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NAFTA Dispute Settlement: Success or Failure?

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I. Introduction

A particular feature of the North American Free Trade Agreement (NAFTA)¹ is the fact that it includes quite comprehensive dispute settlement provisions. Negotiated at a time when dispute settlement was achieving considerable prominence in the Uruguay Round of Multilateral Trade Negotiations, and building on the experience of the Canada-US Free Trade Agreement (CUSFTA),² NAFTA was in many respects a model for dispute settlement in regional free trade agreements. It was novel as well. Not only did it have a general dispute settlement provision (Chapter 20), but it also had a particular dispute settlement arrangement for anti-dumping and countervailing duty matters (Chapter 19), and a dispute settlement provision for investment disputes, giving direct access to foreign investors to sue the NAFTA Parties (Chapter 11). NAFTA was established as a comprehensive free trade agreement and this is reflected in its dispute settlement provisions.

After 15 years of experience with NAFTA's dispute settlement provisions, can it be said that they have worked effectively, either as intended by the negotiators or in their own way independently of negotiating intent? In this article we will address this question. Our focus will be primarily on the processes of Chapters 19 and 20, but we will also give some consideration to Chapter 11. We will consider the origin of these provisions and how they were affected by the advent of WTO dispute settlement. We will consider the

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¹ North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States, 17 Dec. 1992, U.S.-Can.-Mex., (1993) 32 I.L.M. 289 (entered into force 1 Jan. 1994) [hereafter NAFTA].

² Canada-United States Free Trade Agreement, 2 January 1985 (1985) 27 I.L.M. 281 (entered into force 12 Oct. 1987) [hereafter CUSFTA].

problems that have arisen in their application and how many of these problems remain unresolved. However, we shall also show that in certain respects, NAFTA dispute settlement has been active and successful in dealing with particular kinds of disputes in the NAFTA area. In fact, some of the criticisms of the NAFTA processes are based on assumptions that those processes should do things that they are not capable of doing.

We shall conclude with some reflections about dispute settlement provisions in regional trade agreements and the emerging conflicts between regional and multilateral trading systems in respect of dispute settlement.

II. Origins of NAFTA dispute settlement

NAFTA dispute settlement was based in part on the dispute settlement provisions of the CUSFTA. In many respects NAFTA was an extension to Mexico of what had been provided in the CUSFTA with further provisions in certain areas, particularly in relation to investment. However, dispute settlement under the CUSFTA was specific to the Canada-US relationship. Indeed, much of the motor for self-standing dispute settlement in the CUSFTA was the intractable problem of softwood lumber. The CUSFTA was to be a means for resolving that problem.

CUSFTA Chapter 18 was a GATT-like process watered down from Canada's objective of having a comprehensive trade court and Chapter 19 of the CUSFTA was a compromise provision responding to Canada's desire to remove itself completely from the application of US trade remedy law. It provided for review of domestic anti-dumping (AD) and countervailing duty (CVD) determinations by a binational panel in accordance with the domestic law standard of review of the Party making the determination. Since a Canadian concern was that US agencies and tribunals were not even applying their own antidumping and countervailing duty law correctly, binational panel review – putting review at least in part in the hands of non-nationals – was seen as an important concession to Canada.³

In many respects both Chapter 18 and Chapter 19 of the CUSFTA were quite successful.⁴ They were used actively. In the 6 years of the CUSFTA there were 5 disputes under Chapter 18 and 33 under Chapter 19.⁵ Yet the seeds of difficulties that were to appear later in NAFTA were already present in the CUSFTA. These included problems in getting agreement on panel members, disagreements over the

³ See Michael Hart, Bill Dymond & Colin Robertson, *Decision at Midnight: Inside the Canada-U.S. Free-Trade Negotiations* (Vancouver: UBC Press, 1994) at 171.

⁴ See William Davey, *Pine & Swine – Canada-United States Trade Dispute Settlement: The FTA Experience and NAFTA Prospects* (Ottawa: Centre for Trade Law and Policy, 1997).

⁵ For a complete list see NAFTA Secretariat, "Decisions and Reports", <<http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312>>.

application of the domestic standard of review in Chapter 19 cases, conflict of interest provisions, and problems of implementation. A number of these difficulties revolved around the softwood lumber dispute, which continued without resolution, and panel decisions that were subject to “extraordinary review” on three occasions.⁶ Many of these problems were simply carried into NAFTA.

III. The NAFTA Dispute Settlement Provisions

There are three principal dispute settlement processes in NAFTA – a state-to-state process (Chapter 20), a process for review of AD and CVD determinations (Chapter 19), and an investor-state dispute settlement process (Chapter 11). We will deal with each of these in turn.

Chapter 20

NAFTA Chapter 20 was closely modeled on Chapter 18 of the CUSFTA. It applies to disputes between the Parties over “the interpretation or application” of the Agreement and where a Party claims that there has been nullification or impairment of a benefit expected to accrue under any provision of the Agreement.⁷ If consultations between the Parties are unsuccessful the matter can be referred to the Free Trade Commission, which at the request of a Party, is to establish an arbitral panel.⁸ An arbitral panel is composed of 5 members. Each disputing Party chooses two individuals who are nationals of the other Party and the Parties agree on a chair.⁹ That individual will normally not be a national of either of the disputing Parties.

Unlike the CUSFTA, NAFTA also had to deal with the circumstance of a third contracting party, and thus Chapter 20 contemplates both the possibility that the three Parties might be involved in a common dispute and for third Party participation in hearings including the opportunity to make written and oral submissions.¹⁰ The final report of the arbitral panel is to be the basis of an agreement between the Parties on the resolution of the dispute, but in the event of failure to agree, the winning Party can suspend benefits of equivalent effect against the other Party if it fails to implement the panel decision.¹¹

⁶ *Fresh, Chilled or Frozen Pork from Canada*, ECC-91-1904-01 USA (14 June 1991); *Live Swine From Canada*, ECC-93-1904-01 USA (8 April 1993); and, *Certain Softwood Lumber Products from Canada*, ECC-94-1904-01 USA (3 Aug. 1994).

⁷ NAFTA Article 2004 and Annex 2004.

⁸ NAFTA Article 2008.

⁹ NAFTA Article 2011.

¹⁰ NAFTA Article 2013.

¹¹ NAFTA Articles 2018-2019.

Chapter 20 was meant to be an improvement over CUSFTA Chapter 18. The reverse selection process, under which each Party chooses the other Party's nationals as panel members, and the selection of a chair who would normally not be a national of either of the disputing Parties, was designed to eliminate any impression of bias in the panel members. Fundamentally, however, the process remained the same.

Chapter 19

NAFTA Chapter 19 is essentially a transcription of CUSFTA Chapter 19 with certain adaptations because of the addition of Mexico. Chapter 19 provides for the replacement of judicial review for final AD and CVD determinations with binational panel review.¹² To compose a binational panel each Party appoints two members and the Parties agree on a fifth. The panel members then agree amongst themselves who will serve as the chair.¹³ Unlike a Chapter 20 binational panel, which can include a non-national, a Chapter 19 panel is composed solely of nationals of the NAFTA Parties.

The function of the binational panel is to determine whether the final determination of the competent investigating authority of the importing Party was made in accordance with the AD or CVD law of that Party. In making that determination the panel applies the standard of review applicable to judicial review in the importing Party.¹⁴ A panel can uphold the determination of the competent investigating authority or "remand it for action not inconsistent with the panel's decision".¹⁵ The decision of the panel is binding as between the Parties and cannot be subject to any form of judicial review in the courts of a Party. To the extent that a panel's instructions lead to the investigating authority revoking its AD or CVD order, the winning exporter can get a refund of its excess duties already paid.

Although the Chapter 19 process was to replace domestic judicial review, it did not do so completely. Instead, an exporter could, as an alternative to binational panel review, seek judicial review under the law of the importing Party of an AD or CVD determination. However, the choice of one form of redress means the exclusion of the other.¹⁶

A limited form of challenge of a panel's determination was provided with the continuation of the CUSFTA "extraordinary challenge procedure". Grounds for challenge include gross misconduct or bias of a panel member or a serious conflict

¹² NAFTA Article 1904.

¹³ NAFTA Annex 1901.2.

¹⁴ NAFTA Article 1904.3 and Annex 1911.

¹⁵ NAFTA Article 1904.8.

¹⁶ NAFTA Article 1904.11 & 12.

of interest, a serious departure by the panel from a fundamental rule of procedure, or the panel manifestly exceeding its powers, authority or jurisdiction.¹⁷

The adaptation of the Chapter 19 process to the situation of Mexico, a civil law jurisdiction, posed some challenges. Binational panel review draws on common law notions of judicial review of administrative action and a parallel in Mexican law had to be found for setting the standard of review. Article 238 of the Mexican Federal Fiscal Code (FFC)¹⁸ was chosen as providing an appropriate standard, although this gave rise to some difficulties when it came to be applied. The trouble lay in the fact that Article 238 was originally created as a standard for all administrative determinations in tax matters. As a result, binational panels had trouble identifying a specific standard to be applied to AD/CVD determinations.

The specific issue facing the first few panels was reconciling the two standards set forth in Article 1904.3 along with the remedial provisions of Article 1904.8, which states that a panel can either uphold or remand a final determination of the investigating authority. According to Article 1904.3, panels have to apply the standard of review set out in Annex 1911 (FCC Article 238 in the case of Mexico), as well as the general legal principles that a court of the importing Party (the Mexican Federal Fiscal Court) otherwise would apply to a review of a determination of the competent investigating authority (the Mexican Secretariat of Commerce and Industrial Development or "SECOFI"¹⁹). The first panel to review a SECOFI determination, *Cut-to-Length Plate Products*,²⁰ understood the second standard of Article 1904.3 as giving it the equivalent powers as the Mexican Federal Fiscal Court. As such, in reaching its decision, the majority of the panel held that it could go beyond the scope of FCC Article 238 and NAFTA Article 1904.8 and consider claims of Mexican constitutional violations and apply FCC Article 239, which grants the tribunal

¹⁷ NAFTA Article 1904.13.

¹⁸ "Article 238 has since been replaced by Article 51 of the *Ley Federal del Procedimiento Contencioso y Administrativo*, published in the *Diario Oficial de la Federación* on 1 December 2005 and effective 1 January 2006. Article 51 is substantially similar to FCC Article 238 and reads:

Article 51 – An administrative resolution will be declared illegal based on the following deficiencies:

Incompetence of the official that has prescribed, order, or handled the procedure from which said resolution derives.

Omission of the formal requirements demanded by the laws that affect the defenses of the private party and have an effect on the impact of the challenged resolution, including the absence of a basis or rationale as the case may be.

Errors in the proceeding that affect the defenses of the private party and have an effect on the meaning of the challenged resolution.

If the facts that gave rise to the cause of action did not occur, were different from or evaluated wrongly, or if an order was made in breach of the rules applied of there was a failure to apply the rules that should have been applied.

[...] Arbitral bodies or bodies otherwise derived from alternative dispute settlement mechanisms involving unfair trade practice, contained in international treaties and conventions to which Mexico is a party, may not revise the deficiencies listed in this article without a previous complaint from an interested party.

¹⁹ SECOFI's name changed to the Ministry of the Economy at the beginning of 2001.

²⁰ *Imports of Cut-to-Length Plate Products from the United States*, MEX-94-1904-02, 30 Aug. 1995.

authority to declare the challenged determination a nullity; a remedy beyond the scope NAFTA Article 1904.8.²¹

Understandably, the decision in *Cut-to-Length Plate Products* led to some controversy regarding the differences in the standards of review between the three NAFTA Parties.²² Fortunately, subsequent panels have not followed suit. With regard to constitutional violations, the Federal Fiscal Court has clearly stated that such allegations are within its exclusive jurisdiction.²³ With regard to FCC Article 239 and the ability to declare the nullity of a challenged determination, subsequent panels have viewed its application as “an undue expansion” of a panel’s jurisdiction.²⁴ As one panel has recently stated, “the jurisdiction and authority of this Panel are ruled by NAFTA in the first place, and secondly by the FFC, but only as circumscribed by the NAFTA. As a consequence, binational panel review differs, in its scope, from that of the [Federal Fiscal Court].”²⁵

In addition, since the Parties were not entirely sure how Chapter 19 would operate in the Mexican context, a further provision was added to Chapter 19 entitled, “Safeguarding the Panel Review System”.²⁶ It provided for the creation of a special committee to consider whether the domestic law of a Party was blocking the creation or operation of the binational panel process or impeding the implementation of a panel’s decision. In fact, the provision has never been invoked.

Chapter 11

Chapter 11 was novel in the sense that it was an early form of dispute settlement process for investment disputes contained within a comprehensive regional free trade agreement. Yet, in many respects, it was nothing more than the provisions of

²¹ *Ibid.*, at 22-26 and 30-33 (regarding the analysis of Article 14 and 16 of the Mexican Constitution).

²² See J.C. Thomas & Sergio López Ayllón, “NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area” (1995) 33 *Can. Y.B. Int’l L.* 75; David A. Gantz, “Resolution of Trade Disputes Under NAFTA’s Chapter 19: The Lessons of Extending the Binational Panel Process to Mexico” (1998) 29 *Law & Pol’y Int’l Bus.* 297; and Gabriel Cavazos Villanueva & Luis F. Martínez Serna, “Private Parties in the NAFTA Dispute Settlement Mechanisms: The Mexican Experience” (2003) 77 *Tul. L. Rev.* 1017.

²³ *Semanario Judicial de la Federación*, Volume XIV, August 2001. Thesis: 11 to 12A, Page 1445, Registry No. 188,918 which states that the Federal Fiscal Court has the investigative authority to declare judgment on the unconstitutionality of a Presidential Decree that delegates powers to an inferior investigative authority, to give legal investigative authority to another administrative investigative authority. See *Preliminary Resolution by which the Antidumping Investigation (Final Resolution) Regarding the Importation of Pork Legs, Merchandise Classified under Tariff Schedules of the Law of General Taxes of Import and Export, Originating in the United States of America*, MEX-USA-2006-1904-01, 5 Dec. 2008 at 7.

²⁴ *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America*, MEX-USA-98-1904-01, 3 Aug. 2001, at para. 286. [hereafter HFCS].

²⁵ *Ibid.*, at para. 261.

²⁶ NAFTA Article 1905.

a bilateral investment agreement, drawing on the US model bilateral investment treaty and the Canadian Foreign Investment Promotion and Protection Agreement. The basic obligations of most-favored-nation (MFN), national treatment, minimum standard of treatment, and obligations in respect of performance requirements and expropriation, although often using different wording, were common to bilateral investment agreements elsewhere in the world. Equally, the process for allowing investors to bring claims against one of the NAFTA Parties drew on the procedures existing outside of NAFTA; the International Centre for Settlement of Investment Disputes (ICSID) or its Additional Facility, or the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Under the Chapter 11 rules, a precondition for bringing a claim is that a foreign investor has an investment in the territory of the NAFTA Party against which the claim is brought, and the claim can be on behalf of the investor itself or of its investment.²⁷ Although there is no requirement for the exhaustion of remedies before bringing a claim, in bringing such a claim the investor has to renounce recourse to the domestic courts of the Party against which the claim is brought.²⁸

Tribunals established under NAFTA Chapter 11 are composed of three panelists, one appointed by each party and the third, the presiding arbitrator, by agreement of the disputing parties (the investor and the respondent Party).²⁹ In the event of failure to appoint an arbitrator, or failure to agree on a presiding arbitrator, the Secretary-General of ICSID has the power of appointment.³⁰ In accordance with Article 1136, the award of the Tribunal is binding on both the investor and the respondent Party and any monetary award is to be enforceable in domestic courts of the respondent Party in accordance with the terms of the ICSID Convention,³¹ the New York Convention³² or the Inter-American Convention.³³

The NAFTA Secretariat

Although NAFTA establishes a secretariat, it does so in three national sections.³⁴ Thus, each Party has its own national section within its territory³⁵ Each Party bears the costs of its national section.

²⁷ NAFTA Articles 1116 and 1117.

²⁸ NAFTA Article 1121.

²⁹ NAFTA Article 1123.

³⁰ NAFTA Article 1124.

³¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 I.L.M. 524 (entered into force 14 Oct. 1966).

³² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, (1968) 7 I.L.M. 1046 (entered into force 7 June 1959).

³³ Inter-American Convention on International Commercial Arbitration, 13 Jan. 1975, (1975) 14 I.L.M. 336 (entered into force 16 June 1976) [also known as the "Panama Convention"].

³⁴ NAFTA Articles 2002 and 1908.

³⁵ NAFTA Secretariat at <<http://www.nafta-sec-alena.org/en/view.aspx>>.

The national sections of the secretariat provide administrative assistance to Chapter 19 and Chapter 20 panels. The national section of the country whose determination is being reviewed administers Chapter 19 panels and the national section of the respondent Party administers Chapter 20 disputes. The role played by the secretariat is purely administrative. All substantive aspects of disputes are in the hands of the panel members who are entitled to appoint assistants.³⁶

The national sections have no role to play in respect of investment tribunals set up under Chapter 11. Tribunals operating under the ICSID or ICSID Additional Facility Rules use the ICSID secretariat. Tribunals operating under UNCITRAL rules may also use the ICSID secretariat, the Permanent Court of Arbitration, or make other arrangements to establish their own secretariat.

IV. The Advent of the WTO

NAFTA came into force on 1 January 1994. The WTO Agreements came into effect one year later.³⁷ To some extent, the two agreements had been negotiated in parallel. The CUSFTA and NAFTA dispute settlement provisions, which represented an advance over those operating under GATT,³⁸ influenced the development of dispute settlement procedures in the WTO.³⁹ And since the basic terms of the substantive obligations under NAFTA and the WTO, in respect of both tariff and non-tariff measures, including exceptions, were similar, it was likely that the domain of WTO dispute settlement would overlap with that of NAFTA at least in respect of the interpretation and application of certain core principles.

This was anticipated in NAFTA Chapter 20. Article 2005 provides that disputes on matters arising under the NAFTA and under GATT, "any agreement negotiated thereunder, or any successor agreement (GATT)" could be settled in either forum at the discretion of the complaining Party, although if the third NAFTA Party indicates its interest in having the matter resolved under NAFTA, preference is to be given to the NAFTA process. However, in cases involving certain environmental or sanitary and phytosanitary matters, the responding Party can call on the complaining Party to have recourse solely to the NAFTA provisions.⁴⁰ Although these provisions have not yet been invoked before a panel, they are the subject of a current dispute between the US and Mexico.⁴¹

³⁶ NAFTA Annex 2002.2.

³⁷ World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva: Cambridge University Press, 2003).

³⁸ General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 U.N.T.S. 187 (entered into force 1 Jan. 1948).

³⁹ Understanding on the Rules and Procedures Governing the Settlement of Disputes, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 353, 33 I.L.M. 1125, 1226 (1994) [hereafter DSU].

⁴⁰ NAFTA Article 2005.4.

⁴¹ See *infra*.

However, there were further implications for NAFTA from the existence of WTO dispute settlement. The new WTO process had some considerable advantages over NAFTA dispute settlement. The establishment of panels or the appointment of panel members could not be delayed.⁴² Strict time limits for the process were set.⁴³ Panel decisions were binding without any subsequent negotiating process.⁴⁴ There was a structured implementation and if necessary retaliation process.⁴⁵ And finally, and uniquely, there was an appellate process to deal with claims of error in law or legal reasoning by panels.⁴⁶

The existence of the new WTO dispute settlement procedures was to have a clear impact on dispute settlement under NAFTA Chapter 20. The first case between Canada and the US under WTO dispute settlement was a matter on which Canada had an exemption under NAFTA (cultural industries), but no carve-out under the WTO.⁴⁷ The complaining Party, the US, chose the WTO, and this seems to have set the standard for future dispute settlement between the NAFTA Parties. If WTO dispute settlement is an option, then it is the chosen means.

V. NAFTA Dispute Settlement: An Assessment

It is fair to say that none of the NAFTA dispute settlement processes has worked out as they were intended. The least used process is that of Chapter 20 and to that extent, it might be regarded as the least successful. Yet the reasons for success or lack of success differ in the case of the three different processes. Thus, they will each be dealt with separately.

Chapter 20

Chapter 20 dispute settlement has been used once between Canada and the US⁴⁸ and twice between Mexico and the US.⁴⁹ It was also invoked by Mexico in its

⁴² DSU Article 6.1.

⁴³ DSU Article 20.

⁴⁴ DSU Article 16.

⁴⁵ DSU Articles 21-22.

⁴⁶ DSU Article 17.

⁴⁷ WTO Panel Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/R, 14 March 1997; Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997.

⁴⁸ *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, CDA-95-2008-01, Final Report of the Panel, 2 Dec. 1996 [hereafter *Agricultural Products*].

⁴⁹ *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, USA-97-2008-01, Final Panel Report, 1 Jan. 1998; and, *Cross-Border Trucking Services USA-MEX-1998-2008-01*, Final Report of the Panel, 6 Feb. 2001 [Cross-Border Trucking].

sugar dispute with the United States, but no panel was ever set up. The first case was brought in 1995 and the last in 1998, although there have been a number of matters that have been the subject of consultations under Chapter 20 without any panel being established.⁵⁰ The infrequency of use of the Chapter 20 process is, of itself, an indication that the NAFTA Parties have not found it to be useful, although there are several complicating factors.

First, the US has been involved in each of the NAFTA Chapter 20 cases, and it has lost on each occasion. The case involving Canada was initiated by the US; the two Mexican cases involving the US were initiated by Mexico. There was considerable dissatisfaction in the US over its loss in the Agricultural Products case,⁵¹ and implementation of the decisions in the two cases brought by Mexico have caused considerable difficulty. As pointed out below, the Cross-Border Trucking decision is yet to be fully implemented. Thus, the US experience with Chapter 20 has not been satisfactory.⁵²

Second, although the reverse selection process for choosing panel members was an interesting innovation under NAFTA, it may have contributed to difficulties in agreeing to the establishment of a roster of panelists for Chapter 20.⁵³ As of the end of 2009, the NAFTA Secretariat web site still did not list a roster of Chapter 20 panelists although there are indications that a list has been agreed on.⁵⁴

Third, the procedures for appointing panelists do not guarantee that a panel will in fact be established. Although Article 2011 provides that if a Party fails to appoint its panelists, then the panelists are to be selected by lot, it does not provide who shall undertake the selection. It is possibly in the power of the national section administering the dispute to make the selection, but since it is the national section of the respondent Party that administers the process, it seems unlikely that this section would make a selection if the respondent Party had refused to make its own selection. This appears to have been the problem in the dispute between the United States and Mexico over sugar.

Fourth, the lack of any structure for the implementation of decisions has meant that even though a panel decision has been rendered, there is no guarantee that implementation will occur quickly, if at all. This is highlighted by the continuing dispute over Cross-Border Trucking.⁵⁵ The case arose out of the refusal by the US to implement a NAFTA provision requiring both the US and Mexico to allow

⁵⁰ David A. Gantz, *Regional Trade Agreements: Law Policy and Practice*, (Carolina Academic Press: Durham, 2009), 143.

⁵¹ See Dale E. McNeil, "The NAFTA Panel Decision on Canadian Tariff-rate Quotas: Imagining a Tarrifying Bargain" (1997) 22 *Yale J. Int'l L.* 345.

⁵² See also, Gantz, *supra* note 50, at 143.

⁵³ Under NAFTA Article 2009, an agreed roster of 30 names was to be established by 1 January 1994.

⁵⁴ Canada appointed its ten members of the roster by Order-in-Council 2004-1484 (Vol. 138 *Can. Gazette Part I*, No. 51, 18 Dec. 2004). Members were appointed for three year terms to take effect upon approval of the Free Trade Commission (FTC). Apparently they have been approved by the FTC along with roster members from the US and Mexico for a term ending 31 December 2009, however there is no official record of the establishment of the roster.

⁵⁵ *Cross-Border Trucking Services*, USA-Mex-98-2008-01, Final Report of the Panel, 6 Feb. 2001.

nation wide cross-border trucking services by January 2000.⁵⁶ The dispute also included the US preclusion of investment by Mexican firms in US trucking companies. Mexico argued before a Chapter 20 panel that the US had violated the national treatment and MFN provisions of Chapter 11 and Chapter 12 (cross-border services), as well as specific provisions of Annex I providing for such obligations.

The panel found in favour of Mexico in its, however the US has yet to implement the panel's report with regards to its Chapter 12 obligations. The matter has been the subject of congressional debates, executive orders, and even a Supreme Court decision.⁵⁷ More recently, the US began a pilot program granting access to a limited number of Mexican trucks in 2007 that was meant to last 3 years but was withdrawn after only 18 months in March 2009.⁵⁸

Fifth, the WTO alternative stands as a contrast. The problems of establishing panels does not exist there; indicative lists of panel members have been established and the power of the Director-General to appoint panel members has prevented any blocking of panel establishment. The structured process for implementation and retaliation has resulted in most decisions being implemented, and the US has a more balanced win/loss record in WTO dispute settlement. Moreover, WTO panel decisions can be reviewed on appeal.

All of this means that NAFTA Chapter 20 is not a very attractive dispute settlement option in the case of disputes that can be brought before the WTO. Moreover, the WTO also provides the additional element of elevating disputes between the NAFTA Parties to the multilateral level and allowing other, non-NAFTA, states to participate as third parties. This appears to have been one of Mexico's leading motivations in bringing its most recent complaint against the US in the Tuna-Dolphin dispute, with regard to the US refusal to certify Mexican tuna as "dolphin-safe",⁵⁹ before the WTO.⁶⁰ Faced with these considerations, even for those NAFTA disputes that could not be taken to the WTO, the WTO process simply highlights the deficiencies of the Chapter 20 mechanism.

⁵⁶ Peter J. Cazamias, "The U.S. - Mexican Trucking Dispute, A Product of a Politicized Trade Agreement" (1998) 33 *Tex. Int'l L. J.* 349 at 349.

⁵⁷ See Elizabeth Townsend, "NAFTA, Mexican Trucks, and the Border: Making Sense of Years of International Arbitration, Domestic Debates, and the Recent U.S. Supreme Court Decision" (2004) *Transp. L. J.* 131.

⁵⁸ David A. Gantz, "The Cross-Border Trucking Dispute" North American Consortium on Legal Education Conference Presentation, Mexico City, October 2009 (on file with the authors).

⁵⁹ WTO Dispute Settlement Body (DSB), *Minutes of Meeting - Held in the Centre William Rappard on 20 April 2009*, WT/DSB/M/267, 26 June 2009, at para. 79. Mexico stated that beyond the legal considerations, the dispute deals with issues with important multilateral implications that had to be resolved at the WTO as many countries had indicated a desire to take part in, the dispute which would not be possible under NAFTA proceedings.

⁶⁰ *United States - Measures concerning the importation, marketing and sale of tuna and tuna products*, WT/DS381/4, 10 March 2009 [hereafter Tuna-Dolphin dispute].

Chapter 19

By comparison with Chapter 20, dispute settlement under Chapter 19 has functioned relatively effectively. There have been 137 cases brought under Chapter 19; 22 against Canada; 97 against the US and 18 against Mexico.⁶¹ The decisions in these cases have had an impact on the way that domestic agencies function, and this applies particularly to the Department of Commerce (DOC) and the International Trade Commission (ITC) in the United States. Both agencies have had to look again at what they have done. They have had to base their decisions on reasoning and not on conjecture. They have had to revise their determinations. Thus, the binational panels have had a perceptible impact on the process of applying AD and CVD laws in all three countries.

Chapter 19 provides an international review of whether a state is applying its own law correctly. Such an intrusion into the application of domestic law by a binational panel can be seen to raise sovereignty concerns.⁶² Yet to a large extent these panels have been able to function without difficulty, even though they involve lawyers from each of the three NAFTA Parties interpreting and applying each other's domestic law. Dissents have been few; in only a limited number of cases have there been major differences between panel members, and only infrequently have panels divided along national lines.⁶³ The heated political debate in public is not replicated in the privacy of the panel's deliberations. So, as a collegial decision-making process, the Chapter 19 binational panel system works well.

This is not to say that the system is without problems. There have been concerns about delays in panel appointments, the length of time for panels to reach decisions, and the under funding and staffing of the US section of the NAFTA Secretariat.⁶⁴ But a more substantive concern has been about the extent of the mandate of panels, which has manifested itself largely in the highly politicized Softwood Lumber dispute.

The concern arises out of the discretion afforded to panels under Article 1904.8, which states that "[t]he panel may uphold a final determination, or

⁶¹ Some of these cases were terminated before the panel rendered a decision: eight against Canada, seven against Mexico, and 47 against the US. The totals also including pending cases, where, as of December 2009, eight are pending against the US, and one against Mexico. For a complete list see NAFTA Secretariat, "Decisions and Reports", <<http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312>>.

⁶² Constitutional challenges have been raised in the US though all efforts have failed to date. See David A. Gantz, "The United States and Dispute Settlement under the North American Free Trade Agreement: Ambivalence, Frustration, and Occasional Defiance" in Cesare P.R. Romano, ed., *The Sword and the Scales: The United States and International Courts and Tribunals* (Cambridge: Cambridge University Press, 2009) 356 at 381.

⁶³ A 2005 study determined that more than 80 percent of panel decisions resulted in unanimous rulings regardless of panel member nationality. *Ibid.*, at 379.

⁶⁴ See Patrick Macrory, *NAFTA Chapter 19: A Successful Experiment in International Trade Dispute Resolution*, (C.D. Howe Institute, Toronto, 2002). Available at <http://www.cdhowe.org/pdf/commentary_168.pdf>.

remand it for action not inconsistent with the panel's decision."⁶⁵ As a result, a type of adjudicative dialogue has emerged between panels and national agencies. In highly politicized disputes this dialogue has turned into what Professor Chi Carmody has termed, "conversations of contempt",⁶⁶ where tensions have arisen between what a binational panel can do and what a national agency must do in response. Moreover, notwithstanding the imposed limits, faced with recalcitrant agencies, panels have occasionally done more than simply confirm or remand agency decisions.⁶⁷

In *Softwood Lumber*, the conflict centres on the United States contention that Canadian forest policies, including the fees charged by Canada's provincial governments to private firms to harvest trees on public lands, results in injurious subsidization and dumping. In response, the United States has applied ADs and CVDs on Canadian softwood imports. Litigation has followed on and off since 1982 tempered only by negotiated settlements between the two governments, the most recent of which was the 2006 *Softwood Lumber Agreement*.⁶⁸

The cases before Chapter 19 panels preceding the 2006 Agreement were characterized by acrimony between the DOC's determinations of dumping and subsidy and the ITC's final determination of threat of injury,⁶⁹ on the one hand, and the Chapter 19 panels reviewing those determinations on the other hand. In each of the three instances, the binational panels had to remand their decisions at least two additional times, with the panel charged with review of the DOC's subsidy determination making a total of five remands.⁷⁰

⁶⁵ Emphasis added.

⁶⁶ See Chi Carmody, "Continental Conversations: Remand of Binational Panel Decisions Under NAFTA Chapter 19" in *The First Decade of NAFTA: The Future of Free Trade in North America* ed. Kevin C. Kennedy (Ardsley, NY: Transnational Publishers, Inc., 2004) 431 at 453-461. Carmody describes "conversations of contempt" in regard to *Pure Magnesium from Canada (Concerning the Results of the Second Redetermination by the Department of Commerce)*, USA-CDA-00-1904-06, 28 Apr. 2003; and HFCS, *supra* note 24.

⁶⁷ This practice was also found under the CUSFTA, where a binational panel in the *Softwood Lumber* dispute issued a second remand dictating a specific result: "Since Commerce has been unable to provide a rational legal basis for a finding that the provincial stumpage programs are specific and in light of the efficiency with which the Panel review is intended to resolve these disputes, we therefore remand this issue to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries." *Certain Softwood Lumber Products from Canada (Decision of the Panel on Remand)*, USA-92-1904-01, 17 Dec. 1993 at 50-1.

⁶⁸ *Softwood Lumber Agreement* between the Government of Canada and the Government of the United States, 12 Sept. 2006 (entered into force 13 Oct. 2006), <<http://www.international.gc.ca/eicb/softwood/pdfs/SLA-en.pdf>>, (hereinafter as "2006 SLA"). The 2006 SLA will be for a term of seven years with an option to renew for two additional years and includes, *inter alia*, the revocation of the US CVD and AD orders; the return of over \$4.5 billion USD in duties collected by the US since 2002; and a range of initiatives to enhance binational cooperation. See Canada, Foreign Affairs and International Trade Canada, "The Canada-U.S. Softwood Lumber Agreement", <http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/notices-avis/agreement-accord.aspx?lang=eng>.

⁶⁹ Under US law, the ITC has to consider a number of factors in order to determine whether continued importation of dumped or subsidized goods would cause harm to the domestic industry before imposing ADs or CVDs. See 19 USC Section 1677(7)(F)(i).

⁷⁰ See Canada, Foreign Affairs and International Trade Canada, "Softwood Lumber, Canada's Legal Actions", <http://www.dfait-maeci.gc.ca/controls-controles/softwood-bois_oeuvre/notices-avis/nafta-alena.aspx>.

In the second panel remand decision with regards to injury, the irritation of the panel with the ITC was palpable. In unequivocal language, the Panel said:

The [ITC] has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of the Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process.⁷¹

The panel then took the significant step of specifically precluding the ITC from undertaking another analysis of the substantive issues and instructed it to determine that the evidence on the record did not support a finding of threat of material injury,⁷² arguably thereby stretching the limits of Article 1904.8.

When agencies refuse to act on the remand instructions of a binational panel, the panel may feel itself compelled to dictate specific results. This is an extreme outcome and one that leaves the binational panel open to the charge that it has exceeded its jurisdiction. It is not surprising, therefore, that panels were challenged twice under the extraordinary challenge procedure during the latest round of the dispute in relation to both reviews of the DOC's determination of subsidy and reviews of the ITC's determination of injury. The Extraordinary Challenge Committee (ECC) ultimately upheld the panel's ruling in the latter,⁷³ and the US withdrew its challenge in the former given the advent of the 2006 SLA.⁷⁴

It is clear that, first within the CUSFTA and now within NAFTA, Chapter 19 has failed to resolve the Softwood Lumber dispute. But in order for Chapter 19 to do that, the dispute would have had to be essentially about the failure of the US to apply its own law properly. Softwood Lumber is not about that, or least not just about that. The Softwood Lumber issue is in large part political and relates to differences in forest management in the two countries and the power of lobby groups, particularly in US domestic political processes in the implementation of international obligations. It is no wonder that a negotiated settlement has been the outcome of every round of disputes followed immediately by a renewal of fresh investigations upon their expiration.⁷⁵

⁷¹ *Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination (Second Remand Decision of the Panel)*, USA-CDA-2002-1904-07, 31 Aug. 2004, at 3. Moreover, a concurring panelists added: "... for the Panel to postpone finality by issuing yet another open-ended remand instruction to the [ITC] would be to allow the Chapter 19 process to become a mockery and an exercise in futility." *Ibid.*, at 12.

⁷² *Ibid.*, at 7.

⁷³ *Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01USA, 10 Aug. 2005. Moreover, the ECC held that, in rare circumstances, NAFTA Chapter 19 panels could remand determinations with specific instructions to the appropriate U.S. agency. *Ibid.*, at 44-49.

⁷⁴ Canada, Foreign Affairs and International Trade Canada, "Softwood Lumber, Canada's Legal Actions", <http://www.dfait-maeci.gc.ca/controls-contrôles/softwood-bois_oeuvre/notices-avis/nafta-alena.aspx>.

⁷⁵ For a comprehensive overview of the dispute, see Ian Sanford, "Determining the Existence of Countervailable Subsidies in the Context of the Canada-United States Softwood Lumber Dispute: 1982-2005" (2005) 43 Can. Y.B. Int'l L. 297; and, David Quayat, "The Forest for the Trees: A Roadmap to Canada's Litigation Experience in Lumber IV" (2009) 12 J.I.E.L. 115.

Thus, the lofty goal of having Chapter 19 resolve Softwood Lumber was perhaps always overly ambitious given the politically charged context of Canadian softwood lumber exports. Any future solution may have more to do with an increasingly integrated cross-border lumber industry, the increasing parity of the Canadian and US dollars, and changes in the structure of forest management in Canada. In the short term, however, Canadian softwood lumber will continue to be an easy target for US trade remedies. Rather than pointing to a failure in the Chapter 19 process, the Softwood Lumber dispute seems to indicate that legal mechanisms can prove impotent when faced with highly politicized disputes that may be better resolved through diplomatic processes.

Putting aside Softwood Lumber, there is one respect in which the Chapter 19 process has not been successful. This is in relation to the extraordinary challenge process. Resort to the extraordinary challenge process has always been controversial. When the US lodged the first challenge under the CUSFTA,⁷⁶ some argued that it was an improper use of the process. Challenges were supposed to be extraordinary. It was not supposed to be a back door means to appeal.⁷⁷

However, the grounds for an ECC to intervene are limited and the chances of a challenge committee finding in favour of the petitioner are slim. This itself creates a potential problem. If challenge committees always uphold claims against the panel, the panel process would lose credibility. If challenge committees never uphold a claim, then there is a danger that the challenge process itself will lose credibility. This is the risk confronting the ECC process.

The use of the ECC process in respect of Softwood Lumber has already been discussed. But the problem is not limited to that dispute. Two challenges in other areas highlight the credibility problem of the ECC process. In the first, the Committee rejected the petition even though it considered that the dissenting panel member had been correct.⁷⁸ In the second case, the Committee found that the Panel had manifestly exceeded its powers and that this had affected its decision, but since the panel's action did not threaten the integrity of the binational panel process, the Committee rejected the petition.⁷⁹ As a result, in both cases agencies had to accept remand decisions that independent review bodies had said were flawed. This does nothing to encourage respect by agencies for the process or public confidence in it.

In our view, the right to challenge a panel's decision should not be limited to the existing misconduct or egregious error standard. Those grounds can remain, but an appeal should also be allowed where the panel has erred in its

⁷⁶ *Fresh, Chilled, or Frozen Pork from Canada*, ECC-91-1904-01USA, 14 June 1991.

⁷⁷ In fact, one ECC has commented that the process is intended to act as a "safety valve in those extraordinary circumstances where a challenge is warranted to uphold the integrity of the binational process." *Live Swine From Canada*, ECC-1993-1904-01USA, 8 April 1993 at 8.

⁷⁸ *Gray Portland Cement and Clinker from Mexico*, ECC-2000-1904-01USA, 30 Oct. 2003.

⁷⁹ *Pure Magnesium from Canada*, ECC-2003-1904-01USA, 7 Oct. 2004.

interpretation of the domestic law of the country whose agency's decision is being reviewed and the tribunal should not have to demonstrate a threat to the integrity of the panel process. A decision of a panel tested by an appeal should have more credibility in the eyes of a domestic agency, which might eliminate some of the "conversations of contempt" between panels and agencies.

Chapter 11

It is beyond the scope of this paper to provide a comprehensive assessment of the Chapter 11 dispute settlement process, but certain points can be noted.

Granting as it does rights to investors to sue the NAFTA Parties directly, Chapter 11 has been controversial within the territories of each of the NAFTA Parties. The fact that a NAFTA government may have to compensate foreign investors for action it has taken to achieve environmental objectives has been a particular cause of concern, in part because of apprehension about a legislative chill in respect of matters otherwise regarded as in the public interest.⁸⁰ As a result, challenges have been made in the domestic courts of both Canada and the United States to the constitutionality of investor-state dispute settlement under Chapter 11.⁸¹ Similar questions have been raised in Mexico.⁸²

In terms of use, dispute settlement under NAFTA Chapter 11 has been a success. There have been 26 claims brought against Canada, 16 against Mexico and 19 against the US.⁸³ The fact that claims have been brought against Canada and the United States has been somewhat of surprise for the two countries, which largely anticipated that the claims would be against Mexico. The volume of claims under NAFTA Chapter 11 must also be considered against the broader background of a burgeoning of investor-state claims under bilateral investment agreements and other arrangements providing for such claims. The jurisprudence of these tribunals is referred to frequently by Chapter 11 tribunals and the same occurs in reverse. Indeed, early success in NAFTA Chapter 11 claims may have been a catalyst for some of the increase in investor-state claims more generally.

⁸⁰ See Julie Soloway, *NAFTA's Chapter 11: Investor Protection, Integration and the Public Interest* (Institute for Research and Public Policy, Montreal, 2003), <<http://www.irpp.org/choices/archive/vol9no2.pdf>>.

⁸¹ *Council of Canadians v. Canada (Attorney General)*, 2006 CanLII 40222 (ON C.A.). See also David Schneiderman, "Investment Rules and the New Constitutionalism" (2000) 25 *Law & Soc. Inquiry* 757.

⁸² See Santiago González-Luna, "Constitutional Challenges to NAFTA Chapter 11: A Mexican Perspective" in *The First Decade of NAFTA: The Future of Free Trade in North America* ed. Kevin C. Kennedy (Ardsley, NY: Transnational Publishers, Inc., 2004) 279.

⁸³ These totals include cases at varying stages of the arbitral process, including cases that have been withdrawn or inactive. See <<http://www.naftaclaims.com/>>.

Although the existence of the Chapter 11 process has been controversial, there has been less controversy over the operation of that process. It is seen as time consuming and expensive, but over time a generalized pattern of practice in the process is emerging. Nevertheless, some particular concerns have arisen. Two will be mentioned here.

First, although there is no appeal from the decision of a Chapter 11 tribunal, there is a limited form of review in accordance with the terms of the ICSID or Additional Facility Rules or the UNCITRAL rules, which can be judicially reviewed in the place of arbitration. In the *Metalclad* case, this meant review under law of the Province of British Columbia as the seat of the arbitration.⁸⁴ In the review process, the British Columbia court overturned part of the decision of the tribunal, leading to concerns that domestic courts in Canada might take an overly intrusive role in reviewing decisions of NAFTA Chapter 11 tribunals. This led the UPS tribunal to refuse to select a place of arbitration in Canada, even though it was a case brought against Canada, opting instead for Washington, D.C. as the place of arbitration and thereby avoiding any question of judicial review in Canadian courts.⁸⁵ However, subsequent attempts to have Canadian courts overturn decisions of NAFTA Chapter 11 tribunals have not been successful and later Chapter 11 tribunals have selected Canadian jurisdictions as the place of arbitration.⁸⁶

Second, under Article 1131(2), any interpretation of a provision of the Agreement by the FTC is binding on a Chapter 11 tribunal. In August 2001, the Commission adopted an interpretation of Article 1105(1) relating to the minimum standard of treatment to the effect that this standard was the same as the minimum standard of treatment under customary international law.⁸⁷ At the time that it issued this interpretation, the question of the interpretation of Article 1105 was before a Chapter 11 tribunal and Article 1105 had been invoked in other claims.

The tribunal in *Pope & Talbot* took the view that although it did not have to decide the matter, it would have the authority to determine whether in issuing the interpretation the Commission had exceeded its powers.⁸⁸ In fact, the tribunal was inclined to the view that what the Commission had done was to seek to amend the Agreement, something that as a Commission it did not have the power to do.⁸⁹ Subsequent tribunals have not gone so far, preferring instead the approach of the

⁸⁴ *Mexico v. Metalclad Corp.*, 2001 BCSC 664. Available at <<http://ita.law.uvic.ca/documents/Metalclad-BCSCReview.pdf>>.

⁸⁵ *United Parcel Service of America Inc. v. Canada*, UNCITRAL (NAFTA), (Order on the Place of Arbitration, 17 Oct. 2001). Available at <<http://www.naftaclaims.com/>>.

⁸⁶ See *Chentura Corp. v. Canada*, UNCITRAL (NAFTA), (Procedural Order No. 1, 21 Jan. 2008) where Ottawa, Ontario was chosen as the place of arbitration.

⁸⁷ NAFTA Free Trade Commission, "Notes of Interpretation of Certain Chapter 11 Provisions", 31 July 2001. Available at <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>>.

⁸⁸ *Pope & Talbot Inc. v. Canada*, UNCITRAL (NAFTA), (Award in Respect of Damages, 31 May 2002).

⁸⁹ *Ibid.*, at para. 47.

ADF tribunal that NAFTA Chapter 11 tribunals should accept and not look behind interpretations of the Agreement made by the FTC.⁹⁰

Institutional Inadequacy

A long-standing criticism of the NAFTA dispute settlement process has been directed at the inadequate institutional support provided to the Chapter 19 and 20 panels. Much of the criticism stems from the fact that an independent trade secretariat was not created alongside the NAFTA similar to the secretariats established by the labor and environmental side agreements.⁹¹ In fact, an independent trade secretariat was originally agreed upon by the Parties to be based in Mexico City with equivalent staff and funding as the Dallas-based Labor Secretariat and the Montreal-based Environmental Secretariat.⁹² The trade secretariat was never formally established, however, due primarily to the US failure to provide funding.⁹³

The tripartite secretariat is often seen as part of the reason for problems with dispute settlement, including delays in the panel selection process and the panel proceedings themselves. It is also seen to provide insufficient support for the FTC in administering its treaty functions.⁹⁴ Moreover, the secretariat is not completely independent of the NAFTA Parties. Although it

⁹⁰ *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1 (NAFTA), (Award, 9 Jan. 2003) at para. 171. Contrast with *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), (Award, 11 Oct. 2002) at paras 119-121, 125; where the panel did not see an issue of incorporating the FTC Interpretive Note. See also Guillermo Alvarez Aguilar & William W. Park, "The New Face of Investment Arbitration: NAFTA Chapter 11" (2003) 28 *Yale J. Int'l L.* 365 who conclude that allowing the FTC to engage in *de facto* amendment of the NAFTA would jeopardize the stability of investor protection, and in some instances might provoke arbitrator disregard of FTC interpretations.

⁹¹ North American Agreement on Labor Cooperation, Washington, Ottawa, Mexico City, 14 Sept. 1993, (1993) 32 I.L.M. 1499 (entered into force 1 Jan. 1994); and, North American Agreement on Environmental Cooperation, Washington, Ottawa, Mexico City, 14 Sept. 1993, (1993) 32 I.L.M. 1480 (entered into force 1 Jan. 1994).

⁹² See J. Ernesto Grilava & Patrick T. Brewer, "Monitoring and Managing North American Free Trade: The Administrative Bodies of the North American Free Trade Agreement" (1994) 2 *San Diego Just. J.* 1.

⁹³ *Ibid.*, at 2. US support for its national section secretariat remains an issue. Gary Clyde Hufbauer & Jeffrey J. Schott, "Dispute Settlement Systems" in *NAFTA Revisited: Achievements and Challenges* (Washington D.C.: Peterson Institute for International Economics, 2005) at 249.

⁹⁴ See *ibid.*; Sidney Picker, Jr., "NAFTA Chapter Twenty – Reflections on Party-to-Party Dispute Resolution" (1997) 14 *Ariz. J. Int'l & Comp. L.* 465; David A. Gantz, "Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process" (2000) 11 *Am. Rev. Int'l Arb.* 481; Canada, The Senate, Standing Senate Committee on Foreign Affairs, "Uncertain Access: The Consequences of U.S. Security and Trade Action for Canadian Trade Policy (Volume 1)" in *Report of the Standing Senate Committee on Foreign Affairs* (June 2003); and, Canada, House of Commons, Subcommittee on International Trade, Trade Disputes and Investment, "Dispute Settlement in the NAFTA: Fixing an Agreement Under Siege" in *Report of the Standing Committee on Foreign Affairs and International Trade*, (May 2005).

is formally accountable to the FTC, that body is itself a political institution composed of the respective trade ministers of each of the Parties. This may be contrasted with the independence exercised by the WTO Secretariat.⁹⁵ Under the DSU, the role of the WTO Secretariat is explicitly outlined as assisting panels with the legal, historical and procedural aspects of matters dealt with, as well as providing secretarial and technical support.⁹⁶

Nonetheless, calls for institutional improvement in NAFTA have to be considered in the broader context of NAFTA as a free trade agreement. While a single secretariat may make sense with regard to administering dispute settlement, the NAFTA Parties have no present desire to create a supranational institution. In fact, transforming the secretariat into a single secretariat runs the risk of changing NAFTA into a different kind of agreement. As such, it is part of a debate about a much bigger issue – whether NAFTA should remain as a free trade agreement or develop in the future into a customs union.

VI. The Interrelationship of WTO and NAFTA Dispute Settlement Processes

There is no doubt that the existence of the WTO dispute settlement process has had a considerable impact on dispute settlement under NAFTA Chapter 20. It has also had an impact under NAFTA Chapter 19, although there the situation is somewhat different. In the case of NAFTA Chapter 20, in many instances the WTO simply provides an alternative forum. Some disputes could be brought under either the WTO or NAFTA. As we have pointed out, where that option is available, claiming parties have elected to use the WTO process. In the case of Chapter 19, there is no real overlap of jurisdiction with the WTO. Chapter 19 panels review agency determinations to see if they comply with the domestic law of the importing Party. A WTO panel determines whether the domestic law of a WTO Member is in accordance with its WTO obligations.⁹⁷

The interrelationship between Chapter 19 and the WTO processes was highlighted in the Softwood Lumber dispute where parallel to Chapter 19 reviews of the determinations of the DOC and the ITC, challenges were brought in the WTO to the substance of the domestic law that the Chapter 19 panels were reviewing. The DSU enables WTO Members to challenge preliminary agency

⁹⁵ David A. Gantz, "Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process" (2000) 11 Am. Rev. Int'l Arb. 481 at 511.

⁹⁶ DSU Article 27.

⁹⁷ DSU Article 3.3 states that the WTO dispute settlement procedures are designed to provide "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member".

decisions of another Member as well as that Member's law before the law has been invoked.⁹⁸ As a result, Canada was able to challenge the ITC and DOC's final determinations on injury, subsidy and dumping, and the DOC's preliminary determinations on dumping and subsidy.⁹⁹ The decisions of WTO panels then had implications for the next phase of agency determination and Chapter 19 review. Canada was also able to challenge U.S. legislation related to Canadian softwood lumber producers.¹⁰⁰

While the strategy of using both WTO dispute settlement and the Chapter 19 process at the same time is perfectly consistent with both agreements, it results in considerable complexity.¹⁰¹ In the case of Softwood Lumber, the use of both proceedings did not help to resolve the dispute, though litigation exhaustion may have contributed to the temporary solution of the 2006 Softwood Lumber Agreement. In fact, use of the two avenues of dispute settlement spurred further litigation. In trying to comply with a WTO panel's ruling that its finding of threat was unsubstantiated,¹⁰² the ITC in fact determined a fresh finding of threat of injury.¹⁰³ As a result, the ITC took the view that the previous finding of the NAFTA Chapter 19 panel¹⁰⁴ was rendered inapplicable, as it had been based on a pre-WTO ruling finding of threat.

Canada challenged the ITC's new finding of threat at the WTO where the WTO compliance panel originally upheld the determination.¹⁰⁵ The Appellate Body, however, found that the panel had failed to perform a rigorous analysis of the ITC's new threat finding and reversed the panel's conclusions.¹⁰⁶ As the Appellate Body did not rule on the legality of the ITC's new finding of threat due to a lack of sufficient information,¹⁰⁷ it did not comment on NAFTA Chapter

⁹⁸ In *United States – Measures Treating Export Restraints as Subsidies* WT/DS194/R, adopted 23 Aug. 2001 Canada challenged the mere existence of US measures that it claimed required treatment of export restraints as subsidies, rather than their application in a particular case.

⁹⁹ WTO Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 27 Sept. 2002.

¹⁰⁰ WTO Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000 (US – Offset Act (Byrd Agreement))*, WT/DS217/R, WT/DS234/R, adopted 27 Jan. 2003, modified by Appellate Body Report, WTDS217/AB/R, WT/DS234/AB/R.

¹⁰¹ Joost Pauwelyn, "Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' is Cooking" (2006) 9 J.I.E.L. 197.

¹⁰² WTO Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004.

¹⁰³ International Trade Commission, "WTO Dispute Settlement Proceeding Regarding Investigation of the International Trade Commission in Softwood from Canada", US Federal Register 36687, 24 June 2005.

¹⁰⁴ See *Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Material Injury Determination*, USA-CDA-2002-1904-07, 5 Sept. 2003 and subsequent remand decisions.

¹⁰⁵ WTO Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW.

¹⁰⁶ WTO Appellate Body, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, at para. 138.

¹⁰⁷ *Ibid.*, at paras 159-61.

19 proceedings. In the end, the results of dispute settlement were somewhat inconclusive and all related litigation was ultimately terminated before the entry into force of the 2006 SLA.

The more difficult problem, however, arises where decisions of NAFTA panels and WTO panels come into conflict. This could occur, for example, where a NAFTA panel rules on a matter that is subsequently brought before WTO dispute settlement or vice versa. In such a case, the potential for conflicting NAFTA and WTO panel decisions could arise. In principle, under NAFTA this should not occur. NAFTA Article 2005 is meant to ensure that cases are brought in either one forum or the other, but not both. But while that article would govern if the matter were to be raised before a NAFTA panel, it is not clear that a WTO panel would give effect to a provision of that nature in an agreement that was not a WTO covered agreement. In *Mexico-Soft Drinks*, the Appellate Body left this issue open and did not take a position on whether it would give effect to NAFTA Article 2005 if the issue were to be directly before it.¹⁰⁸

The current Tuna-Dolphin dispute between the US and Mexico may result in this issue being confronted directly.¹⁰⁹ The case represents the first time that a NAFTA party has invoked the choice of forum clause under NAFTA Chapter 20. According to NAFTA Article 2005.4, disputes pertaining to matters arising under the WTO Agreement and the standards-related provisions of the NAFTA that concern human, animal, or plant life or health of the environment and raise factual issues regarding the environment or conservation, would be heard, at the responding party's discretion, solely under NAFTA's dispute settlement procedures. Despite the US objections that the Tuna-Dolphin matter should be heard under NAFTA Chapter 20 proceedings,¹¹⁰ the DSB nevertheless agreed to establish a panel in accordance with Mexico's request.¹¹¹ The US has now requested consultations under NAFTA Chapter 20.¹¹² As a result, it is possible that there will be panel proceedings on the same matter under both the WTO and NAFTA.

There has been little jurisprudence in the WTO on how conflicts between the WTO and regional trade agreements are to be dealt with. In *Argentina-Poultry*, a panel rejected the argument that since the matter had already been ruled on by a Mercosur¹¹³ tribunal it could not be considered by the WTO

¹⁰⁸ WTO Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006.

¹⁰⁹ *Supra*, footnote 59 and accompanying text.

¹¹⁰ WTO DSB, *Minutes of Meeting – Held in the Centre William Rappard on 20 April 2009*, WT/DSB/M/267, 26 June 2009, at para. 77.

¹¹¹ *Ibid.*, at para. 81.

¹¹² Office of the United States Trade Representative, "United States Initiates NAFTA Dispute with Mexico over Mexico's Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA", November 2009, <<http://www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over>>.

¹¹³ *Argentina-Brazil-Paraguay-Uruguay: Treaty Establishing a Common Market (Mercado Comun del Sur, Art. 1, or "Mercosur")*, 26 March 1991, (1991) 30 I.L.M. 1041 (entered into force 31 Dec. 1994) [also known as the "Treaty of Asunción"].

panel.¹¹⁴ It did not accept Argentina's claim that in bringing the case Brazil had not acted in good faith or that Brazil was estopped by the existence of the Mercosur ruling.¹¹⁵ However, Mercosur contains no "fork in the road" provision such as NAFTA Article 2005.

In Mexico-Soft Drinks both the panel and the Appellate Body refused to accept the argument that a WTO panel should decline jurisdiction because the matter before it was properly a matter for NAFTA.¹¹⁶ However, in that case, Article 2005 was not invoked by the respondent Mexico. More recently, in Brazil-Tyres the Appellate Body ruled in a way that placed Brazil in a position where compliance with a ruling of a Mercosur tribunal would place Brazil in violation of its WTO obligations.¹¹⁷

What the WTO jurisprudence does suggest, then, is that the WTO asserts priority over regional trade agreements. WTO obligations must be performed, even if that places a WTO Member not in compliance with its obligations under a regional trade agreement. In this light, notwithstanding the fact that the Appellate Body left the matter open in Mexico-Soft Drinks it seems doubtful that the Appellate Body would give effect to NAFTA Article 2005 if that had the result of potentially leaving a WTO Member with no recourse under the WTO in the case of an allegation of a violation of a WTO provision.

This potential for conflict in decisions between the WTO and regional trade agreements and the possibility of consequential forum shopping has led to suggestions that a forum non conveniens principle be adopted in the WTO. Joost Pauwelyn and Luis Eduardo Salles have proposed a "natural forum" approach for determining which body should deal with a dispute in the event of competing jurisdictions.¹¹⁸ In the WTO context, attention might also be given to the role of GATT Article XXIV in dealing with recognition by WTO panels of decisions by tribunals set up under regional trade agreements.¹¹⁹ Although in the past NAFTA Chapter 20 has received little use by the parties, the fact that in recent years the issue of the relationship between Chapter 20 dispute settlement and WTO dispute settlement has arisen twice, suggests that it is an issue that may be of longer-term significance for NAFTA.

¹¹⁴ WTO Panel Report, *Argentina – Poultry Anti-Dumping Duties*, WT/DS241/R, adopted 19 May 2003.

¹¹⁵ *Ibid.*, at paras 7.33-7.42.

¹¹⁶ *Mexico – Softdrinks*, *supra* note 106 at paras. 3-4 and 54-55.

¹¹⁷ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 Dec. 2007.

¹¹⁸ See Joost Pauwelyn & Luiz Eduardo Salles, "Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions" (2009) 42 *Cornell Int'l L.J.* 77.

¹¹⁹ GATT Article XXIV (4) states that:

The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpos

VII. Conclusions

NAFTA dispute settlement did not turn out the way the negotiators might have intended. Chapter 20 has been almost moribund. Chapter 19 has not been able to resolve the softwood lumber issue, and Chapter 11 emerged as a key dispute settlement provision engaging both Canada and the United States and not just Mexico. In light of this, although it is probably a generous assessment, dispute settlement under NAFTA might be regarded as a qualified success. Particularly under Chapters 11 and 19, the mechanisms set up under NAFTA have provided a forum for the resolution of a relatively large number of disputes, and in that sense they have fulfilled a need. Moreover, it is difficult to assess whether Chapter 20 is failing to fulfill a need because the WTO dispute settlement process to a certain extent supplanted it.

While we doubt whether the NAFTA parties are likely to engage in any significant amendment to any of these processes in any event, on balance we are not convinced that changes to the existing processes would make any significant difference to the way they function. As we pointed out earlier, in respect of Chapter 19 some improvement could be made by changing the extraordinary review process into a fully-fledged appeal process although it could change a process from something that is rarely used to something that is used with regularity. The experience of the WTO Appellate Body suggests that if appeal processes exist they will be resorted to routinely.

The change from a secretariat based on national sections to a single independent body would certainly have some advantages. It could provide a common secretariat for Chapter 11 disputes although the use of ICSID and recently more frequently the PCA, means the lack of a NAFTA secretariat for these disputes is not a major problem. However, it is possible that if such a secretariat had existed a Chapter 20 panel would have been established in the sugar dispute between Mexico and the US. But, even if that had occurred, it is not clear that this would have ended that matter. As both the Cross-Border Trucking and the Softwood Lumber disputes demonstrate, the legal processes of NAFTA are not a panacea for highly politicized disputes where lack of clarity in legal interpretation is not what fundamentally drives the dispute.

In any event, as we have pointed out, the question of a united, independent secretariat is part of a broader discussion of the nature of NAFTA as a free trade agreement and any future it may have as a different kind of institution. Unless there is a dramatic increase in the use of the Chapter 20 mechanism, it seems unlikely that the needs of Chapter 20 dispute settlement would alone justify the development of a single NAFTA secretariat. And Chapter 19 dispute settlement (apart from Softwood Lumber) has generally functioned well notwithstanding the inadequacy of the secretariat arrangements.

Finally, in our view, the challenge ahead for NAFTA dispute settlement in its next 15 years, primarily in relation to Chapter 20 and partly concerning Chapter

19, is one that confronts all regional free trade agreements. This is to reconcile overlaps with WTO dispute settlement and determine how conflicts are to be avoided or resolved. In this regard, the matter is less in the hands of the institutions of the regional free trade agreement and more in the hands of the dispute settlement bodies of the WTO.

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