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DISPUTE SETTLEMENT UNDER A NORTH AMERICAN FREE TRADE AGREEMENT

A Report by a Joint Working Group of the American Bar Association, the Canadian Bar Association, and the Barra Mexicana

January 27, 1992

REPORT OF THE JOINT ABA/CBA/BM WORKING GROUP ON DISPUTE SETTTLEMENT

[This Report represents the collective view of the members of the Joint Working Group (Group) on the necessary features of a dispute settlement regime for a North American Free Trade Agreement. It has been submitted to the appropriate officers of the respective bar associations for consideration and endorsement. If a draft Agreement were to be made available in future, the Report could subsequently be revised and updated.]

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Introduction

This report represents an attempt by the three bar associations to give some guidance from the perspective of lawyers on the dispute settlement aspect of the proposed North American Free Trade Agreement (the "Agreement").[1] The extension of the rule of law to international trade-related disputes is important both to the Parties of the proposed Agreement and to the many private parties whose interests may be affected in the course of its application.

The development of a dispute settlement regime involves a careful balancing of many factors. These include many political and economic considerations, not all of which can be taken into account by the Joint Working Group since its members are not privy to the current negotiations.[2] To make a more precise assessment, a draft of the new Agreement embodying their impact would be required.

However, the Group is concerned to produce a report which not only will represent a considered approach by the three bar associations but also will be of assistance to the negotiators. It has sought, therefore, to take into account obvious practical limitations as well as known political and legal constraints. It is hoped, in consequence, that the recommendations in this Report, representing as they do the views of legal practitioners in the three countries, will be helpful and will merit close attention by those charged with the elaboration of the Agreement.

The recommendations are concerned with three broad components of an effective dispute settlement formula: first, the management of disputes; second, a regime for the settlement of disputes; and, third, private party involvement in the dispute resolution process.[3] Following a review of a num-

[1] The Joint ABA/CBA/BM Working Group on Dispute Settlement was an initiative of Dr. Henry King, Jr. and the American Bar Association International Law Section. The Group issued its first report in 1979 under the guidance of Dr. Henry King, Jr. and T. Bradbrooke Smith with Louis Sohen acting as the project's first secretary. Henry T. King, Jr. & T. Bradbrooke Smith, Settlement of International Disputes Between Canada and the USA (American Bar Association and Canadian Bar Association 1979) (on file with the Canada United States Law Journal, Case Western Reserve University School of Law).

[2] Work on the North American Free Trade Agreement (NAFTA) began in June 1990 when Mexican President Carlos Salinas de Gortari and American President George H.W. Bush announced plans to negotiate a free trade agreement. Canada, under the leadership of Brian Mulroney, joined the process in August 1990. Formal negotiations commenced in June 1991 amid intense scrutiny and political pressure in all three countries. *See* Keith Bradsher, *Trade Pact Signed in 3 Capitals*, N.Y. TIMES, Dec. 18, 1992, at D1.

[3] The Joint Working Group has always focused on these three principles in the hopes of promoting peace through rule of law. This focus is clearly represented in the first two princi-

ber of general considerations which have influenced the Group in arriving at its conclusions, the various considerations bearing on these subjects and related aspects are examined and are summarized. While they form a considered and composite approach to the dispute resolution component of the Agreement, the major recommendations are also capable of individual adoption.

General Considerations

The New Dimension:

The addition of a third Party to the existing Canada-United States free trade framework adds a whole new dimension to the trading relationship. The interpretation of the Agreement will be important to all three Parties even though a particular issue may involve only two states or a private party and one state administration. The management of the Agreement to ensure its smooth functioning will be of concern to all three.

Moreover, the very fact of extending the formalized trade relationship to a third party and its citizens will increase substantially the difficulties involved in framing an adequate regime of dispute resolution. One must add to this the new elements of a different legal system, a third language and different culture, as well as another framework of domestic trade legislation even though that legislation may take its inspiration from essentially the same sources.[4] Modifications to the existing Canada-United States regime of dispute resolution of more than a cosmetic nature will obviously be necessary.

Thus, there is a significant challenge to the Parties in their elaboration of an effective and fair regime of dispute resolution. But in recognizing this challenge one must not overlook the fact that all three countries, because of their heritage, share a mutual concern to work out a law-based regime that will reflect their common adherence to and belief in the rule of law.[5]

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ples of effective dispute management and settlement. The Joint Working Group's focus on involving private parties in dispute settlement was intended to allow disputes to be treated as discrete issues to be resolved. The intention was to prevent the NAFTA Parties from trading off and compromising the interests of citizens across a series of unresolved conflicts. *See* King, *supra* note 1.

[4] Beyond the cultural, legal, and linguistic challenges, the NAFTA also faced significant political opposition in all three countries. The Canadian population blamed the recent Canada-United States Free Trade Agreement (FTA) for economic difficulties in the late 1980s and had little appetite for more free trade. In the United States, Congress demanded that any new free trade agreement contain comprehensive environmental and labor standards before granting George H.W. Bush the authority to negotiate. Finally, in Mexico, there was a history of opposition to embracing a closer relationship with the United States. *See* Bradsher, *supra* note 2.

[5] The Joint Working Group was conceived as a mechanism for enhancing world peace through the concept of rule of law. Initially, the Joint Working Group used the Canada-United

The Old Precepts:

What is also most relevant in considering the recommendations which follow are the basic principles which have been at the root of previous ABA/CBA reports on international dispute settlement and which are now endorsed by the reconstituted Joint Working Group. These relate to the three main areas taken up in the recommendations.

(1) The Group is convinced of the importance to any regime of dispute resolution mechanism of adequate means to manage the Agreement so as to encourage use of non-confrontational mechanisms to resolve issues. This implies not only increased awareness and dedication of special resources within each administration but also the development of new intergovernmental means for defining and defusing disputes, including fact finding or other processes, when negotiations fail to produce a resolution of a particular problem.[6]

(2) A consistent theme of previous reports has been the fundamental importance of having a mechanism for definitive settlement of legal disputes when all other options have failed. This is not only for the purpose of some final resolution to a particular problem, but also to backstop the negotiating process. A mechanism is required to provide the boundaries for negotiations in the same way that the existence of judicial recourse to the courts does in each domestic system.[7]

States relationship to illustrate and promote the benefits of managing global relationships through rule of law; with the negotiation of the NAFTA, Mexico was added. Letter from T. Bradbrooke Smith to J.J. Camp, President, Canadian Bar Association (Jan. 27, 1992) (on file with Canada United States Law Journal, Case Western Reserve University School of Law).

[6] The Report and Recommendations of the American and Canadian Bar Association Joint Working Group on the Settlement of International Disputes recognized that not all disputes would be settled by negotiation and those that are not settled are often the ones that deal with the most difficult and troubling issues. Therefore, the Joint Working Group suggested the implementation of a binding third-party settlement procedure in order to provide a reasonable avenue to solve these complex binational disputes. AM. BAR ASS'N & CAN. BAR ASS'N, SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN CANADA AND THE USA: RESOLUTIONS ADOPTED BY THE AMERICAN BAR ASSOCIATION ON 15 AUG. 1979 AND BY THE CANADIAN BAR ASSOCIATION ON 30 AUG. 1979 WITH ACCOMPANYING REPORTS AND RECOMMENDATIONS 57 (1979).

[7] The Joint Working Group considered arbitration to be an ideal method for solving legal disputes because it both showcased a mutual commitment to the final authority of the law in the government of the two countries' affairs, while at the same time allowed the Parties involved some ability to retain control over the composition and procedure of each case. *Id.* at 58.

> (3) Access of private parties to the regime of dispute settlement is also considered fundamental by the Group. The object is, where possible, to remove disputes from the state-to-state level, where considerations extraneous to the particular dispute may be injected into the process, and to transfer it to a more technical level. As well, particularly in a trade context, neither should states in most cases have to carry the burden of espousing citizens' claims nor citizens be forced to depend on attracting the attention and support of their state. Finally, where there is private party access, it gives to aggrieved individuals some sense that their interests are important and are not entirely subordinated to those of the Parties.[8]

The reconstituted Joint Working Group feels that these considerations are equally relevant to a broader North American Free Trade Agreement. To the extent they are now reflected in the existing Canada-United States Agreement, an effort should be made to maintain and enhance those elements. They are most important, not only to an effective system, but also to ensuring the extension of the rule of law in this area

Chapters 18 and 19 of the existing Canada-United States Agreement cannot be simply incorporated into a new North American Free Trade Agreement without modification.[9] On the assumption that they will be the foundation, or at least principal points of reference, for a new dispute settlement regime, the Group has used them as a framework for this report. The chang-

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[8] The *1979 Joint Working Group Report's Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution* gave natural or legal persons the right to take part in all administrative and judicial procedures within the country of origin, in order to prevent, abate, or obtain compensation for damage caused by domestic pollution. *Id.* at xii-xvi.

[9] Chapter 20 of the NAFTA superseded Chapter 18 of the FTA and dealt with general dispute settlement. Chapter 20 of the NAFTA is an improvement and technical extension of the dispute settlement provisions of Chapter 18 of the FTA. Chapter 19 of the NAFTA superseded Chapter 19 of the FTA and dealt with antidumping and countervailing duty maters. "There were four important changes to Chapter 19 introduced by the NAFTA: [f]irst, the NAFTA has no sunset provision limiting the continuation of the Chapter 19 binational process, and it drops the working party established in the FTA to develop different rules for subsidies and antidumping procedure"; "[s]econd, the NAFTA adds a section (Article 1907:3) that outlines desirable qualities for the administration of antidumping and countervailing duty laws"; "[t]hird, the NAFTA adds a section (Annex 1904.15(d) Schedule B) that outlines a series of twenty obligatory amendments to Mexico's unfair trade remedy legislation"; and "[f]ourth, under the title of 'Safeguarding the Panel Review System,' the NAFTA adds a section (Article 1905) that provides remedies if a party does not comply with its obligations under Chapter 19." *See* GILBERT WINHAM, THE FRASER INST., DISPUTE SETTLEMENT IN THE NAFTA AND THE FTA (1993), *available at* http://epe.lac-bac.gc.ca/100/200/300/fraser/assess_nafta/dispute.html.

es required in them ought to reflect the three principal considerations to which the reconstituted Joint Working Group continues to subscribe.

Relationship to the General Agreement on Tariffs and Trade (GATT):

The Group is of the view that recourse to the GATT alternative for dispute resolution should be maintained.[10] The Group is agreed that the mechanism should be triggered by the complaining party only. This follows the Canada/United States formula.[11]

Treaty Architecture:

An important aspect of the proposed Agreement in relation to dispute resolution is the architecture of the treaty. Here the major issue is the relationship between the dispute resolution provisions of the new Agreement and those of the Canada-United States Agreement. The Group proceeded on the basis that it is most unlikely that the existing agreement will be replaced in its entirety. If this be so, the obvious solution is to leave the old provisions in place to the extent that they are not inconsistent with the new Agreement.

This point also raises the issue of the extent of the application of the tripartite Agreement. In this regard, it is also conceivable that the Canada-United States Agreement may eventually be rendered without effect if the new Agreement is one that is framed so as gradually to take over the entire field of the trade relationship between the Parties.[12] In any event, the new treaty ought to have a provision to deal with this problem of applicability under and in accordance with rules it establishes.

On this approach, complete accord on all features of the new Agreement is not rendered essential for the two Parties to the existing scheme. The only problem in this latter regard will be the extent to which new and different mechanisms for dispute resolution are developed that may not apply to the existing arrangement but may, indeed, be considered more or, possibly, less desirable than those which are currently in force between Canada and the United States. If a jurisdictional provision is included as suggested, then this problem can be addressed and resolved.[13]

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[10] When a dispute arises under both the GATT and the NAFTA, the NAFTA allows the Parties to choose either the GATT or the NAFTA as a dispute resolution forum. *Id.*

[11] Chapter 18 explains the procedure for bringing a dispute against another party under the FTA. *See* Free Trade Agreement, Can.-U.S., ch. 18, Oct. 4, 1987, 102 Stat.1851.

[12] The FTA "was a trade agreement reached by Canada and the United States in 1987 . . . . Later it was superseded by the North American Free Trade Agreement that included Mexico." Free Trade Agreement, Can.-U.S., art. 1806(3), Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CUSFTA].

[13] The NAFTA conflicts with the FTA in several areas. For instance, the NAFTA provi-

A more technical point is that the Canada-United States Agreement has a multiplicity of dispute resolution mechanisms scattered throughout its text. To some extent this is unavoidable. On the other hand, in a new North American Agreement, an effort should be made to bring together, to the extent it is feasible so to do, all of the dispute resolution mechanisms into a single or several consecutive, interconnected chapters.[14] Such a consolidation would also focus consideration on dispute resolution generally.

Dispute Management

The Group considers that the complexities arising from a three-Party trade agreement without any background of tripartite dispute resolution between them argues for something more than the essentially ad hoc and informal arrangements currently in force between Canada and the United States. However, it is not convinced that a new international bureaucracy is required to be put in place at the inception of the Agreement. Enhanced arrangements within the existing structures may be all that is required at first as long as there is the possibility of adding new institutions in future. What is essential is that the structure lend itself to meeting certain goals.

Disputes under the new Agreement ought to be identified in their nascent stage. They ought to be managed in a way that will see them not only identified early but quickly resolved by negotiation.[15] Where this fails, the system should ensure that issues are:

(a) clearly defined and their parameters narrowed;

(b) where desirable, devolved for either future resolution or disappearance with the effluxion of time; and

(c) where necessary, resolved by following other procedures in the Agreement with as little confrontation as possible.[16]

While to date the limited experience with the Chapter 18 mechanism in the Canada-United States Agreement seems to indicate that it has functioned reasonably well, the interrelationship between three bureaucracies will prove

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sions for institutional arrangements and dispute settlement supersede their FTA equivalents. *See* Gilbert R. Winham, *Dispute Settlement in NAFTA and the FTA, in* ASSESSING NAFTA: A TRINATIONAL ANALYSIS 251-70 (Steven Globerman & Michael Walker eds., 1993).

[14] The NAFTA chapters on dispute resolution are Chapters 11, 19, and 20. *Id.*

[15] "There is a growing reliance upon negotiation, mediation, and conciliation dispute resolution techniques, in lieu of traditional litigation and even arbitration." George W. Coombe, Jr., *The Resolution of Transnational Commercial Disputes: A Perspective From North American,* 5 ANN. SURV. INT'L & COMP. L. 13, 14 (1999).

[16] The NAFTA creates an overarching process for dispute resolution that sets forth five formal dispute resolution mechanisms, including Chapter 20 providing procedures to resolve disputes on the application of the NAFTA. Cherie O'Neal Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 854 (1997).

to be more complicated. A new tripartite North American Free Trade Commission, taking its inspiration from Article 1802 of the current Agreement, ought to provide more clearly for consultative arrangements at the public service level. In this regard Article 1802:4 of the current Canada-United States Agreement authorizes the establishment of ad hoc standing committees or working groups to whom responsibilities may be delegated. This permissive power should be spelled out in more detail.[17]

Not only should the early warning mechanism based on existing governmental institutions be improved but also additional arrangements contemplated for the future. It should be possible for the Governments to constitute a modest intergovernmental body, perhaps a standing committee, to assist in the identification of disputes and, possibly, with the modalities of their resolution. It should be possible to effect this without having to amend the Agreement in the future.[18]

Besides a possible early warning function, powers in respect of coordination, mediation, and fact finding would be desirable for such a body. For example, a fact finding function would enable Parties to put certain disputes in a holding mode without appearing to neglect them. This could facilitate resolution at a later stage since impartial fact finding is frequently a precondition to the satisfactory resolution of problems. Coordination could become a problem and the existence of an intergovernmental mechanism might also be useful for this purpose.

The Group, therefore, recommends that the Agreement specifically authorize the Parties, if and when they determine it will be of assistance, to establish a permanent mechanism to assist with the resolution of disputes, although not necessarily to have some independent role in their management. It could be international. It could be joint, with three sections. It would be permanent, although it ought to be called upon only when certain tasks are required.[19]

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[17] Article 1802 requires Parties to ensure that any law, regulation, procedure, or administrative ruling of general application respecting any matter of the NAFTA be published or otherwise made available to interested parties; in addition, Article 1802 requires the Parties to publish such measures in advance, giving opportunity for interested parties to comment, to the extent possible. North American Free Trade Agreement, Can.-U.S.-Mex., art.1802, Jan. 1, 1994, 32 I.L.M. 289 [hereinafter NAFTA].

[18] The NAFTA creates several trilateral institutions and an overarching process for dispute avoidance and management. *See* John Kirton, NAFTA Dispute Settlement Mechanisms: An Overview, paper prepared for Experts Workshop on "NAFTA and its Implications for ASEAN Free Trade Area, Asian Inst.," Munk Centre for Int'l Studies, Toronto (May 27, 2004), *available at* http://www.envireform.utoronto.ca/publications/john-kirton/may27-2004.pdf.

[19] The NAFTA Secretariat administers dispute settlement procedures. NAFTA, *supra* note 17, art. 2002.

One specific mode of approaching such a mechanism would be through small organizations established in each capital as sections of an appropriately named institution. This is the formula used for the International Joint Commission. This body would be required to meet regularly but on a limited basis and would have as its mandate to undertake specific tasks either itself or through experts at the instance of at least two of the three Parties. One additional function might be to monitor for the Governments the administration of the Agreement from the point of view of dispute resolution.[20]

It is also conceivable that, in the future, such a mechanism might well become a catalytic force in dispute resolution. With time, if the Parties supported the evolution, it could acquire some weight in the process which would enable it to make recommendations, or participate in various dispute resolution processes such as conciliation or mediation which are also implicitly now provided for in Article 1805:2 of the Canada-United States Agreement.[21]

If this were done in the Agreement with some particularity, then the changing conditions brought on by a functioning and important international instrument could, in future, be met in a flexible fashion and with a minimum of dislocation. Indeed, if the Parties contemplate the extension of the new Agreement to other states, such a mechanism would appear to be a necessary concomitant. Good as the existing bureaucracies may be, this optional plan would, in the view of the Group, add to the flexibility the new Agreement will obviously require.

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[20] One additional function might be to monitor for the government's administration of the Agreement from the point of view of dispute resolution. *Id.*

[21] The NAFTA Article 2001(1) established the Free Trade Commission. The Free Trade Commission oversees the Secretariat, a permanent operational body comprised of an office in each NAFTA member country. Parties send requests for consultation to the Secretariat. If the Parties cannot resolve the matter within the proscribed period, a consulting Party can request the Secretariat for an arbitral panel. The Free Trade Commission shall establish a panel upon delivery of the request. NAFTA, *supra* note 17, arts. 2001-2008.

Adjudication Regime

Treaty Interpretation:

The centerpiece of the recommendations of the Group is that a permanent body, full-time or capable of being convened without delay, be established to deal with disputes between the Parties which involve the interpretation and application of the new Agreement. Such a body would be the key element in the entire dispute resolution process. It would be a permanent institution although it need not involve structures which at the outset require full-time attention by those responsible.[22] A stronger and more elaborate system than that now provided for in Chapter 18 of the Canada-United States Agreement is required.[23]

The new Agreement will be new international law. Its interpretation can, therefore, properly be conferred on an international tribunal. There ought to be no national constitutional difficulties on this aspect. There are, however, two elements of concern. One is the application or execution of the decisions of the tripartite body by the Parties. This will be dealt with below. The other, and possibly related element, is the connection between interpretation and application of the Agreement and the national laws which either implement it or are impacted by it. In this area there could arise constitutional problems although it is hard to foresee their nature or extent.

The Group feels strongly that an interpretive body, independent and established under the Agreement in a permanent and not in an ad hoc fashion, is essential to the ultimate acceptance and smooth working of the document. While the Parties collectively ought to be able to negotiate issues outside a tribunal framework, any one Party should always be able to initiate proceedings before the Tribunal without the concurrence of the others.[24] There should be provision for notification to a Party not initially involved in a dispute and for its participation in the proceedings.[25]

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[22] The Free Trade Commission and Secretariat are permanent institutions that fulfill requests for arbitral panels. *Id.*

[23] The FTA Chapter 18 "served as the direct model for Chapter 20"of the NAFTA. The NAFTA Chapter 20 strengthens the FTA Chapter 18 framework by providing more control to the disputing Parties by allowing them to select the Panel chair, providing more flexibility in reaching an agreement on how the consulting Parties will conform with the final report's ruling, and by expediting the final report process through more rigid time limits. Sidney Pickner, Jr., *The NAFTA Chapter 20 Dispute Resolution Process: A View From the Inside,* 23 CAN.-U.S. L.J. 525, 526-33 (1997).

[24] If a matter is not resolved within the proscribed periods, any consulting Party may request an arbitral panel. NAFTA, *supra* note 17, art. 2006 (stating that any party may request consultations) *and* art. 2008(1).

[25] Third parties believing themselves to have a "substantial interest in the matter" shall be

Constitution of the Tripartite Tribunal:

A permanent Tribunal need not necessarily have members who have no other obligations. What is essential is that there be constituted a permanent institution that can be called upon to deal promptly with interpretive issues whenever they arise. The members must be independent in both a formal and a real sense. They could be remunerated on a per diem basis until such time as the work of the Tribunal requires full-time membership and the concomitant requirement of provision for salaries. Clearly, however, the members should not have, and should refrain from, activities which might give rise to a conflict of interest with their Tribunal responsibilities.[26]

Neither does a Tribunal have to begin with a full slate of members. It can commence with a minimum number to which, as workload may demand, others may be added. The new Agreement ought to make provision for such extension. At the beginning it may well be that only three members are required. There should, however, be alternate members so that the Tribunal can function effectively and without delay. Both permanent and alternate members would come from the ranks of the bench, bar, or academic communities of the three Parties. The Agreement could provide for additional members, probably six, plus alternates at the nomination of the respective Parties when they shall have agreed that the Tribunal should be enlarged.[27]

The Group does not favor the constitution of a Tribunal with members other than from the three Parties. The new Agreement will be a North American Agreement with issues familiar to jurists from Canada, Mexico, and the United States. One must assume an independence of mind on the part of its members and the evolution of a Tribunal which, because of its composition, would quickly take on the characteristics of a court rather than an arbitral body.[28]

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entitled to join as a complaining Party. A third party shall deliver notice to the Secretariat "at the earliest time possible, and in any event no later than seven days after the . . . delivery of a request by (sic) for the establishment of a panel." *Id.* art. 2008(3).

[26] The NAFTA does not have a trade tribunal in the traditional sense of the term. Rather there is a pool of thirty panelists. When a claim arises, the disputing Parties meet and agree on a lead panelist, and then each chooses two panelists that are citizens of the other Party. *Id.* arts. 2008-2011.

[27] Despite the NAFTA language, the implementation of a roster of panelists has not occurred. Rather panelists continue to be selected on an as needed basis. David A. Gantz, *Settlement of Disputes Under the Central America-Dominican Republic-United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 395 (2007).

[28] The three Nations nominate the panelists. By the very language of Article 2009, at least four of the five panelists must be from the disputing Parties. However, the Agreement is silent as to the nationality of the panel chair other than that they meet the qualifications of Article

Consideration should, however, be given to the possibility that the Tribunal be empowered to appoint experts in the role of assessors to assist it in technically difficult cases. The Agreement might provide for these contingencies where, in any given case, all Parties agree that the Tribunal should be so constituted or assisted.[29] This would probably also require a somewhat larger panel and it would be necessary to make provision for spelling out those details. One way of handling this and other details would be to empower the North American Free Trade Commission to make detailed rules for the organization and functioning of the Tribunal.[30]

The new Tribunal, perhaps called the North American Trade Tribunal, would be supported by a very small Registry which, again, could be increased if the workload so demanded. Both the Registry and the Tribunal ought to operate from a central location but, perhaps, away from the capitals. This would underscore the neutrality of the institution. Of course, the Parties may prefer a perambulating body which would hold sessions in the territories of each of the Parties. A fixed location which might be seen to be sufficiently neutral from a geographic point of view is, however, to be preferred.

It may be that, initially at least, the Secretaries of the North American equivalent to the Chapter 19 system under the Canada-United States Agreement (Article 1909) could perform the Registry task, assuming, of course, that that system is adopted for the new Agreement and a Mexican Secretariat is established. This would allow gradual evolution of the system and avoid a top heavy bureaucratic structure at the inception of the Agreement. Rules governing the operation of the Registry and proceedings before the Tribunal would be made by the Tribunal.[31]

2010 unless the Parties are unable to agree on a chair. *Id.* art. 2010.

[29] Experts are expressly allowed under Article 2014. "On request of a disputing Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate, provided that the disputing Parties so agree and subject to such terms and conditions as such Parties may agree." *Id.*

[30] Under the NAFTA, the Free Trade Commission shall establish its rules and procedures. A subsection grants the Free Trade Commission the discretion to establish and delegate responsibilities to committees (both ad hoc and standing), working groups, and expert groups as well as seek the advice of non-governmental sources. *Id.* art. 2001.

[31] A Secretariat with each member country maintaining a Section and each Section being a "mirror-image" of the others is responsible for the administration of the disputes settlement provisions of the NAFTA under The Free Trade Commission. As envisioned, the Secretariat is similar to the binational Secretariat under the FTA, but the Sections are located in the national capital cities of Washington, D.C., Ottawa, and Mexico City. *Id.* art. 2002.

Power of the Tripartite Tribunal:

The Joint Working Group considers that a North American Trade Tribunal should have jurisdiction with respect to disputes involving the interpretation and application of the NAFTA. This would include issues of the consistency of national laws with the Agreement. Where there are differing views as to their respective rights or obligations under the Agreement, if the Parties cannot agree among themselves, any one of them should have the right to put the issue to the Tribunal.

There is a second area which could be included in the powers of the North American Trade Tribunal. There may well be instances in the domestic courts of the three Parties where a view must be taken on the interpretation of the Agreement. This could also arise in relation to the activities of Chapter 19 type panels. The Working Group believes it would be desirable for the North American Trade Tribunal to be given power, upon request, to provide an opinion to a domestic court on the interpretation of particular provisions of the Agreement. Compare Article 1808 of the Canada-United States Agreement.[32] The precise modalities could be set forth in the Tribunal's rules.

It must be acknowledged that divorcing the issue of interpretation from all the facts of a given case may not be desirable in many circumstances. Likewise, there could be problems of timing. On the other hand, the possibility of securing an opinion which could be adopted or rejected by the domestic court in its application to the particular facts might well, over time, provide an interpretive framework that would be most useful. The Group recommends that there be incorporated in the Agreement a scheme for reference of questions on the interpretation of the Agreement at the instance of the domestic court concerned. Domestic law may also have to be amended accordingly.[33]

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[32] Article 1808: Referrals of Matters from Judicial or Administrative Proceedings of the FTA had two provisions:

> 1. In the event an issue of interpretation of the FTA arises in any domestic judicial or administrative proceeding of a Party which either Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, the Parties shall endeavor to agree on the interpretation of the applicable provisions of the FTA.
> 2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation to the court or administrative body in accordance with the rules of that forum. If the Parties are unable to reach agreement on the interpretation of the provision of the FTA at issue, either Party may submit its own views to the court or administrative body in accordance with the rules of that forum. CUSFTA, *supra* note 12, art. 1808.

[33] A scheme for reference of questions on the interpretation of the Agreement at the instance of the domestic court was not adopted by the NAFTA. NAFTA, *supra* note 17.

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Binding Arbitration and the Panel System:

Whether the suggested Tribunal procedure should be in substitution for or in addition to the arbitration and the panel systems as now provided in Articles 1806 and 1807 of the Canada-United States Agreement is less clear. The Group recommends that the regime be rationalized and that the Tribunal procedure be the only one available for the disposition of issues relating to the interpretation and application of the new Agreement. To the extent not overtaken by this formula, the existing system could continue to apply to Canada-United States disputes.

With respect to future proposed measures which may affect the operation of the new Agreement, the Group would consider it less complicated if only the new system were to apply. There would be but one recourse in these circumstances to the Tribunal. On the other hand, it is recognized that there may be reasons to retain the current Canada-United States formula for proposed measures which may demand a less formal and more flexible approach such as that offered by the panel procedures in Article 1807 of the present agreement. Having regard to the proposed right of any Party to initiate proceedings before the Tribunal, agreement of the Parties to the dispute would be required.

In this event the equivalent of Article 1807 of the present agreement may have to be recast and consideration given to whether only two or all three Parties must be represented on a panel. On the face of it, with three Parties to the Agreement, the latter alternative commends itself. Similar complications would be involved were the Parties to wish to retain the section 1806 process as an alternative where the Parties to a dispute agreed.

Decisions:

The Joint Working Group also considered the mechanisms for the implementation of decisions under Chapter 18 of the Canada-United States Agreement. While the scheme of retaliation there found may be the only one available at international law to underpin decisions or judgments of a North American Trade Tribunal, the current Chapter 18 mechanism lacks the suasion that could be offered by a general obligation to implement decisions.[34]

[34] Under Article 1806 (3) of the FTA, a complaining Party may retaliate if: (1) they believe that the measures at issue impair their fundamental rights or benefits under the FTA, and (2) they are unable to resolve their dispute with the other Party within thirty days of receiving the final report of the arbitral panel. The extent of the complaining Party's retaliation in such an instance is to "suspend the application to the other [P]arty of benefits of equivalent effect." CUSFTA, *supra* note 12.

The Group recommends, in consequence, that the new Agreement incorporate a basic obligation on the Parties to implement decisions of the North American Trade Tribunal. This obligation would be supported by a system for retaliation if decisions were not implemented within a given period of time or not implemented in an integral fashion. To the extent it may be possible to do so, the amount of retaliation allowed ought to be limited to the degree of default of implementation or the seriousness of the issue. Put another way, the retaliation ought to be at the level of the nullification or impairment produced by the failure to implement the decision.[35]

Review of Domestic Processes:

A feature of the Canada-United States Free Trade Agreement is the Chapter 19 mechanism for dealing with the application of national trade laws. That provision was included because there was no agreement on the substantive issues of antidumping and countervailing duties. Essentially Chapter 19 provides for recourse to a specially constituted panel for the determination of issues relating to the application of national law where these would otherwise be determined by the national courts. Chapter 19 does not change national laws, it simply establishes what appears to be an independent and bilateral mechanism for their interpretation, an interpretation based on the law of the jurisdiction where the matter arises.[36]

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[35] Under Article 2019 (1) of the NAFTA, a complaining Party may retaliate if: (1) the arbitral panel selected by the Parties pursuant to Article 2011 of the NAFTA determines that a measure at issue nullifies, impairs, or is otherwise inconsistent with the Parties' obligations under the NAFTA, and (2) the Parties are unable to agree to a resolution of their dispute within thirty days of receiving the arbitral panel's final report. Article 2019 (2) directs that in retaliating, the complaining Party should seek to only suspend benefits in the same sectors as those affected by the measures at issue. If such a suspension of benefits is not practicable or would not have an equivalent effect as the measures at issue, the complaining Party may expand its retaliation to affect other sectors. Upon the written request of either party, the Free Trade Commission shall establish a panel to determine whether the level of benefits suspended by the complaining Party is "manifestly excessive." NAFTA, *supra* note 17, art. 2019.

[36] Chapter 19 of the FTA provides for the review of statutory amendments to a Party's antidumping or countervailing duty statutes as well as review of final antidumping or countervailing duty determinations by a five-member review panel. Annex 1901.2 lays out a detailed procedure for selecting the members of such a panel under which each party selects two members and the Parties collectively name a fifth member. Under Article 1903, if the review panel finds that an amendment to a Party's antidumping or countervailing duty statutes is inconsistent with GATT or the purpose of the FTA, the Parties are to seek a resolution of their dispute, which may include remedial legislation with respect to the statute of the amending Party. If such an agreement is not reached or complied with, the non-amending Party may retaliate with equivalent action or terminate the FTA. Under Article 1904, if a review panel finds that a final antidumping or countervailing interest duty determination is inconsistent with the general legal principles that a court of the importing Party would otherwise apply in reviewing a determination of the authority making such a determination, the panel may remand such a

Brief consideration was given by the Group to the alternative of the inclusion in the jurisdiction of the Tribunal of domestic-type issues now dealt with under Chapter 19 of the Canada-United States Agreement. There may have been merit in this were the matter to have begun without a history of the considerable experience with the special dispute resolution mechanism in Chapter 19. The Group felt it was not practical to seek to recast the system for the new Agreement assuming, of course, that there will be a Chapter 19-type formula included in it.

While at first blush the Chapter 19 system may appear to be flawed in the sense that it is the laws rather than their administration that may be objectionable, it has in practice worked very well. There has been general, if not total, satisfaction with the results of individual cases as well as with the collective experience. It has also permitted the disengagement of the respective national bureaucracies to some large degree and allowed the aggrieved interests in each country to make their cases without any overhanging linkage to other issues. Moreover, the disposition of contentious matters has been speedy.

The very success of this system makes its extension to a new arrangement most desirable. Whether or not it is altogether logical and whether or not it responds fully to the real legal difficulties in the trade relationship, as between Canada and the United States, experience has shown that the system works. It should also work well in a North American context. An effort should, therefore, be made to make such alterations in it as will fully accommodate the third partner in the new Agreement.

These modifications will not, however, be purely formal. The following new aspects must be addressed:

> (1) The existence of a dispute involving interests in two of the three Parties will have to be signaled to the third Party in case its interests are in issue directly or indirectly. To this end a system focused on the provision of notice will have to be worked out.
>
> (2) The present panel system may well have to be revised. Depending on the issue, it could be that all three Parties should be represented on a panel. This may, in turn, involve panels of a different size. This aspect will have to be carefully thought out so as not to result in any watering down in the effectiveness of the present system.[37]

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determination for action not inconsistent with the panel's decision. The decision of a panel under Article 1904 is "binding on the Parties with respect to the particular matter between the Parties that is before the panel." CUSFTA, *supra* note 12, arts. 1901-1904.

[37] All arbitral panels allowed under Chapter 20 of the NAFTA are comprised of five members selected from a roster of thirty individuals assembled by a consensus of the Parties. The

(3) With the addition of a third language in the relationship and the possibility of proceedings on both a bilateral and a trilateral basis, the question of the language of panel proceedings to be conducted will arise. In addition, there may be questions of procedure which heretofore have been taken for granted that will require review.[38]

(4) Further consideration will have to be given to the binding character of the decisions and their influence on the tripartite relationship. In this latter regard, will a Canada-United States decision involving, say, Canadian law, have any effect on the administration of analogous Mexican trade law for similar goods from the United States?[39]

Because of its success and its importance to private parties and their lawyers, the Group recommends that serious consideration be given to extending the Chapter 19 procedure under the new Agreement to tariff classification, sanitary and other standards, and rules of origin. Where in proceedings taken before a panel on any such issue a substantial question arises respecting the interpretation or application of the new Agreement, the Panel should be empowered to refer the question to the Tribunal in accordance with the procedure described below.

Private Party Issues

Domestic Proceedings:

As already noted, the current Chapter 19 arrangements have seen private parties largely in control of issues with which they are directly concerned. It has also seen the elimination from the consideration of the matter at hand of other unrelated issues between the United States and Canada. It is most de-

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chair of such a panel is to be selected from this roster by the unanimous agreement of the disputing Parties, or, if the Parties are unable to agree, by the Party or Parties on a randomly selected single side of the dispute from among the individuals on the roster that are not citizens of the selected Party or Parties. If the dispute at issue only involves two Parties, each Party selects two of the remaining four panelists from among the individuals on the roster that are citizens of the other disputing Party. If the dispute at issue involves more than two Parties, the Party complained against selects two individuals that are citizens of the complaining Parties for the panel, and the complaining Parties together select two panelists that are citizens of the Party complained against. NAFTA, *supra* note 17, arts. 2009, 2011.

[38] Currently, any person or panelist may use either English or French in any proceeding or document. *Id.* arts. 1904-29.

[39] Panel decisions under Chapter 19 are binding, in contrast to the other Dispute Settlement Provisions in the NAFTA. *See generally id.* art. 1904; *but see* art. 11 *and* art. 20.

sirable that this continue under a North American Free Trade Agreement and, as suggested above, where possible be extended.[40]

There may, however, be issues arising in relation to the administration of domestic trade laws that affect the larger interests of the Parties to the new Agreement. In consequence, each Party might be given the opportunity to involve itself in such domestic proceedings, even if it means detracting from the position of the aggrieved private party. It is to be hoped that such situations will be rare, but the paramount interest of the Parties to the Agreement should be recognized.[41] The same approach is even more valid in relation to Chapter 19-type panels.

As well, before Chapter 19-type panel procedures are instituted, issues involving private parties before the administrative apparatus of one of the Parties to the Agreement should have some predictable course. In other words, the new Agreement ought, at the very least, to ensure that domestic administrations cannot frustrate recourse by private parties to the international review process where matters covered by the new Agreement are concerned.

Finally, the Group feels that private parties will have to rely on local legal advice and, subject to the immediately preceding consideration, submit themselves to the local legal system so that no special arrangements should be contemplated. This includes language, procedure, and substantive law as amended to implement the Agreement.

Before the Tripartite Tribunal:

It may also be desirable to allow private parties to appear in proceedings before the North American Trade Tribunal. Where an issue of the interpretation or application of the Agreement arises and where a private party is intimately concerned in a concrete and real way, there should be the possibility of that party becoming involved in the proceeding before the Tribunal, with a right ordinarily limited to submitting written argument unless special conditions for participation are otherwise established.

The Group feels that participation could be controlled by a specific requirement that any private party seeking to participate in proceedings before the Tribunal establish that there is involved a matter in which that party has

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[40] It is important to separate the interests between private parties and government obligations in order to protect the interests of both the private parties and Parties to the Agreement. *See generally id.*

[41] Although the NAFTA recognizes the interests of private parties, the NAFTA was itself, ratified by the legislative bodies of the Parties. Thus, a Party should be allowed to involve itself in such domestic proceedings in order to protect its interests. *See generally id.*

an identifiable and proximate legal interest. Mere concerned bystanders should not be allowed to involve themselves.[42]

A different situation may, however, pertain where a reference procedure is, as suggested, incorporated in the jurisdiction of the Tribunal. In a case where it is followed, it may well be that private parties are the principal protagonists and will have the burden of argument before the Tribunal. Depending on the circumstances, the Parties to the Agreement may have an equal or greater interest. They should be permitted to involve themselves as of right and as full participants to the proceedings. As they would have a broader interest in the operation of the Agreement as a whole, they should be recognized as having an important role in any proceedings where it is to be interpreted.

A question arises, particularly in circumstances where there may be no Chapter 19 procedure, whether a private party should have some right to initiate proceedings before the Tribunal in respect of the implementation of treaty obligations on, say, tariff classification, rules of origin, or like matters. The Group takes the view that the Parties to the Agreement remain in form the only persons who can initiate proceedings before the Tribunal.

It recommends, however, that each Party make provision for a system whereby private parties can petition their government to raise issues of interpretation and application before the Tribunal when local remedies are exhausted or unavailable. The system might include the obligation on the government to give due consideration to the matter and on the private party to carry the burden of the proceedings in given circumstances. Such a system would have advantages both for the governments and for private parties as the current Chapter 19 procedure attests.[43]

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[42] The NAFTA allows private parties direct access to the dispute settlement process. Chapter 11, section B allows a private investor of a Party to submit a claim for arbitration under the NAFTA dispute settlement procedures against another Party if it has been damaged by the other Party's NAFTA violation. Private parties may also participate in the context of an antidumping or countervailing duty dispute. Any person or industry, who would otherwise be entitled, under the law of the importing Party, to commence domestic procedures for judicial review of the final determination of the importing Party's investigative authority, can request review by a binational Chapter 19 panel. *Id.* arts. 1116-1117.

[43] The NAFTA forbids any Party from including in its domestic law a cause of action against any other Party on the ground that the latter is in violation of the Agreement. However, the NAFTA requires the Parties to take all necessary measures to give effect to its provisions, including observance by state and local governments. A disputing private investor who wishes to bring a claim for arbitration under the NAFTA must first attempt to settle its dispute through negotiation and consultation. In the context of an antidumping or countervailing duty claim, a determination is to be reached by a competent investigative authority of the importing Party before review by a binational panel. If panel review is sought, that decision itself does not provide relief, but will affirm, vacate, or remand the determination of the importing Party's agency or remand with instructions to render a new determination in accordance with the panel's opinion. *Id.* arts. 105, 1118, 1904, and 2021.

Summary of Recommendations

The ABA/CBA/BM Working Group, having taken into consideration their respective legal systems and the importance to the effective operation of a North American Free Trade Agreement of adequate and sound dispute resolution procedures embodying shared legal values, consider that the new Agreement should, in order of priority, provide for

(a) the establishment of a Tribunal to decide disputes concerning the interpretation and application of the new Agreement;[44]

(b) broad recourse for private parties in respect of trade disputes with which they are concerned; and[45]

(c) an effective and flexible system for the identification and management of disputes.[46]

These elements are fundamental to such dispute resolution procedures and the Working Group recommends they be given effect through adoption of the following:

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[44] There is not a permanent, standing tribunal established to adjudicate disputes arising under the NAFTA. Instead, the Agreement provides for four different mechanisms for ad hoc arbitration and dispute settlement in Chapters 11, 14, 19, and 20. Under Chapter 11, section B, a disputing investor may file a claim for arbitration through the World Bank's International Center for the Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, or the United Nations Commission on International Trade Law arbitration rules. Chapter 14 provides that Chapter 20 procedures will apply to financial services disputes, except that the panelists are to be experts in financial services law or practice rather than international trade law. To date, no dispute has been brought under Chapter 14. Under Chapter 19, regarding antidumping and countervailing duty claims, final decisions by domestic authorities are reviewed by ad hoc binational panels that are charged with applying the law of the importing Party. In other government-to-government disputes under Chapter 20, the Parties appear before an arbitral panel established by the Free Trade Commission for the purpose of that dispute. *Id.* arts. 1120, 1414, 1904, and 2008.

[45] The protection afforded private investors under Chapter 11 and the access given private parties in antidumping and countervailing duties disputes under Chapter 19 are uniquely broad among international treaties. *See, e.g.*, David A. Gantz, *Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process*, 11 AM. REV. INT'L ARB. 481, 486 (2000).

[46] Observers have often regarded the NAFTA's dispute settlement procedures as successful, in that they are generally more expeditious than litigation and they render expert, nonbiased opinions. However, there have been critics, particularly of Chapter 11 procedures, which some say give private corporations too much power to challenge governments' legitimate efforts to regulate for the public good. *See, e.g.*, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1606 (2005). *See also* Daniel M. Price, *Arbitration Under NAFTA Chapter Eleven: Some Observations on Chapter Eleven of NAFTA*, 23 HASTINGS INT'L & COMP. L. REV. 421, 421-22 (2000).

(1) The new Agreement should provide for more extensive and intensive consultation for dispute resolution than now contemplated by the Canada-United States Agreement.[47]

(2) Provision should be made for the establishment in the future of an optional institutional mechanism for dispute prevention and management. It could be constituted as an international body or a tripartite body with national components. Its task would be to assist Parties in the resolution of disputes.[48]

(3) A system of notification to Parties of existing disputes and of monitoring their progress ought to be instituted. A Party should, where it considers its interests under the Agreement to be affected, be able to intervene at an appropriate level to make representations on the subject matter. The system should permit the adoption of conciliation and mediation where they can be agreed on.[49]

(4) A permanent tripartite tribunal consisting of an equal number of members appointed by each Party and with their independence guaranteed should be established to hear and determine cases involving the interpretation and application of the Agreement. To this jurisdiction could be added a power to hear references from national tribunals concerning the interpretation of the Agreement.[50]

(5) It would be desirable that the tripartite tribunal replace the binding arbitration and panel review systems in the Canada-United States Agreement but it is recognized that one or both methods may provide some desirable flexibility in the operation of the Agreement that the Parties would wish to retain.[51]

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[47] The FTA 1804 and the NAFTA Article 2006 are the consultation provisions. Article 2006 provides more extensive consultation through providing a mechanism by which third parties may intervene (*See* art. 2006(3)) and by imposing time limitations on cases dealing with perishable agricultural goods (*See* art. 2006(4)). Furthermore, art. 2006(5) provides clarity and enables consistency by expounding upon the "make every reasonable attempt to arrive at a mutually satisfactory agreement" requirement in the FTA 1804. CUSFTA, *supra* note 12, art. 1804.

[48] The NAFTA agreement has set out a framework, as well as Model Rules of Procedure, to achieve a fair and expedient resolution of disputes by either decisions of the FTC or, if that does not work, by arbitral panel. NAFTA, *supra* note 17, arts. 2007-2008.

[49] The Model Rules of Procedure 6-9 provide a mechanism for notifying Parties. NAFTA Secretariat, Model Rules of Procedure for Chapter Twenty, http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=240 (last visited Dec. 10, 2010).

[50] Article 2020 allows a Party to seek interpretation or application of the Agreement arising in any domestic judicial or administrative proceeding, or for a court or administrative body soliciting the views of the Party to notify the Secretariat. A permanent tripartite tribunal was not adopted under the NAFTA. NAFTA, *supra* note 17, art. 2020.

[51] The NAFTA adopted a variety of dispute resolution options, including optional panel

(6) The Chapter 19 process in the Canada-United States Agreement ought to be adopted, with necessary modifications, for the new Agreement.[52]

(7) The adjudication regime ought to be extended to tariff classification, sanitary and other standards, and rules of origin.[53]

(8) The rights of private parties of one state before the national courts and tribunals of the other two states should be protected so that espousal of their claims by their own state at the international level, although not excluded, would be rendered unnecessary in most cases.[54]

(9) The rights of private parties before any permanent or ad hoc tribunal under the Agreement should be defined and their involvement in any proceeding that may determine their legal interests specifically permitted and its limits defined.[55]

(10) Consideration should be given to permitting the Parties to the Agreement to involve themselves in trade related issues arising out of the Agreement where important questions going to its interpretation or operation are before domestic courts. A system of notice ought to enable this to be made effective.[56]

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review, panel review similar to the dispute settlement provisions of the WTO, and binding arbitration systems. Additionally, before Parties enter a panel review or arbitration, the NAFTA built in stages for conciliation, mediation, and opportunity for Parties to resolve disputes independently. *See* Foreign Affairs and International Trade Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/settle.aspx?lang=en (last visited Dec. 10, 2010). *See also* NAFTA, *supra* note 17, arts. 2003-5.

[52] Chapter 19 of the NAFTA reflects the adoption of this recommendation. Article 1904 provides for binding bilateral panel review of final antidumping and countervailing duty determinations. Article 1903 provides for binational panel review of changes to a Party's existing antidumping and countervailing duty laws. One addition to the Chapter 19 system under the FTA is NAFTA Article 1905 which establishes a "special committee" review process aimed at protecting the binational panel review process by assisting Parties in resolving allegations that a Party's domestic law prevents the establishment of a review panel or prevents the panel from rendering or implementing its decision. *See* NAFTA, *supra* note 17, arts. 1903-1905.

[53] To the extent that a Party's tariff classification schemes, sanitary and other standards, and rules of origin might be inconsistent with a Party's obligations under the NAFTA or cause nullification or impairment of its terms, the adjudication regime of the NAFTA Chapter 20 would cover such disputes. *Id.* art. 2004.

[54] Currently, it does not appear that this recommendation has been adopted. *See generally id.*

[55] This recommendation has been adopted in part; however, the rights, interests, and limits of the private parties could be more clearly defined. *See generally id.* art. 1904.

[56] No such notification system has been put in place; however, the domestic courts of the three Parties have largely been prevented from playing a significant role in resolving disputes that have arisen under NAFTA. This is due in large part to the Agreement's prohibition on

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creating a private right of action in its domestic law based on a NAFTA violation. *Id.* art. 2021. *See* Patricia Isela Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 TEX. INT'L L. J. 489, 493 (2003).