NAFTA CHAPTER TWENTY—REFLECTIONS ON PARTY-TO-PARTY DISPUTE RESOLUTION

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I. INTRODUCTION

In 1994 Canada, Mexico, and the United States entered into the North American Free Trade Agreement, or the "NAFTA" as it has become more commonly known.[1] The NAFTA was modelled substantially on the pre-existing bilateral Canada-United States Free Trade Agreement (CUSFTA), established in 1988.[2] Included among the NAFTA's provisions are a series of arrangements relating to the management and resolution of assorted disputes. Of these, the two most significant are found in Chapters 19 and 20 of the NAFTA.[3]

NAFTA Chapter 19, modelled substantially on the same chapter number in the CUSFTA, deals with the resolution of disputes arising out of anti-dumping (AD) and countervailing duty (CVD) matters. Chapter 19 of both Agreements is unique in that it establishes international dispute resolution panels to review the application of national AD and CVD legislation by national administrative or judicial organs.[4] Participants with standing before such panels include not only governmental entities but also private parties[5] who participated in the same matter at the national level.[6] No equivalent mechanism which either reviews the application of national trade legislation or permits private nongovernmental parties to participate is found in international trade law. Many disputes have been brought under Chapter 19 of both the CUSFTA[7] and the NAFTA,[8] and the process has been widely reported in scholarly publications.[9]

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1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (1993) [hereinafter NAFTA].

2. Canada-U.S. Free Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (entered into force Jan. 1, 1989) [hereinafter CUSFTA].

3. NAFTA, *supra* note 1, arts. 19, 20; 32 I.L.M. at 682-699.

4. *Id.* art. 1904, 32 I.L.M. at 683-84; CUSFTA, *supra* note 2, art. 1904, 27 I.L.M. at 387-90.

5. CUSFTA, *supra* note 2, art. 1904 § 7, 27 I.L.M. at 388; NAFTA, *supra* note 1, art. 1904 § 7, 32 I.L.M. at 683.

6. CUSFTA, *supra* note 2, art. 1904 § 7, 27 I.L.M. at 388; NAFTA, *supra* note 1, art. 1904 § 7, 32 I.L.M. at 683.

7. NAFTA SECRETARIAT—U.S. SECTION, STATISTICAL SUMMARY OF DISPUTE SETTLEMENT PANELS UNDER THE U.S.-CANADA FREE TRADE AGREEMENT (1996) [hereinafter STATISTICAL SUMMARY]. As of 1996, a total of 52 cases had been brought; 33 were completed (including 3 under an extraordinary challenging committee

NAFTA Chapter 20, modelled on CUSFTA Chapter 18, deals with the resolution of disputes regarding the interpretation or application of the Agreement itself. Unlike Chapter 19 of either the NAFTA or the CUSFTA whose jurisdiction is restricted to the two national trade law issues referred to above, Chapter 20 addresses international law matters. Furthermore, the mechanisms established are designed to address and resolve disputes in the first instance rather than, as in Chapter 19, to act as an organ to review decisions of national dispute resolution bodies. Finally, the parties to disputes under Chapter 20, unlike Chapter 19, must be states—specifically, the three states which are parties to the NAFTA.

Unlike Chapter 19 of the NAFTA and the CUSFTA before it, very few cases have employed the government-to-government panel processes of Chapters 18/20. From 1988 until the establishment of the NAFTA, only five cases employed the process under CUSFTA Chapter 18.[10] Since the establishment of the NAFTA, only two panel reviews have been requested under Chapter 20, *Tariffs Applied by Canada To Certain U.S.-Origin Agricultural Products*[11] which has been completed,[12] and *Broom Corn Brooms from Mexico*[13] which was recently

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process); 13 were terminated at the request of participants; 4 were consolidated into two panels; and 2 were stayed indefinitely. *Id.*

8. *Id.* at 1 (Mar. 7, 1997). As of March 7, 1997, 24 cases have been brought; 12 panel reviews have been completed; 7 have been terminated at the request of participants; and 5 are active. *Id.*

9. *See, e.g.*, Michael H. Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement and The North American Free Trade Agreement: Implications for the Court of International Trade*, 25 LAW & POL'Y INT'L BUS. 37 (1993); Alicia D. Greenidge, *The NAFTA Code of Conduct for Dispute Settlement Procedures Under Chapter 19 & 20*, 863 PRAC. L. INST. 859 (1994); Lisa B. Koteen, *Life After NAFTA: Review of Antidumping and Countervailing Duty Proceedings Under Chapter 19 of the North American Free Trade Agreement*, 863 PRAC. L. INST. 841 (1994); Homer E. Moyer, *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707 (1993); Robert Napoles, *Dispute Resolution Under Chapter 19 of the NAFTA: Antidumping and Countervailing Business As Usual*, 10 ARIZ. J. INT'L & COMP. L. 459 (1993).

10. *In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Can.-U.S. Free Trade Agreement, Panel No. CDA-89-1807-01 (Oct. 16, 1989); *In the Matter of Lobsters from Canada*, Can.-U.S. Free Trade Agreement, Panel No. USA-89-1807-01 (May 25, 1990); *Treatment of Non-Mortgage Interest Under Article 304*, Can.-U.S. Free Trade Agreement, Panel No. USA-92-1807-01 (Feb. 8, 1993); *In the Matter of: The Interpretation of Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales*, Can.-U.S. Free Trade Agreement, Panel No. CDA-92-1807-01 (Feb. 8, 1993); *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec*, Can.-U.S. Free Trade Agreement, Panel No. USA-93-1807-01 (June 3, 1993).

11. *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, Panel No. CDA-95-2008-1 (Jan. 22, 1996) (appealed by U.S. government, panel decision issued December 2, 1996).

12. STATISTICAL SUMMARY (Mar. 7, 1997), *supra* note 7, at 7.

requested.[14] The author had the honor, privilege, and responsibility of serving as a member of that first panel. While nothing in this Article will discuss that case or disclose any discussions, deliberations, or proceedings relating to it,[15] this Article is intended as a reflection on the operation of the NAFTA Chapter 20 dispute resolution process, focusing in particular on the panel selection process, the rationale and effect of the Initial Report/Final Report process, and finally on the institutional aspects of the process. A summary outline of Chapter 20 precedes the discussion.

II. OVERVIEW OF NAFTA CHAPTER TWENTY

The NAFTA, like the CUSFTA, is overseen by a Commission[16] consisting of cabinet level representatives responsible for, among other things, the resolution of disputes regarding the interpretation or application of the Agreement.[17] Commission decisions under both Agreements are taken by consensus.[18] Administrative oversight of the NAFTA, like the CUSFTA, rests with a permanent Secretariat comprised of national sections.[19] Hence, Secretariat offices are found in Washington, Ottawa, and Mexico City.

Pre-panel processes under NAFTA Chapter 20, like the General Agreement on Tariffs and Trade (GATT) before it,[20] and the later World Trade Organization (WTO), as well as CUSFTA Chapter 18, are designed to resolve differences of opinion through agreement. All these processes, with specified time limits

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13. *Broom Corn Brooms*, Panel No. USA-97-2008-01 (appealed by Mexican government).

14. STATISTICAL SUMMARY (Mar. 7, 1997), *supra* note 7, at 7.

15. Code of Conduct for Dispute Settlement Procedures Under Chapters 19 and 20 of the North American Free Trade Agreement, 59 Fed. Reg. 8720, 8721 (1994) [hereinafter Code of Conduct]. Any such discussion would be a violation of the Code of Conduct. *Id* art. VI, § A, at 8721.

16. NAFTA, *supra* note 1, art. 2001, § 1, 32 I.L.M. at 693; CUSFTA, *supra* note 2, art. 1801, § 2, 27 I.L.M. at 383-84. Under the NAFTA the Commission is called a "Free Trade Commission." Under the CUSFTA it was called "The Canada-United States Trade Commission."

17. NAFTA, *supra* note 1, art. 2001, § 2(c), 32 I.L.M. at 693; CUSFTA, *supra* note 2, art. 1802, § 1, 27 I.L.M. at 384.

18. NAFTA , *supra* note 1, art. 2001, § 4, 32 I.L.M. at 693; CUSFTA, *supra* note 2, art. 1802, § 5, 27 I.L.M. at 384.

19. NAFTA, *supra* note 1, art. 2002, 32 I.L.M. at 693-94; CUSFTA, *supra* note 2, art. 1802, § 4, 27 I.L.M. at 384. The CUSFTA had no specific provision establishing the Secretariat; rather, it was established under the Commission's broad power to delegate responsibilities. *Id.*

20. *See, e.g.*, General Agreement on Tarrifs and Trade, Oct. 30, 1947, art. XXIII, §§ 1, 2, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. Most GATT dispute resolution provisions begin by making reference to the disputing parties first working out mutually satisfactory adjustments.

(except for GATT) provide for consultation,[21] and, in the case of NAFTA Chapter 20 and the new WTO, followed by good offices, conciliation, and mediation.[22]

In the event attempts at mutual agreement fail to resolve the dispute, a party may refer the matter in question to the Commission for the establishment of a nonbinding arbitral panel[23] of five members[24] which the Commission is required to establish.[25] If the dispute involves only two parties, a third party under the NAFTA is entitled to join as a complaining party if it determines it has a "substantial interest,"[26] and if it does not, the third party may nevertheless attend and participate in hearings as well as make and receive written submissions.[27] Oddly, however, unlike the disputing parties, a third party is not entitled to receive or comment on Initial Reports[28] (notwithstanding the fact that the panel is nevertheless entitled, on the basis of such comments, to request the views of such third party).[29] In effect, the third party may therefore be called on to express views on matters not fully explained to it. The third party is also not entitled to receive the Final Report except to the extent it is represented on the Commission to which the Final Report is eventually conveyed.[30]

The arbitration process is meant to be substantially confidential.[31] This is similar to the processes in the CUSFTA as well as those of GATT and its WTO

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21. NAFTA, *supra* note 1, art. 2006, 32 I.L.M. at 694; CUSFTA, *supra* note 2, art. 1804, 27 I.L.M. at 384; Understanding on Rules & Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 4, 33 I.L.M. 1228-29 [hereinafter WTO Annex 2]; GATT art. XXII. GATT Article XXII also provides consultation provisions but with no time limits specified. *Id.*

22. NAFTA, *supra* note 1, art. 2007, 32 I.L.M. at 695: WTO Annex 2 art. 5. CUSFTA had no specific equivalent provision.

23. NAFTA, *supra* note 1, art. 2008, § 1, 32 I.L.M. at 695; CUSFTA, *supra* note 2, art. 1806, § 1, 27 I.L.M. at 385. Under the CUSFTA the Commission has discretion whether or not to refer a matter to arbitration, but such arbitration is binding. *Id.*

24. NAFTA, *supra* note 1, art. 2011, § 1(a), 32 I.L.M. at 696; CUSFTA, *supra* note 2, art. 1807, § 3, 27 I.L.M. at 385-86; WTO Annex 2 art. 8(5). Its CUSFTA predecessor also called for five-person panels. By contrast, WTO panels consist of three persons. *Id.*

25. NAFTA, *supra* note 1, art. 2008 § 2, 32 I.L.M. at 695.

26. *Id.* art. 2008, § 3, 32 I.L.M. at 695. If it fails to do so, the third party runs the risk of thereafter being precluded from initiating dispute settlement processes on "substantially equivalent" grounds. *Id.* § 4, 32 I.L.M. at 695.

27. *Id.* art. 2013, 32 I.L.M. at 696.

28. *Id.* art. 2016, §§ 2, 4, 32 I.L.M. at 697.

29. *Id.* § 5(a), 32 I.L.M. at 697. A third party is a "participating party" within the meaning of Article 2016. *Id.*

30. *Id.* art. 2017, §§ 1, 3, 32 I.L.M. at 697.

31. *Id.* art. 2012, § 1(b), 32 I.L.M. at 696. Article 2012 mandates that the Commission establish Model Rules of Procedure which provide that "the panel's

successor.[32] Unless the Commission decides otherwise, the Final Report of the panel is made public within specified time limits, including any separate opinions of panelists.[33] However, disclosure of the identity of panelists who write separate opinions is prohibited.[34]

In practice, confidentiality is extended to protect the names of the panelists until the Final Report is made public.[35] While maintaining the confidentiality of panel members during the course of proceedings suggests a certain secret "Star Chamber" quality, it is apparently intended to protect panelists from harrassing inquiries during the course of the proceedings. While such confidentiality has been maintained in the case of all five CUSFTA Chapter 18 proceedings, it was breached in the case of the first NAFTA Chapter 20 proceeding within days of the panel's appointment.[36] While such a breach may create problems for the disputing governments, the process itself nevertheless remained unaffected.

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hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential." *Id.*; *see also Model Rules of Procedure*, Exchange of Letters between Ambassador Michael Kantor, U.S. Trade Representative, the Hon. Rob MacLAren, Canadian Minister for International Trade, and the Hon. Herminio Blanco Mendoza, Mexican Secretary of Commerce & Industrial Development, July 13, 1995, together with Additional Letter of Understanding Regarding the Availability of Information in the Context of NAFTA Chapter 20 Dispute Settlement Procedures [hereinafter *Model Rules*].

32. WTO Annex 2 art. 14.

33. NAFTA, *supra* note 1, art. 2017, 32 I.L.M. at 697; *see also* CUSFTA, *supra* note 2, art. 1807, § 8, 27 I.L.M. at 385-86.

34. NAFTA, *supra* note 1, art. 2017, § 2, 32 I.L.M. at 697. The prohibition applies to the Initial Report as well, indicating that the purpose of the prohibition is to protect panelists from government reaction (whether positive or negative) or the appearance of the possibility of any such reaction. *Id.*; *see also* Code of Conduct, *supra* note 15, art. VI, § D, at 8722.

35. *See* those portions of Letter from Cathy Beehan, Canadian Secretary to Sidney Picker, Jr. (Jan. 19, 1996) (letter of appointment to CDA-95-2008-01 Panel) (on file with author), stating that, "The names of the panel members are not public until the final report is published by the Parties." *Id.*; *Model Rules, supra* note 31, Rule 35. The Secretariat's classification of the names of panel members is made pursuant to Rule 35 which imposes confidentiality obligations on the NAFTA parties, in particular Procedure (8) of procedures agreed to by the CDA-95-2008-01 disputing parties which requires Secretariat personnel to maintain (with specified exceptions expressed in Procedures (1) and (2) only) the confidentiality of the panel proceedings. Letter from Jennifer A. Hillman, General Counsel of the U.S. Trade Representative, to Jonathan T. Fried, General Counsel, Trade Law Division, Dept. of Foreign Affairs and International Trade, Canada (July 13, 1996) (on file with author). Because the names of panel members are not included in the exceptions specified in Procedures (1) and (2) above, the Secretariat treats such names as confidential. *Id.*

36. *See, e.g.*, Barrie McKenna, *Briton to Head NAFTA Panel, First Non-North American Will Oversee Dispute about Canada's Tariffs on Dairy, Poultry*, GLOBE AND MAIL (Toronto), Jan. 23, 1996; Peter Morton, *Gloves are Off for Latest Canada-U.S. Trade Fight, Kantor Challenges Dairy, Poultry Import Duties*, FIN. POST, Jan. 30, 1996; Peter Morton, *Milk-Tariff Panel Appointed after Six Months of Haggling*, FIN.

III. REFLECTIONS ON THE OPERATION OF THE NAFTA CHAPTER TWENTY DISPUTE RESOLUTION PROCESS

A. The Panel Selection Process

Once an arbitral panel is requested, a panel must be established. In preparation for this, Canada, Mexico, and the U.S. were obligated by January 1, 1994 to establish a roster of up to thirty potential panelists to be appointed by consensus for three year renewable appointments.[37] In fact, to date, no such roster has been established. As there is no requirement that panelists be selected from the roster, the failure of the parties to implement this provision has not precluded establishment of a Chapter 20 panel.[38] However, it does make the process more protracted. If a roster member of appropriate nationality is selected, no party may object.[39] This is presumably on the ground that, since consensus was required to establish the roster, that was the time to raise an objection. If a non-roster member is proposed, he or she is subject to peremptory challenge by any other disputing party.[40] This, in part, explains the lengthy six month period between the initiation of the arbitral process calling for establishment of a panel in the first Chapter 20 dispute and its final selection.

Under the NAFTA the panel chair is selected first[41] rather than, as in the CUSFTA, chosen last.[42] Presumably, the initial selection of a chair allows the parties to assess the effect the chair may then have on panelists and hence help determine the panelists they will later select. The chair is chosen by mutual agreement of the disputing parties without regard to nationality.[43] If the parties fail to agree on a chair, a disputing party, chosen by lot, may pick anyone not its own national.[44] By contrast, under the CUSFTA, the Commission selected the fifth and final panelist *after* the previous four had already been selected, or if the Commssion did not agree, the four previously selected roster members selected

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POST, Jan. 23, 1996; *U.S. Canada Name Panelists to Settle Dairy, Poultry Dispute* INSIDE NAFTA, Jan. 24, 1996; *U.S. Gears up for Food Fight with Canada,* OTTAWA CITIZEN, Jan. 30, 1996; *Arbitrage sur le lait: le président est choise*, LA PRESSE, Jan. 23, 1996; *L'arbitrage sur le lait, les oeufs et la volaille est pret à commencer*, LE DROIT D'OTTAWA, Jan. 23, 1996. Some of the foregoing designations were incorrect, e.g., the GLOBE AND MAIL, *supra*, misspelled the names of Sidney Picker, Jr. ("Sydney Picker") and Donald M. McRae ("Donald McCray") as well as reversing their U.S. and Canadian nationalities, respectively.

37. NAFTA, *supra* note 1, art. 2009, 32 I.L.M. at 695-96.

38. *Id.* art. 2011, § 3, 32 I.L.M. at 696 (providing that "[p]anelists shall *normally* be selected from the roster [emphasis added]").

39. *Id.*

40. *Id.*

41. *Id.* art. 2011, § 1(b), (c), 32 I.L.M. at 696.

42. CUSFTA, *supra* note 2, art. 1807, § 3, 27 I.L.M. at 385-86.

43. NAFTA, *supra* note 1, art. 2011, § 1(b), 32 I.L.M. at 696.

44. *Id.*

the chair.[45] The NAFTA process therefore transfers greater control to the disputing parties (or to luck) than was the case under the CUSFTA.

The selection under the NAFTA of the remaining four roster members is unique. Nationality counts, but unlike prior practice, including the CUSFTA,[46] disputing parties may not nominate their own nationals. Rather, they nominate nationals of the other disputing party. As stated earlier, if the nominee is a roster member, he/she is considered selected; if not, the party whose national it is, may veto the nomination.[47] While perhaps having political appeal, it is not clear whether the reverse nationality selection process makes any substantive difference.

The reason for imposing nationality requirements may rest on assumptions that a national will either support his or her ouw country, or, being familiar with his or her country's culture, will best understand and interpret that country's position to fellow panelists. In other words, if it is assumed that a national will be biased, then there must be a balancing of biases.[48] Furthermore, that would portend the appointment of a "neutral" chair who is a national of none of the disputing parties, and effectively render the chair the sole decision-maker. If that is true, the reason for nationality requirements would appear to be substantially political. However, little in the opinions issued under either the NAFTA or the CUSFTA suggests that panels display national biases; most of the decisions were unanimous.[49] An additional reason for imposing a nationality requirement may be to afford the resulting opinion greater credibility and acceptance in the bodies politic of the disputing parties because a representative of the party's culture participated in the process.

The stated qualifications of panelists (other than the obvious—objectivity, reliability, sound judgment, and freedom from control or influence by any party)[50]

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45. CUSFTA, *supra* note 2, art. 1807, § 3, 27 I.L.M. at 385-56. Presumably, therefore, a chair was chosen following an assessment of his or her ability to manage the previously selected panelists.

46. *Id.* Under the CUSFTA, five person panels had to have at least two Canadians and two Americans. Each party, "in consultation with the other," selected two panelists (presumably though not necessarily its own nationals), and if it failed to appoint its nationals, they were to be selected from among its own roster-member nationals by lot. *Id.*

47. NAFTA, *supra* note 1, art. 2011, § 3, 32 I.L.M. at 696.

48. There may be few differences between the socio/political and legal cultures of the original CUSFTA parties, Canada and the U.S., but with the NAFTA and the inclusion of Mexico, differences widen. This may become a growing factor as additional countries are added. Most of them are likely to share Mexico's hispanic, linguistic, and civil law culture which may enhance their ability to interact with one another but widen the gap between them and the two principal English-speaking common law societies of the U.S. and Anglophone Canada.

49. Four of the five decisions under CUSFTA Chapter 18 and the only decision to date under NAFTA Chapter 20 were unanimous.

50. NAFTA, *supra* note 1, art. 2009, § 2(a), (b), 32 I.L.M. at 695-96; CUSFTA, *supra* note 2, art. 1807, § 1, 27 I.L.M. at 385-86. Interestingly, while the CUSFTA

have undergone a subtle but distinct shift since the establishment of the CUSFTA. Under the CUSFTA, panelists were to be selected for their "expertise in the particular matter under consideration."[51] In other words, they were expected to be familiar with the subject matter of the dispute. They need not be, and have not always been, lawyers. By contrast, the NAFTA has broadened the criteria by requiring individuals who have "expertise or experience in law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements. . . ."[52] Like the CUSFTA, the NAFTA panelists still need not necessarily be lawyers, though all panelists in the first case, referred to above, were.[53]

Perhaps the most difficult criterion for panel participation is the prohibition against a conflict of interest or the appearance of such a conflict.[54] Rigid initial and continuing disclosure requirements are imposed for good reason.[55] However, because so many otherwise qualified persons in the private or public sectors have some association which would either create a conflict or the appearance thereof (given the breadth and scope of a NAFTA dispute), it is increasingly difficult and time-consuming to assemble a panel. The academic community alone offers the greatest likelihood of avoiding such conflicts, and it is therefore unsurprising that all the panelists in the first NAFTA Chapter 20 dispute were law professors. Similarly, all but one of the panel assistants, who are also expected to comply with the Code of Conduct conflict of interest provisions, were selected principally from the academic arena.[56] Indeed, the sole assistant exclusively from the private sector resigned during the proceeding when the law firm with which he was associated accepted a client who created the appearance of a conflict.[57]

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imposes these criteria on all panelists (whether on the roster or not) the NAFTA as worded only imposes these criteria on roster members, even though, without the establishment of a roster, all panelists selected in the first Chapter 20 dispute to date, were not roster members. While nothing suggests the reason for this change under the NAFTA, or any reason for it, perhaps the difference was due to oversight.

51. CUSFTA, *supra* note 2, art. 1807, § 1, 27 I.L.M. at 385-86.

52. NAFTA, *supra* note 1, art. 2009, § 2(a), 32 I.L.M. at 695-96.

53. The panelists were a law dean (Stephen Zamora of the University of Houston Law School) and four law professors (Ronald C.C. Cuming of Saskatchewan University, Donald McCrae of Ottawa University, Sidney Picker, Jr. of Case Western Reserve University, and the chair, Elihu Lauterpacht of Cambridge University's Trinity College).

54. NAFTA, *supra* note 1, art. 2009, § 2(c), 32 I.L.M. at 695-96; Code of Conduct, *supra* note 15, art. I, at 8720.

55. Code of Conduct, *supra* note 15, art. II, at 8720-21.

56. Emanuela Gillard and Daniel Bethelem, assistants to Professor Elihu Lauterpacht; Yair Baranes, assistant to Professor Ronald C.C. Cuming; Colin Picker, assistant to Professor Sidney Picker, Jr.; and Professor Craig L. Jackson, assistant to Dean Stephen Zamora.

57. Christopher Kent, assistant to Professor Donald M. McRae.

B. Initial Report/Final Report Process

NAFTA Chapter 20, like CUSFTA Chapter 18 before it,[58] and similar to the new dispute resolution provisions of the WTO,[59] provides that the panel within specified time limits shall issue an Initial Report to the disputing parties who thereafter have fourteen days to comment.[60] The panel may thereafter consider such comments[61] and make whatever revisions it deems appropriate before issuing its Final Report which is due thirty days after the issuance of the Initial Report. The entire process is confidential.[62]

The Final Report is precisely what its name indicates, final and hence nonappealable. It is presented to the disputing parties who are required to transmit it to the Commission within an unspecified but reasonable period of time.[63] While the disputing parties are free to attach to the Final Report any separate views they may have, the Commission is not an appeal organ and hence may not reject the Final Report on the basis of any such views. Rather, the disputing parties may agree on the resolution of the dispute, in which case they are expected but not required to conform to the Report's determinations or recommendations.[64] If the disputing parties do not agree on the resolution the complaining party may within thirty days suspend equivalent benefits to which the party complained against would otherwise be entitled,[65] if the Report determines that a measure is inconsistent with NAFTA obligations or causes nullification or impairment.

What is the purpose of the Initial Report/Final Report process? The Initial Report appears to offer the disputing parties an opportunity to assess the panel's thinking and to provide whatever comments they deem appropriate. The panel is thereafter free to make whatever change, correction, or modification it deems appropriate.[66] Furthermore, by receiving what is effectively a preview of the panel's coming determination, the disputing parties have some time to take such steps as they deem necessary to prepare the public for whatever consequences may follow from the eventual publication of the Final Report. It may also have been the intention of the parties that the Initial Report, as with conciliation, might prompt the parties to settle the dispute, although there is no evidence that an Initial Report has ever done so either under CUSFTA Chapter 18 or NAFTA Chapter 20.

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58. CUSFTA, *supra* note 2, art. 1807, § 5, 27 I.L.M. at 385-86.
59. WTO Annex 2 art. 15. Unlike the NAFTA and the CUSFTA, the time limits are set by the panel rather than the Agreement. *Id.* art. 15, § 1.
60. NAFTA, *supra* note 1, art. 2016, § 4, 32 I.L.M. at 697.
61. *Id.* § 5, 32 I.L.M. at 697.
62. *Id.* art. 2012, § 1(b), 32 I.L.M. at 696.
63. *Id.* art. 2017, § 3, 32 I.L.M. at 697.
64. *Id.* art. 2018, § 1, 32 I.L.M. at 697.
65. *Id.* art. 2019, § 1, 32 I.L.M. at 697-98.
66. *See id.* art. 2016, § 5, 32 I.L.M. at 697.

Thus, the Initial Report/Final Report process can be seen in either of two ways. First, it may be the rough equivalent of a lower court/appeal court process, or perhaps more accurately, a court determination followed by a rehearing. The Initial Report is released for publication, and the parties may present arguments in support of and in opposition to the published opinion. Thus, a court may consider both the Initial Report and the subsequent arguments to determine whether the Initial Report is correct, or should be modified or reversed. Second, it may be seen as a part of the work product producing the opinion, allowing the panel to prepare an interim opinion reflecting its thinking, submit it to the interested parties for their commentary, which the panel may then take into account as part of its effort in producing the final opinion.

Are these two processes different? They may be. If the process is intended to enhance the quality of the work by providing outside, albeit interested, feedback, then the panel may be freer in preparing the Initial Report either to test ideas or language without fear of public scrutiny. If, on the other hand, the process is an equivalent of an appeal or rehearing process, then the Initial Report must be more critically and carefully constructed. In practice, there may not be any significant difference between these two processes provided confidentiality is maintained. However, in the case of the first NAFTA Chapter 20 dispute, the Initial Report was leaked by unknown persons to the public and immediately published.[67]

Without suggesting that such publication in any way affected or influenced the Final Report, it is likely to present the appearance of having done so. Publication of an Initial Report, like publication of a lower court opinion, invites public scrutiny and calls for interpretation of any difference between it and the Final Report (or in the case of the lower court analogy, the appellate court's opinion), investing nuance if not substantial meaning in each such difference. Thus, if the Initial Report/Final Report process is roughly similar to an appeal or rehearing process, then publication, though unfortunate, is unlikely to tarnish the Final Report or its integrity. If, on the other hand, the purpose is "work product," then publication of the Initial Report could have a chilling effect on the willingness of a panel to revise an opinion, thereby frustrating the purpose of the project, and such publication may therefore warrant consideration of declaring the proceedings to be null and void. While the NAFTA does not clearly indicate the purpose of the process, its confidentiality requirements strongly suggest that "work product" is the more appropriate reason.[68] In any event, the leak clearly

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67. *See, e.g., Confidential Interim NAFTA Panel Decision on U.S.-Canada Dairy/Poultry Dispute,* INSIDE NAFTA, July 24, 1996, at 20. No other NAFTA or CUSFTA Interim Report had heretofore been leaked and published. While WTO experienced a similar leak involving the same two parties in a dispute regarding cultural rights, the process is not entirely analogous as WTO includes a formal appellate review process. *See* WTO Annex 2 art. 17.

68. NAFTA, *supra* note 1, art. 2016, § 5, 32 I.L.M. at 697. The panel "on its own initiative" appears free to "reconsider its report" and "make any further examination that it considers appropriate." *Id.* Such language suggests that the Initial

suggests the need for tighter security control by everyone concerned. Perhaps the three NAFTA parties or the Commission should consider setting specific consequences in the event of future leaks.

C. Institutionalization and the NAFTA Chapter Twenty Process

The panel dispute resolution mechanism built into the CUSFTA and later the NAFTA is not equivalent to that of a court or similar tribunal. It is essentially ad hoc and apparently intended to be so. Panels are hand-tailored to each dispute; there is no reason that any panel member will have the opportunity to participate in a later panel, although establishment of a roster would make subsequent participation more likely. Each panel must therefore establish its own manner of addressing what may become related issues of process. As the cliché suggests, the wheel must be reinvented with each dispute. By contrast, a permanent body hearing periodic disputes inevitably will develop an institutional mentality and approach to dispute resolution. Procedures and related processes are likely to develop or be established as needed.[69] Increasing familiarity with the processes and with fellow tribunal members would establish an institutional culture which could create an independent dispute resolution mechanism of increasing substance. Such an ongoing mechanism was suggested by the Joint Working Group on Dispute Settlement of the American Bar Association, the Canadian Bar Association, and the Barra Mexicana when considering the NAFTA.[70] The Group specifically criticized the Chapter 18 panel process of the CUSFTA, stating that, "[a] stronger and more elaborate system . . . is required."[71]

In addition to institution-building, an ongoing permanent tribunal could offer practical benefits, including the following: (1) A permanent tribunal of members with reasonably long-term tenure would eliminate the present tedious process of selecting panelists. As stated earlier in this Article, the increasing difficulty of finding panel members who are satisfactory to all parties concerned, qualified, and most important, free of conflicts of interest, makes the process cumbersome. Over one-third of the time between the initiation of the panel process in the first NAFTA Chapter 20 dispute, and the issuance of the panel's Final Report, was

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Report process is part of the work product of the panel. By contrast, the later WTO Dispute Settlement Understanding, which also adopted an Interim Report/Final Report process, suggests that this is more of a mini appeal than a work product process, because, in the absence of comments by the parties, the panel cannot modify the Interim Report. It becomes the Final Report. WTO Annex 2 art. 15(2).

69. *See, e.g., Model Rules, supra* note 31, Rules 17, 20. NAFTA panels are empowered to adopt procedures as needed. However, as ad hoc entities with no institutional memory or future, they are unlikely to do so.

70. *See* Henry King, Jr. et al., *Section Recommendations & Reports, American Bar Association Section of International Law and Practice Reports to the House of Delegates*, 26 INT'L LAW. 855, 861-864 (1992).

71. *Id.* at 861.

devoted to the selection of the panelists. (2) It is increasingly likely that panelists, as in the first case, will be academics who as a group are most likely to be free of conflict of interest problems. Whether or not academics otherwise make the best panelists is problematic, but it is doubtful, given the qualifications provisions of NAFTA Article 2009, that academics were the principal intended panelists.[72] (3) The logistics of distributing materials to panelists and their assistants (who inevitably live in widely scattered locations across North America and abroad) as well as scheduling and assembling them for hearings and deliberation sessions would be eliminated while simultaneously providing more effective control over confidential material. (4) For panelists who inevitably juggle panel obligations with their ongoing career commitments, conflicts of time, and professional interests would be avoided. Furthermore, such competing commitments may conflict with the NAFTA's relatively rigid time limits[73] which in turn could jeopardize the quality of panel decisions. Such time restraints would be less necessary with a permanent tribunal composed of long-term career-committed judges who hold no competing positions.

Whatever idealogical or practical benefits it might otherwise offer, whether or not such a permanent and relatively independent tribunal would contribute to the goals of the NAFTA, remains problematic. Perhaps the parties, as sovereign states recognizing different socio/cultural backgrounds, require greater political control in order to determine more effectively for themselves the nature and extent of international institution building.

While it is unlikely that the NAFTA in the near future will consider substitution of a permanent tribunal for the panel process, nevertheless some form of institution building process will take place even under the present system. The NAFTA Secretariat is obligated to provide "administrative assistance" to Chapter 20 panels.[74] Inevitably, given the necessary supervision of panel processes by the permanent Secretariats, they will provide ad hoc panels with institutional memory and continuity. Their influence over the process therefore will inevitably increase.[75] Such influence, however, may present the

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72. NAFTA, *supra* note 1, art. 2009, 32 I.L.M. at 695. Article 2009 addresses only the skill qualifications required, not the profession of the panelist. *Id.*

73. *See id.* arts. 2016, 2017, 32 I.L.M. at 697. Normally, panelists must submit the Initial Report within 90 days after the last panelist is selected and they have an additional 30 days to submit the Final Report. While seemingly an unnecessarily short period of time to digest initial written submissions (essentially, briefs), hold a hearing, read post-hearing submissions, and hold deliberations, a swift decision on matters of substantial political as well as legal interest to the parties is in their best interests. Furthermore, prior experience, mostly from the GATT, suggested that, without time limits, panelists could allow the process to go on for years.

74. *Id.* art. 2002, § 3(b)(ii), 32 I.L.M. at 693-94.

75. Fortunately for the NAFTA, in the opinion of the author, if the Canadian Secretariat (which as the Secretariat of the party complained against, was responsible for supervision of the first Chapter 20 dispute) is any example, the professionalism and quality of its secretariat service is unsurpassed.

Secretariats with conflicting interests because they are created and overseen by NAFTA's Free Trade Commission,[76] and obligated to assist it,[77] which may, or may appear to, conflict with a developing institutional service provided to independent panels.

Institutionalization can also result from repeated assignment of the same panelists. The more they serve, the more familiar each becomes with the process, and inevitably, they bring to the process their own de facto institutional memories. Substantial repetition has taken place in the CUSFTA/NAFTA Chapter 19 panels. In the six CUSFTA Chapter 18/NAFTA Chapter 20 cases to date, only one person has been a repeat panelist.[78] Such multiple appointees are inevitably valuable resources to fellow panelists, but whether or not the influence this sort of institution substitution provides was intended by the parties is questionable.

Within the framework of the present panel process, greater institutionalism may be created first by finally establishing the thirty person roster called for in the Agreement, and then by periodically bringing all roster members together for two to three days in a retreat atmosphere. They could meet and become familiar with Secretariat personnel and processes, and, without ever disclosing classified aspects of individual cases, discuss institutional problems panels generally might encounter. Annual federal judicial conferences held by the federal circuits in the U.S. could provide a rough model for such retreats. By getting to know each other the thirty roster members would also have a better chance of creating a framework of collegiality. Hence, once any five roster members found themselves on a designated panel, they could undertake the process with a wheel already invented and spinning.

IV. CONCLUSION

In conclusion, the NAFTA should be viewed organically as a continuously developing institution. Such development, which would enhance and encourage the use of dispute resolution mechanisms, should be encouraged by the parties. This Article was intended to introduce observations on selective aspects of the

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76. NAFTA, *supra* note 1, art. 2002, § 1, 32 I.L.M. at 693-94.

77. *Id.* § 3(a), 32 I.L.M. at 694.

78. Professor Donald M. McCrae served on the first NAFTA Chapter 20 panel (*Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products,* Panel No. CDA-95-2008-01 (Dec. 2, 1996)) and two CUSFTA Chapter 18 panels, (*In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring*, Panel No. CDA-8-1807-01 (Oct. 16, 1989); and *Treatment of Non-Mortgage Interest Under Article 304,* Panel No. CDA-92-1807-01 (Feb. 8, 1993)). McRae also served on one CUSFTA Chapter 19 dispute *Softwood Lumber from Canada,* Panel No. USA-92-1904-02 (July 26, 1993)).

dispute settlement process to stimulate more in-depth consideration of that process in order to increase its effectiveness.