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The Dispute Resolution Process under NAFTA

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THE DISPUTE RESOLUTION PROCESS UNDER NAFTA

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My article will be limited to the most relevant provisions of the dispute resolution system of the North American Free Trade Agreement ("NAFTA")[1] including a general interpretation and a general overview of the antidumping and countervailing duty provisions. As in the U.S.-Canada Free Trade Agreement ("FTA"),[2] there are various dispute resolution systems to cover such specialized areas as agriculture, foreign investment, and others.

Chapter 19 of NAFTA governs antidumping ("AD") and countervailing duty ("CVD") dispute settlement matters in very much the same manner as they are governed under the FTA with a few exceptions and a few additions. Chapter 20, Institutional Arrangements and Dispute Settlement Procedures, contains the most important new provisions and changes in comparison with the FTA.

Chapter 19 does the following things: (1) it reaffirms the right of the three countries to retain and apply their antidumping and countervailing duty laws and to change them in a matter consistent with NAFTA; (2) it reaffirms issuance of declaratory opinions after the binational panel review, when a country intends to amend its AD and CVD statutes; (3) it reaffirms the replacement of judicial review with an ad hoc binational panel review; (4) it introduces a system to safeguard the panel review system through the creation of an ad hoc special review committee; (5) it provides that the panelists shall include sitting and retired judges to the fullest extent practicable, all of whom must be lawyers in good standing; and (6) it clearly establishes that changes a country makes to its AD and CVD laws will have to be made in a fashion to allow for the operation of Chapter 19. There is a long list of changes that the three countries have to make to their antidumping and countervailing duty laws to allow for the operation of the new Chapter 19.

As in the case of the FTA, Chapter 20 of NAFTA creates a Free

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1. North American Free Trade Agreement, Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

2. Jan. 2, 1988, U.S.-Can., *reprinted in*, BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 353 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter FTA].

Trade Commission which is composed of cabinet-level representatives of the three parties or their designees. The Commission, as under the FTA, has the following authority: (1) it supervises implementation of the Agreement; (2) it oversees further elaboration; (3) it resolves disputes that may arise regarding the interpretation and application of the Agreement; (4) it supervises the work of all committees and working groups established under the Agreement; and, (5) in general, the Commission may consider any other matter that may affect the operation of the Agreement. Also, the Commission may establish and delegate responsibilities to ad hoc or standing committees, working groups, or groups of experts. It may seek the advice of nongovernmental groups. Finally, it may take such other action in the exercise of its functions as the parties may agree. The Commission will establish its own rules and procedures. Very importantly, all decisions of the Commission must be taken by consensus. The Commission, in turn, will create, as in the case of the FTA, a Secretariat comprised of national representatives called "Sections" in the Agreement. This means that each country will establish a permanent office and will be responsible for the operation and costs of each particular Section and the payments of expenses of the panelists and members of the special committees and scientific boards which will operate as advisors in providing assistance to the Commission. The Secretariat, which again is composed of Sections of each country, shall provide assistance to the Commission and provide assistance to the panels and the other committees established under Chapter 19.

A provision in NAFTA that was not contained in the FTA, is a clear obligation by the three parties to agree, or to make their best effort to agree, on the interpretation and application of the Agreement and to make every attempt through cooperation and consultation to arrive at a mutually satisfactory resolution of any matter that may affect its operation.[3] This is a new provision constituting an international obligation of the three parties to attempt to arrive at a mutually satisfactory resolution of matters that affect the operation of the Agreement.

The Dispute Settlement provisions of NAFTA provide that the Parties agree to submit to the system established under Chapter 20[4] all matters related to interpretation and application of the Agreement, as well as any other matter that a party considers to be inconsistent with other obligations of the parties in the Agreement. In addition, any measure of another party that would cause the nullification or impairment of the benefits that a party is expecting under the Agreement may also be submitted.

The provisions of NAFTA, like the provisions of the FTA, permit disputes to be resolved either under the dispute settlement systems of the

3. NAFTA, *supra* note 1, art. 2003.
4. *Id.* art. 2004.

General Agreement on Tariffs and Trade ("GATT")[5] or NAFTA.[6] In other words, when a dispute arises, the complaining party has the right to choose the forum and this forum may be either GATT or NAFTA. This, however is where the third-party becomes extremely important in the proceeding. The complaining party must give notice to any other party of its intention to bring the matter under GATT, and the third-parties may consult with the complaining party as to the more convenient forum for the dispute. If the parties cannot agree on the forum, the dispute normally will be settled under the provisions of NAFTA rather than GATT. If the dispute concerns certain matters, however, the responding party may request that the matter be settled under the provisions of NAFTA and not under GATT.[7] These matters include: measures adopted by a party to protect its human, animal, or plant life; measures to protect its environment; issues concerning the environment, health, safety, or conservation; and issues directly related to scientific matters. For this to happen, the responding party must deliver a copy of the request to the Secretariat advising them that it wishes the matter to be resolved under the provisions of NAFTA and not under GATT. As in the case of the FTA, once a dispute settlement procedure has been initiated, whether it is GATT or NAFTA, the procedure has to continue in the forum which has been selected, to the exclusion of the other.

A provision which is surprisingly left out in NAFTA, and which was contained in the FTA, is the notification of proposed measures. The FTA provides that a party which intends to adopt a measure which could impair, or have some negative effect on, the benefits that the other parties were expecting to receive under the Agreement, is obliged to notify the other party of the proposed measure.[8] This provision is not included in NAFTA. I think that this is a step backward because, although perhaps it was a difficult obligation to implement, at least it required the parties to make bona fide efforts to notify other parties in advance of any such proposed measure.

The first step in the dispute settlement procedure under NAFTA is consultation.[9] Any party may request consultations with other parties regarding any actual or proposed measure or other matter that may affect its interests.

After the consulting parties have met, they are required to make every attempt to arrive at a mutually satisfactory resolution through consultations. The parties are required to provide all the information necessary for the Commission to make a full examination of the actual or proposed measure, and to treat confidential information in the course of the consultation on the same basis as a party providing the information would. The Commission is required to avoid any resolution that would

5. Apr. 10, 1947, 55 U.N.T.S. 194, *reprinted in*, BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990).

6. NAFTA, *supra* note 1, art. 2005.

7. *Id.*

8. FTA, *supra* note 2, art. 1803.

9. NAFTA, *supra* note 1, art. 2006.

adversely affect the interests under the Agreement of any other party. If the consulting parties fail to resolve a matter within thirty days of the delivery of the request for consultations, or forty-five days after the delivery of a request by a third-party to become a party to the consultations, or fifteen days after delivery of a consultation request in matters regarding perishable agricultural goods, any party may request in writing a meeting of the Commission. Also, a party may request a meeting of the Commission when it has received a notice of a request of a panel under GATT, if the request deals with a matter regarding the environment or any other scientific matter. The Commission, after receiving a request from a party, shall meet and attempt to resolve the dispute promptly. For this purpose, the Commission may call on such technical advisors, or create such a working group of experts, as it deems necessary to resolve the dispute.

If the Commission is not able to resolve the dispute, then any party may request the establishment of an arbitration panel.[10] The FTA called for binding arbitration on certain matters, or on matters that the Commission would decide.[11] But in the case of NAFTA, the element of binding arbitration has been eliminated completely. After a party has requested the establishment of an arbitration panel to resolve a dispute, the requesting party shall submit its request to the other party and to each Section of the Secretariat, and once the Commission has received the request, it shall promptly establish an arbitration panel. Again, a third-party which considers that it has a substantial interest in the matter, shall be entitled to join as a complaining party. This is done by simply delivering a notice indicating that such party considers that it has a substantial interest to participate in the dispute as a complaining party. Such notice must be delivered at the earliest possible time after a request for the establishment of a panel has been submitted to the Commission. The participation of a third-party is extremely important. If such party does not join as a complaining party, it normally may not thereafter initiate or continue a dispute settlement proceeding under the Agreement or a dispute settlement proceeding under GATT with respect to the same matter, in the absence of a significant change in the economic or commercial circumstances surrounding the matter. NAFTA states that the third-party "shall refrain thereafter from initiating or continuing . . . a dispute settlement procedure under" NAFTA or GATT.[12] What this means is, if that third-party elects not to participate in the dispute as a complaining party, it shall refrain from participating in a similar matter, either under the Agreement or under GATT, at a later time. So this, for all practical purposes, obliges the third-party to become involved in the dispute.

The three countries are required to establish a roster of panelists who are willing to serve on the arbitration panels.[13] The list will consist of up to thirty individuals who will be appointed by consensus amongst the

10. *Id.* art. 2008.
11. FTA, *supra* note 2, art. 1806.
12. NAFTA, *supra* note 1, art. 2008.
13. *Id.* art. 2009.

three countries. They will serve for a period of three years and may be re-elected. A special feature of this panel roster is that the Agreement does not require that they be citizens of Canada, the United States, or Mexico. This obviously means that they can be citizens of any country. The FTA required that the majority of the members of the panels be citizens of the United States or Canada.[14] The thirty panelists have to be selected by the three countries by consensus. This means that each country will have the opportunity to review the candidates that are presented by the other countries and will have from the beginning the ability to know who they will be and what type of individuals would be involved in this panel mechanism.

Chapter 20 contains very specific procedures for selecting the panel. When there are only two disputing parties, the panel shall be comprised of five members. The first member to be selected will be the chair of the panel which the disputing parties shall endeavor to name within fifteen days after delivery of the request for the establishment of the panel. If the parties are unable to agree on the chair within this fifteen day period, the disputing party chosen by lot shall select, within five days, as chair an individual who cannot have the same citizenship of that party. Within fifteen days of selection of the chair, each disputing party shall select two panelists who have the same citizenship as the other disputing party. This is what has been called the "reverse selection procedure." For example, suppose there is a case between Canada and Mexico. The chairman of the panel cannot be a citizen of Mexico or of Canada unless the parties so agree. The members selected by Mexico will have to be of Canadian or American citizenship and the members selected by Canada will have to be from the United States or Mexico.

When there are more than two disputing parties, an alternate procedure shall apply. The panel will be comprised of five members and the chair of the panel shall be chosen by the disputing parties. If the disputing parties are unable to agree on the chair within this period, the parties or party on the side of the dispute chosen by lot shall select a chair which may not be a citizen of that party or parties. After the selection of the chair, the party complained against shall select two panelists, one of whom has to be a citizen of the complaining party and the other of whom is a citizen of the other complaining party. The complaining parties then shall select two panelists who are citizens of the party complained against.

As in the case of the FTA, the Commission will establish its model rules of procedure in accordance with general principles such as the right to a hearing, the right to provide initial and rebuttal written submission, and others.[15] One very important element that has been brought into the Chapter 20 procedure is that the panel has to initiate the proceedings

14. FTA, *supra* note 2, art. 1807.
15. NAFTA, *supra* note 1, art. 2012.

by first determining the "terms of reference."[16] Such a provision was not contained in the FTA and this term of reference will allow the dispute to be precisely determined and to be precisely dealt with.

Two other new features of NAFTA are of special interest. A disputing party may call for the establishment of a scientific review board which may assist the arbitration panel in its decisions.[17] An important new issue here is that the implementation of the report issued by the panels has to be done by the parties. In the FTA, the implementation of the decision in the dispute was the responsibility of the Commission.[18] In NAFTA, the implementation of the final report of the panel is the responsibility of the parties, not the Commission.

Finally, there is a sub-chapter in Chapter 20 which provides for an obligation of the three countries "to the maximum extent possible, encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private Parties."[19] The Commission will establish an Advisory Committee on Private Commercial Disputes comprised of persons with expertise or experience in the resolution of private international commercial disputes. All of this is to be done with a view to encourage the solution of private disputes through commercial arbitration.

16. *Id.*
17. *Id.* art. 2015.
18. FTA, *supra* note 2, art. 1807.
19. NAFTA, *supra* note 1, art. 2022.

SOME COMMENTS AND COMPARISONS: GATT AND NAFTA

MICHAEL W. GORDON*

As a brief opening matter, I would like to point out that specific provisions in the North American Free Trade Agreement ("NAFTA")[1] protect the names Bourbon, Whiskey, and Tennessee Whiskey. Mexico also has protection granted to Mescal and Tequila, and Canada to Canadian Whiskey. This may be more serious than it sounds. I can recall twenty years ago being in Mexico and looking for a bottle of Bourbon and the only one that was available was Pan Americana Bourbon Whiskey, manufactured by a Japanese corporation in Mexico. We will have no more of that.

First, I would like to make some comments about the General Agreement on Tariffs and Trade ("GATT")[2] and its relationship to NAFTA, and a little bit about the European Community ("EC"), which in many ways is a better entity to compare NAFTA with. In looking through NAFTA, I found a half dozen or so references to GATT. These are in trade-related areas such as national treatment, where NAFTA provides that the GATT rules will prevail, and areas of the Customs Valuation Code, where GATT rules will prevail. That becomes very important because GATT does not include rules of origin provisions while NAFTA does. It will be necessary to value different portions of a product based on where it is coming from, and the method of evaluation must comply with the GATT valuation code, which is really quite specific. There are also provisions that deal with safeguards and dispute resolutions.

I find several things which are challenging in the dispute resolution area. One is the difficulties of a civil law nation participating in a dispute panel that has already worked with two common law countries, Canada and the United States. How will decisions be drafted? How will they be used in the future? The nature of the Mexican process, it seems to me, is not as fact-specific as with the common law. There is a good deal of discretion in the Ministry of Commerce and Industrial Promotion, la Secretariat de Comercio y Fomento Industrial ("SECOFI"), which deals with dumping and subsidies. I think those questions need to be addressed.

Second, the interesting aspect of dispute resolution is that we now have a third party. What is the role of the third member state when two other states have a dispute? If the third member is acting in the same manner as the party whose behavior is challenged, does the third

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

2. Apr. 10, 1947, 55 UNTS 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT].

party still have a right to intervene? What will their influence be if the third party wants to use GATT and the first one wants to use NAFTA? That is one thing that is left out of the Agreement, and essentially had to be left out.

Third, a great deal more trade has been generated among the parties recently, and to some degree NAFTA is irrelevant. NAFTA is going to do a lot of important things, but it is a product of a relationship that has improved much over the last few years. There are going to be many private commercial disputes which are not dealt with in NAFTA. We need very much to think of addressing such areas as enforcement of foreign judgments and the question of issuing judicial decrees in different currencies. Mexico has had rather strict rules about issuing decrees only in pesos. It is only fairly recently that the United States and England have deviated and allowed judgments in other currencies. These issues need to be addressed.

We tend to overlook the fact that GATT was formed to do something quite different from NAFTA. As Professor Sohn mentioned, GATT came out of the Bretton Woods group of agreements[3] and was initially directed to deal with tariffs. Later it began to take on more trade barrier issues and in the Uruguay round has considered, so far unsuccessfully, the four really difficult issues of investment, agriculture, intellectual property, and services.

NAFTA is a far more comprehensive agreement. It deals, fundamentally, with the relationship among three nations in areas of economic, social, and political relation. In that sense it is more like the European Community. But unlike the EC, it starts off by including a member state which is a developing nation. The EC did not have to address this until late in its development when Spain, Portugal, and Greece became members. The EC is quite different because, in a sense, that agreement was based on the desire to move all workers across borders freely. There is an underlying sense that NAFTA is intended to prohibit the movement of any workers across borders. Although immigration is a prohibited word in the discussion of the Agreement, the concern of the United States over immigration from Mexico underlies the Agreement, and there is hope that NAFTA will improve jobs in Mexico and allow Mexicans an opportunity to prosper at home.

The European Community is also very different because its institutions are very different from the institutions in NAFTA. An additional difference is that Mexico entered NAFTA on the basis of symmetry, on the basis of being a full party to that Agreement, whereas Mexico entered GATT with some of the special benefits that the developing nations may obtain in GATT. As you know, GATT was formed initially without any special benefits for underdeveloped countries, but provisions were added later at the urging of developing nations. Developing nations are now

3. Louis B. Sohn, *An Abundance of Riches: GATT and NAFTA Provisions for the Settlement of Disputes*, 1 U.S.-MEX. L.J. 3, 4-11 (1993).

treated separately and specially under GATT. For the most part, Mexico is not asking for that kind of treatment in NAFTA.

Another difference in GATT and NAFTA is the perception of these two groups. I think we have a perception that multi-lateralism in GATT is not working very well. The Dunkel Draft[4] is about the last thing we have, and that was a document for curing insomnia given to us on the eve of Christmas last year. There is a perception that bilateralism can better assist development, and we are seeing it throughout the world.

There are several differences in the composition of GATT and NAFTA. Members of GATT include a number of restrictive trading nations. India is a good example. The regional areas, when created, tend not to include restrictive trading nations as members. The reason we can have NAFTA now is because of the turnaround that has taken place in Mexico since 1982. GATT allows foot draggers. GATT allows participants to be in the organization and essentially not to agree to a number of elements. NAFTA does not. Many of the GATT member states are not signatories to all of the various GATT codes. Future access is open essentially to all in GATT. It seems clear to me now that with NAFTA, although the language really refers to three parties and not to any one party, because of the fast track procedure in the United States it would be impossible to get a bill through Congress that had an access provision for other, identified countries.

The scope of GATT does not yet cover several areas that are covered in NAFTA. The areas that I mentioned earlier are agriculture, intellectual property, services, and investment. It is intended that GATT will cover these matters. But agriculture, particularly, and intellectual property, to some degree, have held up the process. NAFTA covers these, and they may indeed be considered areas of GATT failure and areas of NAFTA success. Any significant new GATT concepts, however, could mandate a review of NAFTA, and there are some provisions in the NAFTA that address that. NAFTA addresses several areas which should not bring any objection from GATT, for example, land transportation. Indeed, if you look at the organization of NAFTA in contrast to GATT, you find that they are really two very different agreements. There are thirty-eight articles in GATT; only one is industry specific.[5] I did not even realize that it was there. They are special provisions related to cinematographic films. In NAFTA, by contrast, there are seventeen chapters, four of which are industry specific,[6] and Chapter 3 has an Annex which adds two other industries, automotive and textiles trade. Then there are some five chapters that deal with GATT. These, then, are really two very different agreements. Many people thought we could not have an agreement in NAFTA until we had an agreement in GATT. I think that was absolutely incorrect and was incorrect from the very beginning.

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4. Draft Final Act Embodying the Results of the Urugray Round of Multilateral Trade Negotiations, UR-91-0185, GATT Secretariat (Dec. 20, 1991) (also known as the Dunkel Draft).

5. GATT, *supra* note 2, art. IV.

6. *See* NAFTA, *supra* note 1, ch. 6, Energy; ch. 7, Agriculture; ch. 13, Telecommunications; and ch. 14, Financial Services.

There are two areas that could be subject to challenge. One is the rules of origin, which is troubling to many people because NAFTA has a more stringent rule of origin than we have had before, which could be a barrier to third nations. The other area is the Mexican *maquiladora* rule, which essentially applies no duty to nations which bring products into the market process, provided that those products are reexported. For products from the United States or Canada, that is no problem. But products coming in from Japan now have no duty under the new rules that will be phased out, and ultimately they will pay a duty. Thus, there will be a question in the minds of some other countries whether or not that provision is an appropriate provision in the free trade area to include under GATT Article XXIV.

COMMENTS ON THE POTENTIAL INFLUENCE OF NAFTA ON PROCEDURES FOR THE SETTLEMENT OF DISPUTES

CARLOS ANGULO PARRA*

The North American Free Trade Agreement ("NAFTA")[1] will make a big difference in many of the procedures that the Mexican litigator or the American litigator will have to follow with respect to dispute settlements. In Mexico, we have had in the past a very closed system with respect to litigation. This may drastically change once NAFTA enters into effect.

NAFTA's most important innovation is the creation of the panels for the settlement of disputes and the way those panels will function. A roster of judges from each of the three NAFTA parties will participate in settling disputes. The panel procedure itself has a series of steps to be followed, many of which are a bit foreign to the normal way of settling disputes in Mexico.

I have always criticized the judicial system in Mexico. In practice, there is a series of highly formal sets of rules that you have to respect. As a consequence, the procedural rules may become more important than resolving the issues; thus, the procedural steps have become paramount while the dispute itself has become a secondary thing. The NAFTA panel procedure for settling disputes of an international nature between the parties of NAFTA should make this problem disappear. This will definitely generate a different way of seeing things within the Mexican system, at least with respect to disputes between NAFTA parties. The probable evolution that this may generate in Mexico is very interesting to contemplate. Mexico, the United States, and Canada may implement within their own territory some changes in order to make the judicial procedures uniform. I believe that NAFTA will generate a tremendous amount of energy between Canada, the United States, and Mexico in all respects, which will create a different environment in doing business, in conducting law practice, and in settling disputes. There is, however, much to be done, much to be resolved, and much to be addressed on a case-by-case basis as this system develops. This creates a big challenge for the jurists in the North American continent to make this work.

The responsibility starts, of course, with the governments that have to

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex.

implement this new structure. Their responsibility will have to filter down to the individual practitioner who is participating in a dispute settlement. Of course, as in all things related to the law practice, you will encounter a lot of problems. The most important one, which Professor Sohn has addressed, is choosing the forum.[2] NAFTA contains provisions to change the dispute settlement sections depending on the problems that may occur in practice. This will be a very important challenge for all of us.

One thing that I believe to be important is that arbitration is given a very important role under NAFTA for the settlement of disputes between private parties. In Mexico, unfortunately, arbitration is not widespread. With the introduction of the NAFTA provisions on arbitration, however, it may become a more important way of solving disputes in Mexico.

With respect to the procedure itself, I believe that an innovative part of the procedure, at least for Mexico, would be the possibility of having one general hearing in the panel procedure. The Mexican system of litigation generally requires a series of separate, written formal submissions to the court. The hearing, where all of the issues of a matter are put into a single time frame and all of the parties are put in a single room to address those issues, provides the panel with a concise and general presentation of the facts and legal issues in the dispute so that a final resolution can be issued. This is an innovation from the Mexican point of view. I believe that this is an opportunity for generating an evolution within our own system to improve Mexican procedures for solving disputes.

2. *See* Louis B. Sohn, *An Abundance of Riches: GATT and NAFTA Provisions for the Settlement of Disputes*, 1 U.S.-MEX. L.J. 3 (1993).

COMMENTS ON DISPUTE RESOLUTION

LOUIS B. SOHN*

Mr. Rojas described very nicely the content of Chapter 20 of the North American Free Trade Agreement ("NAFTA"),[1] which is the main part on dispute segment.[2] What, however, is hidden in the document are fourteen other methods of settling disputes. In various chapters there are provisions to establish a working group or special committee to deal with problems of implementation under that particular chapter. One of the methods that is supposed to be used for this purpose is consultation. This is another method of dealing with problems which the legal literature has been neglecting. Consultations are a means to deal with problems before they become disputes. A group established by the parties looks at the problem and tries to solve it. It is not a dispute between one and another; it is a problem that all three of them are facing together. Therefore, it is in their interest to be able to solve the problem. The enemy this time is not the other side, but the problem. This permits a different approach for solving the problem.

The provisions on consultation are not only in Chapters 19 and 20, but also in a number of other chapters. These are very important provisions. Mr. Rojas already described the provisions on consultations in Chapter 20. There is an additional provision for NAFTA itself to do quite a number of things. The Commission does not just meet from time to time on general questions, but supervises the implementation of the convention. The Commission may establish working groups, sub-groups, and ad hoc groups. A plethora of bodies will be working under this document.

Mr. Rojas mentioned that there was a group established by the bar associations of Mexico, Canada, and the United States, following roles played by the Canadian and American bars with respect to the first draft of the Free Trade Agreement between Canada and the United States. One of our recommendations was that the functions of consultation, interpretation, and application be centralized in one joint group on the subject because it is very difficult for those fourteen already existing groups, and some additional groups that are going to be established, to do that by themselves. The mandate of each working group described in other chapters is quite different. Some of them are very broad and grant quite a number of functions for those groups. Others are limited to a particular question. One, for instance, will focus on rules relating

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA].

2. *See* Hector Rojas V, *The Dispute Resolution Process Under NAFTA*, 1 U.S.-MEX. L.J. 19 (1993).

to the origin of the materials being manufactured from parts purchased in different countries and general problems of trade interpretation. Such exercise of extra functions by this particular working group is based on a very broad mandate under Chapter 5. In addition, in Article 2020[3] there is a provision that if a matter is being discussed by an administrative body or a court of a member state, and a party thinks that this requires interpretation of the convention, that matter must be referred to the Commission for interpretation. The Commission would need a body of legal experts to interpret the Agreement under Article 2020. That body might eventually acquire the same status as the Court of Justice of the European Community, which has this kind of jurisdiction by reference from national tribunals. The party is obliged to submit the agreed upon interpretation of the Commission to the court or administrative body in accordance with the rules of that forum. Only if the Commission cannot agree, can any party submit its own opinion to the court. The court would then choose among them.

There is one more provision to which I would like to call attention; it is in Chapter 11 on Investment. Investors having a dispute with a party about investments made in that country do not have to go to their government to submit a claim. They can ask for an arbitration panel which is established in accordance with one of the three existing main arbitration systems.[4] It can be submitted under the Convention of the World Bank that established the International Center for the Settlement of Investment Disputes ("ICSID").[5] It can also be submitted to arbitration under the Additional Facility Rules of the ICSID[6] or under UNCITRAL Arbitration Rules.[7] Those arbitration rules are greatly favored, especially by the developing countries. Therefore, they are likely to be used quite often in disputes arising from investments in Mexico.

Recognition of more access to international remedies by individuals or private corporations, instead of making every dispute an international affair, now exists. This is something that our joint tripartite working groups have emphasized very strongly. It is highly appropriate that these

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3. Article 2020 (Referrals of Matters from Judicial or Administrative Proceedings) states:
> If an issue of interpretation or application of this Agreement arises in any domestic judicial or administrative proceeding of a Party that any Party considers would merit its intervention, or if a court of administrative body solicits the views of a Party, that Party shall notify the other Parties and its Section of the Secretariat. The Commission shall endeavor to agree on an appropriate response as expeditiously as possible.

NAFTA, *supra* note 1, art. 2020.

4. *Id.* ch. 11, subchapter B (Settlement of Disputes between a Party and an Investor of Another Party). Article 1120 provides for submission of a claim to arbitration.

5. 17 U.S.T. 1270 (1965).

6. Doc. ICSID/11/Rev. 1 (1986). For a comment on these rules, see A. Broches, *The "Additional Facility" of the International Center for Settlement of Investment Disputes (ICSID)*, 4 Y.B. COMM. ARB. 373 (1979).

7. United Nations Commission on International Trade Law arbitration rules were approved by the United Nations General Assembly on December 15, 1976, by Resolution 31/98.

alternatives are built into this Agreement because when disputes happen, political issues immediately emerge. There is pressure by national legislators and so on, and as a result the situation becomes more difficult. If a dispute is simply being discussed in a commercial arbitration tribunal, it does not attract the same kind of public attention as does a dispute between governments. As a result, the problem may get resolved purely on the basis of law, as it should be. Therefore, we have here an abundance of riches. We have several alternatives to choose from. Not only is this important now because of investment in Mexico or investment in Canada, but there is now investment in the United States by both of these countries. In fact, when I lived in the State of Georgia, the largest investments in the state were made by Canadians. The situation has changed. It is not purely the United States being the great investor, with the others supposedly suffering from foreign investment and some kind of domination by other countries. This has now clearly become a more reciprocal process. Therefore, having some special provisions on the subject is extremely important. I am glad that NAFTA has pioneered in that area.

These pioneering provisions in NAFTA are not only important for the parties, but hopefully may influence developments outside of NAFTA as well. The GATT[8] rules are not yet absolutely finished. Perhaps this is another area in which the GATT rules can be improved. In addition to the main GATT rules on settlement of disputes, there are also supplements, so-called codes of procedure and codes of principles, that were adopted under the Tokyo round of GATT negotiations.[9] There would be another set of such codes adopted under the present Uruguay round.[10] One of the things on the Uruguay list is a new investment agreement. Perhaps NAFTA innovations for settlement of disputes between government and private parties can be incorporated into it. GATT agreements have influenced NAFTA, and hopefully NAFTA will influence GATT agreements. This is not a fixed process. There are some provisions in NAFTA that allow for possible modifications and improvements, provided it is being done by request of the Commission. Therefore, this is not written in stone, but on a piece of paper which can be changed whenever necessary. This flexibility of international agreements is a novelty and the negotiators should be complimented.

In general, I am very pleased at the substantial number of recommendations by our bar groups that have been adopted by the governments. I think Mr. Rojas of Mexico and our Canadian colleague, Bradbrook Smith, are very much responsible for the fact that their governments listened to us. In the United States, of course, we have too many people who clamor for attention, and at this point the Bar Association is not

8. General Agreement on Tariffs and Trade, Apr. 10, 1947, SS U.N.T.S. 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990).

9. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 494 (1991).

10. *Id.* at 495.

completely welcome in Washington. We seem to have various troubles with our government. It was the influence of our Mexican and Canadian colleagues more than ours that made the recommendations of our joint committee visible in this document.

COMMENTS ON DISPUTE SETTLEMENT ISSUES UNDER NAFTA

SANFORD E. GAINES*

Professor Sohn raised some questions about certain provisions and some ambiguities that he saw in the text of the North American Free Trade Agreement ("NAFTA").[1] The first concerns Article 103, which is entitled "Relation to Other Agreements." Article 103 does include the General Agreement on Tariffs and Trade ("GATT")[2] in its reference to "other agreements," so that NAFTA would prevail to the extent of any inconsistency. The clear intention of the parties is that the NAFTA obligations prevail among the three parties as to matters explicitly covered in NAFTA, to the extent that there may be some inconsistency between the NAFTA obligations and GATT obligations. A few exceptions to that rule, however, have been provided for in the Agreement. One example is the Sanitary and Phytosanitary Measures.[3]

A question also arose about the choice of forum for dispute resolution. The general rule in NAFTA is that the complainant gets to choose the forum. This is, of course, the traditional rule in international dispute settlement as well as in domestic litigation. Nevertheless, there is one important exception to this in the environmental area under NAFTA. If a dispute arises under or involves the environmental and conservation agreements identified under Article 104, or the application of Sanitary and Phytosanitary Measures or certain standards-related measures, the respondent may require that those matters be heard exclusively under NAFTA.[4] Thus, if the complainant in the first instance were to bring such a dispute in the GATT, the respondent can compel, by written request, that the dispute be heard exclusively under NAFTA.

With respect to third parties and their effect on choice of forum, NAFTA provides that there should be notification to the third party of

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1. Oct. 7, 1992 draft, U.S.-Can.-Mex. [hereinafter NAFTA]; *see* Louis Sohn, *An Abundance of Riches: GATT and NAFTA: Provisions for Settlement of Disputes*, 1 U.S.-MEX. L.J. 3 (1993).

2. Apr. 10, 1947, 55 U.N.T.S. 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter GATT].

3. NAFTA, *supra* note 1, art. 710.

4. *Id.* art. 2005(3), (4) (GATT Dispute Settlement). The measures under subsection (4) are limited to those "concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect the environment" or "that raises factual issues concerning" such matters. *Id.*

an intention to take a dispute to GATT and the third-party can then ask for consultations on the selection of the forum.[5] Furthermore, if there is failure to agree among the parties on the choice of forum, normally NAFTA would be the forum for the resolution of those disputes.

Once a dispute formally begins in one forum, however, the forum may not be switched.[6] There is ample opportunity to anticipate where the complainant will bring a dispute because the formal initiation of the dispute under the GATT provisions does not occur until after a dispute settlement panel request has been filed. This only occurs after consultations have been held.[7] Consequently, the responding party will be aware of the potential for a dispute settlement proceeding several months prior to the request for a dispute settlement panel in the GATT.

Another question raised was whether NAFTA might preempt state regulation of corporations on the theory that they create barriers to trade. Such a theory of preemption is not consistent with the overall tenor of NAFTA. All three countries, it should be noted, have federal systems and, of course, U.S. corporations are already subject to differing corporate regulations from one state to another. NAFTA is an undertaking of the national governments, and presumes the continued application of state and local regulation consistent with the obligations of the Agreement.[8] The relevant obligations with respect to corporation law would include national treatment and Most Favored Nation ("MFN") principles. These principles support the continued application of various state regulations so long as they are applied in a manner that does not discriminate between foreign and domestic investors or entities. I would also observe that a business entity that incorporates in a state becomes, ipso facto, a domestic business.

A question was raised about the relationship between a NAFTA dispute settlement panel ruling, or a GATT dispute settlement panel finding, and national or domestic court litigation. It is important to understand that in both the GATT and NAFTA, the disputes are disputes between governments, so their provisions deal only with government-to-government dispute settlement. Private parties are not directly involved in these disputes. Therefore, if a NAFTA dispute settlement panel makes a finding adverse to the position taken by the United States, the United States government cannot turn around and sue the foreign sovereign in a domestic court. However, if a private party feels that their interests have been somehow aggrieved by an improper resolution of a dispute between the governments, I suppose that they could try to bring a case in a national court against its own government. NAFTA and GATT are international obligations of the United States and would have substantial precedence

5. *Id.* art. 2005(2) (GATT Dispute Settlement).

6. *Id.* art. 2005(6).

7. GATT, *supra* note 2, art. XXIII. NAFTA itself has similar consultation requirements. NAFTA, *supra* note 1, art. 2003 (cooperation requires consultation to attempt to resolve the dispute).

8. *See* NAFTA, *supra* note 1, art. 105 (requiring parties such as national governments to ensure observance of NAFTA by state and provincial governments "except as otherwise provided.")

over domestic legal provisions. With respect to the direct effect of a dispute settlement on domestic law, it is important to understand that GATT and NAFTA dispute settlement panel findings are not self-executing. If a particular dispute settlement finding calls for some adjustments to United States law to make it consistent with GATT or NAFTA, any such changes must be taken up through our statutory and constitutional procedures. In some cases, perhaps some adjustment to an administrative rule would be appropriate to give effect to the panel finding. In such cases, notice and comment rulemaking would be necessary. In other cases, perhaps some adjustment to legislation would be appropriate. This would require an act of Congress. Ultimately, it is a sovereign matter for each nation to determine how to carry out or, indeed, whether to carry out the findings of a dispute settlelment panel.

DISCUSSION OF DISPUTE RESOLUTION

QUESTION: In your judgment, does the negotiation of bilateral or regional trade agreements like NAFTA undermine the efforts to renegotiate GATT or other multi-lateral trade negotiations?

ANSWER, *Prof. Sohn*: Certainly not. These documents enforce each other.

QUESTION: What happens if a decision rendered by an international panel established under NAFTA is challenged in one of the national courts of law? Suppose a complaint is rejected by a panel and the complainant adversely affected challenges in the national courts?

ANSWER, *Prof. Gordon*: There is a procedure under NAFTA by which, if one of the parties does not comply with the resolution of a panel, the complaining party may suspend benefits of equivalent effect against the other party.

Chapter 19 (Dispute Settlement in Antidumping and Countervailing Duty), Article 1904(11), states that:

> [a] final determination shall not be reviewed under any judicial procedures of the importing Party if an involved Party requests a panel with respect to that determination within the time limits set forth in this Article. No Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

This provision does not apply if neither party sought panel review of a final determination by their own national administrative bodies. Chapter 20 (governing other dispute settlement procedures), Article 202(1) (Private Rights), provides that "no Party may provide for a right of action under its domestic law against any other Party on the ground that a measure of another Party is inconsistent with this Agreement," but there is no provision expressly dealing with a challenge in a national court to a panel resolution. That is what the provision says, but if we look at the experience with arbitration or the parties that agreed to binding arbitration with no appeal, and we see the number of courts that have found some way of allowing an appeal, we have to worry. But basically, I think that if we start with a rule saying "if you choose the panel, that's it, no appeal."

ANSWER, *Prof. Sohn*: This brings up a very interesting question with respect to sovereignty. All of the three parties in NAFTA said that they are giving up sovereignty. Therefore, there is the question of whether there remains the possibility of an extraordinary appeal in Mexico, such as the Writ of Amparo. There is no problem with habeas corpus in the United States.

ANSWER, *Prof. Gordon*: There has been a really serious problem developing in the European Community ("EC") along this line with the creation of a Constitutional Court in Germany and a Constitutional Council in France. The German court has said that for constitutional concepts, their agreement to abide by decisions of the EC Court does

not hold. This is something fairly recent and extremely important, and I think it parallels your comment on Amparo and our own Constitution.

QUESTION: Does the 21st Amendment[1] that relates to alcohol face real jeopardy under NAFTA?

ANSWER, *Prof. Gordon*: I don't think that it is in jeopardy at all. As long as we have deep, dark woods in the American South, we are not in jeopardy.

QUESTION: There is presently a sugar agreement between the United States and Mexico regulating imports into each country from the other. NAFTA would require both countries to harmonize their import regime within six years at a protection level that is higher than Mexico's current variable system. Could that be challenged under GATT as illegal under Article 24?[2]

ANSWER, *Prof. Gordon*: I suppose that this could and should be challenged by other sugar producing nations. I think sugar is going to be a problem for the United States, since it is one of the most highly protected areas in the United States. This is a very highly subsidized industry in the United States. It appears from what I have seen of the Agreement that there are very special arrangements for Mexico relating to sugar. The figures show a substantial harm to Caribbean nations, who I think are very likely to complain, and I would certainly think that GATT would be one of the likely forums. However, I don't think that such complaints will be successful. There are some very substantial internal relationships within the European Community that are far more protective than those practiced by members of NAFTA. I cannot see GATT coming down with a final determination that NAFTA would be violative of GATT. On the other hand, there could be a determination that some sugar provisions are violative. In that case, we would simply renegotiate them or come up with more sensible U.S. sugar rules that do not protect our sugar industry quite as much as they do now.

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1. This amendment states:
   The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. CONST. amend. 21, § 2.

2. Article XXIV(5)(b) of the General Agreement on Tariffs and Trade provides that:
   with respect to a free-trade area, . . . the duties and other regulations of commerce maintained in each of the constituent territories . . . shall not be higher or more restrictive than the corresponding duties and other regulations or commerce existing in the same constituent territories prior to the formation of the free-trade area . . . .

General Agreement on Tariffs and Trade, Apr. 10, 1947, 55 U.N.T.S. 194, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 3 (Stephen Zamora & Ronald A. Brand eds., 1990).