 1807, para. 1 (stating that “panelists shall be chosen strictly on the basis of objectivity, reliability and sound judgment and, where appropriate, have expertise in the particular matter under consideration”).
\end{itemize}
2. Chapter 19 Conflict of Interest Rules

a. Overview

Chapter 19 establishes substantially stronger conflict of interest rules than those found in the WTO.134 Furthermore, Chapter 19 is specifically designed for the settlement of anti-dumping and countervailing duty disputes.135 Thus, one reason why the conflict of interest provisions under Chapter 19 are more rigorous than those in Chapter 18 is because of the specific nature of the disputes.135 Countervailing duty and anti-dumping disputes137 are more likely to involve private parties and require trade specialists138 than the types of trade disputes normally brought under Chapter 18.139 Therefore, the inevitable conflicts between private party interests and trade specialists warrant greater conflict of interest measures.140

134. Compare CAFTA, supra note 125, ch. 19 (containing conflict of interest rules for binational dispute settlement procedures) with WTO, supra note 4, arts. 8.3, 8.9 (defining the conflict of interest guidelines for panelists).
135. CAFTA, supra note 125, ch. 19.
136. See Alan M. Rugman and Andrew Anderson, The Dispute Settlement Mechanisms, Cases in the Canada-United States Free Trade Agreement: An Economic Evaluation, 24 GEO. WASH. J. INT'L L. & ECO. 1, 15 (1990) (reporting that only three of the eight Chapter 18 cases the Commission examined have resulted in the formation of arbitration panels).
137. See generally ANTIDUMPING LAW AND PRACTICE (John H. Jackson and Edwin A. Vermulst eds., 1989) (comparing the antidumping laws of various nations); RICHARD DALE, ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER (1980) (providing a detailed examination of antidumping history and practices); JACKSON, WORLD TRADE, supra note 19, at 217-69 (defining anti-dumping and countervailing duty rules and policies).
138. Telephone Interview with GATT Panel Member (name withheld upon request) (July 26, 1994) (commenting that “technical” disputes such as those involving antidumping and countervailing duties are more likely to result in conflicts of interest between the experts interpreting the disputes and the industries involved).
139. See CAFTA, supra note 125, art. 1801, para. 1 (stating that financial service, countervailing duty, and anti-dumping disputes are not governed by Chapter 18). A party's failure to eliminate contested tariffs is an example of a dispute that would fall within the jurisdiction of Chapter 18. Id. ch. 4, art. 401. Chapter 18 would similarly govern disputes concerning acceptable levels of contaminants in food. See id. ch. 8, annex 708.1, sched. 12 (mandating rules governing the regulation of contaminants in foods and beverages).
140. See Murphy, supra note 110, at 600-01 (discussing how private practitioners selected for CAFTA panels are inherently prone to conflict of interest problems because of their relationship to private industry).
CAFTA mandates that the majority of panel members must be lawyers.\(^{141}\) Thus, with trade attorneys hearing disputes that may directly affect a specific industry, the likelihood of conflicts of interest will increase.\(^{142}\) Furthermore, similar to the WTO panel reports, Chapter 19 panel decisions are legally binding\(^{143}\) unlike non-emergency action reports under Chapter 18.\(^{144}\) The likelihood of a conflict of interest between an attorney and an industry the attorney has represented, coupled with the binding effect that a panel report can have on that industry, strengthens the need for impartial panels.\(^{145}\) Accordingly, the Chapter 19 rules governing conflicts of interest are designed to address these concerns.\(^{146}\)

b. Preventative Measures

Annex 1901.2 of Chapter 19 provides that the five-member binational panel will be composed of Canadian and United States trade experts selected from a roster.\(^{147}\) Similar to the WTO provisions and Chapter 18, a panel member may not be affiliated with a party or receive instructions from a party.\(^{148}\) This is the only substantive similarity between the conflict of interest rules of Chapter 19 and the WTO.\(^{149}\)

Annex 1901.2 of CAFTA allows a party to object to a panel member nominee for any reason.\(^{150}\) Each party is allowed four peremptory challenges to the opposing party’s nominees.\(^{151}\) Furthermore, if the parties

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141. CAFTA, supra note 125, annex 1901.2, para. 2.
142. See Canada: Conflict of Interest Problems Hurting FTA Chapter 19 Dispute Settlement, Lawyer Says, 8 INT’L TRADE REP. (BNA) No. 22, at 813 (May 29, 1991) (statement of Ivan Feltham, Professor of Business and Trade Law, The University of Ottawa) (opining that conflict of interest issues are inevitable under the Chapter 19 practice of filling the majority of panel positions with international trade attorneys).
143. CAFTA, supra note 125, art. 1904, para. 9.
144. See supra note 131 (defining Chapter 11 emergency actions).
145. See Murphy supra note 110, at 600 (noting that regardless of the “objective professionalism” required of panelists, trade attorneys will inevitably experience professional or personal conflicts of interest with the disputes they must adjudicate).
146. CAFTA, supra note 125, note 125, annex 1901.2, para. 2.
147. Id. annex 1901.2, para. 1.
148. Id. Because CAFTA panels are binational, the citizenship safeguards present in the WTO are unnecessary. See WTO, supra note 4, annex II, art. 8.3 (prohibiting panelists who are citizens of a party in a dispute from sitting on the panel).
149. See supra notes 98-105 and accompanying text (describing the conflict of interest provisions in the WTO).
150. CAFTA, supra note 125, annex 1901.2, para. 2.
151. Id. annex 1901.2, para. 2; see supra notes 113-118 and accompanying text.
cannot agree on the composition of a panel, they choose panel members by lot from each party’s roster. Therefore, unlike the WTO provisions, the possibility that a biased panel may be selected based on the subjective discretion of a single official is unlikely.

The conflict of interest safeguards in Chapter 19 also provide strict measures to ensure that panel members adhere to an ethical code of conduct. Panelists must sign disclosures listing business ties and other personal and confidential information. If a panel member does not sign a disclosure, the individual is disqualified from sitting on a panel. Additionally, both parties are responsible for sanctions against a panel member if the individual violates the disclosure orders.

(discussing the “compelling reason” standard that a party must meet under the WTO before a panel member can be rejected).

152. CAFTA, supra note 125, annex 1901.2, paras. 2-4. Under Chapter 19, each party must choose two panelists within 30 days. Id. annex 1901.2, para. 2. If after the four allotted peremptory challenges the first four panelists have not been agreed upon, the panelists are picked by lot. Id. The fifth panelist must then be selected within the next 25 days by the parties. Id. annex 1901.2, para. 3. If the parties cannot agree on the fifth panelist, the four empaneled members select the fifth member. Id. If the four panelists cannot agree, the fifth panelist is chosen by lot. Id.

153. See supra notes 120-23 and accompanying text (describing how the WTO Director-General is responsible for selecting panel members when the parties are unable to agree on the panel’s composition).

154. CAFTA, supra note 125, annex 1901.2, para. 6.

155. See id. annex 1901.2, para. 7 (directing panelists from the United States to sign protective orders for information and panelists from Canada to sign an undertaking for information).

156. Id.; see 53 Fed. Reg. 53,212 (1988) (codifying the procedural rules relating to the investigation of information disclosed by panelists). Panelists will be required to disclose, inter alia, existing or previous business, financial, social or personal relationships with the parties; direct or indirect personal or financial interest in the outcome of the dispute; or any public advocacy of an issue related to the dispute. See Canada: Conflicts of Interest Rules for Members of FTA Panels Outlined in Crosbie Letter, 6 INT’L TRADE REP. (BNA) No. 3, at 75, 76 (Jan. 18, 1989) [hereinafter Crosbie Letter] (relaying the guidelines for prospective panelist disclosures exchanged in a letter from John Crosbie, Canadian International Trade Minister, to Clayton Yeutter, United States Trade Representative). Article 1910 of Chapter 19 directs the United States and Canada to establish a code of conduct for committee members and panelists through an exchange of letters. CAFTA, supra note 125, art. 1910.

157. CAFTA, supra note 125, annex 1901.2, para. 8.

158. Id. Annex 1901.2, paragraph 8 states that “[e]ach Party shall enforce such sanctions with respect to any person within its jurisdiction” Id.
c. Extraordinary Challenge

If a conflict of interest is suspected once the panel report has been issued, Chapter 19 provides a safety valve that allows a party to challenge a decision. Under the extraordinary challenge provision in Annex 1904.13, the challenging party must allege that a panel member was biased or guilty of a “serious” conflict of interest. The party must also assert that the conflict or bias materially affected the outcome of the decision and is a threat to the integrity of the panel procedure. Unlike Chapter 19 panel disputes, which private appellants can bring, only governments may invoke an extraordinary challenge.

Once a government asserts a claim, an Extraordinary Challenge Committee (ECC) convenes to hear the allegations. An ECC is composed of three former or active judges from the United States and Canada, appointed from a roster of ten jurists. The ECC must establish whether there is reason to bring the challenge under Annex 1904.13 and then render a decision to vacate, remand, or affirm the original panel decision.

Some commentators suggest that the extraordinary challenge provision may be subject to abuse. Others are concerned that industries will

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159. *Id.* art. 1904, para. 13. The party must challenge the decision within a reasonable time after the panel has issued the report. *Id.*

160. *Id.* Article 1904, paragraph 13 states that a party may utilize the extraordinary challenge procedure if that party alleges that:
   a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, ii) the panel seriously departed from a fundamental rule of procedure, or iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and b) any of the actions set out in subparagraph (a) has materially affected the panel’s decision and threatens the integrity of the binational review process, . . .

*Id.*

161. *Id.*

162. See Krauss, supra note 131, at 89-90 (reporting how prior to CAFTA, parties could file an appeal from decisions by the Court of International Trade).

163. CAFTA, supra note 125, annex 1904.13, para 1.

164. *Id.*

165. See supra note 160 (listing the issues a party must allege to file an extraordinary challenge under article 1904, paragraph 13).

166. CAFTA, supra note 125, annex 1904.13. Remanded cases are sent back to the original panel for consideration in light of the committee’s decision. *Id.*

167. Kristin Moody-O’Grady, *Dispute Settlement Provisions in the NAFTA and the*
ignore panel decisions and use the extraordinary challenge procedure to politicize the dispute process.\textsuperscript{168} Furthermore, although a code of conduct presumably guards against the likelihood of bias among ECC judges, Canadian judges have not voted in favor of United States interests.\textsuperscript{169}

 Nonetheless, the extraordinary challenge provides CAFTA parties with a valuable safety valve that enables them to challenge conflicts of interest and other panel misconduct.\textsuperscript{170} Furthermore, a panel decision under CAFTA can be challenged based upon the actions of the panel member, unlike a WTO panel report appeal that must relate to the relevant law concerning the dispute or the legal interpretation of the panel's decision.\textsuperscript{171} While the Chapter 19 conflict of interest rules seem to efficiently ensure the composition of impartial panels, a recent dispute\textsuperscript{172} illustrates that Chapter 19 is not flawless.\textsuperscript{173}

\section{B. Chapter 19 Provisions in Practice: The Softwood Lumber Dispute}

1. Background

The United States and Canada have been embroiled in an ongoing

\textit{CAFTA: Progress or Protectionism?}, 18 FLETCHER F. WORLD AFF. 121, 130 (1994).
\textsuperscript{168} See id. (citing \textit{Dispute Resolution Procedures for U.S.-Canada F.T.A. Run Into Trouble}, GLOBAL FINANCIAL MARKETS, Apr. 9, 1991).
\textsuperscript{169} See Charles Abbott, \textit{U.S., Rebuffed, Will Refund Some Canada Lumber Duties}, REUTER EUR. BUS. REP., Aug. 3, 1994, \textit{available in LEXIS, NEWS Library, REUTER File} (statement of Malcom Wilkey, United States judge on the softwood lumber ECC) (asserting that of the six votes on the three Extraordinary Challenge Committees, Canadian committee members have cast all of their votes against the United States Commerce Department's position).
\textsuperscript{170} See Moody-O'Grady, supra note 167, at 130 (opining that the ECC, acting as a bilateral judiciary panel, ensures the continued progression of the CAFTA dispute settlement process).
\textsuperscript{171} WTO, supra note 4, annex II, art. 17.6.
\textsuperscript{173} See Murphy, supra note 110, at 601 (arguing that the CAFTA panel process can be cumbersome). In one case a panel procedure was completely suspended when an attorney recused himself from a countervailing duty dispute because of conflict of interest problems. \textit{Id.} at 600. Furthermore, because a panelist is prohibited from representing the parties for one year following the proceeding, panel members are sometimes reluctant to serve. See \textit{Hurting FTA, supra} note 142, at 814 (stating that attorneys are intimidated by the Chapter 19 one year restriction against representation of an involved party).
dispute regarding alleged subsidies of the Canadian softwood lumber industry. The United States asserts that softwood lumber imported from Canada materially injures the American lumber industry. On December 17, 1993, a binational panel remanded a softwood lumber countervailing duty case, holding that the evidence available was not sufficient to support the United States Commerce Department’s allegations of Canadian subsidies. Following the decision, an attorney from a United States lumber industry trade association searched the public records of two Canadian panelists.

The panelists were Canadian trade attorneys employed by firms representing Canadian lumber companies. The attorneys failed to report complete information on the required disclosure statements. The United States filed an extraordinary challenge, alleging that the panelists had conflicts of interest based on their firms’ ties to the Can-

174. See generally United States Trade Representative v. Canada, supra note 172 (detailing a concise account of the facts and issues surrounding the softwood lumber dispute).


177. Greg Rushford, Lawyers’ Ties Spur Bias Claim, LEGAL TIMES, June 20, 1994, at 5. John Ragosta, the attorney responsible for the public record search of the two Chapter 19 panelists, represents the Coalition for Fair Lumber Imports. Id.

178. Id.

179. Id.; see supra notes 155-58 and accompanying text (explaining that signed disclosure statements must be filed with the Secretariat before an individual can sit on a CAFTA panel).

180. U.S. Challenges Decision, supra note 176, at 586. The United States filed the extraordinary challenge on April 6, 1994. Id.

181. Id. Trade officials stated that the challenge was necessary to ensure complete confidence in the integrity and impartiality of the panel procedure. Countervailing Duties: U.S. Plans Conflict of Interest Challenge in Canadian Lumber Dispute, 11 INT’L TRADE REP. (BNA) No. 9, at 350 (March 2, 1994) (statement of Ira S. Shapiro, General Counsel for the United States Trade Representative). Lumber industry representatives assert that in order to maintain a bias free system, Congress should review what the industry perceives as serious procedural problems in Chapter 19 binational panels. Id. (statement of John A. Ragosta, attorney, U.S. Coalition for Fair Lumber Imports). John A. Ragosta was responsible for the initial complaint to the
The ECC, composed of two Canadian judges and one American judge, handed down a decision in four months.

The ECC dismissed the request for an extraordinary challenge on the grounds that the United States had failed to meet the necessary standard. The vote was two to one, with the two Canadian judges voting to reject the United States claim. In dissent, the United States judge asserted that the committee had made errors in its decision and that the two attorneys had materially breached the Chapter 19 Code of Conduct by failing to fully disclose certain professional ties.

United States and Canada regarding his discovery of information that had not been disclosed by the two panelists. Rushford, supra note 177, at 5.

One of the panelists, Richard Dearden, had disclosed his firm’s ties to some specific Canadian lumber companies, an American carpenter’s labor union and the Canadian Government. Id. He did not disclose that his firm also represented the United States Trade Representative, the Commerce Department and other Canadian lumber companies. Id. The other panelist, Lawson Hunter, had disclosed that his firm represented three Canadian lumber companies. Id. He did not report in his disclosure statement that a firm he joined in 1993 lobbied Canadian lumber firms or that he had represented the Canadian Transport Department. Id. But see Canada: Comment - Get Agreement On Subsidies Code, FIN. POST, Aug. 4, 1994 at 8 [hereinafter Agreement On Subsidies Code] (reporting that among the conflicts listed, one complaint involved work done over 30 years ago by a deceased attorney for one of the firms and a second incident cited work that was performed by an attorney while he was a student at another firm).

Canadian committee member, Justice Gordon Hart stated that “[i]n this case it is my view that there was no intentional refusal to reveal any matter that would justify the opposite party in removing either panelist and the request by the U.S. government for an extraordinary challenge should be rejected.” Id.

One Canadian judge stated that he was concerned that the lopsided vote would be interpreted as the result of national bias. Id.

See Agreement on Subsidies Code, supra note 182, at 8 (noting that Malcom Wilkey, the dissenting United States ECC judge, stated that the decision was “aberrant”); Countervailing Duties: Canada Prevails in Softwood Lumber Extraordinary Challenge Ruling, 11 INT’L TRADE REP. (BNA) No. 32 (Aug. 10, 1994), available in WESTLAW, BNA-ITR database (statement of Judge Malcom Wilkey) (asserting that the ECC “Binational Panel Majority opinion may violate more principles of appellate review of agency action than any opinion by a reviewing body that Judge Wilkey ever read”).

United States Trade Representative v. Canada, 1994 WL 405928 (Wilkey, J., dissenting). Judge Wilkey stated that “to tolerate such a failure to disclose would constitute the most obvious and dangerous threat to the integrity of the Binational Panel review process, because the selection of these members rests entirely on the voluntary, complete and continuing disclosure of any possible affiliations casting
A number of groups affected by the outcome of the dispute were dissatisfied with the decision. United States lumber industry trade associations claim that American industries will not be able to rely on the process. Legislators asserted that the holding raised serious concerns about the CAFTA dispute resolution process. Canadian industry officials are pleased with the decision, but expressed concern over the expense and length of time involved in the procedure. Moreover, Canadian government officials suggest that an improved method of settlement procedures for countervailing duty and anti-dumping disputes will be necessary to ensure an integrated market between the United States and Canada. The most measurable consequence of the decision, however, is the resulting $578 million in duties the United States must return to the Canadian lumber industry.


189. Agreement on Subsidies Code, supra note 182, at 8 (statement of Harold Maxwell, Chairman, U.S. Coalition for Fair Lumber Imports); see also Abbott, supra note 169 (reporting that while no United States trade officials had publicly commented on the ECC ruling, one official had "privately expressed disappointment").

190. Countervailing Duties: Lawmakers Blast Canada Lumber Ruling, Urge Solution to Flaws in Panel System, 11 INT’L TRADE REP. (BNA) No. 34 (Aug. 24, 1994) available in WESTLAW, BNA-ITR database (statements of Sen. John Breux and Sen. J. Bennett Johnson). Senator Jesse A. Helms stated that if the ECC ruling is indicative of the decisions that will be handed down by international dispute resolution panels, “then Congress must assume that the dispute settlement system in the World Trade Organization will even further impair the sovereign right of the U.S. to interpret its own laws.”

191. Canadian Victory, supra note 188 (statement of Tom Buell, Chairman, Canadian Forest Industries Council).

192. Agreement on Subsidies Code, supra note 182, at 8 (statement of Roy MacLaren, Canadian Trade Minister).

193. Abbott, supra note 169. The United States Department of Commerce had imposed a 6.51% duty on all Canadian softwood lumber exported to the United States. Id. Canadian officials expect a refund of approximately $578 million in duties owed to Canadian lumber firms. Id.; see Canada Hails U.S.-Canada Lumber Panel Decision, REUTER NEWSWIRE, Aug. 3, 1994, available in WESTLAW, INT-NEWS database (statement of Roy MacLaren, Canadian Trade Minister) (asserting his expectations that the United States promptly implement the decision of the ECC to ensure that Canadian industries receive the C$800 million, plus interest, that was collected by
2. Implications of the Case

While the Chapter 19 panel procedure may not be flawless, the softwood lumber case illustrates CAFTA's relatively effective conflict of interest provisions. Simultaneously, the decision reflects the practical impossibility of assuring complete neutrality in dispute resolution panels. Even if the softwood lumber ruling and the lopsided voting history of the ECC are the result of bias, guarding against the influence of national interests in a binational system may be impossible. Nonetheless, the economic repercussions of the decision reflect the necessity of safeguarding against conflicts of interest in a binding panel process.

Rules that require full disclosure by panelists and allow parties to challenge alleged panel bias are considerably stronger than the provision available under the WTO. That is not to say that Chapter 19 is the ultimate paradigm for the strengthening of the WTO provisions. Nevertheless, conflict of interest guidelines modeled after Chapter 19, tailored to the requirements of a multinational organ and modified to remedy the flaws, may provide the best means of decreasing the likelihood of biased panels tainting the equitable adjudication of international trade disputes.

IV. RECOMMENDATIONS

A. PANEL COMPOSITION

1. Increase Panel Size

One of the simplest ways to decrease the likelihood that a conflict of
interest will affect the outcome of a dispute is to increase the size of the panel. Unlike a Chapter 19 panel, a WTO panel is composed of three panelists, unless the parties agree to five. 199 The dynamics of group decision-making suggest that five-member panels may decrease the likelihood that a conflict of interest would influence a panel’s decision. 200 Additionally, five diverse individuals would arguably bring a different dynamic to the deliberation process through a broader range of experiences. 201 Weaknesses inherent in larger panels, such as lengthier deliberations and additional strains on panel rosters, 202 can be remedied. The inclusion of more non-governmental panel members could increase the availability of qualified members and minimize the depletion of panel rosters. 203 Additionally, the parties’ rigid adherence to

199. WTO, supra note 4, annex II, art. 8.5.
200. See Tatsuya Kameda, Procedural Influence in Small Group Decision Making: Deliberation Style and Assigned Decision Rules, 6 J. PERSONALITY & SOC. PSYCHOL. 245, 250 (1991) (asserting that when a decision task is based upon a dichotomous option of finding for or against one party, a minority position will not have a substantial basis of defense against the majority consensus); Walter C. Swap, Destructive Effects on Groups of Individuals, in GROUP DECISION MAKING 69, 81 (Walter C. Swap & Assoc. eds., 1984) (reporting that the majority of decision-making studies reveal that increasing the size of a group results in more conformity among the members); Hugo Bedau, Ethical Aspects of Group Decision Making in GROUP DECISION MAKING 115, 125 (Walter C. Swap & Assoc. eds., 1984) (discussing the dynamics of ethical reasoning in groups where conflicts of interest may be involved); see also William H. Smoke and Robert B. Zajonc, On the Reliability of Group Judgments and Decisions in MATHEMATICAL METHODS IN SMALL GROUP PROCESSES 322, 323 (Joan H. Criswell et al. eds., 1962) (finding that in five member group experiments, there is an increased probability that the group will arrive at a quorum).

201. See Plank, supra note 51, at 66 (stating that parties in GATT disputes have requested five member panels to ensure a broader spectrum of ideas on the issues before the panel); Homer E. Moyer, Jr., Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort, 27 A.B.A. SEC. INT’L L. 707, 714 (1993) (opining that CAFTA experiences have revealed a different dynamic created by five member panels).

202. See Moyer, supra note 201, at 714 (noting that CAFTA panels will often deliberate for several hours without breaks); see also Plank, supra note 51, at 66 (stating how the three panel procedure under earlier GATT provisions had developed as the rule because of the lack of panelists available during multiple panel disputes).

203. See WTO, supra note 4, annex II, art. 8.4 (providing that the Secretariat is responsible for maintaining the original and supplemental GATT rosters and that members can update the roster lists periodically). The roster of panelists maintained by the Secretariat must be supplemented more frequently than is currently requested by the Understanding. See id. annex II (stating that the Contracting Parties “may periodically suggest names of governmental and non-governmental individuals”) (em-
deliberation timetables should decrease the likelihood of delays.\textsuperscript{204}

2. Allow Peremptory Challenges

The current "compelling reason" standard that a party must satisfy to reject a panel nominee is uncertain.\textsuperscript{205} While the standard has been a relatively simple threshold to satisfy, there are no guidelines to ensure the adherence to past practices.\textsuperscript{206} Furthermore, under the current system, assessing whether a party has a compelling reason is a subjective determination left to the Secretariat.\textsuperscript{207} Therefore, invoking the Chapter 19 model of peremptory challenges would eliminate subjectivity from the process.\textsuperscript{208}

\textsuperscript{204} See supra notes 103-104 and accompanying text (describing the increasing number of non-governmental panel members on GATT rosters). Chapter 19 panels have generally met CAFTA timetables. Moyer, supra note 201, at 717. These timetables have been adhered to even though the pool of available experts has been insufficient. Murphy, supra note 110, at 600. Therefore, preventing a drawn out panel composition procedure under the WTO will depend to a large extent on the parties' adherence to WTO timetables. See Plank, supra note 51, at 95 (asserting that timely cooperation with the GATT panel procedure is the responsibility of the parties). Since the WTO time limits are relatively rigid, there is little room for intentional delays by the parties. See id. at 94 (revealing that Rosine Plank was unaware of any intentional panel delays during her term as a GATT official).

\textsuperscript{205} See supra notes 112-19 and accompanying text (explaining the procedure for objecting to panel nominees).

\textsuperscript{206} See supra notes 115-16 and accompanying text (asserting that in past practice, in order to meet the "compelling interest" standard, a party's mere assertion that they believed a panel nominee would be biased was often sufficient for an objection).

\textsuperscript{207} WTO, supra note 4, annex II, art. 8.6.

\textsuperscript{208} See supra notes 150-52 and accompanying text (describing the Chapter 19 peremptory challenge procedure). If the current standard becomes more rigid or fluctuated, the peremptory challenge rule would guarantee a party the right to object outright to a panel member nomination. See CAFTA, supra note 125, ch. 19, annex 1901.2, para. 2 (stating that the parties have the right to four confidential peremptory
3. Draw Panelists by Lot

If the parties cannot agree on the composition of a panel, panelists should be selected by lot rather than under a subjective standard based on who the Director-General "considers most appropriate." The Understanding mandates that panel prospects be listed on the rosters by experience in their respective sectors. Therefore, a simple system of grouping panel members by subject matter could generate a list of qualified individuals for each specific dispute. Provided that the number of panelists on the WTO roster is continually supplemented, no additional burden should be placed on the available pool of eligible individuals.

B. ETHICAL GUIDELINES

1. Institute a Code of Conduct

Unlike CAFTA, the WTO does not have a code of conduct for panelists or Appellate Body members. While panelists are not necessarily


209. See supra note 152 and accompanying text (explaining the Chapter 19 process of selecting panelists by lot).
210. WTO, supra note 4, annex II, art. 8.7.
211. Id. annex II, art. 8.4.
212. See supra note 203 and accompanying text (recommending continuous supplementation of panel rosters).
213. See WTO, supra note 4, annex II, arts. 8.1, 8.2 (stating that panel members
judges, they act in a judicial capacity when rendering panel decisions. Thus, judicial codes of conduct derived from various countries could provide suitable models. A majority of international judicial codes provide guidelines regulating the ethical behavior of judges. The United States judicial codes similarly include rules governing financial, personal and business ties.

should be well qualified and chosen in accordance with the policy considerations of ensuring independence, diversity and experience).


216. See id. at 1476-77 (reporting that in Argentina, activities considered incompatible with judicial status include, inter alia, political activity, commercial activity, and acting as an attorney); id. at 1497 (stating that judges in Brazil are prohibited from engaging in commercial activities or from being involved in a commercial corporation); id. at 1550-51 (explaining that Greece’s Supreme Disciplinary Council will sanction a judge for “exploiting judicial status for personal gain” or for acting “improper”).

Alternatively, drafting a code of conduct patterned after international arbitration provisions would similarly provide an effective ethical code for the WTO. INTERNATIONAL BAR ASS’N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon 1-D (1987) [hereinafter IBA CODE OF ETHICS]. Canon 1-D of the IBA Rules of Ethics states that following appointment, an arbitrator should:

avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest, in circumstances which might reasonably create the appearance that they had been influenced in the arbitration . . .


217. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2 GUIDE TO JUDICIARY POLICIES AND PROCEDURES, CODES OF CONDUCT FOR JUDGES AND JUDICIAL EMPLOYEES, I-9 to I-12 (1993) [hereinafter U.S. JUDICIAL CODES]. Canon 3C(1) of the Code of
2. Require Disclosure Statements and Recusal

As illustrated by the softwood lumber case, the use of non-governmental trade experts as panel members will inevitably result in conflicts of interest. Thus, in addition to a code of conduct, panel members should be required to sign and continuously supplement disclosure statements similar to those required under Chapter 19, providing the DSB with confidential financial, personal, and business information. A panel member’s disclosure statement would presumably reveal possible conflicts of interest. Similar to the Chapter 19 provisions, the documents could be filed confidentially with the Secretariat and an investigating authority, such as the Appellate Body, that would be respon-

Conduct states:
A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which:
(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
(c) the judge knows that, individually or as a fiduciary, the judge . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding . . . .

Id. at I-10. A financial interest is defined as “ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party . . . .” Id. at I-11.

218. See supra notes 104-11 and accompanying text (discussing the likelihood that private sector attorneys affiliated with various industries and acting as panelists will have conflicts of interest with the subject matter of disputes).

219. See CAFTA, supra note 125, annex 1901.2, para. 7 (outlining the signed statements required by CAFTA panel members). A number of international arbitration rules similarly request that arbitrators submit written disclosures. See, e.g., ICC Rules of Arbitration, supra note 216, art. 1, para. 7 (stating that an arbitrator must submit a written disclosure listing “facts or circumstances which might be of such a nature as to call into question the arbitrator’s independence in the eyes of the parties”); AMERICAN ARB. ASS’N, INTERNATIONAL ARBITRATION RULES art. 7 (1991) (requiring that a prospective arbitrator disclose any circumstances that may create doubts as to the arbitrator’s independence or neutrality).

220. See Crosbie Letter, supra note 156, at 76 (noting the information required under the Chapter 19 disclosure statements). Conflict of interest disclosure requirements would also apply to third party members and would therefore alleviate some of the current problems of ascertaining whether a party had a substantial interest in the dispute. See supra note 98 (discussing third party members).

221. See WTO, supra note 4, annex II, art. 17 (listing the rules governing the Standing Appellate Body). The WTO Appellate Body is composed of seven members,
sible for investigating conflicts of interest.222

Additionally, unlike Chapter 19, WTO panel members with conflicts of interest should be required to recuse themselves from the dispute.223 The disqualification rules in the United States judicial codes of conduct224 or in international judicial codes would provide effective recusal models.225

C. EXTRAORDINARY CHALLENGE

1. Allow Extraordinary Challenges

In instances where the recommended conflict of interest safeguards have not adequately guaranteed the composition of an impartial panel, the parties must have a safety valve to challenge the panel’s decision.226 The extraordinary challenge mechanism in CAFTA is an effective guideline.227 The WTO appellate procedure, which allows panel appeals based only on questions of law,228 should be amended to permit challenges for alleged panel member bias, violations of the code of conduct, serious conflicts of interest and gross misconduct.229 Furthermore, requiring a challenging party to assert that a panelist’s actions

appointed by the DSB, serving terms of two to four years. Id. arts. 17.1, 17.2.


223. See Crosbie Letter, supra note 156, at 76 (reporting that under Chapter 19, panel members with conflicts of interest are not required to recuse themselves and can still serve on a panel once a conflict has been disclosed).

224. See U.S. JUDICIAL CODES, supra note 217, §§ 3.1-3.6 (mandating a judge’s recusal and disqualification based upon, inter alia, financial interests, family relationships, relationships to law firms, government interests, and other personal and business relationships).

225. See generally Judicial Tenure, supra note 215 (listing disqualification procedures for judges in various countries and international organizations). Disqualification provisions in international arbitration rules provide additional guidelines for a WTO recusal requirement. See IBA CODE OF ETHICS, supra note 216, Canon II-E (defining rules of withdrawal for an arbitrator alleged to be biased or partial).

226. See supra notes 159-66 and accompanying text (explaining the extraordinary challenge procedures under Chapter 19 of CAFTA).

227. See CAFTA, supra note 125, annex 1904.13 (outlining the extraordinary challenge procedure).

228. See WTO, supra note 4, annex II, art. 17.6 (limiting panel report appeals to issues of law and the legal interpretations of the panel members).

229. See CAFTA, supra note 125, art. 1904, para. 13 (listing the allegations a party may assert under the extraordinary challenge procedure).
materially affected the panel decision and jeopardized the integrity of the process would establish a rigorous standard that should guard against the proliferation of frivolous challenges.

2. Provide Appellate Review

Following the assertion of a challenge, the WTO Appellate Body should be responsible for reviewing the allegations. Because the Appellate Body is a multinational panel, the possibility of national influences affecting the outcome of the review would be minimized. Under the WTO, three international legal experts unaffiliated with any government or other organizational interest would hear challenges of panelist impropriety. Furthermore, an appellate member would be unable to preside over any challenge in which that member had a conflict of interest. Therefore, an extraordinary challenge review by the Appellate Body would not be susceptible to the type of bias that may have affected the softwood lumber ECC.

CONCLUSION

The WTO represents a promising step toward the realization of the international trade body originally envisioned by the GATT Contracting Parties. The Understanding on Rules and Procedures Governing the Settlement of Disputes embodies many of the customs and organizational practices developed in the past forty-five years. The history of the panel procedure illustrates this growth. From the DISC case wrought with

230. See id. art. 1904, para. 13(b) (stating that a party filing an extraordinary challenge must assert that conflict of interest, bias, or gross misconduct of a panel member has "materially affected" the decision and "threatens the integrity" of the panel process).

231. See Murphy, supra note 110, at 596 (asserting that since the extraordinary challenge was intended to be invoked only in rare circumstances, the challenging party must therefore meet a rigid standard).

232. See generally WTO, supra note 4, annex II, arts. 17-20 (defining the rules governing the WTO appellate review).

233. See supra notes 185-86 (discussing the possibility of bias on the softwood lumber ECC).

234: WTO, supra note 4, annex II, arts. 8.9, 17.3.

235. Id. annex II, art. 17.3. Appellate Body members "shall be unaffiliated with any government" and "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest." Id.

236. See supra notes 185-86 and accompanying text (describing the possible national interest bias of the two Canadian judges on the softwood lumber ECC).
delays and vague panel reports, to the legally binding panel procedure of the WTO, GATT has developed a generally effective dispute resolution procedure. Nonetheless, the conflict of interest provisions in the Understanding remain inadequately equipped to deal with the realities of increasing globalization and the rapid expansion of trade.

As international trade issues become more complex, the need for qualified experts to referee disputes increases. Invariably, those who are the most qualified are also the most familiar with the subject matter, thereby increasing the likelihood of a conflict of interest. This comment proposes that the WTO adopt rigorous conflict of interest provisions modeled after the rules in CAFTA Chapter 19.

Establishing a code of ethics and requiring signed disclosures may reveal possible conflicts prior to panel deliberations. Increasing panel size and allowing peremptory challenges can minimize the effect that a conflict of interest may have on the outcome of a dispute. Finally, adopting a procedure that allows appellate review of alleged panel bias provides a necessary safety valve which enables parties to challenge decisions adversely affected by panelist impropriety.

Incorporating these recommendations into the legally binding dispute settlement procedure of the WTO may promote the successful adjudication of disputes by minimizing the possibility of biased panel decisions. Although ensuring the absolute impartiality of panels may be a practical impossibility, failing to protect against the likelihood of conflicts of interest may harm the international trading community and jeopardize the integrity of the WTO.