

7-1-1997

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Valerie Hughes

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### Recommended Citation

Valerie Hughes, *Essay on John C. Thomure, Jr.'s Presentation*, 28 U. Miami Inter-Am. L. Rev. 685 (1997)

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# ESSAY ON JOHN C. THOMURE, JR.'s PRESENTATION

VALERIE HUGHES\*

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## I. INTRODUCTION

I would like to begin by thanking the *University of Miami Inter-American Law Review* for inviting me to participate in this Symposium and for the very "warm" reception I have received here in Miami.

I have been asked to comment on Mr. Thomure's paper and to discuss whether the North American Free Trade Agreement (NAFTA) Chapter 20 dispute settlement system would function in the Free Trade Agreement of the Americas (FTAA). These are both difficult tasks because Mr. Thomure has raised a lot of interesting and thoughtful ideas, and because it is hard to recommend a dispute settlement system for a set of obligations that does not yet exist. In any event, I am up for the challenge.

Mr. Thomure has made some very interesting observations and proposals. I agree with much of what he has said, but I confess that I do not agree with all of it. First, I will primarily address Mr. Thomure's general thesis, and then I will consider the question of whether the Chapter 20 system would serve the FTAA.

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\* The Author is General Counsel, Trade Law Division at the Department of Foreign Affairs and International Trade Canada. The views expressed herein do not necessarily represent those of the Government of Canada.

## II. MR. THOMURE'S PAPER: THE ADDITION OF AN APPELLATE PROCEDURE

Mr. Thomure's thesis is essentially that the NAFTA Chapter 20 dispute settlement procedure should be improved, and the best way to improve it is by adding a process for appealing panel decisions. That idea is certainly worth debating. Mr. Thomure's proposal presents problems in the reasons he cites for requiring improvements to Chapter 20, and hence for requiring appellate review of the NAFTA panels. I want to address those reasons because they are relevant to what I propose to say about the FTAA dispute settlement system.

If I understand Mr. Thomure's position correctly, Chapter 20 must be improved because:

(a) it is geared to facilitating negotiated agreement rather than to adjudicating disputes;

(b) weaker political parties will be frustrated and coerced into agreeing to terms under a compromise settlement;

(c) Commission decisions are made by consensus, so a party's request to establish a panel may be blocked by a Commission member;

(d) an appellate procedure will ensure that panelists do not decide cases along national lines, and that decisions will be based on law rather than politics;

(e) an appellate procedure will enable parties to enforce panel decisions.

I agree with Mr. Thomure's first observation that the dispute settlement mechanism is geared toward facilitating negotiated agreement rather than dispute adjudication. It is, and it should be. We are dealing with disagreements between sovereign states about international treaty obligations, and any violation of those obligations constitutes very serious misconduct at international law. Therefore, state parties should make every effort to resolve their disagreements through consultations, which are held *in camera*, before escalating the matter to a semipublic adversarial panel process involving allegations of treaty violation. The World Trade Organization (WTO) dispute settlement system also enjoins states to seek to arrive at mutually satisfactory solutions and to leave the adjudicative process

as the last resort to be accessed when all other efforts to resolve the matter have failed.<sup>1</sup>

Mr. Thomure's second concern is that weaker parties will be forced to agree to compromise solutions instead of having their rights vindicated by an adjudicative panel. I think history proves the contrary; David has often taken Goliath to dispute settlement, under the Canada-U.S. FTA, under NAFTA, and under the WTO, and Goliath has often been found to be in the wrong. Thus, having a consultations phase is not, in my view, a weakness of the NAFTA Chapter 20.

Mr. Thomure's third complaint about Chapter 20 is that one party can block the establishment of a panel by the Free Trade Commission (Commission) because all Commission decisions must be made by consensus. I read Chapter 20 quite differently. While it is true that Chapter 20 provides that all Commission *decisions* shall be taken by consensus,<sup>2</sup> this does not present an impediment as far as the establishment of panels is concerned. This is because panels are not established by Commission *decision*. The Commission has no discretion once a complaining party submits a request for the establishment of a panel. Chapter 20 stipulates that the Commission "shall" establish it.<sup>3</sup>

Mr. Thomure calls for appellate review of Chapter 20 panel decisions to guard against panelists deciding cases along national lines and to ensure that decisions are based on law rather than politics. Again, history proves that nationality is simply not a factor. It wasn't under the FTA, and it has not been under the NAFTA. In fact, most decisions have been unanimous. Moreover, Chapter 20 permits the appointment of nonnationals to sit on panels, and the one and only Chapter 20 panel established to date included a nonnational.<sup>4</sup>

It must be borne in mind that Chapter 20 panelists chosen by the parties are highly respected experts who feel a responsibility to the system, and whose professional integrity is at stake.

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1. See, e.g., *Understanding on Rules and Procedures Governing the Settlement of Disputes, Marakesh Agreement Establishing the World Trade Agreement*, art. III(7), Annex 2, 33 I.L.M. 112 (1994).

2. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993), art. 2001(4) [hereinafter NAFTA].

3. *Id.* art. 2008(2).

4. *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (Supply Management)*, File No. CDA-95-2008-01, Apr. 12, 1996.

The decisions are well-reasoned and firmly grounded in law.

Finally, Mr. Thomure suggests that establishing an appellate review will improve the system because it will encourage enforcement of panel decisions. Again, enforcement has not really been an insurmountable problem under either the FTA or NAFTA, and as Mr. Thomure has correctly pointed out, Article 2019 sets out action that may be taken by the "winner" for nonimplementation, including suspension of benefits.

Enforcement was a recognized problem under the old General Agreement on Tariffs and Trade (GATT), because a single party (i.e., the losing party) could block adoption of a panel report, and this actually happened on several occasions. The new system under the WTO eliminates this problem because such blocking is only possible through consensus.<sup>5</sup>

It may be argued that there is stricter accountability under the new dispute settlement system in the WTO than under the NAFTA as far as enforcement is concerned, because the losing party is specifically required to let WTO members know how it is giving effect to a panel decision. In the WTO, the losing party has to inform the Dispute Settlement Body within thirty days after the adoption of a panel decision of its intentions in respect of implementation.<sup>6</sup> In the NAFTA, the losing party does not report in a similar way to the Commission. Thus, I agree with Mr. Thomure's view that the WTO provisions appear to more rigorously address enforcement issues than do the NAFTA rules, but I submit that accountability must necessarily be more rigorous in an institution of 130 members, as opposed to an institution of only three.

I would not necessarily link the existence of an Appellate Body in the WTO to greater enforceability of panel decisions. The Appellate Body is not mandated to enforce panel decisions; rather, it must consider only issues of law and legal interpretations developed by the panel. If the panel has not erred in law, the panel decision is upheld—not enforced. In fact, the existence of the Appellate Body has not obviated the need for recourse to Article 21(3) of the DSU, which provides for arbitration in the event parties cannot agree on a reasonable time for implemen-

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5. Final Act, Annex 2, Understanding on Rules and Procedures Governing Settlement of Disputes, 33 I.L.M. 1226 (1994), art. 16(4) [hereinafter DSU].

6. *Id.* art. 21(3).

tation. For example, in *Japan—Taxes on Alcoholic Beverages*,<sup>7</sup> the parties went to arbitration on implementation, even though the Appellate Body had essentially confirmed the panel's decision on the merits.

I would like to make one final observation about Mr. Thomure's paper before moving to the FTAA, and let me emphasize that this is a purely personal point of view. While I am not convinced that we need to add an appellate procedure to the NAFTA, I think it is worth debating the idea, but for reasons other than those which Mr. Thomure advances. The NAFTA is a complicated treaty in many respects, and the questions that arise under it often concern complex and specialized factual matters. In addition, the number of decisions interpreting the agreement and its predecessor are precious few, so guidance is hard to obtain. Panelists, expert and highly respected though they are, are susceptible to making an error of law, or to developing an interpretation that has far-reaching ramifications beyond the panel's "field of vision." Appellate review allows for correction when appropriate—it is a nice fig leaf. The fact is, so far we have not needed it.

### III. DISPUTE SETTLEMENT UNDER THE FTAA

Would the NAFTA Chapter 20 dispute settlement mechanism work for the FTAA? The question is premature. How can we determine what system will work when we do not know what the obligations are? Or what form the agreement will take? The dispute settlement mechanism must be tailored to the rules to be established under the FTAA, so until we have those rules, we should not attempt to formulate a new dispute settlement mechanism, or emulate an existing system. I was not invited to this symposium, however, to get away with that kind of answer, so let me try to share some of my thoughts on dispute settlement under the FTAA.

The first thing we should consider is whether it would be useful to follow the precedent in the NAFTA of establishing mechanisms that provide for dispute avoidance or settlement at a level other than government-to-government proceedings—in

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7. *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, WTO Doc. AB-1996-2, at 17-25 (Oct. 4, 1996).

other words, setting out procedures for matters to be dealt with internally instead of through adversarial government action. For example, regarding rules of origin in the NAFTA, any exporter may obtain a binding advance ruling on whether its product meets a value-content test or qualifies as an originating good.<sup>8</sup> There is also a procedure for a bid challenge review on procurement matters,<sup>9</sup> and for the conduct of safeguard or emergency action proceedings.<sup>10</sup> The Intellectual Property Chapter requires parties to ensure that procedures are available under domestic law to permit taking action against infringement of Intellectual Property rights set out in the Intellectual Property Chapter.<sup>11</sup> Finally, Chapter Eleven B sets out the investor-state dispute settlement regime.

All of these procedures contribute to faithful observance of the obligations set out in the treaty, and as such, form part of the dispute avoidance or settlement mechanisms of the NAFTA. The FTAA negotiators may well wish to consider adopting similar provisions in the FTAA.

As for government-to-government dispute settlement procedures, the NAFTA Chapter 20 is without a doubt a useful model for the FTAA negotiators. It promotes settlement through consultations and provides clear rules for resolving matters through adjudicative means when consultations fail to resolve them. It ensures procedural fairness by establishing a right to at least one hearing, and provides disputing parties the opportunity to make written submissions. Timelines are set out, and no one party can delay or block the process.

Procedural rules have been developed to complement these requirements,<sup>12</sup> which provide to panels a considerable degree of flexibility in seeking additional evidence or information, as they may require. There is opportunity to comment on a panel's initial report containing findings of fact and a determination as to whether a measure is inconsistent with the obligations set out in the agreement.

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8. NAFTA, *supra* note 2, art. 509.

9. *Id.* art. 1017.

10. *Id.* ch. 8.

11. *Id.* art. 1714(1).

12. *Model Rules of Procedure for Chapter 20 of the North American Free Trade Agreement and Supplementary Procedures Pursuant to Rule 35 on the Availability of Information*, Canada Gaz., pt. 1, 3408, Sept. 23, 1995.

Third party participation is available to the member that is not a full-fledged disputing party, but which has an interest in the proceedings. A third party is entitled to attend all hearings and to receive parties' written submissions, and to make written and oral submissions to the panel.<sup>13</sup> Post-decision procedures permit suspension of benefits of equivalent effect for nonimplementation after thirty days.<sup>14</sup>

Chapter 20 and its predecessor, Chapter Eighteen under the FTA, have worked well. Panel decisions are well-written, thoughtful, and well-reasoned. Of the six decisions issued to date<sup>15</sup> under both the FTA and the NAFTA, all but one have been unanimous.<sup>16</sup> Naturally, those whose interests have been protected by Chapter 20, like the Canadian dairy and poultry industries, sing its praises, while those who represent losing constituencies are sometimes—shall we say—uncomplimentary.

The system is not perfect; there is always room for improvement and the FTAA negotiators should benefit from our "lessons learned."

One problem we have had is in establishing the Chapter 20 roster. The parties were to have appointed up to thirty individuals to serve as panelists by January 1, 1994.<sup>17</sup> Roster members are to be appointed by consensus for a renewable three-year term.<sup>18</sup> There have been no appointments to date. Although Chapter 20 permits selection of panelists who are not on the roster, a disputing party may exercise a pre-emptory challenge against anyone selected who is not on the roster.<sup>19</sup> As long as there is no roster, a preemptory challenge privilege enables a party to delay the establishment of a panel and hence the dispute settlement process indefinitely.

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13. NAFTA, *supra* note 2, art. 2013.

14. *Id.* art. 2019.

15. See *In the Matter of Canada's Landing Requirements for Pacific Coast Salmon and Herring*, Oct. 16, 1989, 12 ITRD 1026; *Lobsters from Canada*, No. USA-89-1807-01, May 25, 1990, 12 ITRD 1653; *In the Matter of Article 304 and the Definition of Direct Costs*, No. USA-92-1807-01, June 8, 1992, 14 ITRD 2326; *In the Matter of the Interpretation of and Canada's Compliance With Article 701(3) With Respect to Durum Wheat Sales*, No. CDA-92-1807-01, Feb. 8, 1993, 15 ITRD 2270; *In the Matter of Puerto Rico Regulations on the Import, Distribution and Sale of U.H.T. Milk from Quebec*, No. USA-93-1807-01, June 3, 1993, 16 ITRD 1769; *Supply Management*.

16. *Lobsters from Canada*, No. USA-89-1807-01, May 25, 1990, 12 ITRD 1653.

17. NAFTA, *supra* note 2, art. 2009(1).

18. *Id.*

19. NAFTA, *supra* note 2, art. 2011(3).



Would governments agree to any limitations in that regard? I do not know for sure, but the current situation is unsatisfactory in my view. The architects of the WTO dispute settlement system may have the better idea. Under the WTO, if disputing parties cannot agree on panelists within a certain time, the Director General of the WTO will select them.<sup>20</sup> The current Director General has done just that in the European Community (EC) case against the United States on Helms Burton.<sup>21</sup> The FTAA drafters will need to consider which system, the NAFTA or WTO, best suits their objectives in this regard.

The confidentiality requirement has also posed difficulties. Under Chapter 20, panel hearings, deliberations, the initial report, and some of the written submissions are confidential. In *Supply Management*,<sup>22</sup> the initial report was leaked and subsequently quoted (and misquoted) in the press. Yet the parties and panelists could not acknowledge what everyone knew to be the bottom line—that the panel had found in Canada's favor, at least at the initial report stage. Similar things occurred with respect to the United State's case against Canada in the WTO on *Split-Run Magazines*,<sup>23</sup> and in Canada's case against Japan.<sup>24</sup>

It has been suggested that the confidentiality rules should be relaxed somewhat to avoid these situations and to increase the transparency of the process. I believe there is considerable merit in keeping the initial report confidential, because the disputing parties still have a chance to influence the decision at that stage, and the panel may find it difficult to reverse or significantly alter its findings on the basis of parties' post-interim report comments when the contents of the interim report are widely known. However, experience indicates that leaks are bound to occur when matters of public interest are at stake, and it may be that the NAFTA parties should concede defeat in this respect. Thus, confidentiality is a feature of Chapter 20 that the FTAA negotiators should consider carefully.

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20. DSU, *supra* note 5, art. 8(7).

21. *United States—The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/3.

22. *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products (Supply Management)*, CDA-95-2008-01, Apr. 12, 1996.

23. *Canada—Certain Measures Concerning Periodicals*, Mar. 14, 1997 (Final Report not yet adopted).

24. *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, WTO Doc. AB-1996-2, at 17-25 (Oct. 4, 1996).

The Chapter 20 third party procedure may not be the best model for the FTAA. The system was adapted from a bilateral agreement—namely, the Canada-U.S. FTA. While it may have made the transition to a trilateral agreement reasonably well, the transition to an agreement with thirty-four parties may prove to be more difficult. A third party under Chapter 20 has all manner of rights. Participation is unconditional, and attendance at all hearings is guaranteed, as is receipt of the disputing parties' written submissions.<sup>25</sup> Further, it is entitled to make written and oral submissions.<sup>26</sup> Under the NAFTA, these far-reaching rights can belong only to one party, which is quite manageable. A dispute settlement under the FTAA, however, must serve thirty-four parties. In a situation in which thirty-two of the thirty-four parties seek to participate as third parties using the NAFTA model of full and unconditional participation, the dispute settlement mechanism would be unable to rise to the occasion. Even if only one-half of the FTAA parties wanted to exercise third party rights, the panel process could be quite cumbersome.

The WTO system may be a better model for third party participation. There, third party participation is not unconditional—it is necessary to have a “substantial interest” in a matter before a panel,<sup>27</sup> and participation is limited. Although third parties have an opportunity to be heard and to make written submissions to the panel, they receive only the submissions for the first hearing,<sup>28</sup> and they are usually not permitted to attend all hearings. It is true that the WTO third party system has its critics, since some believe that third parties should have access to all written submissions and hearings, and not only to those for the first hearing. However, in an institution with 130 members, perhaps some limits are necessary to ensure that the dispute resolution mechanism is not overly burdened. Perhaps the FTAA drafters, in considering the merits of the WTO third party process, could improve upon it by setting out more clearly the criteria for participating as a third party. For example, it may be useful to define what is meant by having a “substantial interest” in a matter before the panel.

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25. NAFTA, *supra* note 2, art. 2013.

26. *Id.*

27. DSU, *supra* note 5, art. 10(2).

28. *Id.* art. 10.3.

Another feature of the NAFTA Chapter 20 that may not serve the FTAA very well is the requirement that the Free Trade Commission meet following consultations to seek to resolve the dispute.<sup>29</sup> This may work for a trilateral institution like the Commission. However, it may not be ideal for an institution of thirty-four parties. Perhaps if the ministerial meeting did not include all FTAA ministers, but only ministers from disputing parties, it would contribute to the process. However, once one gets beyond a handful of participants, as may often be the case, it may be very difficult to find a solution that is acceptable to all concerned parties.

With respect to the implementation of panel decisions, Chapter 20 may not be the appropriate model for the FTAA. Chapter 20 imposes no time limits for implementation. But the right to suspend benefits arises fairly quickly—thirty days after the final report.<sup>30</sup> Among three parties, it may be possible to work out mutually agreed upon solutions in a reasonably short period of time. Among several, it is more complicated and there could be a need to extend the deadline beyond thirty days.

The WTO procedure, however, may provide useful guidance for the FTAA. There, parties may have a “reasonable period of time” to comply with panel decisions.<sup>31</sup> If they prove unsuccessful, the winning party can have an arbitrator determine what the “reasonable period of time” would be under the circumstances. As I mentioned earlier, this procedure was invoked in the *Japan—Taxes on Alcoholic Beverages* case.<sup>32</sup> This is an avenue that is not available under the NAFTA, and it may be that the FTAA negotiators should give it some study and consideration.

From time to time, NAFTA scholars posit the idea of a “permanent” panel for settling disputes which could be composed of panelists appointed for fixed terms. I can see some benefits to having a permanent body to whom you can turn quickly, and bypass the time consuming panelist selection process. Such a trade tribunal would amass experience and expertise, and panelists would not need to feel each other out and develop working rela-

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29. NAFTA, *supra* note 2, art. 2007(4).

30. *Id.* art. 2019.

31. DSU, *supra* note 5, art. 21(3).

32. *Supra*, note 7.

tionships at the start of each case, as in the present system. However, these benefits may be outweighed by the disadvantages of establishing such an institution. The costs would be a problem; panelist and staff salaries, office costs, and so forth, would add up. In any event, if we had had a permanent body during the life of the FTA and under the NAFTA, the panelists would have been lonelier than the Maytag repairman because we have only had six cases since 1989.

The NAFTA does not appear to need such an institution. The WTO does not have one either, except at the appellate level. It may be politically too difficult to decide on composition for a permanent WTO panel. What about a permanent dispute settlement body under the FTAA? Would disagreement on composition be insurmountable? Would such a body be busy enough? It is hard to say.

My final observation relates to appellate review. Should the FTAA dispute settlement system include the possibility for appeal of panel decisions? I suspect that Mr. Thomure would say it should. I will say that it probably will. Let us not forget that the establishment of an Appellate Body in the WTO was largely due to United States efforts. During the Uruguay Round negotiations, the United States was reluctant to give up the right it had enjoyed and used effectively under the GATT to block the adoption of panel decisions. The quid pro quo for giving up that power was the establishment of the WTO Appellate Body to provide "insurance" against a very bad decision—the fig leaf, if you will. The United States may take the same approach in the FTAA negotiations. And given the stellar performance of the Appellate Body at the WTO thus far, it may be a very good idea indeed.