The Experience of NAFTA Dispute Settlement Mechanisms: Lessons for the FTAA
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I was asked to suggest some lessons from the experience of the NAFTA dispute Settlement mechanisms for the FTAA negotiations on dispute settlement. In this presentation, I will first review the experience of each mechanism embedded in NAFTA, and reach some conclusions of this experience. In the second section, I will derive some lessons for the FTAA.

The NAFTA Experience

When one reviews the experience of the results of the cases that have been presented within the various dispute settlement mechanisms of NAFTA one can argue that the NAFTA partners have agreed to new rules and procedures that have helped to enhance the management of their economic relations.

The overall record of litigation between the three countries over the past eight years under the NAFTA is one of commitment to the rule of law. The three countries have used the procedures roughly equally. The three have succeeded and failed in pressing their complaints. The three have generally accepted the results of panel proceedings and implemented the required changes in law and policy, although not always with enthusiasm and grace. On occasion, some additional pressure is required to resolve the issues. On other occasions, the resolution of one dimension of an issue has led

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to a flare-up of a related issue.[2] In general, however, the three governments have been prepared to make full use of the system and to live by its results.

In general, panels has adjudicatory bodies have fulfilled their role very professionally and have decided as they were expected to do, namely, on the basis of fairness, efficiency, transparency, consistency, impartiality and reasoned decision making based upon the rule of law.

The NAFTA Chapter 19 binational panel process, for example, has proved to be as popular a dispute settlement mechanism in NAFTA as it was in the Canada- U.S. Free Trade Agreement (CUSTA) [3] To date (ie, through February, 2003), the NAFTA experience with Chapter 19 is more than nine years, during which there have been 86 cases initiated , including cases completed, terminated or continuing; and during this period NAFTA, panels have sustained decisions by administrative domestic authorities, and remanded others, seeking either clarification or stronger justification for the decision rendered, or in the absence of justification, determining that the decision be vacated. Experts reviewing the reasoning in such cases have generally agreed that the panels of experts, familiar with the economic and legal concepts, have performed their tasks ably and professionally and often more thoroughly than had been the case by the domestic courts.

While some cases that took place between Canada and the U. S. during the period of existence of the CUSTA led some critics to charge that the bias of foreign participants in favour of their own litigants had tainted and discredited the Chapter 19 process, so far this claim has not been made regarding the NAFTA experience.[4] And there are good reasons for this. So far there has been no case involving a decision split along national lines, more than eighty percent of the cases have been decided unanimously while the rest

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[2] A clear example of this has been the saga of the sugar and HFCS cases where the developments in one have clearly affected the developments in the other.

[3] The CUSTA went into effect on January 1, 1989, and was succeeded by the NAFTA on January 1, 1994. During the five years of its existence, the Parties formally brought 47 cases against each other; this figure does not include disputes that were resolved in consultations prior to the establishment of a binational panel. Of the 47 cases, 28 were directed against U.S. agencies (ie, either antidumping or countervailing duty determinations of the Department of Commerce, or injury determinations of the International Trade Commission), and 19 were directed against Canadian agencies (ie, against Revenue Canada–now Canada Customs and Revenue Agency–for antidumping or countervailing duty decisions, or the Canadian International Trade Tribunal for decisions on injury).

[4] It must be said that the charge of bias was considered unfair by most serious observers.

have involved majorities of mixed national origin.

By any measure, the process has demonstrated a very high level of professionalism and lack of bias and despite that there has been a number of high-profile cases, has succeeded in resolving disputes on a more principled, less political basis. In short, Chapter 19 has proved a pleasant surprise in reducing the cross border temperatures in trade remedy disputes. It has forced officials in the three countries to operate within the scope of the law, and reduced the capacity of pro-protectionist industries to pressure administrative officials to favor their interests.

The more general dispute settlement provision of NAFTA`s Chapter 20 on the other hand, have been used less frequently but as usefully. A variety of difficult issues have been resolved at the consultative level as well as at the Panel level.[5] By the end of 2002, three cases had been decided by a dispute panel, two brought by Mexico against the United States (*Broomcorn Brooms* and *Cross Border Trucking*) and one by the United States against Canada (*Poultry and Dairy)*. The panel decisions were considered of exceptionally good quality.

As for investment disputes, the evidence overall from our analysis is that it is an efficient and thus effective mechanism to resolve investment disputes. By the beginning of 2003, 23 cases had been initiated under NAFTA's mechanism for the settlement of investment disputes. Nine cases have been filed against Canada, nine against Mexico, and five against the United States of America. Eight of the twenty three cases have thus

[5] Among some of the most important cases that have been resolved through consultations are Uranium Exports (Canada v. the U.S, 1994) in which bilateral consultations apparently resolved Canadian concerns over a suspension agreement between the U.S. and Russia concerning dumping of uranium, through U.S. assurances that Canadian interests would be taken into account. See Int´l Trade Rep. No. 12, (Apr. 5, 1995); Import Restrictions on Sugar (Canada v. United States, 1995) involving a dispute over American import restraints on Canada and a Canadian antidumping action against U.S. sugar, ultimately resolved when the U.S. and Canada negotiated revised sugar quotas; Restriction on Tomato Imports (Mexico v. the U.S. 1996) in which Mexican objections to a U.S. tariff rate quota on Mexican tomatoes were ultimately resolved through an agreement between the U.S. government and Mexican growers suspending application of U.S. antidumping duties; Helms Burton Act (Mexico and Canada v. the U.S, 1996) in which Mexico and Canada challenged the U.S Helms-Burton Act provisions restricting travel and facilitating lawsuits against foreign companies that invested in Cuba, ultimately suspending the complaint when the U.S. and the European Union agreed to a face-saving suspension of a parallel WTO complaint; The threat by the U:S: not to comply with the NAFTA provision to allow Mexican avocados to enter the US market that surfaced in 1996-1997 because it would introduce various pests into California, was ultimately resolved through consultations and Mexican avocados permitted to enter the US.

far reached a final award.[6] Four of these six awards have been rendered in favor of the Claimant investor and four of them in favor of the Respondent State.[7] In the four cases decided in favor of the Respondent State, Mexico and the U.S. were the Respondent. Canada has been the Respondent State in two of the cases reaching a final award in favor of the Claimant and Mexico likewise in two of them. In one case decided against Canada, the S.D. Mayers Case, the Arbitral Tribunal has not yet reached a determination on the amount of damages.

The experience so far is that arbitrations are launched, Tribunals constituted, and proceedings undertaken, without the disputing parties dragging their feet or refusing to arbitrate. The disputing parties have had ample opportunities to submit their objections, challenges, submissions and claims. The trend so far has been for Tribunals to allow four rounds of written pleadings on the substantive issues in addition to allow all jurisdictional and other type of challenges and submissions. Contrary to the other dispute settlement mechanisms under NAFTA, Chapter 11 investment arbitration utilize procedural rules, to the extent not modified by NAFTA, that exist and are applied also outside NAFTA, and that include independent administrative bodies (the case of ICSID and the ICSID Additional Facilities Rules), or that establish ways of solving impasses during the administration of the arbitration that do not rely uniquely on the willingness of the disputing parties. This contributes to the smooth and efficient conduct of the proceedings.

Moreover, there has been no report of a NAFTA Party suggesting it would refuse or delay payment of damages if ordered under an award. In fact, there is the case of the government of Mexico which has already complied with the Metalclad award. This has several consequences. NAFTA investment arbitration is not designed to effect a direct change in the policy or measure in conflict. It facilitates enforceability and compliance

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[6] These are: Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States (The Azinian Case); Waste Management Inc. v. The United Mexican States (The Waste Managament Case); Metalclad Corporation v. The United Mexican States (The Metalclad Case); S.D. Myers v. the Government of Canada; (The S.D. Myers case); and, Pope & Talbot Inc. v. the Government of Canada (The Pope and Talbot Case); Mondev International v. the U.S (The Mondev Case) and ADF Group Inc. v. the U.S (The ADF Case).

[7] The Azinian and the Waste Management Cases were decided in Favor of the Mexican government while the Metalclad, The CEMSA and the S.D. Myers and Pope and Talbot in favor of the Claimant investors and against the Mexican government in the case of Metalclad and CEMSA and against the Canadian government in the two latter cases. The Mondev and ADF cases were decided in favor of the U.S. government.

because it is generally easier for a State to pay compensation than to change or amend a law or policy. It is, or should be, an extraordinary remedy. It is not the remedy to be sought for minor disturbances or measures that could be more effectively challenged through domestic remedies in order to secure the continuity of the investment.[8] In fact, this mechanism derives from the customary law of claims under international law, and there, the exhaustion of local remedies constitutes a condition to raise a claim to the international level. Though under NAFTA, an investor need not as a general rule exhaust its local remedies as a procedural condition to bring a claim, the question of whether it is necessary to have exhausted local remedies to successfully claim a breach under certain of the substantive provisions has not yet been resolved by any Tribunal.[9]

Despite of the above, however, the Chapter has produced considerable controversy which the NAFTA governments have been ready to address suggesting that the governments seem to have a clear sense of what the main purpose of the chapter should be.

In sum, to the extent that Canada, Mexico and the United States have been prepared to use available rules and procedures, it is clear that the new, more binding dispute settlement procedures have helped the management of Canada, Mexico and U.S. relations. The existence of international agreements does not mean that there will not be conflicts, only that there is better basis for resolving them. Since the three partners carry out one of the busiest trade relations in the world, it was to be expected that numerous disputes would arise as the NAFTA agreements were implemented. This expectation has not been wrong. The application of clear rules within a set of binding procedures has ensured equality of standing among the three parties. Agreed rules, not power politics has determined outcomes.

Nevertheless, there are limits to government's willingness to cede control to international rules and procedures as illustrated by the continuing saga of or Mexican trucking services and sugar which have bedeviled Mexico-U.S. relations for the last

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[8] It is also extraordinary in that it is not a domestic type remedy, but an international law remedy. At issue is not whether the measure was lawful or legitimate under the domestic law of the Party, but whether it was contrary to the NAFTA investment obligations.

[9] For example, one of the question before the Loewen Tribunal is whether in order to successfully argue a breach of Article 1105 for denial of justice it is necessary that the claimant or its investment exhausted the available local remedies.

several years. Mexico's restraint in adopting retaliatory measures on the trucking services case appear to be based on the judgment that while Mexico has the right on his side, the costs of adopting retaliatory measures both economically and politically outweigh the benefits. Mexico is also probably counting that the Bush administration in the end will implement the Panel recommendation as it has repeatedly announced it will and after the agreement between the Executive and Congress everything seems to indicate it will after all.

The trucking services and sugar exceptions seem to have an echo in a number of high-profile WTO cases like the EU ban on hormone-treated beef and U.S foreign sales corporations (FSC) which similarly remain to be resolved despite the benefits of panel proceedings. In these cases both the EU and the US authorities have determined that they would rather face the wrath of their trading partners than that of the public or constituencies, and have not taken satisfactory action to implement the decision of the WTO panels.

To conclude, much progress has been made over the past decade in enshrining into international agreements better rules and procedures to settle disputes, but international rules and procedures remain some distance from the level of certainty expected from domestic rules and procedures, particularly in politically controversial issues involving the policies of one of the major players, such as the EU or the US, or in bilateral cases involving stakes as high as those in softwood lumber or sugar. In the coming years, as efforts to expand and strengthen the rules keep pace with deepening integration, it will be important to pay equal attention to the concomitant need to ensure that the procedures for the settlement of disputes are sufficiently robust to make the rules enforceable and thus provide traders and investors with the confidence to make the best of the close ties among Canada, Mexico and the United States.

Lessons for the FTAA

The extensive and varied mechanisms for dispute resolution that are embodied within the North American Free Trade Agreement represent a unique approach (in their variety and breadth) to the well recognized need for sound dispute settlement

mechanisms in matters involving regional trade agreements. [10] What lessons can we learn from NAFTA for the FTAA ? I think one can derive lessons from each of the NAFTA mechanisms and thus our discussion will focus in every one of them.

Chapter 20

It seems inevitable that the Chapter 20 mechanism or something similar will be embodied in one form or another in future regional free trade agreements. In effect, the bilateral free trade agreement between the United States and Jordan concluded in October 2000 incorporates a mechanism substantively very similar to Chapter 20 of NAFTA.[11] Likewise, the issue of dispute settlement has arisen as well in the bilateral agreements of the U.S. with Singapore and Chile for which negotiations were initiated in the final days of the Clinton Administration and are being pursued by the Bush Administration. This Chapter also may be a model for the government-to government dispute settlement under the long-discussed Free Trade Agreement of the Americas, if such an agreement is ever concluded. In all of these agreements, as in NAFTA, there will be substantive rights and obligations not found in the WTO agreements that lend themselves to resolution under a bilateral or regional mechanism. [12]

As we discussed before, in a very basic sense, the Chapter 20 general arbitration mechanism has served the purpose for which it was intended reasonably well (if not promptly) that is, to resolve disputes that could not be resolved in the course of normal bilateral discussions. Certainly, when the NAFTA governments have had the

[10] For example, The Southern Cone Common Market (Mercosur) incorporates a mechanism for third party resolution of disputes among the member governments, consisting of negotiations, a type of conciliations by the member governments, and compulsory arbitration. See Mercosur/CM/DEC No. 1/91 -Protocol of Brasilia for the Solution of Controversies, reprinted in Thomas Andrew O'Keefe (1997)., Latin American

[11] Agreement Between the United States of America and the Hashemite Kingdom of Jordan, Oct 24, 2000, art 17.

[12] Even though most countries in the Western Hemisphere are all members of the WTO Dispute Settlement Body (DSB) with its apparent superior structural and procedural framework, the fact is that the WTO will not necessarily be an appropriate forum for all or even most disputes involving the FTAA countries in a future FTAA agreement. Like it happened in the case of NAFTA with the cross-border trucking services provisions of Annex I, it seems very unlikely that the FTAA parties, would be willing to entrust to groups of non nationals WTO panelists or the members of the appellate body the task of interpreting legal provisions that are unique to NAFTA or the FTAA.

patience to persevere, the decisions rendered on the whole have provided a valid basis for resolution of the disputes that they addressed. However, those who expect adjudicatory systems to follow set limits are likely to find the NAFTA chapter 20 system wanting. In NAFTA all the cases reaching the panel level have taken excessive delays in constituting the panels, particularly Cross Border Trucking Services and in one case, Sugar, it has been impossible to constitute the Panel has a result of the refusal of the United States to appoint panelists. These delays suggest the existence of significant procedural imperfections in the system particularly with regard to the apparent inability of the parties to agree promptly on panelists and the limited degree of secretarial support provided by the NAFTA governments. [13]

In the FTAA or other agreements much of the delay in selecting chairpersons and or panelists, could be eliminated if the parties to the agreement utilized an appointing authority, such as the Secretary General of the ICSID or even the WTO secretariat, who would be empowered to select a chairperson if the disputing parties failed to agree on one within thirty days. [14] The appointing authority would have to be provided with detailed, agreed upon guidance from the parties as to the qualifications and criteria for selecting a chairperson in order to avoid unpleasant surprises or unqualified candidates. A pre-arranged chairperson roster would further facilitate this process.

In an agreement with many parties—such as the FTAA—there is a necessity and an opportunity for a truly independent, adequately financed, secretariat with an adequate legal/professional staff and the authority to appoint panelists if the parties to a dispute cannot themselves promptly agree. If each of the parties appoints a roster of ten or more persons, as most WTO members have done under the Dispute Settlement Understanding, and the Parties can be encouraged to choose such rosters by merit, it is likely to be easier for any two disputing Parties to agree more quickly on a group of arbitrators. However, finding candidates both who are technically qualified and perceived as truly independent is likely to remain difficult regardless, given the due diligence that the disputing

[13] The main problem in NAFTA for appointing panelists promptly has to do with the fact that the three countries have not fulfilled their commitment to appoint the thirty person formal roster contemplated in the Agreement. Nor have the three countries fulfilled the agreement to select by lot the chairpersons when they have been unable to select one by agreement which is the first step to begin selection of the panel.
[14] This is the rule that applies in Chapter 11 Arbitral Tribunals.

governments must exercise in preparing to litigate issues of major political and economic importance.

It has been suggested that the ad hoc arbitration model be replaced by a trade court, particularly in the context of the FTAA. [15] Despite the advantages that a court could have, [16] political acceptance of a permanent trade court for even multilateral free trade agreements seems problematic at best, for the same reasons it was impossible in NAFTA. The court concept simply raises too many issues that could detract from other important objectives of such agreements such as concerns over national sovereignty. Under these circumstances, an arbitral mechanism more like the WTO´s Appellate Body, but with original rather than appellate jurisdiction, with seven (or perhaps nine or eleven) persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements, appointed for four- year terms and sitting in panels of three, should be considered [17] In the FTAA or the bilateral free trade agreement context, this group would serve as the panelists, without a separate appellate body. Of course, there would presumably be relatively fewer cases in comparison with the WTO´s DSB.

The use of a much smaller roster, reasonably well paid for the part-time work they would be called upon to do in panels of three or five , would speed up the panel selection process and could provide a degree of consistency in decisions that is probably impossible to achieve using ad hoc panel selection, particularly if like the members of the Appellate Body, all members of the roster consulted regularly with each other in pending decisions.

Chapter 19

It is most likely that countries negotiating future free trade agreements especially in the Western Hemisphere are likely to face the same conundrums Canada and Mexico faced when they negotiated NAFTA. As the liberalization of the FTAA or other bilateral

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[15] See Sidney Picker, NAFTA Chapter 20 –Reflections on Party to Party Dispute Resolution, 14 ARZ. J.INT¨L & COMP. L. 465 (1997)

[16] It seems reasonable to assume that a court, if properly organized and staffed, would eliminate the panel selection delays and assure a high level of trade expertise, as well as provide a higher degree of consistency among decisions.

[17] DSU, Supra note 2, Art. 17(1), 17(2), 17(3).

agreements proceeds many countries will be in a position similar to Canada and Mexico and will have to make sure that the foreign access they will gain from trade liberalization is not derailed by trade distorting actions like antidumping occurring within their principal trading partners which for many in the Western Hemisphere is the United States.

The high propensity of the US to the usage of Antidumping actions helped precipitate the creation of Chapter 19 administrative review in the CUSTA and NAFTA and could do the same thing in the FTAA. Many argue that a first-best strategy would be to reform antidumping policy, [18] but that seems unlikely given the current political context as demonstrated in the passage of the trade promotion authority to the U.S Executive. [19] The next-best strategy may be to ensure that antidumping actions are at least taken in a fair and responsible manner by administrative agencies in importing countries. Were the FTAA countries to pursue the latter strategy, a likely course of actions would be to establish some sort of administrative review at the regional level.

This process could follow the pattern we recommended above for the Chapter 20 process, a regional roster would help to prevent the delays in constituting panels that of lately has experienced the NAFTA Chapter 19 process.

Chapter 11

It is likely that in future trade agreements like the FTAA where the U.S. is a party, there will be a proposal to include a chapter on investment with added provisions to provide for an investor state dispute resolution mechanism. In fact, a good number of countries in the Western Hemisphere have already signed Bilateral Investment Agreements (BITS) with the U:S, Canada and Mexico which follow a similar institutional design as NAFTA chapter 11.. However, in considering ways to handle investment issues in future regional agreements like the FTAA, NAFTA experience with Chapter 11 can be useful in drawing conclusions about what to do at the regional level.

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[18] See Thomas M. Boddez and Michael J. Trebilcock, Unfinished Business: Reforming Trade Remedy Laws in North America (C.D.Howe Institute, Toronto 1993).

[19] One of the conditions that Congress imposed to the Executive Branch for the provision of new trade authority was not to compromise unfair trade laws in future negotiations.

First of all, the evidence from our analysis shows that NAFTA´s Chapter 11 is an efficient and thus effective mechanism to resolve investment disputes and to this extent it could serve as the model for any future investment agreement. Nevertheless, a number of issues have arisen in the operation of Chapter 11 that could usefully be addressed in a future regional agreement.

Transparency

There is no fundamental reason why investor-state dispute settlement should not be open to broader public scrutiny and accountability, particularly since issues of broad public concern may be litigated before an arbitral Tribunal. Chapter 11's origins lay in private arbitration procedures within which there were good reasons to observe confidentiality in order to encourage conciliation leading to the settlement of disputes. The capacity of an investment chapter at the regional level to address issues of broad public concern, however, should trump these considerations. Steps should thus be taken to open up the process more than was done by the NAFTA Commission on the NAFTA´s Chapter 11 case. Among the issues to be addressed is the extent to which documents should be made public and how, who should have standing to attend hearings, who should have standing to intervene before a tribunal, and similar issues. One way to address some of these issues is for the parties to negotiate procedures to be used in investment cases, modeled on the ICSID and UNCITRAL procedures, but adapted to the unique requirements of an FTAA investment chapter

Scope of investor-state dispute settlement

In great part, most of the controversy that NAFTA´s Chapter 11 has generated has to do with the fact is that the scope of investor –state dispute settlement is not well set out in the Chapter, providing both litigants and Tribunals with a lot of opportunity to

flesh it out, perhaps with more creativity than was originally envisaged. This is not in itself a bad thing, but may be contrary to what the parties intended. Similarly, some of the concepts in Chapter 11, e.g., in article 1105: 'minimum standard of treatment' remain vague and thus provide litigants and panelists with significant scope to make law.[20] Case law will eventually fill this gap, but perhaps on a basis that goes beyond what the parties intended. One of the risks in any modern judicial process is the temptation for panels to legislate rather than adjudicate, particularly in areas where the substantive law is vague and subject to interpretation. Of course, most of the critics of Chapter 11 are among those who are most eager to make use of this tendency in other areas, e.g., international environmental and human rights agreements. Nevertheless, FTAA parties might be better served by using the experience of the past eight years in NAFTA as a basis for setting out a more considered view of the scope and intent of investor-state arbitration.

Discipline on frivolous complaints

Some critics have expressed fears that well-endowed firms can use an investment chapter like NAFTA´s Chapter 11 procedures to chill legitimate regulatory measures. While, as noted above, there is little evidence to sustain this fear, a remedy can be envisaged. There already have been hints in some cases that costs can be awarded to the defending government in cases of malicious or frivolous cases. Tribunals in the future should be encouraged to make full use of this provision.

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[20] Professor Sir Robert Jennings, former president of the International Court of Justice in the Hague, has delivered a strongly worded opinion to the *Methanex* panel, taking strong exception to the NAFTA Commission Decision delineating its interpretation of Article 1105. In his view, the Decision fundamentally twists rather than interprets the intent of Article 1105. If nothing else, his opinion underlines the need for some clearer statement of some of the basic concepts set out in Chapter 11. See Jennings's statement at www.cyberus.ca/~tweiler/naftaclaims.html.