

## INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

**The quality of this reproduction is dependent upon the quality of the copy submitted.** Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps.

ProQuest Information and Learning  
300 North Zeeb Road, Ann Arbor, MI 48106-1346 USA  
800-521-0600

**UMI<sup>®</sup>**



UNIVERSITÉ D'OTTAWA  UNIVERSITY OF OTTAWA

ÉCOLE DES ÉTUDES SUPÉRIEURES  
ET DE LA RECHERCHE

SCHOOL OF GRADUATE STUDIES  
AND RESEARCH

MENDEZ-LOPEZ, Carlos Fradique  
AUTEUR DE LA THÈSE-AUTHOR OF THESIS

LL.M.

GRADE-DEGREE

LAW

FACULTÉ, ÉCOLE, DÉPARTEMENT-FACULTY, SCHOOL, DEPARTMENT

TITRE DE LA THÈSE-TITLE OF THE THESIS

CHAPTER 18 OF THE CANADA-UNITED STATES  
FREE TRADE AGREEMENT:  
A COMPREHENSIVE ANALYSIS AND THE NAFTA DIMENSION

I. Feltham & B. Morse

DIRECTEUR DE LA THÈSE-THESIS SUPERVISOR

EXAMINATEURS DE LA THÈSE-THESIS EXAMINERS

M. Cohen

J. Fried

G. Kane

(LE DOYEN DE L'ÉCOLE DES ÉTUDES SUPÉRIEURES)  
ET DE LA RECHERCHE

SIGNATURE

(DEAN OF THE SCHOOL OF GRADUATE STUDIES)  
AND RESEARCH



AR

Chapter 18 of the Canada-United States  
Free Trade Agreement  
A comprehensive analysis and the NAFTA dimension

Carlos Fradique Mendez Lopez



Thesis submitted to the School of Graduate Studies and  
Research of the University of Ottawa in partial  
fulfilment of the requirements for the LL.M.

© Carlos Fradique Mendez-Lopez, Ottawa, Canada, 1993

UMI Number: EC52155

### INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

**UMI<sup>®</sup>**

---

UMI Microform EC52155  
Copyright 2007 by ProQuest LLC  
All rights reserved. This microform edition is protected against  
unauthorized copying under Title 17, United States Code.

---

ProQuest LLC  
789 East Eisenhower Parkway  
P.O. Box 1346  
Ann Arbor, MI 48106-1346

## ABSTRACT

The provisions set out in Chapter 18 of the C-U.S. FTA created a complex structure of bilateral institutions and designed a general system to assist in the avoidance and the resolution of bilateral trade disputes.

In the first chapter of the thesis, I will look at the provisions of Chapter 18 in a broad context. From this departure point, I will go through the dispute management and settlement techniques available in the Agreement and the institutional structure designed for its management. I will attempt to present a systematic analysis of the overall system created in the bilateral treaty, by referring to the various aspects and features of the regime created by virtue of Chapter 18.

This first part includes a detailed examination of the techniques available to the Parties, such as notification, the request for information and consultation, and the resort to arbitration and advisory panels. With respect to the

institutional framework, attention will be given to the general structure and functioning of the bodies involved in the dispute resolution process.

Within the second chapter, an analysis of the current status of the Chapter 18 cases establishes a background to facilitate a further evaluation of the mechanism to date. A brief and general examination of the procedural and substantive issues related to the panel experience is provided to present a global picture of the actual functioning of the dispute settlement provisions of the Agreement.

Finally, in the third chapter, I will focus on the perspectives and options available to improve the dispute settlement regime, with special regard to the current process of establishing a North American Free Trade Agreement between Canada, Mexico and the United States. Once a basic analysis of the structure and the functioning of the Agreement is provided for in the two preliminary chapters, I will study the alternatives for the management of a more complex trade relationship.

At this last stage of the research, I will examine the main issues embodied in a NAFTA dimension, such as the

adjudicative alternative to solve international trade disputes, the formal right of individuals to become part of the process of settlement of commercial conflicts and the enhancement of a more rule-based regime to manage the broader North American framework.

### ACKNOWLEDGMENTS

Without the combined scholarship that was awarded to me by the School of Graduate Studies and Research and the Faculty of Law of the University of Ottawa, it would have been extremely difficult for me to attend this Master's program. I would like to express my endless thanks for their trust in me and for their continuous confidence and support.

It is with sincere respect, admiration and endless gratitude, that I would like to thank Professor Ivan R. Feltham. I am greatly indebted for his invaluable advice and patience as the supervisor of my thesis.

I would also like to extend special thanks to Professor Bradford Morse for the confidence he expressed in me and the continuous encouragement he gave me.

Finally, I would to like to express my gratitude to Karen Gravelle, Eddie Taylor, Daniel Arnold, Judy Korecky and Emery Haszka who kindly reviewed the text for grammar and style, and to Mrs. Nicole Laplante, Miss Sylvie Leblanc and Miss Francine Daoust, for their never-ending assistance.

TABLE OF CONTENTS

ACKNOWLEDGMENTS.....i

TABLE OF CONTENTS.....iii

INTRODUCTION.....1

CHAPTER I.

    CHAPTER 18 OF THE C-U.S. FTA  
    "INSTITUTIONAL PROVISIONS"  
    GENERAL STRUCTURE.....8

        1.- INTRODUCTION.....8

        2.- COVERAGE OF CHAPTER 18 PROVISIONS.....11

        3.- DISPUTE AVOIDANCE MECHANISMS.....16

            3.1.- NOTIFICATION.....16

            3.2.- REQUEST FOR INFORMATION.....17

            3.3.- DIRECT CONSULTATIONS.....17

        4.- THE CANADA-UNITED STATES TRADE COMMISSION..18

            4.1.- MANDATE.....19

            4.2.- MEETINGS.....20

            4.3.- PROCEDURES.....22

4.4.- DECISIONS.....	23
4.5.- WORKING GROUPS.....	23
4.6.- ROLE.....	25
<b>5.- ARBITRATION AND ADVISORY PANELS.....</b>	<b>27</b>
5.1.- INTRODUCTION.....	27
5.2.- COMPOSITION OF THE PANEL.....	28
5.3.- REPLACEMENT OF A PANEL MEMBER.....	31
5.4.- ACCESS TO PANELS.....	33
5.5.- GENERAL RULES OF PROCEDURE.....	34
5.6.- INITIAL REPORT.....	38
5.7.- FINAL REPORT.....	39
5.8.- TIMELINES.....	40
<b>6.- ADOPTION OF REPORTS.....</b>	<b>41</b>
6.1.- ARBITRATION PANELS.....	41
6.2.- ADVISORY PANELS.....	42
<b>7.- REMEDIES.....</b>	<b>43</b>
7.1.- RETALIATION.....	43
7.2.- COMPENSATION.....	44
7.3.- TERMINATION OF THE AGREEMENT.....	45
<b>8.- THE SECRETARIAT.....</b>	<b>45</b>
<b>9.- REFERRALS.....</b>	<b>46</b>

**CHAPTER II.**

<b>ANALYSIS OF CHAPTER 18 PANEL CASES.....</b>	<b>48</b>
<b>1.- CANADA'S LANDING REQUIREMENT FOR PACIFIC COAST SALMON AND HERRING.....</b>	<b>49</b>
1.1. ANTECEDENTS.....	49
1.2. BACKGROUND TO THE C-U.S. FTA CASE...	51

1.3.	PANEL'S TERMS OF REFERENCE.....	52
1.4.	ARGUMENTS OF THE PARTIES TO THE DISPUTE.....	53
1.5.	FINAL PANEL REPORT.....	54
1.6.	ADOPTION OF THE PANEL REPORT.....	56
2.-	UNITED STATES REGULATIONS ON LOBSTERS.....	58
2.1.	BACKGROUND.....	59
2.2.	CONSTITUTION OF THE PANEL.....	60
2.3.	TERMS OF REFERENCE.....	60
2.4.	CANADIAN ARGUMENTS.....	61
2.5.	UNITED STATES ARGUMENTS.....	62
2.6.	PANEL DECISION.....	63
2.7.	ADOPTION OF THE REPORT.....	67
3.-	OUTSTANDING ISSUES.....	68
4.-	EVALUATION OF THE CHAPTER 18 PANEL PROCEEDINGS.....	70

**CHAPTER III.**

	PERSPECTIVES ON AND PROSPECTS FOR THE IMPROVEMENT OF CHAPTER 18 PROVISIONS.....	79
1.-	RECOURSE TO GATT PROCEDURES.....	80
2.-	DISPUTE AVOIDANCE AND MANAGEMENT.....	81
2.1.-	GENERAL REMARKS.....	81
2.2.-	NOTIFICATION.....	82
2.3.-	DIRECT CONSULTATIONS.....	83
2.4.-	CONSULTATIONS AND THE THIRD PARTY...	85

3.- A NORTH AMERICAN TRADE COMMISSION.....	85
3.1.- INTRODUCTION.....	85
3.2.- A NAFTA DIMENSION.....	87
4.- KEY ISSUES IN DISPUTE	
SETTLEMENT TECHNIQUES .....	91
4.1.- BINDING DECISIONS.....	91
4.2.- PRIVATE PARTIES ISSUES.....	94
4.2.1.- Why permit private party's access?.....	95
4.2.2.- The extent of private party participation.....	96
4.2.3.- Domestic implementation.....	97
5.- DISPUTE RESOLUTION BODIES.....	98
5.1.- PANELS.....	98
5.1.1.- Scope of the arbitration panels.....	98
5.1.2.- Constitution of the panels...	99
5.1.3.- Trilateral Panels.....	102
5.1.4.- Roster of panelists.....	104
5.1.5.- Appointment of panelists.....	104
5.1.6.- Panel rules of procedure...	105
5.1.7.- Panel reports.....	106
5.1.8.- Adoption of the panel reports.....	106
5.2.- TRIPARTITE TRIBUNAL.....	108
5.2.1.- Background.....	108
5.2.2.- Recommendations of the Joint Group.....	114
5.2.3.- The importance of a Trade Tribunal in the North American context.....	118

6.- DISPUTE SETTLEMENT MECHANISMS OF BOTH TREATIES.....	121
7.- THE SECRETARIAT.....	123
8.- FINAL REMARKS.....	125
 BIBLIOGRAPHY.....	 127

## INTRODUCTION

The question of dispute resolution is fundamental in bilateral and multilateral agreements, since predictability and certitude with regard to the fair application of the substantive international rules are essential to build solid zones of trade and to enhance international economic relations.

When Canada and the United States launched their negotiations towards a joint Free Trade Area, a deep concern was expressed on the Canadian side regarding the need to obtain a safe and foreseeable environment for the new era in trade between the two countries. Since the smaller Canadian economy could not be left at the mercy of the bigger negotiating power of the "Uncle Sam", Canada wished to establish a system that would prevent the United States from

easily avoiding its obligations under the Agreement. In general, Canada sought to create a binding and uniform dispute settlement regime that would set up well-defined rules and principles governing trade matters.

The Dispute Settlement Procedure finally established in the C-U.S. FTA is a diverse and complex structure developed to handle trade and commercial disputes. The Parties provided for several institutions and techniques in order to create a secure and predictable environment for the proper implementation and surveillance of the treaty.

The Parties set forth the general regime in Chapter 18 of the Agreement. This system, roughly speaking, deals with dispute regarding the interpretation and application of the Agreement and with those cases in which a measure proposed or taken by the other Party is regarded as inconsistent with the provisions of the treaty.

Excluded from that general system, among others, are certain matters regarding countervailing and antidumping laws and final orders which are covered by Chapter 19 of the C-U.S. FTA. First of all, the review of any changes in existing

countervailing or antidumping domestic rules for consistency with the GATT and the C-U.S. FTA is to be conducted by a binational panel. Likewise, the Parties have agreed to replace domestic judicial review of final orders in countervailing and antidumping matters by a binational panel mechanism which is to apply the domestic standards and national law of the Party concerned.

It is my opinion that the Chapter 18 procedures have been given little attention, and most of the focus has been on the innovative binational panel review mechanism of the Chapter 19 of the Agreement. However, from the beginning, the Chapter 19 provisions were designed to be in place for a limited period of time pending the adoption of a set of substantive rules governing the subject-matter<sup>1</sup>. Over time, attention will be attracted to the importance of Chapter 18 regime, due to the development of a new system for countervailing and antidumping matters, the pressure to strengthen adjudicative techniques in the resolution of disputes among the two countries and a growing necessity for bringing the rule of law to the international framework.

---

<sup>1</sup>. See C-U.S. FTA Article 1906.

Moreover, the accession of a third Party to an already growing relationship in the context of a potential North American Free Trade Agreement<sup>2</sup> will add ingredients demanding a different approach to address dispute settlement matters.

When considering the addition of another trade partner, the efficiency of Chapter 18 must be revisited since, in a Trilateral context, the issue of dispute resolution acquires a new dimension and poses a significant number of questions to be resolved.

In that broad setting, the purposes of this thesis are manifold. In the first chapter, I will attempt to subject the provisions of Chapter 18 to a critical analysis. I will go through the institutional structure of the Agreement and analyze the dispute management and settlement techniques agreed upon by the Parties. The scope of the dispute settlement process, the general architecture of the treaty, the international mechanisms available to the parties to a given dispute and the process itself are issues that will be addressed in this preliminary approach.

---

<sup>2</sup>. As of the date of the submission of this thesis, no official document concerning the NAFTA negotiations has been released.

Afterward, an analysis of the current status of Chapter 18 cases is provided in the second chapter, as a way to further evaluate the functioning of the mechanisms to date. A brief and general examination of the procedural and substantive issues related to the panel experience is provided to present a global picture of the intergovernmental dispute resolution regime of the Agreement.

Finally, in the last phase of the study, I will focus on the perspectives and options available for improved mechanisms and institutions, with special regard to the trilateral scenario. Once a basic analysis of structure and functioning of the Agreement has been established in the two preliminary chapters, the reader will be able to conclude that there is room for improvement in the management of a more complex trade relationship.

An approach merely modeled after the current Chapter 18 procedures does not seem to suffice for a demanding three-way framework. A Chapter 18 "plus" must be developed to respond to the new issues raised in the broader context. Both availability of better institutions to settle disputes and confidence in the fair and unbiased application of the

international rules must be pursued when designing an effective international dispute resolution regime for the North American Trade Zone. This includes more sophisticated institutions, a stronger administrative support for the smooth and prompt resolution of pending issues, the creation of supporting and advisory groups to provide technical advice and a more solid framework capable of providing guidelines and support to the Parties.

Within this larger scenario, the Parties have the opportunity to review the desirability of establishing a general commitment of compliance with the decisions of a final trilateral mechanism designed to settle disputes. Such a move is, in my opinion, fundamental to build confidence in the execution of the Agreement and to ensure that the rights of the partners in trade are fully protected. The advisability of permitting private parties' input in different stages of the process and the convenience of enhancing openness in certain phases of the dispute mechanism, are also issues to that will be addressed in that last phase of the research.

In the hope that this study will raise some concerns about the need to strengthen certain principles in the

management of the North American trade relationships and by insisting on the desirability of developing a new set of institutions devoted to better supervise the international trade relationship, I invite the reader to approach the first chapter of the thesis.

**CHAPTER I**  
**CHAPTER 18 "INSTITUTIONAL PROVISIONS"**  
**GENERAL STRUCTURE**

**1.- INTRODUCTION**

The provisions set out in Chapter 18 of the C-U.S. FTA created a complex structure of bilateral institutions and designed a general and broad system to assist in the avoidance and resolution of bilateral trade related disputes.

In order to provide a comprehensive analysis of the system therein agreed I will present a detailed explanation of the dispute avoidance, management and settlement techniques chosen for the Canada-United States Free Trade Area, taking into consideration both the substantial and procedural matters involved. I will also attempt to analyze the various aspects and features of the institutions created by virtue of Chapter 18. Those institutional bodies are essentially the Commission, the Secretariat and the arbitration and advisory Panels.

The Parties to the Agreement were not able to develop a single comprehensive mechanism to deal with potential or actual trade disputes in a uniform manner. Instead, the Parties designed a number of specific dispute mechanisms scattered through the text of the Agreement. I will refer to the various mechanisms set forth in the C-U.S. FTA in order to present an introductory overview of the general dispute settlement regime of the Agreement.

1.- In the first place, it was established a general system which comprises most procedures and alternatives. This comprehensive body of rules can be found in Chapter 18 of the treaty. Technically it also includes the GATT dispute settlement procedures pursuant to Article 1801 of the C-U.S. FTA. In effect, disputes arising under both the GATT and the C-U.S. FTA may be settled in either forum, at the discretion of the complaining Party.<sup>1</sup>.

2.- The second system, contained in Chapter 19, was designed to deal exclusively with the changes in

---

<sup>1</sup>. C-U.S. FTA Article 1801 (3).

the existing laws concerning antidumping and countervailing duties and to provide for binational review of final antidumping and countervailing duty determinations.

3.- Finally, there are sectoral provisions dealing with specific issues in different chapters of the Agreement; such as:

3.a) Consultations on uniform administration of customs measures, and notification and consultation prior to major changes in such measures.<sup>2</sup>

3.b) Consultations on regulatory matters in the field of energy.<sup>3</sup>

3.c) Review of compliance with agreed professional standards and criteria for architectural services by a special committee established for this purpose.<sup>4</sup>

---

<sup>2</sup>. C-U.S. FTA Article 406 and Annex 406.

<sup>3</sup>. C-U.S. FTA Article 905.

<sup>4</sup>. C-U.S. FTA Article 1608.

## 2.- COVERAGE OF CHAPTER 18 PROVISIONS

The general system applies to the avoidance and settlement of all disputes about:

- a) the interpretation or application of the FTA provisions<sup>5</sup>,
- b) whenever an actual or proposed measure<sup>6</sup> of the other Party is deemed inconsistent with the obligations of the Parties under the Agreement or causes nullification or impairment of FTA benefits in the sense of Article 2011<sup>7</sup>,
- c) in emergency actions taken pursuant to Chapter 11 of the Agreement.

- a) Disputes about the C-U.S. FTA provisions.

All disputes regarding the interpretation or application of the provisions of the Agreement are subject to Chapter 18 rules except for the following areas:

---

<sup>5</sup>. C-U.S. FTA Article 1801 (1).

<sup>6</sup>. According to the C-U.S. FTA Article 201 (1), for purposes of the Agreement, "measure includes any law, regulation, procedure, requirement or practice".

<sup>7</sup>. C-U.S. FTA Article 1801.

- a.1) Disputes regarding financial institutions<sup>8</sup> (except insurance<sup>9</sup>).
- a.2) Disputes regarding countervailing and antidumping final orders and changes in existing laws and regulations for consistency with the GATT and the object and purpose of the Agreement.<sup>10</sup>
- a.3) Disputes over decisions of the Canadian government, taken under the Investment Canada Act, with regard to the acquisition by U.S. citizens of certain business

---

<sup>8</sup>. Financial institutions and services, other than insurance, are completely excluded from the dispute settlement provisions of the Agreement; as a result of a "pending" status of the negotiations. Any disputes concerning financial services are subject to notification of proposed regulations and consultations between the Canadian Department of Finance and the United States Department of the Treasury. See C-U.S. FTA Article 1704. For an extensive and interesting analysis of the reasons leading to the exclusion of the financial sector, see Graham, W. C. *Dispute Resolution in the Canada-United States Free Trade Agreement: One part of a complex relationship*. Paper presented at Union Internationale des Avocats. Mexico city. (July, 1991) at 28.

<sup>9</sup>. C-U.S. FTA Article 1701 (1) in concordance with Articles 1601 (2) (a) and 1703 (1).

<sup>10</sup>. C-U.S. FTA Chapter 19.

enterprises in Canada.<sup>11</sup> Other matters over investment can be submitted to panels. If this is the case, panelists are to take into consideration how such disputes are normally dealt with by internationally recognized rules for commercial arbitration. Additionally panelists must be selected taking into consideration their expertise and knowledge in the field of international investment.<sup>12</sup>

b) Nullification and impairment:

Article 2011 of the Agreement states that if a Party considers that the application of any measure, whether or not such measure conflicts with the provisions of the Agreement, causes nullification or impairment of any benefit reasonably expected to accrue to that Party, directly or indirectly under the provisions of the Agreement, that Party may, with a view to the satisfactory resolution of the matter, invoke the consultation provisions of Article 1804 and, if necessary, the

---

<sup>11</sup>. C-U.S. FTA Article 1608 (1). For a study of the operation of the dispute mechanisms involving investment decision and measures, see Appuzo, A.M. and Kerr W.A. "International Arbitration - The Dispute Settlement Procedures chosen for the C-U.S. FTA." 7 *Journal of International Arbitration* (1988): 7-15 at 12.

<sup>12</sup>. C-U.S. FTA Article 1608 (4).

dispute settlement provisions pursuant to Articles 1805, 1806 and 1807. According to the general definition of Article 103 of the treaty, it seems that this provision is broad enough to include any measure taken by national, provincial and local governments and agencies.

c) Emergency Action:

In general terms, the "safeguard" or "escape clause"<sup>13</sup> permits placing temporary restrictions on imports when these are causing serious injury to domestic producers. Any dispute arising from measures taken under Chapter 11 must be sent to binding arbitration if the Commission has not reached a mutually agreeable resolution of the issue within 30 days.<sup>14</sup>

Two tracks are set out in Chapter 11 of the C-U.S. FTA, namely a "bilateral track" and a "global track". The first one allows the Parties to escape temporarily from the tariff-reduction commitments of the C-U.S. FTA, and to increase, within certain limits, duties during the ten year transition

---

<sup>13</sup>. This provision is considered the counterpart to Article XIX under the GATT.

<sup>14</sup>. C-U.S. FTA Article 1806.

period.<sup>15</sup> In other words, Canada or the United States may restrict access to its market if imports of a particular good from the other Party or from all sources are seriously injuring a domestic industry.

In this event, consultations must precede any protective action, actions must not be placed for a period extending over three years, and in any case cannot be extended beyond the transition period without express consent of the exporting Party. After that transition period, an emergency action can only be taken with the consent of the exporting Party.

In addition, the country undertaking the safeguard action must provide mutually agreed upon compensation to the exporting country. Such compensation may take the form of expediting duty elimination on another product of equal importance. If the form and level of compensation is not agreed to by the exporting country, then it may take unilateral action which would have trade effects that are equivalent to the safeguard action taken by the importing country.

---

<sup>15</sup>. C-U.S. FTA Article 1101.

Under the global track, emergency actions taken by a Party based on Article XIX of the GATT shall normally exclude imports from the other Party from these actions unless these imports exceed 5%-10% of total imports. Prior notice and consultation must also be provided before either Party implements a global action. This action should not reduce the other Party's imports below the trend of imports in a recent base period. Mutually agreed trade liberalizing compensation in the form of concessions shall be provided by the Party taking such trade action.

As specified in Article 1103, the arbitration provision applies only to actions or measures actually implemented by either Party which have not been resolved by consultation or settled by the Commission. If an action has only been proposed, then arbitration under Article 1806 cannot be invoked.

### **3.- DISPUTES AVOIDANCE MECHANISMS:**

#### **3.1.- NOTIFICATION**

It was agreed that each Party must provide, in advance, written notice to the other Party of any proposed or actual

measure that it considers might materially affect the operation of the FTA. The notice must include the reasons for the proposed or actual measure.<sup>16</sup>

The written notice must be given as far in advance as possible of the implementation of the measure. In the event that prior notice is not possible, the Party implementing the measure must provide written notice to the other Party as soon as possible after implementation.<sup>17</sup> This written notice will not be considered to be an indication that the measure is inconsistent with the Agreement<sup>18</sup>.

### 3.2.- REQUEST FOR INFORMATION

If requested, a Party must promptly provide information and respond to questions pertaining to any actual or proposed measure whether or not previously notified.<sup>19</sup>

### 3.3.- DIRECT CONSULTATIONS

Either Party may request consultations regarding any

---

<sup>16</sup>. C-U.S. FTA Article 1803 (1).

<sup>17</sup>. C-U.S. FTA Article 1803 (2).

<sup>18</sup>. C-U.S. FTA Article 1803 (4).

<sup>19</sup>. C-U.S. FTA Article 1803 (3).

actual or proposed measure or any other matter that it considers affects the operation of the Agreement<sup>20</sup> regardless of whether the matter has been notified in accordance with Article 1803.<sup>21</sup> Any confidential information exchanged in the course of consultations should be treated on the same basis as the Party providing it<sup>22</sup>.

Under the C-U.S. FTA, consultations are clearly the general dispute avoidance mechanism of choice. The Parties agreed to make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations.<sup>23</sup>

#### **4.- THE CANADA-UNITED STATES TRADE COMMISSION:**

The Agreement created a Commission composed of the Party's cabinet level officer or Minister responsible for

---

<sup>20</sup>. Interestingly, consultations can be requested on any actual or proposed measure, even if this does not materially affect the operation of the C-U.S. FTA.

<sup>21</sup>. C-U.S. FTA Article 1804 (1).

<sup>22</sup>. C-U.S. FTA Article 1804 (3).

<sup>23</sup>. C-U.S. FTA Article 1804 (2).

international trade<sup>24</sup>. If the Parties cannot resolve the matter within 30 days after the initiation of direct consultations, any Party may request in writing a meeting of the Commission<sup>25</sup>. At the Commission level, the Parties should attempt to resolve the dispute in an amicable manner. At this stage, the advice of technical experts is useful in an attempt to settle the dispute in a negotiated manner<sup>26</sup>.

#### 4.1.- MANDATE

The Canada-United States Trade Commission was designed to have functions with respect to several matters. Its first critical responsibilities are with regard to the supervision of the due implementation and further elaboration of the Agreement<sup>27</sup>, and to the consideration of any other matter that

---

<sup>24</sup>. C-U.S. FTA Article 1802 (2). Accordingly, the principal representative on the Commission for Canada is the Minister for International Trade, while the United States Trade Representative plays the corresponding role on side of the United States.

<sup>25</sup>. C-U.S. FTA Article 1805 (1).

<sup>26</sup>. C-U.S. FTA Article 1805 (2).

<sup>27</sup>. The Commission must take into account the objectives set out by the Parties. The objectives pursuant to Article 102 are "...to eliminate barriers to trade in goods and services between the territories of the Parties; facilitate conditions of fair competition within the Free Trade Area; establish significantly conditions for investment within this Free Trade

may affect the operation of the FTA.<sup>28</sup> The Commission is basically concerned with exercising a managerial function over virtually any matter arising in connection with the C-U.S. FTA. Any decision taken at the Commission by the two countries' representatives reflects the will of their governments.

The Commission was also constituted as dispute resolution forum. It is in charge of the prevention, management and resolution of disputes that may arise over the interpretation or application of the C-U.S. FTA.<sup>29</sup>

#### 4.2.- MEETINGS

The Commission, according to the text of the Agreement, must convene at least once a year in a regular session to review the functioning of the C-U.S. FTA. The sessions of the Commission must be held alternatively in the two countries.<sup>30</sup>

---

area; establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement."

<sup>28</sup>. C-U.S. FTA Article 1802 (1).

<sup>29</sup>. C-U.S. FTA Article 1802 (1).

<sup>30</sup>. C-U.S. FTA Article 1802 (3).

In practice, the Commission has met twice a year in regular sessions.

Regular meetings regarding economic relations at cabinet level between officials of the two countries were already a customary practice since the earliest sixties. In fact, for a long time before the FTA and to coordinate the smooth functioning of the bilateral relationship, officials of both sides in the significant economic areas had regularly been in continuous communication, in order to identify potential disputes.

Either Party may request in writing an extraordinary meeting of the C-U.S. Trade Commission whenever the Parties themselves have failed to resolve any matter by direct consultations. Article 1805 of the C-U.S. FTA, allows either party to file a written request for a meeting of the Commission after 30 days of consultations held directly between the Parties, in attempting to set a time limit for the consultative process initiated under Article 1804 . In practice, whenever an extraordinary meeting of the Commission is required, either member of the Commission files a written request to the other Party, since the members of the

Commission are the representatives of the two governments.

Chapter 18, at this point, adds a slightly more formal dimension. The possibility of bringing controversies before the two chief officials for international trade at a bilateral forum constitutes a psychological factor to enhance the resolution of disputes.<sup>31</sup>

#### 4.3.- PROCEDURES

The Commission is empowered to fashion its own rules and procedures<sup>32</sup>; albeit paragraphs 3 and 5 of Article 1802 outline certain procedural guidelines concerning meetings and decision making issues. In practice, a formal set of rules has not been developed regarding the Commission meetings. There is no available record of the issues taken before the

---

<sup>31</sup>. Professor McRae has commented that the meetings at the Commission are advantageous in the sense that they imply a different approach to the matter at issue. He is of the opinion that a discussion at the Commission is "psychologically speaking" more likely to lead to an amicable resolution of the problem since it involves a different management of the matters undergoing and official at a much higher level. McRae, Donald in an Speech at the Course of Canada-United States Negotiations: Comparative Perspectives. University of Ottawa. Ottawa, Ontario. November 21, 1991.

<sup>32</sup>. C-U.S. FTA Article 1802 (5).

Commission and only the governments are aware of what takes place at that level. The high degree of discretion in the management of issues at the Commission level makes it unnecessary to develop a formal or legalistic scenario to conduct proceedings.

#### 4.4.- DECISIONS

Since the Commission is composed of both Parties' representatives, it is obvious that in any matter requiring a decision of that body, both Parties' consent is required. The logical consequence of this feature is that Parties clearly have veto powers through all the processes held at that forum.<sup>33</sup>

#### 4.5.- WORKING GROUPS

The Commission can also establish and delegate functions to subsidiary, ad hoc or standing committees or working groups to assist in the consideration of matters concerning the interpretation, implementation, further negotiation or application of the C-U.S. FTA<sup>34</sup>. In fact, even in absence of

---

<sup>33</sup>. C-U.S. FTA Article 1802 (5).

<sup>34</sup>. C-U.S. FTA Article 1802 (4). See also C-U.S. FTA Article 1805 (2).

such specific provision, the Parties were, in any event, capable of mutually establishing any advisory group for any particular matter.

Some groups were formed in the Agreement for purposes of evaluating certain issues and developing some rules for particular matters. Some of those groups are: A working group to review levels of government support for wheat, oats and barley<sup>35</sup>; eight working groups on technical regulations and standards in the field of agriculture<sup>36</sup>; a joint monitoring committee to report on progress in the further elaboration of technical regulations and standards in respect to some agricultural issues<sup>37</sup>; a group on North American automotive trade and production<sup>38</sup>; a working group on rules and disciplines for subsidies and antidumping matters<sup>39</sup> and a joint advisory committee on outstanding issues related to retransmission rights<sup>40</sup>.

---

<sup>35</sup>. C-U.S. FTA Article 705 and Annex 705 (4).

<sup>36</sup>. C-U.S. FTA Article 708.

<sup>37</sup>. C-U.S. FTA Article 708 and Annex 708 (1).

<sup>38</sup>. C-U.S. FTA Article 1004.

<sup>39</sup>. C-U.S. FTA Article 1907.

<sup>40</sup>. C-U.S. FTA Article 2006 (4).

#### 4.6.- ROLE

The Canada-United States Trade Commission is no doubt the central instrument, created under the C-U.S. FTA, to manage the Agreement<sup>41</sup>. The main feature to point out, when analysing the Commission's mandate and functioning, is the fact that the Commission was undoubtedly conceived as a political body.<sup>42</sup>

---

<sup>41</sup>. For an interesting comparison of the C-U.S. FTA Commission with equivalent institutions in other free trade agreements see Steger, D. "The Dispute Settlement Mechanisms of the C-U.S. FTA. Comparison with the Existing System." Conference on the Canada-United States Free Trade Agreement. Analysis of the text. University of Ottawa, Faculty of Law. January 21, 1988. in *Understanding the Free Trade Agreement*, McRae & Steger, D. (eds) Halifax, The Institute for Research on Public Policy, (1988): 49-72 at 62.

<sup>42</sup>. This aspect has been broadly commented upon by the scholars in the field. See i.e. Clarkson, S. "The Canada-United States Trade Commission. The Institutional implications of CUSTER" in *Trade-offs on Free Trade*. Gold Marc & Leyton-Brown David. (eds) Carswell, (1988): 160-169. See also Parker, R. "Dispute Settlement in the GATT and in the C-U.S. FTA" 23 *Journal of World Trade* (June, 1989): 83-93 at 91; Ferguson, K. "Dispute Settlement Under the C-U.S. FTA." 47 *University of Toronto, Faculty of Law Review* (1989): 317-353 at 335; Graham, W. *Dispute Resolution in the C-U.S. FTA: One part of a complex relationship*. Paper presented at Union Internationale des Avocats. Mexico City, (July, 1991) at 17; MacDorman, T. "The Dispute Settlement Regime of the FTA." 2 *Review of International Business Law* (November, 1988): 303-330 at 308 and Sohn, L. "Dispute Resolution under a NAFTA." (Conference proceedings: Competition and Dispute Resolution in the North American Context; conducted under the auspices of the Canada-United States Law Institute and Case Western

Accordingly, the main function of the Commission is, ultimately, to implement the will of the Parties in the execution of the treaty, and to serve as their formal forum for consultation.

The Commission definitely is not an independent body empowered with judicative or "third-party" functions. In fact, one could say that the Commission is nothing more than a title to designate the two government cabinet officials at formal and periodical meetings. The Commission will, however, ensure that trade disputes be discussed at a very high level, enhancing the possibility of agreeing to a resolution in an expeditious and amicable manner<sup>43</sup>.

According to the composition and role of the Commission, its decisions, as mentioned, must be taken by consensus. This is advantageous, in the sense that it limits hostility and ensures that disputes are to be solved in a negotiated manner

---

Reserve University School of Law. Cleveland, Ohio, April 3-5)  
12 *Canada-United States law Journal* (1987): 319-328 at 319.

<sup>43</sup>. See *Supra*, note 31.

on amicable terms.<sup>44</sup> On the other hand, it could eventually allow abuses against the weaker trade partner as a possibility inherent in any negotiation.<sup>45</sup>

## 5.- ARBITRATION AND ADVISORY PANELS

### 5.1.- INTRODUCTION

Chapter 18 provides for two different types of binational panels, namely, non-binding panels<sup>46</sup>, and binding or arbitration panels<sup>47</sup>.

A non-binding panel can be convened if a dispute has been referred to the Commission under Article 1805 and has not been resolved within a period of 30 days after such referral, or if it has not been referred to binding arbitration under Article 1806.<sup>48</sup>

---

<sup>44</sup>. See Ferguson, K. "Dispute Settlement under the C-U.S. Free Trade Agreement." 47 *University of Toronto, Faculty of Law Review*. (1990): 317-353 at 335.

<sup>45</sup>. See Canadian Chamber of Commerce. *A NAFTA and its implications for Canada's relationship with the countries of the Asia-Pacific*. Paper presented at the Pacific Conference Kuala Lumpur, (August 1991) at 8.

<sup>46</sup>. C-U.S. FTA Article 1806 (2).

<sup>47</sup>. C-U.S. FTA Article 1806.

<sup>48</sup>. C-U.S. FTA Article 1807 (2).

A binding arbitration panel is established in the following events:

- i- Upon the agreement of the Parties, or
- ii- In disputes involving emergency safeguard actions taken pursuant to Chapter 11 of the FTA, or<sup>49</sup>
- iii- In disputes concerning the determination of levels of government support for wheat, oats and barley.<sup>50</sup>

#### 5.2.- COMPOSITION OF THE PANEL

The Commission shall develop and maintain a roster of individuals from which, whenever possible, panelists must be chosen. Distinct from Chapter 19 panels<sup>51</sup>, there are no treaty regulations pertaining to the appointment of Chapter 18 panelists, except for the fact that the treaty requires that panelists must be chosen on the basis of "objectivity, reliability and sound judgment",<sup>52</sup> and for certain areas "have expertise in the particular matter".<sup>53</sup>

---

<sup>49</sup>. C-U.S. FTA Article. 1806 (1).

<sup>50</sup>. C-U.S. FTA Article 705; Annex 705.4 (16).

<sup>51</sup>. C-U.S. FTA Annex 1901 (2).

<sup>52</sup>. C-U.S. FTA Article 1807 (1).

<sup>53</sup>. For instance in matters concerning investment. See C-U.S. FTA Article 1608 (4).

The panel is to be composed of five members, with each country assured of having two of its citizens as members. Each Party, in consultation with the other<sup>54</sup> and within fifteen days of the establishment of the panel, shall elect two members of the panel. In the remote event that a Party fails to designate its panelists within fifteen days, they are selected by lot from the roster of panelists.

Nothing in the Agreement prevents the Parties from agreeing on a fifth panelist who is a national of a third country. However, due to the long shared tradition in resolving bilateral disputes, the kind of issues to deal with and the number of recognized jurists in both countries, it is often unnecessary to bring in members from a third country.

The Commission shall then undertake the responsibility of appointing the chairman of the panel.<sup>55</sup> If the Commission cannot agree on the fifth member within the fifteen day period, at the sole request of either Party, the four

---

<sup>54</sup>. Since this process is to be carried out by consulting about the proposed panelist, if any party has any concern regarding the impartiality of any member could exercise its veto power.

<sup>55</sup>. C-U.S. FTA Article 1807 (3).

appointed panelists shall decide on the fifth panelist within thirty days of the establishment of the panel. If no agreement is achieved, the fifth panelist shall be selected by lot from the roster of panelists.<sup>56</sup>

The limited experience with only three panels is not enough to constitute a solid reference. However, so far, if in a given case one of the countries has three members in the panel, the Parties seem to have agreed that next time the other country will have the majority. According to the general rules set out in the Code of Conduct for Proceedings under Chapter 18 panels<sup>57</sup>, the appointment of panelists runs as follows:

A potential panelist is approached by the respective Secretariat and asked to complete a "Disclosure Statement" in which the candidate must reveal any facts, interests or relationships that could eventually affect the potential member's autonomy and/or impartiality, or that are likely to

---

<sup>56</sup>. C-U.S. FTA Article 1807 (3).

<sup>57</sup>. See Code of Conduct for Proceedings under Chapters 18 and 19 of the C-US FTA under the C-US FTA. Canada Gazette, Part I, January 14, 1989 p. 96.

create the appearance of bias in their designation<sup>58</sup>. They are particularly asked about direct or indirect financial or personal interest in the outcome of the dispute.

If there is no concern about the candidate's competence to serve as panelist, the candidate is appointed by the official in charge after holding consultations with the other Party.

After the appointment as member of the panel, he or she remains under the same obligation of being independent and impartial. The panelist must promptly disclose any interests or relationships that may arise while the case is under way.<sup>59</sup> Moreover, panelists are to operate in their individual capacities and not be associated with or receive instructions from either Party.<sup>60</sup>

### 5.3.- REPLACEMENT OF A PANEL MEMBER

Article 1807 (3) of the C-U.S. FTA, provides that the

---

<sup>58</sup>. This disclosure statement is made pursuant to Part III of the Code.

<sup>59</sup>. See Supra, note 57.

<sup>60</sup>. C-U.S. FTA Article. 1807 (3).

panel shall be composed of five members. If any appointed member can no longer perform his or her duties in the case of death, retirement, disqualification or disability a replacement is to be chosen according to Part II of the Model Rules of Procedure for Chapter 18 panels.

Since all panelist must be present during oral proceedings, in the case of the death, retirement, disqualification or disability from any cause of one of the panel members after the oral arguments have begun, the Chairman may order that the matter be reheard. After the selection of a substitute panelist, the oral argument proceedings will be reheard on such terms as are appropriate.<sup>61</sup>

The appointment of a replacement panel member after the initial report of the panel has been released is permitted according to the ruling on the matter issued in the first Chapter 18 panel. In that case, the Chairman, Professor

---

<sup>61</sup>. See Model Rules of proceedings for Chapter 18 Panels Part V (3). In the first panel convened pursuant to chapter 18 the panelist Dr. Waldo Johnson was replaced after the submission of the initial report, but the oral arguments were not reheard.

Donald McRae, considered that, since "there is no provision in the Agreement authorizing the panel to operate with less than five members, and since Part II of the Model Rules does provide for the appointment of a replacement in the event of death, the replacement of a panel member who dies was obviously contemplated."<sup>62</sup>

#### 5.4.- ACCESS TO PANELS

Article 1807 (4) provides that "unless otherwise agreed by the Parties, the panel shall base its decision on the arguments and submissions of the Parties". There seems to be no provision for panels to seek, or accept, submissions from provincial or state governments, or from private parties.

The rules of procedure establish that the panel may call upon other individuals to provide information concerning matters in dispute, subject to agreement of both Parties and only in such terms and conditions that they agree. This provision, again, reaffirms the fact that the Parties reserve the power to determine the scope of the panel analysis.

---

<sup>62</sup>. See Final report of the panel in the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring (Annex A).

#### 5.5.- GENERAL RULES OF PROCEDURE

The rules and procedures for the panels are not spelled out in detail in the text of Chapter 18. There are some guidelines concerning the right of the Parties to at least one hearing, and the opportunity to provide written submissions and rebuttal of arguments<sup>63</sup>. There are also time limits for the completion of the preliminary and the final report. However, there is a set of rules of procedure which supplement the provisions of the Agreement. These bilaterally agreed rules apply to non-binding panels and can be used for arbitration panels under Article 1806; unless the Commission directs otherwise.<sup>64</sup>

According to the Agreement provisions and the eight parts of the Model Rules of Procedures for Chapter 18 panels, the proceedings are to be conducted in the following manner :

\* As stipulated by part III of the Model Rules of Procedure, panel proceedings initiated at the request of one Party are to take place in the Capital of the other Party,

---

<sup>63</sup>. C-U.S. FTA Article 1807 (4).

<sup>64</sup>. See Model Rules of Procedures for Chapter 18 panels Part I (1).

unless otherwise is mutually agreed.

\* Within 10 days of the appointment of the Chairman of the panel, the Party that requested the panel must file its initial submission with the Responsible Secretary. The other Party then has 20 days to file its counter-submission. It seems that these terms could be too short for certain cases involving particularly complex matters.

The responsible secretary will promptly forward to the other secretary all submissions received and all documents generated by the panel.<sup>65</sup> Additionally, each panel will decide how many supplementary written submissions will be filed and will determine the term for each in accordance with the limitations imposed by the panel under Chapter 18. In any event, each Party must be granted the opportunity to file an identical number of written submissions<sup>66</sup>.

\* The panel is authorized to fix the date and time of oral proceedings. The panel must also provide equal time to each Party in making its presentations, taking into account

---

<sup>65</sup>. Ibid. Part III (5).

<sup>66</sup>. Ibid. Part IV (3).

the following sequence:

- 1.- argument of the Party which requested the panel,
- 2.- argument of the other Party,
- 3.- reply of the Party which requested the panel,
- 4.- counter-reply of the other Party.<sup>67</sup>

\* All proceedings and deliberations of the panel are confidential. The panel may not contact one Party without contacting the other Party as well, and no panel member will discuss the dispute with either Party in the absence of the other panel members<sup>68</sup>. Particularly, all deliberations of the panel leading up to the preparation of the report will be private and confidential, though assistants and support staff may be present with the panel's permission. This provision demonstrates independence of the panel and guarantees transparency in the proceedings vis-à-vis each other but not with regard to other interested persons.

\* Written and/or oral proceedings may be in English or in French or in both languages. The responsible secretary will

---

<sup>67</sup>. Ibid. Part V.

<sup>68</sup>. Ibid. Part VI.

have the proceedings translated if requested by one of the Parties or one of the panelists. If the panel report is issued in one language, then the Secretary in charge must arrange for prompt translation into the other language<sup>69</sup>.

\* Unless a shorter or longer term is agreed by the Parties; the initial report of the panel will be presented to the Commission no later than three months after the panel Chairman is appointed. As commented, the panel of experts is only to base its conclusions on the arguments presented by the Parties<sup>70</sup>.

\* In order to take the most advantage of the panel findings, there is no necessity of consensus or unanimity in the issuance of the report with provision being made for separate and dissenting opinions. If the panel were required to decide by unanimity, the lack of consensus would impede the issuance of any recommendation at all.

---

<sup>69</sup>. Ibid. Part VII.

<sup>70</sup>. C-U.S. FTA Article 1608 (4), indicates that, whenever a given dispute involves investment matters, the panel is also to take into consideration how such a dispute would be dealt with by internationally recognized rules for commercial arbitration.

#### 5.6.- INITIAL REPORT

The panel usually issues preliminary factual findings before the completion of the initial report which should be presented to the Parties within three months after the appointment of the Chairman. It is subject to the discretion of each panel to decide whether to permit the Parties to comment on such preliminary factual synopsis. The initial report must contain at least:

- a) findings of fact,
- b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of the Agreement or cause nullification and impairment in the sense of Article 2011, and
- c) its recommendations, if any, for the resolution of the dispute.<sup>71</sup>

Additionally, but only when so requested by either Party at the time of establishment of the panel, the report must also include the findings referring to the adverse trade effect of the measure if it were found not to conform with the

---

<sup>71</sup>. C-U.S. FTA Article 1807 (5).

obligations of the Agreement.<sup>72</sup>

Once the initial report is issued, the Parties have fourteen days to present a written reasoned statement of their objections, if necessary.<sup>73</sup> In this event, at request of the Commission or either Party or at the panel's own motion, the panel is empowered to request the views of both Parties. The panel may reconsider this initial report or examine any particular point of the subject-matter.<sup>74</sup>

#### 5.7.- FINAL REPORT

The final report must be released within 30 days of issuance of the initial report<sup>75</sup>. The separate opinions are to be issued at that time. The final report shall normally be published along with the separate opinions unless the Commission otherwise agrees.<sup>76</sup>

---

<sup>72</sup>. Ibid.

<sup>73</sup>. C-U.S. FTA Article 1807 (6).

<sup>74</sup>. Ibid.

<sup>75</sup>. Ibid.

<sup>76</sup>. Ibid.

### 5.8.- TIMELINES

The C-U.S. FTA provides for quick panel decisions since the Agreement establishes a tight timetable for filings and oral arguments as commented. The Chapter 18 panels' minimum timeline for disputes review in a regular case without extension is as follows:

- Day 1: Filing of request for consultations. Begins 30 calendar days consultation period between U-S and Canada.
- Day 31: Either government may request the Canada-United States Trade Commission be convened after 30 days of consultations.
- Day 41: The Commission must convene within 10 days of the request for a meeting.
- Day 61: If the Commission does not resolve the dispute within 30 days after the request for a meeting, the Commission may refer the dispute to a panel.
- Day 76: Deadline for selection of two panel members by each government.
- Day 91: Deadline for a joint selection of fifth panellist
- Day 180: Deadline for the panel to have established rules, held hearing, considered written submissions by the

two governments and other interested parties.

Day 195: Deadline for comments by governments once the initial report has been filed.

Day 211: Deadline for the issuance of the final report.

Day 241 Deadline for resolution of the issue. Failure to resolve the issue gives the government the right to suspend benefits under the FTA.

## 6.- ADOPTION OF REPORTS:

### 6.1.- ARBITRATION PANELS

Once the panel report is released, the concerned Party must implement it without delay, and Parties must attempt to agree on appropriate compensation or remedial action.<sup>77</sup> If the concerned Party does not implement the report in a "timely fashion", or if no agreement on the compensation or remedy is achieved, the favoured Party may suspend the application of "equivalent benefits of this Agreement to the non-complying Party."<sup>78</sup>

---

<sup>77</sup>. C-U.S. FTA Article 1806 (3),

<sup>78</sup>. C-U.S. FTA Article 1805 (3).

## 6.2.- ADVISORY PANELS

The Commission must attempt to reach consensus on how to resolve the dispute within 30 days of receipt of the advisory panel's report or within the time the Commission agrees upon.

What if the Commission, that is to say, the two governments, does agree on a way to solve the dispute, but the concerned Party does not adopt the decision mutually reached by the Parties at the Commission? There does not seem to be a specific provision dealing with the "binding" nature of the bilateral report issued by the two governments at the Commission<sup>79</sup>.

However, one could consider such a provision unnecessary, since, strictly speaking, any decision that the Commission makes is not to be regarded as coming from a "third-party", and is not different from any other decision taken by consensus by the two governments. The rationale behind such a lack of an article is probably to be found in the fact the Commission as a political body, will never tackle such a situation. In other words, if a State does not like a

---

<sup>79</sup>. See MacDorman, Ted. "The Dispute Settlement regime of the FTA." *2 Review of International Business Law* (November, 1988): 303-330 at 313.

proposed recommendation, it will simply instruct its representative on the Commission to disagree with the proposal.

Sometimes the implementation of the outcome of the dispute settlement process is time-consuming because it requires to amend domestic legislation. There is no specific provision in the treaty concerning timelines for the implementation of the decision. However, political pressure could be brought at the Commission level to ensure rapidness in the implementation of mutually agreed decisions. Additionally and most importantly, the Parties have recourse to the remedies provided in the Agreement itself, as will be shown in the following subtitle.

## **7.- REMEDIES:**

### **7.1.- RETALIATION**

If the governments do not agree on mutually satisfactory terms of a final resolution of the dispute and one state feels that its fundamental rights under the FTA, or the benefits it had anticipated enjoying under the FTA, are being impaired by virtue of the implementation or maintenance of the measure at

issue, that State may unilaterally suspend benefits of equivalent value against the non-complying Party, pending resolution of the dispute.<sup>80</sup>

However, the use of unilateral retaliation is certainly related to the will of the State to proceed against the other taking into account the effectiveness of such measure. At this point it is interesting to note that a decision of retaliate often involves highly political issues and it is not an advisable way to solve disputes. The stronger trade partner usually has more ways to bring pressure to bear on the smaller party. Moreover, retaliation involves an escalation of the dispute and ends up hurting innocent sectors of the domestic industry since the retaliation need not relate to the same industry causing the original problem. While the availability of the threat of unilateral retaliatory action may be useful in negotiations, the actual taking of retaliatory action must be carefully considered.

#### 7.2.- COMPENSATION

Chapter 18 contains a broad scope which implies a large amount of discretionary power in finding a remedy. The C-U.S.

---

<sup>80</sup>. C-U.S. FTA Article 1807 (8).

FTA defines potential measures to be taken by the Commission as the "non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Article 2011 or, failing such a resolution, compensation."<sup>81</sup> Furthermore, the decision of the Commission is not confined to that, yet broad scope. In effect, the C-U.S. FTA states that such remedies are to be used "where possible."<sup>82</sup>

### 7.3.- TERMINATION OF THE AGREEMENT

In the most extreme situation, the Parties reserve the right to giving six-month's notice of termination of the C-U.S. FTA. Over time, however, it will be increasingly more difficult to terminate the Agreement, due to the unavoidable process of integration of both economies.

### **8.- THE SECRETARIAT:**

Under the Free Trade Agreement provisions, it was agreed that the Parties will implement two permanent Secretariat Offices, with the main function of facilitating the operation

---

<sup>81</sup>. Ibid.

<sup>82</sup>. Ibid.

of Chapter 19 panels.<sup>83</sup> One of the additional functions of the Secretariat was to provide institutional support for the Commission and the Chapter 18 panels when so directed.<sup>84</sup>

The Secretariat offices are not to play an independent role in the operation of the Agreement and are merely to perform a court registry role within the whole process.<sup>85</sup>

#### 9.- REFERRALS:

Chapter 18 also provides for a mechanism for consultation and agreement on the interpretation of the applicable provisions of the Agreement regarding domestic judicial or administrative proceedings at the Parties motion or at the request of the concerned body<sup>86</sup>.

---

<sup>83</sup>. C-U.S. FTA Article 1909.

<sup>84</sup>. Through an exchange of letters dated December 29, 1988 between the U.S. Trade Representative and the International Trade Minister of Canada.

<sup>85</sup>. See Stone, F. *Institutional Elements and Dispute Resolution under the C-U.S. FTA*. Research paper. The Institute for Research on Public Policy, Ottawa, Ontario, (April 1989) at 9.

<sup>86</sup>. This procedure is limited to the interpretation of provisions of the Agreement itself and does not cover any issue with respect to domestic legislation.

If a question arises in a domestic court or administrative agency<sup>87</sup> about any C-U.S. FTA provision, the United States and Canada will try to agree upon a common interpretation of the provision at issue. Any joint interpretation will be submitted to the court or administrative body in accordance with its rules. If the Parties do not reach an agreement on the interpretation of the provision at issue, then either Party may submit its own views to the court or administrative body.<sup>88</sup>

---

<sup>87</sup>. The language of Article 1808 is broad enough to include procedures before department agencies as well as courts.

<sup>88</sup>. C-U.S. FTA Article 1808. For an interesting discussion on the point see Zuijdwijk, T. "Dispute Settlement Mechanisms under the FTA." Presented at conference on Alternative Dispute Resolution in Canada-United States Trade Relations 40 *Maine law review* (July, 1988) 325-334 at 333.

CHAPTER II  
ANALYSIS OF THE CHAPTER 18  
PANEL CASES

Since the entry into force of the Agreement, three panels have been convened pursuant to the provisions of Chapter 18. In the first place I will refer to the two panel cases already concluded, by presenting a general analysis of the substantive and procedural issues therein involved. Afterward, a brief analysis will be found concerning the third one just convened.

Each country initiated one of the two panels already finished and both reports ruled in favour of the United States claims. Both cases concerned fisheries, and both revolved around assertions by the complaining country that the other party's measures, said to be taken primarily aimed at conservation, had the actual effect of creating trade barriers and to enhance economic protectionism. Both cases were

challenges under GATT provisions, expressly incorporated by reference into the C-US FTA framework.<sup>1</sup>

**1.- CANADA'S LANDING REQUIREMENT FOR PACIFIC COAST SALMON AND HERRING<sup>2</sup>**

**1.1.- ANTECEDENTS**

In may, 1989, the United States requested the first binational panel review pursuant to Chapter 18. This first case was heavily related to a previous complaint by the United States several years earlier, under Article XXIII of the GATT. In November 4, 1987 a GATT panel<sup>3</sup> had issued a report holding that a Canadian export prohibition on unprocessed Pacific

---

<sup>1</sup>. C-U.S. FTA Article 407 (1) "Subject to the further rights and obligations of this Agreement, the Parties affirm their respective rights and obligations under the General Agreement on Tariffs and Trade (GATT) with respect to prohibitions or restrictions on bilateral trade in goods." Furthermore, Article 1201 of the C-US FTA reads "Subject to the provisions of Articles 409 and 904, the provisions of Article XX of the General Agreement on Tariffs and Trade (GATT) are incorporated into and made a part of this Part of this Agreement". See particularly GATT, Article XX (g).

<sup>2</sup>. The Binational Secretariat's reference of the case is CDA-89-1807-01 (Oct 16, 1989).

<sup>3</sup>. Measures affecting Exports of unprocessed Herring and Salmon, United States vs. Canada GATT Doc. L/6268, GATT B.I.S.D. 35th. Supp. p. 98 (1988)

salmon and herring was deemed inconsistent with, and therefore constituted a violation of GATT Article XI:1<sup>4</sup>. That GATT panel also ruled that the Canadian prohibition was not exempted under the terms of Article XX (g) as a conservation measure.

Canada had argued before the GATT panel that its prohibition was to be considered under either of two exemptions in the General Agreement<sup>5</sup>, but the panel had completely rejected such argument. The United States had also requested the GATT panel to rule on the admissibility of a substitute measure proposed by Canada, but the panel held that such request was beyond its scope and jurisdiction.

On March 21, 1988, and in light of the panel decision, Canada advised the United States that it would agree with the report and, consequently, accept the adoption by the GATT Council of the report of the GATT panel. In effect, by the end of April 1989, Canada had already removed the export restrictions on unprocessed herring, sockeye salmon and pink salmon.

---

<sup>4</sup>. These GATT provisions, prohibits quantitative restrictions on exports and imports of goods.

<sup>5</sup>. See GATT Article XX.

1.2.- BACKGROUND TO THE C-U.S. CASE

By the time the Free Trade Agreement had entered into effect, Canada had revoked the regulation prohibiting the export of unprocessed salmon and herring; but at the same time, Canada had issued and implemented a substitute body of new regulations concerning a landing requirement for Pacific coast salmon and herring<sup>6</sup> by which it was required that several kinds of salmon and roe herring caught in Canada's Pacific coast fisheries be only landed at a licensed landing station in Canada.

The measure was for the purpose of catch reporting and examination by the Department of Fisheries and Oceans. The measure was said to be exclusively directed to permit due gathering of statistical data and biological sampling information for conservation and management purposes.

The United States, however, was of the opinion that such measures constituted a trade barrier, since the actual effect of the new regulations was the same as the effect of the

---

<sup>6</sup>. Pacific Herring Fishery Regulations, amendment, SOR/89-217, 123 Can. Gaz. PT II 2348-85 of May 10, 1989 and Pacific Commercial Salmon Fishery Regulations, amendment, SOR/89-219, 123 Can Gaz. pt II, 2390-91 of May 10, 1989.

earlier regulation ruled unlawful by the GATT panel. As a result, the United States called for consultations, and, since discussions at the Trade Commission failed to resolve the dispute, the United States then requested the formation of a panel at the end of 1989. The panel of five members was composed of one trade expert and one fishery expert from each country, and a Canadian appointed as the chairman<sup>7</sup>.

1.3.- PANEL'S TERMS OF REFERENCE

The two countries agreed on the terms of reference to address the controversy<sup>8</sup>. Under the panel's terms of reference, it was required to rule whether Canada's landing requirement amounted to an export restriction within the meaning of GATT Article XI:1<sup>9</sup> (incorporated by reference into

---

<sup>7</sup>. The following were the members of the panel: Chairman: Donald M. McRae - Panelists: Waldo Johnson, Frank Stone, Robert Hudec, Jim Brandon . Due to the death of Dr. Johnson, Donald T. Tansley was appointed as a replacement panelist by Canada.

<sup>8</sup>. The terms of reference for the panel were jointly set out, by means of exchange of letters between the Parties on May 23 and 30, 1989.

<sup>9</sup>. GATT Article XI (1) "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of

Article 407 of the C-U.S. FTA<sup>10</sup>) and, if so, whether the landing requirement was a "conservation measure" subject to an exception under GATT Article XX(g) (incorporated by reference into Article 1201 of the C-U.S. FTA.<sup>11</sup>)

1.4.- ARGUMENTS TO THE PARTIES TO THE DISPUTE

The United States argued before the C-U.S. FTA panel that the landing requirement was in "clear effect" an export prohibition, since the landing requirement meant delays, extra cost and possible deterioration for fish destined for the United States, while for fish sold in Canada, the landing requirement had no significance since the catch would have to be landed in any event. Such situation, said the United States, was placing American processors at a competitive disadvantage in relation to Canadian processors.

Canada argued that the landing requirement was not an export restriction at all, pointing out that United States buyers were free to purchase unprocessed salmon and herring

---

the territory of any contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party".

<sup>10</sup>. See Supra, note 1 Chapter II.

<sup>11</sup>. Ibid.

under the same terms as Canadian buyers and henceforth they were treated under the same footing. Further Canada claimed that the landing requirement was necessary to obtain an accurate count of fish caught, in order to prevent over-fishing and to conserve stocks. The argument turned on interpretation of the GATT rules incorporated in the C-U.S. FTA and of the report of the GATT panel concerning the previous regulation.

1.5.- FINAL PANEL REPORT

The panel's final report was rendered in October, 1989. Following a detailed consideration of the issues, the Panel, in an unanimous decision, concluded that the conservation benefits of the landing requirement would depend on the volume of unlanded exports which would be expected to occur in the absence of a landing requirement.

In the case of the salmon and herring fisheries at issue, the panel was of the opinion that Canada's landing requirement was in fact a restriction on "sale for export" within the meaning of GATT Article XI:1 and as a result "incompatible with Canada's obligations under Article 407 of the Free Trade

Agreement."<sup>12</sup>

The panel also concluded that the measure could not be considered as primarily aimed at conservation within the meaning of GATT Article XX (g) and was, therefore, not exempt pursuant to C-U.S. FTA Article 1201. Where the primary effect of a measure is in fact the regulation of export transactions, it concluded, the measure may be considered as restrictions within the meaning of Article XI (1), even without a showing of actual trade damage.

The panel was of the view that a landing requirement could be considered to be primarily aimed at conservation if provision were made to exempt from landing such proportion of the catch which would not impede the data collection process.

The panel did suggest a way for Canada to bring its landing requirements within the exemption, by excluding from the requirement a portion of the catch that would not impede its data collection process. On the basis of an examination of the scientific evidence, the panel indicated that 100 percent

---

<sup>12</sup>. See Final report of the panel in the matter of Canada's landing requirement for Pacific Coast Salmon and Herring. CDA 89-1807-01 October 16, 1989. (54)

of the catch was not necessary for purposes of conservation.

At that moment, the question was to determine at what point an exemption from landing requirements would impede data collection and conservation objectives. The precise proportion, the panel said, would depend on the data and management need of each fishery but suggested that a range of 10-20% of the catch would provide appropriate guidance i.e. 80-90% would need to be landed in Canada.

As to Canada's defense based on GATT Article XX (g), the FTA panel essentially adopted the interpretation of the earlier GATT panel: A conservation measure was not prohibited only because it had incidental trade restricting effects, but this did not mean that every trade restricting measure was exempt if it had a conservation-promoting effect. Here the question was whether the landing requirement would have been adopted for conservation purposes alone, if Canadian buyers had to bear the same cost of the measure as that borne by foreign buyers.

1.6.- ADOPTION OF THE PANEL REPORT

After receiving the final report of the panel, Canada and

the United States disagreed on how the report should be implemented. The Commission jointly agreed on the part of the panel's report that had found the existing practice illegal, but could not agree on implementation of the panel's recommendations for curing the illegality.

Negotiations were held for four months, and finally a compromise was reached that was not inconsistent with the panel's recommendation but did not follow the recommendation in detail either. The two countries, in February 1990, finally managed to reach an agreed resolution by which they resolved their long-standing fisheries dispute by signing a four-year agreement<sup>13</sup>. Differing interpretations of the panel's final report led to the prolonged negotiations on how to remedy the violations.

Under the new arrangement, 20 per cent of salmon and herring caught in British Columbia fishing grounds will be permitted to be transported directly to the U.S. in 1990, increasing to 25 per cent from 1991 through 1993. The remainder of British Columbia salmon and herring would remain

---

<sup>13</sup>. See External Affairs and International Trade Canada. News release, Feb 22 1990 No.038.

subject to Canadian landing requirements.

After March 1, 1993, the Commission using the procedures contemplated by art. 1805 (2) will review this decision, with the assistance of technical and industry advisors, in light of the experience then gained and the conditions and circumstances prevailing at that time.<sup>14</sup>

## 2.- UNITED STATES REGULATIONS ON LOBSTERS<sup>15</sup>

The second dispute raised under Chapter 18 was also an issue concerning fisheries. In this opportunity, the product was lobsters harvested in the Atlantic Ocean, and it was Canada that complained about an import restriction imposed by the United States.

---

<sup>14</sup>. For an interesting evaluation of the salmon and herring case see MacDorman, Ted. "International Trade Law meets International Fisheries Law: The Canada-United States Salmon & Herring Dispute." 7 *Journal of International Arbitration* (1990): 107-121.

<sup>15</sup>. United States regulations on Lobsters. The Binational Secretariat reference of the case is: USA-89-1807-01 (Dec, 12, 1989)

Once again, the measure, a minimum size restriction on the sale of lobsters, was defended as a measure of conservation, but attacked from the Canadian point of view as an unfair trade measure of domestic market protection. The debate was, once again, about the interpretation of GATT provisions incorporated in the FTA text, not about any provision pertaining exclusively to the C-U.S.FTA. This time, however, the panel could not reach an unanimous decision.

2.1.- BACKGROUND

The United States adopted the Magnuson Act amendments on December 12, 1989. The effect of the amendments was that lobsters from foreign countries with minimum size requirements smaller than the U.S. federal minimum were not allowed to enter into the interstate or foreign commerce within or from the United States.

Prior to the 1989 amendments, lobsters harvested in U.S. federal waters could not be sold in interstate commerce if they failed to meet federal minimum size requirements. Persons found selling sub-sized lobsters could, however, avoid conviction by simply establishing that the lobsters had been

purchased in a jurisdiction which imposed smaller minimum size requirements as was the Canadian case.

## 2.2.- CONSTITUTION OF THE PANEL<sup>16</sup>

After failing to reach an agreement through consultations, the two sides agreed to submit the controversy to a panel. This time the chairmanship went to the United States side. The parties agreed upon an accelerated schedule, requiring that the submission of the final report were done in less than four months from the moment in which the panel selection was completed.<sup>17</sup>

## 2.3.- TERMS OF REFERENCE

The panel's terms of reference required that it determine whether the 1989 amendments to the United States' Magnuson Fishery Conservation and Management Act prohibiting the sale or transport in or from the United States of whole live lobsters smaller than the minimum possession size in effect under United States Federal Law amounted to an import

---

<sup>16</sup>. The panel was composed in the following manner: Chairman: Bernard Norwood - Panelists: Mary Beth West, Thomas Clingan, Simon Potter and Robert Latimer.

<sup>17</sup>. See Final Panel Report in the matter of United States Regulations on Lobsters. USA 89-1807-01 December 12, 1989. Part I (1.3).

restriction inconsistent with the obligations of the United States under Article 407 of the C-U.S. FTA which incorporates GATT Article XI. If the answer to this question was in the affirmative, the panel was also to decide whether the 1989 amendments were exempted by GATT Article XX (incorporated by reference into Article 1201 of the FTA).

2.4.- CANADIAN ARGUMENTS

Canada argued that the 1989 Magnuson Act amendments violated the prohibition against import restrictions in GATT Article XI. In Canada's view, the 1989 amendments amounted to an absolute prohibition on the importation of sub-sized lobsters. Since the trade effect of the measure was to prevent Canadian sub-sized lobsters from entering into United States commerce, Canada argued that the measure was a border restriction of the kind prohibited by GATT Article XI. With regard to the exception contained in Article 1201 of the C-U.S. FTA, Canada argued that the measure could not be justified as being "primarily aimed at" the conservation of United States lobsters. Canada disputed the defense under Article XX (g) and argued that Article III, the national treatment article of GATT, was irrelevant because the Magnuson Act amendments were border measures and not internal

regulations.

#### 2.5:- UNITED STATES ARGUMENTS

The United States argued first that the Magnuson Act amendments were an "internal measure" covered by the "national treatment" provisions of GATT Art. III, rather than a "border measure" governed by GATT Art. XI. Pursuant to Art. III<sup>18</sup>, measures affecting the "internal sale, offering for sale, purchase, transportation, distribution or use of" products must not discriminate unfavourably against imported products so as to afford protection to domestic production.

Since the amendments applied equally to United States lobsters as well as to Canadian lobsters, in the United States view, GATT Article XI had no application to the 1989 Magnuson Act amendments. In other words, what the 1989 amendment had done was to apply to imported lobsters the same size

---

<sup>18</sup>. In addition to the general Article incorporating the GATT provisions; Article 501 of the C-U.S. FTA reads: "Each Party shall accord national treatment to the goods of the other Party in accordance with the existing provisions of Article II of the General Agreement on Tariffs and Trade (GATT) including its interpretative notes, and to this end the provisions of Article III of the GATT and its interpretative notes are incorporated into and made part of this Part of this Agreement."

requirement already applicable to lobsters grown in U.S. waters.

Thus, the United States argued, if a restriction applicable to both imported and domestic products were to be held to be a prohibited import restraint, the measure would run counter to GATT and the FTA since it would favour imports.

Finally, the United States argued that if the panel were to find that the restriction did fall under Article XI, the restriction would come under the exemption of Article XX(g) in that it was designed to permit lobsters to reach the egg-bearing stage before being harvested.

#### 2.6.- PANEL DECISION

This time the panel, with an American trade expert as chairman, was not able to agree on a single opinion.<sup>19</sup>

---

<sup>19</sup>. The minority was not identified in the report, and there is no official report concerning whether the three American panelists decided in the same way. However, it is possible that the panel had, in fact, issued a split decision along national lines with the three United States panelists ruling in favour of the United States and the two Canadian panelists dissenting.

The decision was based in the conclusion of the majority of the panelists, identified as the panel's conclusion, that with regard to imported goods, GATT Article XI:1 applies only to imported goods at the time or point of importation, while Article III is to apply both to imported goods (at the border or internally) and to domestic goods. According to that appraisal, Article XI was inapplicable to the subject-matter and rather, the Magnuson Act amendments were to be regarded as internal measures of the kind governed by GATT Article III.

After a lengthy analysis, the majority was of the view that the United States measures at issue affected exclusively the internal marketing of lobsters without regard to their origin. The Canadian argument was rejected. The majority said that the U.S. restrictions imposed on Canadian lobsters were not of the kind of import restrictions governed by Article XI of the GATT, because they did not apply exclusively to imported products and because they were not imposed at the time of importation. As a result, Article XI which in the panel opinion sets down a prohibition on measures that apply at the time or point of importation and that apply only to imports, were not to apply to the case. Moreover, the mere fact that the United States could eventually apply such

measures at the border was in fact expressly permitted by Article III and does not mean by itself that the issue would be covered by Article XI.

On this basis, it became unnecessary for the majority to make any pronouncement with regard to the subsidiary possible application of GATT Article XX(g) as a particular exception to Article XI and the evaluation regarding potential trade effects.

Notwithstanding, after deciding the question put to it by the parties, the majority expressly stated that it was not determining the measure's consistency with United States obligations under GATT Article III since that question was beyond its terms of reference.

In the opinion of the minority, on the other hand, the Magnuson Act amendments were definitely a border measure subject to Article XI, and not an internal regulation subject to Article III. The dissenting position noted that the U.S. measures had the effect in the first place of "totally denying to Canadian live sub-sized lobsters access to the U.S. market".

The minority also argued that the majority interpretation allows any importing country to prohibit the sale of an imported product by prohibiting the sale of like domestic products, contrary to the purpose of Art. XI, which has only limited exceptions to the prohibition on import restrictions other than duties.

Since the minority decided that the Magnuson Act amendments does violate Article XI, they examined the issue of whether the measure was saved by GATT XX(g) which provides an exemption for measures relating to the conservation of exhaustible natural resources. Seeing both conservation and competition motives in the legislative record of the measures, the minority concluded that the United States had not met the burden of showing that the restriction was aimed primarily at conservation. Noting that the burden was on the United States to prove that the measure was "primarily aimed at" conservation, and considering that the panel received unduly limited information, the minority said that it could not conclude that the measures could be deemed as "primarily aimed" at conservation.

Additionally, the minority concluded by noting that the evaluation of the trade effects of the U.S. measures was not possible due to the lack of sufficient data.

#### 2.7.- ADOPTION OF THE REPORT

On may 25, 1990 the Commission received the panel's final report. The Canada-United States Trade Commission agreed to consider the panel's report during the 90 days following its release. The Commission agreed to extend the usual 30-day consultation period in light of the complicated issues to be resolved.

Both governments consulted extensively with various segments of the industry and they recommended an agreed solution under which the U.S. measure would contain various state-level size restrictions which would be adjusted and the two countries would pursue more effective cooperation in management of the resource. Canadian lobstermen objected, however, and the Government of Canada finally decided not to accept the industry recommendations.

As a result, the United States restriction remains operative and actually applicable to Canadian lobsters, in

effect confirming the result recommended by a majority of the panel. The Canadian government let it be known that in its view, the opinion of the minority of the panel represented the correct interpretation of the relevant provisions of the FTA and the GATT.<sup>20</sup>

### 3.- OUTSTANDING ISSUES

In January 6, 1992 the Honourable Michael Wilson, Minister of Industry, Science and Technology and Minister for International Trade announced that Canada had requested the Canada-United States Commission to establish a panel under Chapter 18 of the C-US FTA.<sup>21</sup> There are no official documents available with regard to the members of the panel, the date in which the panel was effectively established and the terms of reference and schedule proposed to the panel. However, and according to the limited information provided in the news release mentioned, the panel has been convened to study an

---

<sup>20</sup>. For a further analysis of the Lobsters Case see MacDorman, Ted. "Dissecting the Free Trade Agreement: Lobster Panel Decision." 18 *Canadian Business Law Journal* (1991): 445-459.

<sup>21</sup>. See External Affairs and International Trade Canada. News Release No. 6 January 6, 1992.

issue concerning the treatment of non-mortgage interest in the value-added formula for determining the eligibility of goods for preferential FTA tariff treatment. Canada's standpoint is that territorial content includes any interest paid in relation to land, equipment and buildings used in the production of goods, while the U.S. Administration is of the view that only interest paid with respect to a mortgage can be included as North American content under the FTA rules of origin.

It seems that the panel has already been convened and the members have also been selected. However, there is no information available neither at the Canadian section of the Secretariat of the agreement nor at external affairs because of the confidentiality of the panel proceedings. One could predict that this time the panel is likely to be composed of a majority of members of the Canadian side and that, unless the parties decide otherwise, the initial report would be issued by July this year according to the regular timetable of the panel.

#### 4.- EVALUATION OF THE CHAPTER 18 PANEL PROCEEDINGS

So far, only three disputes have been brought before Chapter 18 panels. Two panels have already released their final decision and a third one has recently been convened. Even though, that's too small a number to draw conclusions from, one would say that there is a common perception that the panel procedures provided under Chapter 18 have performed quite well in achieving the objectives sought by the Parties in dealing with trade disputes. In the broader picture of both Chapter 18 and Chapter 19, the efficiency of the FTA panels has been widely acknowledged by the national scholars and by the governments.<sup>22</sup> Albeit panels convened pursuant to Chapter 18 have led to further negotiations rather than to an end of the dispute, in general, there is a common assessment of the mechanism as being quite successful in achieving the FTA purposes and in dealing with disputes in a timely and

---

<sup>22</sup>. "The dispute settlement mechanisms of Chapter 18 have been used effectively and both countries have been pleased with the usefulness of the Commission in overseeing the operation of the Agreement." See The United States - Canada Free Trade Agreement Biennial Report - Chapter of Institutional Provisions.

impartial fashion.<sup>23</sup> The most salient features that have been highlighted with regard to the functioning of the resolution mechanism can be shown along the following lines:

a) Selection of panelists:

The selection of the panelist has offered no disturbance or inconvenience and has always been done in an amicable basis. The Parties have exercised some sort of a veto power for proposed panelist whenever any party has had concerns about his or her impartiality. The appointment of the chairman of the panel has always been by consensus.

b) Timeliness:

The Chapter 18 panels have issued prompt decisions. Furthermore, the Parties have also agreed to solve matters

---

<sup>23</sup>. See i.e. Horlick & Debusk, A. "The functioning of United States - Canada Free Trade Agreement Dispute resolution panels." Paper presented at *Conference on North American Free Trade: Economic and Political Implications*. Washington D.C. (June 28, 1991) at 13; Bello, Holmer, Kelly. "Midterm report on Binational Dispute Settlement under the United States - Canada Free Trade Agreement. (United States Law and Policy Series No. 18)." 25 *The International Lawyer* (Summer, 1991): 489-516 at 495 and Lowenfeld, A. *Binational Dispute Settlement under Chapters 18 and 19 of the C-U.S. FTA. An interim appraisal*. Research paper. (December 1990 and update 1991) at 78.

within a narrower schedule and the panel members have managed to issue panel reports quickly.

c) Overall usefulness:

The panel procedures seem to have been successful in focusing on the core of the debate and in offering the Parties a fairly complete objective and neutral analysis that narrows the range of alternatives and enhances the chances of negotiating an amicable solution.<sup>24</sup> In this sense, Chapter 18 adds a different approach to the mechanism of negotiation that had traditionally been used between Canada and the United States.

d) Impartiality:

All the panels convened pursuant to Chapter 18 have been composed by a majority of members of one country. The obvious concern about that situation is the fear that panels issue split decisions along the lines of nationality.

---

<sup>24</sup>. This feature is what Professor Ivan Feltham describes as the "genius of Chapter 18". See Feltham, Ivan *Canada-United States Commercial and Trade Disputes: Are We Ready for Adjudication?* Hyman Soloway Public Lecture. University of Ottawa, Ottawa, Ontario. (May 16, 1991) at 14.

The second Chapter 18 panel issued a split decision. As I mentioned in the corresponding part of the preliminary exposition of the panel cases<sup>25</sup>, this decision may well have been divided along national lines. However, no statement can be advanced in this regard, since such information is confidential and, thus, there is no available official record. This issue is interesting because it can lead to argue that a permanent Tribunal might secure an better ambience of impartiality and fairness in the whole process. In any event, when considering the greater picture of both Chapter 19 and 18 panels, one could conclude that C-U.S. FTA panels have been impartial, and that there has not been a correlation between the nationality of the panelist and the outcome of the panel report.

e) Quality of the decisions:

On this issue, there is a common opinion that the decisions and reports have been thoughtful and detailed. It seems clear that the panelists have attempted to produce carefully crafted decisions of high quality.<sup>26</sup>

---

<sup>25</sup>. See Chapter II Subtitle 2.6

<sup>26</sup>. "The consideration given by panel members to the issues and contentions of the parties has been careful, and the opinions have been well thought and well crafted... As a

f) Effectiveness in the adoption of the panel reports:

There is a more or less widespread satisfaction with the process following the issuance of panel reports. Nonetheless, it is to be noted that Canada and the United States took approximately four months to reach an agreement on the final report issued in the Canada's landing requirement for Pacific Coast Salmon and Herring case. There was a deep concern about the possibility that Canada was not going to comply with the final report, damaging the credibility of the process. However, an agreed resolution was finally reached by the two governments.

For the second panel, the matter was not settled in a negotiated matter. However, the lack of agreement leaves in effect the measure at issue, confirming as a result, the decision of the panel.

Simmon Potter, a practitioner quoted by Ellen Beall has

---

whole the opinions are of high quality, and should leave even losing parties -including the government agencies concerned- confident that they received a full and fair hearing." See Lowenfeld, A. *Binational Dispute Resolution under Chapters 18 and 19 of the Canada-United States Free Trade Agreement. An interim Appraisal*. Research paper. (December 1990 and update April 1991) at 80.

said about the process:

"The expedited nature of this forum coupled with a clear intent of the parties to provide an effective dispute resolution mechanism and the rules of procedure which provide for a near courtroom atmosphere (witnesses who may be the private parties excluded in principle for being direct parties to the state to state dispute) have resulted in a more adversarial forum and in decisions which appear more "Judicial" in approach and more precedent based and sometimes more direct than most GATT panel reports."<sup>27</sup>

Within that general positive evaluation of the panels, there are, however, some features which have been considered as defects of the system. I will briefly refer to these issues here, and then, in the third chapter of the thesis, I will deal with them at length. Some suggestions leading to the improvement of the regime with regard to these weaknesses will also be brought forward in the last stage of this research.

a) Non-binding decisions:

The most broadly stated criticism points to the fact that

---

<sup>27</sup>. See Beall, E. in *Dispute Resolution in the GATT and Chapter 18 of the FTA*. Lecture given at Dalhousie University. (November 12, 1991) at 19.

the panel decisions are not regularly binding for the Parties, and that the sanctions provided for in the Agreement might not suffice in ensuring compliance of decisions.

However, considering what is capable of achievement under international law, it seems to me that the FTA is successful in setting well-defined rules and penalties commonly accepted for breaches of obligations under public treaties.<sup>28</sup> Even though the panel reports are not binding, the final decision "normally shall conform"<sup>29</sup> with the panel report. Furthermore, as commented<sup>30</sup>, specific measures in favour of the winning Party are available whenever the Party complained against does not implement the findings of the panels in a timely fashion. In this narrower sense, one could say that the FTA procedures are "binding".

b) Participation in the process:

When one examines the rules governing participation and

---

<sup>28</sup>. For an interesting analysis on this point see Ferguson, K. "Dispute Resolution in the C-U.S. FTA." 47 *University of Toronto, Faculty of Law Review* (1990): 317-353 at 351.

<sup>29</sup>. See C-U.S. FTA Article 1807 (2).

<sup>30</sup>. See Chapter I Title 7.

access of the Parties in the process, it seems that insufficient access has been given to the private parties. The current system benefits the private sector in terms of cost savings, since the claim is pressed by the government on behalf of the concerned party, but is detrimental to the private parties in the sense that their claims are ultimately subject to the willingness of the public body to advance their complaints. In the next stage of the analysis I will examine the question of whether a broader scope of input for private interests is advisable and, if so, to what extent.

c) Politization of the process:

Whenever the Parties have failed in resolving the matter in an amicable manner and it is sent to panel review, the dispute has already gained a level of political involvement which might not be advisable to a prompt and fair system of resolving the question at issue.<sup>31</sup>

---

<sup>31</sup>. "As mentioned previously, one of the main problems encountered so far under the Chapter 18 binational panels is that the countries resort to this process when disputes have reached a political impasse." See Bello, Holmer & Kelly, D. "Midterm Report on Binational Dispute Settlement Under the United States-Canada Free-Trade Agreement." 25 *The International Lawyer* (Summer 1991): 489-517 at 515.

This problem might be ameliorated, in my opinion, by establishing a last resort to an independent mechanism to settle disputes in a definitive fashion. When all the alternatives available fail to solve a dispute in a negotiated manner, there must be the possibility for the governments to refer the dispute to a fair, impartial and independent mechanism capable of providing a definitive ruling over the issue.

CHAPTER III  
PERSPECTIVES ON AND PROSPECTS FOR THE  
IMPROVEMENT OF CHAPTER 18 PROVISIONS

In this final chapter, I will focus on the different alternatives needed for the development of a better set of institutional provisions and dispute settlement procedures under the C-U.S. FTA. This issue will be addressed taking into account the challenges that the current process of establishing a North American Free Trade Agreement raises in a broader context.

I will use a scheme similar to the one employed when analysing the general structure of Chapter 18 to discuss this topic.

1.- RECOURSE TO GATT PROCEDURES

The alternative recourse to the GATT dispute resolution mechanism, to the regimes of the Agreements negotiated thereunder, and even to the dispute mechanisms established at the outcome of the Uruguay round, should be maintained. Certain provisions of the GATT regime are unique and, thus, for a particular issue, a complaining party may find it more convenient to bring the dispute before the multilateral setting and to invoke its special provisions. Bearing that in mind, the alternative resort to the GATT procedures must be kept as provided for in the C-U.S. FTA, that is to say, the mechanism should be triggered by the complaining Party only, so is would be at its sole discretion that one regime is chosen at the exclusion of the other.

Once either mechanism is chosen by the complaining party, no resort to the other option must be available as the current bilateral treaty provides for.

## 2.- DISPUTE AVOIDANCE AND MANAGEMENT

### 2.1.- GENERAL REMARKS

A trilateral framework is more complicated because, among other reasons, of the Parties' lack of experience in conducting permanent channels of communication; the variety of languages and cultures of the three countries; and the dissimilarities amongst their administrative levels and institutions.

Cooperation and coordination at the administrative level, the constitution of regular channels of consultation, and early notification of proposed measures on an almost daily basis have proved to be excellent means of keeping disputes from arising in the bilateral scenario and, therefore, these techniques must also be enhanced in the trilateral arena. Prior talks with the appropriate officials of the other government have frequently led, not only to a mutual recognition of each Party's concerns, but also to adjustments and accommodations based on an honest consideration of such recognition, which, in the long-run, prevent disputes.

Under the new Agreement, the contracting Parties must also attempt, to the greatest extent possible, to identify and resolve disputes at their primary stage. Taking into consideration the less communication experience among the three countries, the issue of management of the potential disputes must deserve full attention.

#### 2.2.- NOTIFICATION

Notification prior to implementation of any measure of general coverage must be kept as the golden rule in the future management of relationships at the North American context. The positive experience in the management of the early warning mechanism in the bilateral treaty is an indicator that such technique is likely to be most effective at the trilateral level.

Except for certain circumstances, the Parties should be given enough and reasonable time to make comments and discuss the measures at issue. For this purpose the Parties must, to the extent practicable, allow enough time before entry into force of the proposed legislation or measures once such issues have been notified.

Article 1803 of the C-U.S. FTA reads "If prior notice is not possible, the Party implementing the measure shall provide written notice to the other Party as soon as possible after implementation." Even in those cases in which a Party implements a measure under emergency circumstances, a procedure to discuss it as soon as possible after implementation must also be kept.

### 2.3.- DIRECT CONSULTATIONS

The trilateral framework will require a set of consultation procedures similar to that of Chapter 18. However, the involvement of three Parties poses special considerations to be addressed: A more complex framework demands that the new Agreement provide more extensively for consultative mechanism at the administrative level.

The Commission, that is to say the Parties themselves, could obviously constitute whatever groups it considers necessary for the proper functioning of the Agreement. Regarding this power and with respect to the process of dispute resolution, the constitution of a body charged with powers with regard to coordination, mediation or fact-finding functions could be useful.

The report of the Trilateral Joint Working Group<sup>1</sup> suggested the possibility that the three partners constitute a modest committee in order to assist in the process of identifying and promptly attempting to solve disputes. Regarding this point the Group says:

"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."<sup>2</sup>

This body would co-ordinate on-going consultations and monitor, in behalf of the governments, the administration of the Agreement.

It is my opinion that the three governments are not likely to give up their independence and autonomy in the

---

<sup>1</sup>. See Report of the Joint Working Group of the American Bar Association, the Canadian Bar Association and La Barra Mexicana. *Dispute Settlement under a North American Free Trade Agreement*. (January 1992) at 5.

<sup>2</sup>. Ibid.

management of these issues in the short run. However, if the Agreement is extended in the future to include other members, a multilateral framework will certainly require the constitution of a coordinating body with some kind of independent status.

#### 2.5.- CONSULTATIONS AND THE THIRD PARTY

If a consultation is held between two countries, the content of the request must be notified to the other country, since this third Party is likely to be interested in the subject as a matter of principle. The Agreement must contain a provision by which requires notification to the third Party of any bilateral consultation proceedings.

### **3.- A NORTH-AMERICAN TRADE COMMISSION**

#### 3.1.- INTRODUCTION

One of the comments on the current system points out that the institutional arrangements established in Chapter 18 might not be sufficient to successfully supervise the operation of the Agreement or to provide the administrative framework needed to address disputes in an adequate fashion as the

growing relationship brings about a more complicated scenario<sup>3</sup>. In fact, the Agreement itself contains the possibility for the Parties to create more permanent bodies and working groups to assist in certain matters of the Treaty, but so far it seems that the two governments have not made full use of that power. However, it is expected that in the long run, when economies become more integrated, new institutional provisions will have to be put into place.<sup>4</sup> In this regard, the possibility of adding a new partner to the already growing Canada-United States relation raises some concerns about strengthening the Agreement's current institutional structure.

The C-U.S. FTA model would require significant and substantive improvement to respond to the new difficulties of a bigger and more complicated Zone. The intricacies of the new

---

<sup>3</sup>. "Although the institutional mechanism are not perfect, hopefully they will evolve into a more permanent, authoritative binational institution in the future... The institutional provisions of the FTA are probably the most that the government of the United States and Canada could have agreed to at this point of time." See *Supra*, note 41 Chapter I at 50.

<sup>4</sup>. See i.e. Hart, M. *Dispute Settlement and the C-U.S. FTA*. Research paper. Centre for Trade Policy and Law. Ottawa, Ontario. (August 21, 1990).

trilateral relations and, the existence of sensitive areas in the three economies calls for a more elaborate and detailed institutional structure. Moreover, a greater degree of economic integration created as a consequence of the Agreement could only be successfully managed if more sophisticated institutions are set out to respond to the commitments and complexities of the North American Free Trade Zone.

### 3.2.- A NAFTA DIMENSION

A body along the lines of the current Commission of the Canada-United States Treaty is likely to be developed in the broader North American context. However, a trilateral framework will certainly constitute a different scenario for which the scope of functions and responsibilities will necessarily vary.<sup>5</sup>

---

<sup>5</sup>. "The Canada-United States Trade Commission (CUSTC), a Ministerial-level organization, then meets to discuss the panel report and negotiate its implementation. Because these are negotiations and hence Canada is susceptible to the U.S. application of its greater power, Mexican accession to this chapter and its participation in these panels may be beneficial by adding an additional voice to the proceedings. This is especially significant since Canada and Mexico are likely allies on many important potential disputes with the United States. " Martin, K. "The North American Free Trade Agreement Negotiations and the Canada-United States Free Trade Agreement: Revisiting Unfinished Business." Paper presented at the Conference *North American Free Trade: Labor, Industry and*

A North American Trade Commission is likely to continue functioning as a political body rather than as an independent "third party" institution. The Parties are not yet prepared to create an independent body with a much greater degree of authority.

The Commission should retain its character as a common forum for consultation which has proved to be useful in the bilateral relationship, and which seems to be equally functional at the trilateral level. As provided for in the current Chapter 18, if the Parties can not achieve a mutually amicable resolution of an issue through direct consultations within a reasonable time, there must be a resort to the Commission procedures by permitting either Party to request in writing a meeting of the Commission. Such requests must state the matter complained of and the relevant provisions of the Agreement.<sup>6</sup> The third Party must be immediately notified under such circumstances.

Since its first meeting, the Commission under the C-U.S.

---

*Government Policy Perspectives.* Ottawa, Ontario (November, 1991) at 8.

<sup>6</sup>. As in article 1805 (1) C-U.S. FTA.

FTA has met twice a year. As a lesson from that experience, more frequent meetings of the Commission may well be established for the Trilateral Area. In fact, a regime requiring more frequent meetings would be advisable when taking into account the need for a permanent review of ongoing matters. This must be coupled with a regular and equitable system to rotate the site of each of the meetings of the Commission.

The complexity of a trade relationship among the three members, once again, would bring into question whether the Commission must have permanent or quasi-permanent board of representatives of the three countries in order to address ongoing matters in a more efficient and expeditious manner.

Will the rule of consensus be maintained for a Commission in a North American Area? I would foresee that the countries will be afraid of giving too much power to the Commission by establishing a different decision rule. Nonetheless, decisions regarding some minor administrative matters could be taken by using a majority rule.

The presence of Mexico, a Spanish-language country, will

add a third language to the proceedings. At the end of the day, this is simply a minor issue which would be easily solved by establishing a translation system for certain procedures or by mainly conducting some matters in a language agreed upon and, then, have the relevant matters promptly translated into the others.

The Commission proceedings have been managed in a confidential fashion. Basically, there is no access to the Commission acts, and no public record of the Commission's meetings is available. In order to guarantee more openness in the process and to avoid undue political pressures at the Commission level, consideration should be given to a system of regular reporting by the Commission. The Commission would make public reports on the status of each dispute before it; the work plan the Commission has adopted to resolve the dispute; and the reasons for any delay. However, this is a particularly sensitive issue, since such a move could eventually create unnecessary and inconvenient public posturing by politicians.

Finally, it has been suggested that, after a given period of consultations before the Commission, the matter should be immediately referred to the next resort available in the

dispute resolution process.<sup>7</sup> With regard to this alternative, it should be noted that it is a movement towards a stronger and more binding model and would challenge the governments to judicialize trade disputes that cannot be resolved by negotiations. On the other hand, such a provision could also have the effect of limiting the number of disputes that a Party is willing to put over to the Commission for resolution. If a Party does not want to exhaust the negotiation phase, it would not resort to the Commission, since the period for negotiation and consultation would be significantly shorter and, furthermore, if the Parties failed to reach an amicable solution of the controversy, the issue would ultimately be sent to the panel.

#### 4.- KEY ISSUES ON DISPUTE SETTLEMENT TECHNIQUES

##### 4.1- BINDING DECISIONS

Under this subtitle, I will briefly address the matter of whether a binding model is advisable for the trilateral framework and if so, to what extent. As well, which matters would come under the jurisdiction of such a binding mechanism.

---

<sup>7</sup>. See Senate Foreign Affairs Committee Sixth Report of the Committee. *Monitoring the Implementation of the Canada-United States Free Trade Agreement* at 17.

In general terms, I am of the opinion that a last resort to binding arbitration is advisable, both at the bilateral and at the trilateral level<sup>8</sup>.

Among sovereign States, the scope of "binding decision" is an issue which should be considered within a "sui generis" dimension. Certainly, it is not useful to test the "international binding effect" against the standard of enforcement under a domestic legal system. What a scheme of binding arbitration, at the international level, can achieve, is simply a certain degree of foreseeability that a given report or judicial decision is likely to be implemented. The only real mechanism to enhance compliance is the retaliation, contemplated not only in the C-U.S. FTA<sup>9</sup> but also in the GATT.<sup>10</sup>

---

<sup>8</sup>. This issue is obviously linked with the next section of the thesis regarding the panel and Tribunal models. At this point I will simply highlight the importance of having a resort to binding decisions, be it through Arbitration Panels as in the C-U.S. FTA or by resorting to a Trilateral Tribunal.

<sup>9</sup>. See C-U.S. FTA Article 1806 (3) and 1807 (9).

<sup>10</sup>. See GATT Article XXIII.

The Trilateral Joint Working Group<sup>11</sup> considered the mechanism for the implementation of decisions under Chapter 18 of the C-U.S. FTA. While the group also points out that the scheme of retaliation created in the Bilateral Treaty may be the only one available at the international level to underpin decisions, it is advisable that a general obligation to implement decisions be undertaken by the Parties. This would have the immediate effect of creating a "persuasive" power over the concerned Party with respect to its compliance with the ruling. This obligation would be backed up by a system of retaliation whenever a decision is not properly implemented within a given period of time.

It is important that, to the practicable extent, the amount of retaliation permitted against the non-complying party be limited to the degree of default on the implementation of the decision and by taking into account the importance of the measure in question. The determination of the level and degree of retaliation, could be established by taking the panel report or the decision of the Tribunal as a guiding framework. The creation of appropriate procedures to

---

<sup>11</sup>. See Supra, note 1 Chapter III.

determine the level of the nullification or impairment produced by the failure in implementing the decision and to decide whether that level was exceeded by the winning Party, would also be advisable.<sup>12</sup>

#### 4.3.- PRIVATE PARTIES ISSUES

It is clear that the rules of Chapter 18 of the C-U.S. FTA do not provide for a system initiated at the request of private parties, rather, only the Parties to the Agreement themselves have access to advisory and arbitration panels.<sup>13</sup> Further, there is no opportunity for private parties to input the process before the arbitration or advisory panels once its procedures have already been commenced. This is, however, consistent with general principles of international law and GATT practice.

---

<sup>12</sup>. See Supra, note 1 Chapter III. In fact, such mechanism was considered in the proposed draft document concerning dispute settlement regime for the multilateral negotiations of the GATT. That proposal establishes that, whenever a concerned Party objects to the level of suspension authorized by the Council, such Party is entitled to refer the matter to arbitration. See Dunkel draft document. Section S (20.3).

<sup>13</sup>. Under the provisions of Chapter 19 of the Treaty, private parties do have such right.

#### 4.3.1.- Why permit private party's access?

Some reasons could be advanced to justify that private parties be entitled to participate to some extent in the dispute resolution processes<sup>14</sup>. First, private commercial interests are, in fact, involved in most international trade disputes. In this context, it follows that whenever such matters are decided between the governments the decision primarily affects private parties. It seems to be unfair that those subject to the results of the dispute settlement procedure have no role in the process whenever the outcome substantially affects them.

Private parties could be given the right to participate before panels in certain phases and within certain limitations. In the case of a Trilateral Tribunal, whenever a private party is substantially affected by an issue of interpretation or application of the Agreement, there could also be a mechanism allowing that party to become involved in the case.

---

<sup>14</sup> See Supra, note 24 Chapter II.

4.3.2.- The extent of private party participation:

First, as I have suggested, private party participation could be permitted in different stages of the dispute resolution process. In consultations; before the advisory and arbitration panels; before the proposed Tribunal; or, in referrals the extent of their right to participate in the proceedings must be addressed in a different manner.

The Trilateral Joint Working Group is of the view that private parties must be entitled to participate, but the right to initiate procedures must be kept to the Parties to the Agreement solely; as in the current Chapter 18 provisions.<sup>15</sup>

Once the proceeding has commenced, a party holding a substantial interest should be allowed to at least submit written arguments. This private interest must be substantial, actual, identifiable and direct in relation to the subject-matter.<sup>16</sup>

---

<sup>15</sup>. The 1992 report of the Trilateral Joint Working Group, suggests that the Parties to the Agreement remain in form the only persons who can initiate proceedings before the Tribunal. See Supra, note 1 Chapter III at 12.

<sup>16</sup>. Ibid.

4.3.3.- Domestic framework:

If a system permitting private party participation is adopted at the trilateral level and the Parties to the Agreement remain the only entities entitled to initiate procedures as suggested, it must be considered an appropriate domestic regime by which private parties be empowered to have their governments raise certain issues before the panels or the Tribunal, whenever local remedies are insufficient, exhausted or unavailable. This system must also include a general obligation on the governments to give due and prompt attention to the matter<sup>17</sup>.

---

<sup>17</sup>. In this regard, Section 301 of the United States Trade Act of 1974 can provide some guidance. Section 301 authorizes the U. S. Trade representative to take "all appropriate and feasible action" to enforce U.S. rights under trade agreements such as the FTA, on his own initiative or based on a petition from a private party. An interested person may file a petition with the United States Trade Representative requesting section 301 action in any case in which the person considers that the concerned Party has failed to honor a provision of the Agreement or has caused the nullification or impairment of the benefits that the United States could reasonably have anticipated under the Agreement. Section 303 (a) of the Trade Act requires that the matter be submitted to the formal dispute resolution procedures of the Agreement if consultations have failed to produce a mutually acceptable solution.

## 5.- DISPUTE RESOLUTION BODIES

One of the key issues involved in a dispute settlement regime within a trilateral model is the determination of which institutional system best fits the demanding North American framework. It seems that the two main options available for the zone are the current ad-hoc panels and a permanent Tribunal. In this section I will attempt to study those two models.

### 5.1.- PANELS

A trilateral Agreement may adopt a dispute settlement structure similar to that provided for in Chapter 18 of the C-U.S FTA. In fact, some scholars have foreseen that a NAFTA would apply a mechanism modeled along the lines of the current Chapter 18. Assuming that such a model is chosen for the trilateral Agreement, I will address in this section the difficulties posed by the accession of a third member.

#### 5.1.1.- Scope of the arbitration panels:

The scope of binding panels in the C-U.S. FTA<sup>18</sup> seems to be a very narrow departure point. Even within the bilateral

---

<sup>18</sup>. See C-U.S. FTA Article 1806.

framework it seems that the substantive rules are detailed enough to permit a wider scope of issues to be subject to binding arbitration.

For the trilateral arena, certain issues could also be added to the coverage of compulsory binding arbitration. Rules of origin, technical standards, and regulations on certain agricultural matters are issues for which binding arbitration could be advisable depending on the complexity and degree of detail of the substantive rules agreed upon in the new Treaty.<sup>19</sup>

5.1.2.- Constitution of the panels:

Trilateralization will clearly raise the question of the composition of the panels.

First of all, it is feasible that not all the panels will be constituted by members appointed by the three countries. The rationale for this is to be found in the fact that, if a dispute is initially raised between two of the Parties and the third country does not express a substantial interest on the

---

<sup>19</sup>. For an excellent compendium and analysis of issues likely to be appropriate for Adjudication see *Supra*, note 24 Chapter II at 15.

outcome, its involvement on the panel process will be, in my opinion, not only unnecessary but inconvenient and inadvisable.

Setting aside the issue of private access to the panel process, and assuming that no resort to the mechanism of another agreement is chosen, I can imagine some different situations within the scope of the trilateral treaty;

a) a dispute between two of the Parties, with no relevant meaning for the third one.

b) a dispute mainly between two of the members but with the third member wishing to participate in the settlement process.

c) a dispute among the three members of the Treaty.

d) a complaint by two members of the Treaty against the third one.

I will try to analyze the first two proposed hypothesis and then the last two.

For the first case, I would imagine that a model along the lines of the current system of panels would be advisable. In other words if a dispute was raised between a complaining Party against another one, the panel could be composed of five members; two for each country and a chairman elected by consensus. When the four appointed members do not agree on the chair of the panel, the fifth member would be elected by lot from the roster.

I would say that within this framework, it does not seem advisable that a national of a third country be appointed to chair the panel, since in a decision divided along national lines, the chair would ultimately be the final judge over the dispute.

If the identity of the minority is kept secret in a divided ruling, there is no way to determine whether a division along national lines took place at the level of the panel proceedings or not. However, in managing sensitive international issues, one must try to avoid suspicions to the greatest extent possible, and that is why the involvement of the third Party under these conditions would be inadvisable.

In the second case, if the third party expresses a substantial interest in the subject of the dispute, but not as a complaining Party, it seems to me that it should be given the opportunity to participate in the process by presenting arguments in writing and to have oral access to the panel proceedings.

5.1.3.-           Trilateral panels:

For those third category of cases in which the three Parties are involved the panel can be formed according to different models.

The first one would be by permitting each Party to appoint an equal number of members. If each Party appoints one member, a panel of just three members does not seem to be advisable. A system where two members are appointed by each Party raises a deadlock vote. It would be better, then, to constitute panels of nine members if an equal number of panelists is to be nominated by each Party.

Another option could be a model in which each Party would appoint two members, and the other panelist is selected by

consensus. The chair of the panel could be selected by lot. In this scheme, however, a seven-member panel could also deadlock requiring the chair to cast the deciding vote.

A third possibility is to be found in a model similar to Chapter 18 procedures. A five-member panel, with one panelist appointed by each Party, and the other two selected by lot from the roster or appointed by lot by the Commission.

Finally in the event of the failure of the Commission or the appointed members in selecting a chairman, the system of the appointment by lot from a trinational roster as provided for in the C-U.S. FTA could be a last resort.

The fourth type of dispute involves a complaint of two of the Parties against a third country measure, the system of panels can be cumbersome. I can foresee that a split decision along national lines could substantially damage the Parties' credibility and confidence in the process due to an appearance of an unfair decision of the dispute.<sup>20</sup>

---

<sup>20</sup>. All of these options, as exposed, contain problematic issues. It suggests that an independent and permanent Court may be more advisable for the area.

5.1.4.- Roster of Panelists:

I think that the roster of potential panelists must be exclusively formed by nationals of the three countries. However, I see no inconvenience in permitting a citizen of a foreign country to be one of the members of the panel if in a particular case such appointment is desirable.

The current treaty is quite vague in establishing minimal requirements and impediments for the members of the roster, maybe as a manner of providing enough flexibility regarding the range of individuals qualified to serve as panel members. In developing a roster of potential panelists for some highly specialized areas requiring special expertise, attention must be given to have the qualifications required for its members carefully spelled out. The complexity of certain issues may well require that members of the roster be experts in international trade law as a minimum condition. Further expertise may be required for certain areas as the current C-U.S. FTA provides for.

5.1.5.- Appointment of panelists:

Depending on the model adopted, the question of how to nominate and select the members of the panel must also be

addressed. The selection of some of the members must be done by the concerned Parties after consultations to preserve veto powers to the Parties whenever they have any reasonable concern about the candidate's objectivity or impartiality.

5.1.6.- Panel rules of procedure:

The rules of procedure could be added to the text of the Agreement as an Annex modeled after the rules in effect for the current panels. However, such a model must be modified to provide a effective framework at the trilateral level, and improved by the experience gained during the operation of the current Agreement.

If not all the panels are to be composed by members appointed by the three Parties, as I have suggested, a third Party to a dispute must be entitled to attend some stages of the process. A set of rules governing the third Party access to the process must be developed concerning which stages could that third party attend, the right to be notified of the documents and evidence submitted by the Parties and even to make written submissions and/or oral submissions.

5.1.7.- Panel reports:

As in the current regime, the final report must be issued after receiving the comments of the Parties at their own initiative or at the panel's request. This would thereby allow the members of the panel to reconsider their first report and to make any additional analysis of the matter in dispute if such were the case. In these conditions the final report is more likely to be useful in working out a resolution of the dispute.

The proceedings of the panel have been confidential under the provisions of the current Free Trade Agreement. In a trilateral framework, consideration should be given to the desirability of giving a greater degree of openness to certain stages of the process, as to further guarantee transparency and to enhance confidence in the proceedings.

5.1.8.- Adoption of the panel reports:

In the bilateral framework, the adoption of the panel report is a task committed to the Commission, that is to say, to the disputing Parties. The role of the Commission at this stage is not clear in the new scenario. If a Commission is

composed of members of the three countries and if a dispute concerning only two of them is to be settled, should the Commission, as a whole, decide on the adoption of the panel report?. Since in the trilateral arena, a dispute may well be held between two Parties, it seems that the adoption of the report could ultimately be left not to the Commission but to the concerned Parties, except, whenever issues concerning treaty interpretation are involved.

One could argue that concerning matters with respect to the interpretation of the Treaty, all Parties will be involved as a matter of principle, so they, as a whole, must participate in the resolution of the dispute. In a model where Parties are to resolve disputes by negotiation, there will always be the inherent possibility that one Party will gang up on another, bringing political pressure on the negotiations to obtain a given decision.

Once, again, the advisability of having an adjudicative mechanism to solve disputes in a definitive manner, is reinforced by these considerations.

## 5.2.- TRIPARTITE TRIBUNAL

### 5.2.1.- Background

The settlement of trade disputes in a NAFTA by bringing them before a North American Trade Tribunal is one of the key elements that deserves most consideration by the three governments when implementing a comprehensive and predictable framework in a three way pact. In fact, such a possibility has been commented upon a number of times, most particularly in the context of the Canada-United States relations. The first work on specific alternatives for an effective dispute resolution mechanism in the North American Area was provided in a 1979 report of a joint Group of the American Bar Association and the Canadian Bar Association. At that time, the two bar associations evaluated a variety of issues concerning trade disputes and disputes in the field of energy resources, antitrust, extraterritorial jurisdiction, pollution and boundary waters.

As a result of such study, in 1979 both Associations proposed two treaties related to dispute resolution. One provided general procedures for a third-party settlement of

disputes; while the other concerned equal access to and equality of remedies available in the courts of the countries concerning transfrontier pollution cases.

The first proposed treaty contained a procedure by which any question of interpretation, application or operation of any treaty in force between the two countries was to be brought before the compulsory jurisdiction of an Arbitral Tribunal or the International Court of Justice.<sup>21</sup> The treaty also provided that any other dispute between the States with respect to a question or principle of international law, could be submitted to third-party settlement procedures by special agreement between the Parties.<sup>22</sup>

Interestingly, the draft treaty provided for the application of the principles and rules of international law as well as "other relevant principles of substantive law in force in either of the two countries, particularly those

---

<sup>21</sup>. See Article 1 of the Draft Treaty on a third-party settlement of disputes. American Bar Association and Canadian Bar Association. *Settlement of International Disputes between Canada and the U.S.A.* (September 20, 1979).

<sup>22</sup>. Ibid. Article 2 paragraph 1.

manifesting their common legal traditions".<sup>23</sup> Additionally, the Parties could agree on specific rules to be applied by the Tribunal.<sup>24</sup> Unfortunately the recommendations advanced by the joint Group at that time did not receive enough attention by either the Canadian or the United States officials and were not adopted by the governments.

In 1985, the Government of Canada and the United States began negotiations towards a comprehensive bilateral treaty. The two Bar Associations then established a new joint Group to report on the major legal issues involved in the prevention, management and settlement of the disputes. As a result, on April 1, 1987 a draft resolution was issued by the American and Canadian Bar Associations in which they recommend the adoption of "appropriate dispute resolution mechanism in relation to trade disputes involving their respective countries." In particular, the group called for the establishment of three main institutions;

a) a Joint Canada-United States Free Trade Commission designed to carry managerial functions with regard to trade disputes

---

<sup>23</sup>. Ibid. Article 8 Paragraph 8. (emphasis added)

<sup>24</sup>. Ibid. Article 8 paragraph 3.

between them. The Commission would be empowered with authority to organize special studies and consultations and to establish and choose appropriate dispute resolution mechanisms;

b) a joint Canada-United States Free Trade Tribunal to interpret the Free Trade Agreement and to decide legal disputes between the members relating to their rights and obligations under the Agreement; and

c) an appropriate set of procedures enabling reference to the above-mentioned Tribunal from domestic courts and administrative bodies of either country of questions involving the interpretation of the Free Trade Agreement, at the instance of affected parties, including private parties.<sup>25</sup> This jurisdiction should extend not only to disputes between the two governments but also to disputes relating to the interpretation of the Agreement arising in domestic tribunals or agencies.

The advantages of having a permanent Tribunal, rather than ad-hoc proceedings involving laborious appointment

---

<sup>25</sup>. See American Bar Association & Canadian Bar Association. *Joint Group on the Settlement of International Disputes*. (April 1st. 1987).

processes time after time, was alleged as a reason to opt for a body in charge of the dispute process in a continuing basis. This proposed Tribunal was not subject to a rigid composition. In fact, the report called for the establishment of a body large enough to allow constitution of panels of different size appropriate to the technical matters of the issues in dispute.

On November 10, 1987 a second report on the C-U.S. FTA was issued containing comments on the Agreement reached on October 4, 1987.<sup>26</sup> The group focused on the provisions for the settlement of disputes relating to the interpretation and application of the Agreement as they were agreed to in broad terms by the chief negotiators.

The purpose of the report was to provide some assistance in the development and implementation of the "legal work" to follow the principles agreed in that document. At this stage, the Joint Group analyzed the general scope of the proposed provisions on dispute settlement, the Commission's functions and powers, and the binding arbitration procedures agreed for measures taken with regard to safeguards matters. The Group

---

<sup>26</sup>. Document released in October 4, 1987 know as "The Elements of the Agreement."

proposed that whenever a question of interpretation or application of the Agreement arises in a case brought before a domestic court or tribunal may be referred to an international institution.

On March 12, 1990<sup>27</sup> the Canadian Bar Association suggested the creation of a Joint Working Group including Mexican lawyers, to consider matters arising in the new scope a proposed North American treaty.

In January, 1992 a report was issued by the Trilateral Joint Working Group of the American Bar Association, the Canadian Bar Association and the Barra Mexicana containing the recommendations of the three countries' lawyers on the dispute settlement aspect of the treaty.

The centrepiece of the recommendations of the group is that a permanent full time body or one capable of being convened on short notice, be established to deal with disputes between the Parties which involve the interpretation and application of the new Agreement. A Trade Tribunal would be

---

<sup>27</sup>. See Canadian Bar Association. *Memorandum to members of the Canadian Bar Association group on Dispute Settlement*. (March 12, 1990).

the fundamental component in the whole dispute resolution process.<sup>28</sup>

5.2.2.- Recommendations of the Joint Group<sup>29</sup>:

\* A strong and independent body established under the Agreement in a permanent fashion, is essential to the maximum workability and smooth functioning of the substantive provisions agreed upon by the Parties. The whole dispute settlement mechanism would be based on a last resort to this final ruling body.

\* Members of the Tribunal:

It was suggested that the Tribunal could commence with a minimum number of members to which, as workload may require, others may be added. At the beginning, the Group suggested that a body composed of only three members may suffice, and that provision should be made to alternate members so that the Tribunal can function effectively and without delay.

\* The members of the Tribunal would be citizens of the

---

<sup>28</sup> See Supra, note 1 Chapter III.

<sup>29</sup> Ibid.

three countries. Members other than nationals from the three Parties are not likely to be engaged in the process since the new Agreement will concern issues familiar to scholars from Canada, Mexico and the United States. However, the Tribunal should be empowered to appoint, at its own motion or at the Parties' request, experts in the role of assessors to provide assistance in technical and specialized matters.

\* The criteria to select the members of the Tribunal, the body of rules concerning conflict of interest and impediments, the salaries, the location of the institution, the language in which proceedings are to be conducted, the rules of procedures are issues that are not likely to be cumbersome. The fundamental point is to establish a permanent institution capable of being convened without delay to deal with disputes whenever they arise. It does not seem necessary to have full-time members at least at the initial stages of the functioning of the body. Afterward, whenever the workload increases, full-time membership may be required. Further, a system to guarantee real and formal independency of the members will preserve impartiality and fairness within the process.

\* Initiation of procedures:

Any Party must be empowered to initiate procedures without prior consensus among the Parties involved. This depends, however, on the system provided for in dealing with the other treaties binding and in effect among the Parties. I will look at this particular issue in the next subtitle of the research.

\* If a Tribunal is to be established, provision must be set forth permitting third party participation in the disputes held between the two other Parties. Accordingly, there should be a formal arrangement for notification of the third Party and the extent of its participation in the dispute process.

\* Scope of Jurisdiction:

A North American Trade Tribunal should have authority to settle disputes involving the interpretation and application of the new NAFTA. If any competing views are found as to the Parties' rights or obligations under the Agreement, and the Parties cannot reach a resolution among themselves, any of them should have the right to put the issue to the Tribunal for a ruling on the matter. Since the treaty constitutes

international law, its interpretation could, in principle, also be given to a supranational body. The Tribunal must also be empowered to adjudicate issues with respect to the implementing legislation and the consistency of the domestic laws with the Agreement.<sup>30</sup>

Regarding the issue of the interpretation of the Agreement for matters heard at the domestic courts or tribunals, there must be a resort to the Tribunal's opinion. This is similar to the current article 1808 of the C-U.S. FTA.

A precise set of rules must be set forth in the Tribunal rules. At this point, the Joint Group states:

"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

---

<sup>30</sup>. It has to be acknowledged, however, that such broad scope may raise some constitutional issues in the three countries. The same concern applies with regard to the execution of the decisions of the supranational body in the domestic setting.

framework that would be most useful."<sup>31</sup>

5.2.3.- A Trade Tribunal for the North American context.

Within the framework previously described, and taking into account the comments advanced a number of times through this document, I strongly believe that it is advisable to constitute a Trade Tribunal for the North American Trade Zone in charge of resolving disputes amongst the Parties. The complexity of the Trilateral Area calls for the establishment of a more elaborated system to settle disputes in a definitive manner than the one now provided for in the C-U.S. FTA.

The bilateral Agreement is a very comprehensive document. If one looks at the degree of detail and substantiveness of the provisions of the bilateral treaty, the first element needed to establish a Supranational Tribunal is given, namely, a clear and detailed set of substantive rules. There is no reason to think that the North American treaty is going to be narrower in scope and, rather, one would be tempted to foresee that the new Agreement is to supersede the current C-U.S. FTA in the short or in the long run. In this scenario, the establishment of an independent body to determine whether one

---

<sup>31</sup> Ibid.

of the Parties has conducted itself according to the pre-established rules is recommendable.

If the rules for the new Agreement are spelled out in a precise and detailed manner, there is no reason to confine the Parties' options in settling disputes to never-ending political negotiations and advisory mechanisms when the scenario for a Judge to rule in law is so properly provided for in the Agreement itself.

In my opinion, a Trade Tribunal is not only possible in the trilateral framework, but, highly advisable. A system of panels would be highly cumbersome because of the number of issues that I have pointed out at the appropriate section of my research. Problems with regard to the appearance of fairness and impartiality of the members of ad-hoc panels are not likely to be faced when opting for an adjudicative mechanism.

The benefits of having a permanent body acting as a pivotal point in the dispute resolution process have also been alluded to a number of times in this thesis. The appearance of fairness in the process provides comfort to all concerned

Parties and will minimize political heat in the management of highly controversial issues. Moreover, in time, a body of reasoned decisions will undoubtedly become increasingly useful in the resolution of future disputes.

If the Agreement is to be opened to the accession of other members, as it has been anticipated a number of times, the advisability of having a Tribunal is reinforced. If a massive trading bloc is created as a result of the inclusion of other Central and South American countries, the complexity of the relationship would require a uniform and consistent regime to solve intergovernmental disputes. From a developing country perspective, there is no doubt that a scheme involving third-party settlement of disputes procedures is much more comfortable.

This approach is to conclude that nothing must prevent parties from having a supranational fair, permanent, impartial Tribunal to solve disputes in a definitive manner. A body along the lines and principles set out in this section would, in my opinion, best serve to resolve the trade disputes in the new atmosphere of the Trilateral Zone.

6.- DISPUTE SETTLEMENT MECHANISMS OF BOTH TREATIES

In this section I will briefly address the issue of how to attune the dispute settlement regime adopted at the trilateral level with the current system in force between Canada and the United States. In any event, all these options are strongly related to the degree of comprehensiveness of the new treaty provisions. Taking that into account, for the harmonization of the new institutions with the current system, different options are available:

1.- a new Agreement could completely supersede the institutions of the C-U.S. FTA. If a Trilateral Trade Tribunal is established and the new institutions and procedures are comprehensive enough to facilitate such change, this first approach could be advisable;

2.- if a Trilateral Tribunal designed to resolve disputes among the three countries is set forth, the regime could be instituted in such manner that the Tribunal procedure be used to the exclusion of any other for issues exclusively related

to the interpretation of the new Agreement. To Canada-United States disputes, the current system could continue to apply;

3.- if the system of panels, is kept for the Trilateral Arena, any dispute arising both under the new Agreement and under the C-U.S. FTA could be settled in either forum chosen at the discretion of the complaining Party and that once the procedure is initiated, it must be used to the exclusion of any other. This resembles the current provision permitting recourse to GATT procedures.

If this option is chosen, it might be coupled with a provision to prevent Mexican rights granted under the North American Free Trade Agreement from being transgressed. Again, depending on the areas covered by the new Agreement, Mexico could eventually be granted certain prerogatives which must be preserved in correlative matters of dispute between Canada and the United States when applicable. Obviously this is pure speculation and, again, it depends on how comprehensive the ratified treaty turns to be. However, as a general rule, there should be a provision preventing the result that, resort to the C-U.S. FTA, impairs Mexican benefits under the new Agreement.

Within this scheme, as another alternative, the selection of the forum could be subject to agreement of both parties to a dispute. In this case the complaining Party would require the consent of the Party complaining against to resort to the C-U.S. FTA mechanism.

Finally, that option could also be further modified by requiring that recourse to C-U.S. FTA procedures be subject to consultation or agreement of the three Parties. In other words, the alternative recourse to the bilateral mechanism would be subject to the Mexican acceptance of being excluded from it.

#### **7.- THE SECRETARIAT**

A Secretariat to facilitate the operation of the Commission and to provide efficient and substantive support to the dispute settlement body, will have to be established by the Parties. In the current treaty, the Secretariat appears as an institution, mainly designed to assist the Chapter 19 panels and linked with the Chapter 18 panels as a decision of

the Commission<sup>32</sup>. The role of the Secretariat is focused on court registry functions. Any new institution to settle disputes, be it a trilateral panel or a supranational Tribunal, would require administrative support similar to the one provided for the C-U.S. FTA Secretariat.

At the beginning, and considering that there appears to be no major inconvenience in establishing a Mexican office of the Secretariat, it seems to me that the most advisable alternative is that the Parties use the current Secretaries of the C-U.S. FTA, to carry out the responsibility of providing administrative support.<sup>33</sup> As I said, that trilateral Secretariat would comprise national sections, unless the Parties agree in a location which geographically and politically could be seen as neutral and convenient for all

---

<sup>32</sup>. In fact, when negotiating the C-U.S. FTA, the creation of a more elaborate office seems to have been considered by the team in charge of the chapter, and apparently was intentionally rejected, in part, to avoid institutional continuity in the process. See remarks by Jean Anderson at *The Canada-United Free Trade Agreement: New directions in Dispute Settlement. American Society of International Law Proceedings Annual* (1989): 251-271 at 268.

<sup>33</sup>. This is the position of the Trilateral Joint Working Group in its report of January, 1992. See *Supra*, note 1 Chapter III at 5.

Parties. In fact, the experience of the binational Secretariat have been successful and I see no reason to object to the constitution of a trinational Secretariat, at least for the very first stages of the process.

#### **8.- FINAL REMARKS**

The previous approach was intended as to present a general overview of the North American Free Trade Agreement scenario in the matter of dispute resolution. As I tried to expose, there are a number of issues that seem to require a reassessment in order to better satisfy the different perspectives brought about by the trilateral framework. Some of the points presented in this research may appear in a ratified continental treaty. Others, however, imply challenges to the governments that they may refuse to undertake at this stage of the process of economic integration. Nonetheless, it is my opinion that in the near future if not now, the three governments are likely to revisit most of the questions briefly addressed in this document as the economic links grow and the international dimension become stronger and more complex.

The field of international trade law is one of the most dynamic in the general discipline of commercial law. In that dimension, the issue of dispute resolution is, no doubt, mainly a matter of lawyers' concern. It is my opinion that the international legal community must devote its best efforts in a commitment to enhance a better regime to manage international trade relations among countries.

Furthermore, I consider that the adjudicative alternative to solve international trade disputes, the formal right for individuals to become part in the process of resolution of commercial conflicts and the enhancement of a more rule-based regime to manage the intricate international trade scenario, are now and will continue to be the fundamental issues to look at when assessing the immediate improvements in managing international disputes.

Finally, from a developing country perspective, the issue of intergovernmental dispute resolution is even more important. If in the future other Latin American countries are to become a part of a truly continental treaty, I have no doubt that the considerations contained in this modest paper will be part of the atmosphere of their accession to the Zone.

## BIBLIOGRAPHY

American Bar Association & Canadian Bar Association.  
*Settlement of International Disputes between Canada and the U.S.A.* (September 20, 1979).

American Bar Association & Canadian Bar Association.  
*Report of the Joint Working Group on the Settlement of International Disputes.* (April 1st, 1987).

American Bar Association & Canadian Bar Association.  
*Preliminary information report on the Elements of the Canada-United States Free Trade Agreement.* (October 4, 1991).

American Bar Association & Canadian Bar Association  
*Joint Working Group on Dispute Settlement. Meeting with representatives of La Barra Mexicana.* (May 24-25, 1991).

American Bar Association. Section of International Law & Practice.

*Canadian Law Newsletter.* Periodical Publication.  
Washington D.C. (1989).

Anderson, Andrew & Rugman, A.

"A review of the Dispute Settlement Process under the Canada-United States Free Trade Agreement and the GATT." Presentation at the Conference *New Corporate Strategies for a North American Market: The Free Trade Agreement in practice.* Toronto, Ontario. (October 2-3, 1991).

Anderson, Andrew & Rugman, A.

"The Canada-United States Free Trade Agreement: A legal and Economic Analysis of the Dispute Settlement Mechanisms". 6 *Journal of International Arbitration*. (December, 1989): 65-81.

Anderson, M. & Fried, J. T.

"Dispute Settlement between Governments: The Canada - United States Free Trade Agreement in Operation." Paper presented at the Canada-United States Law Institute Conference: *The Law & Economics in Dispute Resolution in the Canada-United States Context*. (April 12-14, 1991).

Appuzo, A.M. & Kerr W.A.

"International Arbitration - The Dispute settlement Procedures chosen for the Canada - United States Free Trade Agreement." 5 *Journal of International Arbitration* (1988): 7-16.

Baker, Stewart.

"Resolving Disputes under the Canada-United States Free Trade Agreement. Comments on Chapter 18." in *Living with Free Trade Agreement: Canada, the Free Trade Agreement and the GATT*. Dearden, Richard (ed.) Centre for Trade Policy and Law. Halifax. (1989).

Beall, Ellen.

*Dispute Resolution*. Discussion paper and lecture at Dalhousie University. (November 12, 1991).

Beall, Ellen.

*Dispute Resolution in the GATT and Chapter 18 of the Free Trade Agreement.* Lecture Given at Dalhousie University. (November 13, 1991.)

Beall & Holbein, J.

*Dispute Resolution Under the Free Trade Agreement.* Outline. Seminar presentation in Minneapolis, (June 20, 1990).

Bello & Holmer, A. (eds.)

*Guide to the United States - Canada Free Trade Agreement.* Prentice Hall Law & Business. Englewood Cliffs, New Jersey. (1989).

Bello & Holmer, A.

"Dispute Resolution Under the United States-Canada Free Trade Agreement." In *New opportunities Under the United States-Canada Free Trade Agreement: Breaking the Trade Barrier.* Clifton: Prentice Hall Law & Business, (1989): 161-176.

Bello, Holmer & Kelly.

"Midterm report on Binational Dispute Settlement Under the United States - Canada Free Trade Agreement. (United States Trade Law and Policy series No. 18)." 25 *The International Lawyer.* (Summer, 1991): 489-516

Bernier, Ivan & Lapoint, B.

*Accord de libre échange entre le Canada et les États-*

*Unis. Annoté.* - Les Éditions Yvon Blais Inc. Cowansville, Quebec. (1990).

Bernier, Ivan & Lapoint, Benoit. (eds.)

*Free Trade Update.* Edit. Yvon Blais, Cowansville, Quebec. (1990).

Bilder, Richard B.

"International Third Party Dispute Settlement." *Denver Journal of International Law and Policy.* (Spring, 1989): 471-503.

Brierly, John E.C.

"Canadian Acceptance of International Commercial Arbitration." *40 Maine Law Review.* (1988): 287-305.

Bronckers, Marco C. E. J.

"Non Judicial and Judicial Remedies in International Trade Disputes." Some reflections at the close of the Uruguay round. *15 Journal of World Trade.* (1989): 120-126.

Brunsdale, Anne E.

"An overview of the International Trade Commission and its role in a possible North American Free Trade Area." *12 Canada-United States Law Journal.* (1987): 187-194.

Bureau of National Affairs.

*International Trade Reporter - Current reports.* Periodical Publication. Washington D.C. U.S. (1989).

Castel, J-G.

"The Settlement of Disputes under the 1988 Canada-United States Free Trade Agreement." 83 *The American Journal of International Law*. (January, 1989): 118-128.

Castel, J-G.; de Mestral, A. L. C. & Graham, W. C.

*The Canadian Law and Practice of International Trade with particular emphasis on export and import of goods and services*. Emond Montgomery Publications Limited. Toronto, Ontario. (1991).

Chapman, Anthony.

*Canada-United States Free Trade Agreement. Major issues*. Library of Parliament. Research branch. Ottawa, Ontario. (1989).

Clarkson, Stephen.

"The Canada-United States Trade Commission: The political implications of CUSTER." in *Trade-offs on Free Trade*. Gold Marc & Leyton-Brown David (eds.) Carswell, Toronto (1988): 160-169.

Cluchey, David P.

"Dispute Resolution Provisions of the Canada-United States Free Trade Agreement." Presented at the Conference on Alternative Dispute Resolution in Canada-United States Trade Relations. 40 *Maine Law Review*. (July, 1988): 335-348

Court Reporting Services Inc.

*Forum on Binational Dispute Resolution Procedures under*

*the Canada-United States Free Trade Agreement. Seminar Proceedings. (April 23, 1991).*

Davey, William J.

"Dispute Settlement under the Canada-United States Free Trade Agreement." in *Trade-offs on Free Trade*, Marc Gold & David Leyton-Brown (eds). Toronto, Ontario. Carswell, (1988): 173-181.

Dearden, R; Hart, M. & Steger, D.

*Living with Free Trade - Canada, the Free Trade Agreement and the GATT.* Proceedings of a Conference held at the University of Ottawa, Faculty of law (Common Law). May 5, 1989. Centre for Trade Policy and Law, Halifax, (1989).

Dearden, Richard G. (ed.)

*Free Trade Law Reporter & The Free Trade Observer Newsletter.* C.C.H. Canadian Limited. Don Mills, Ontario. Periodical Publication. (1989).

Dearden, Richard G.

*The Dispute Settlement Mechanisms under Chapter 18 & 19 of the Canada-United States Free Trade Agreement.* The Canadian Institute of Chartered Accountants. Commodity Tax Symposium. Ottawa, Ontario. (September 18, 1990).

Dearden, Richard G. (ed.)

*Canadian Trade Law Reporter.* C.C.H. Canadian Limited. Don Mills, Ontario. Periodical Publication. (1989).

Dearden, Richard.

*The Canada-United States Free Trade Agreement. Final text and Analysis.* Don Mills, Ontario. CCH Canadian Limited. (1988).

Econoscope

*Free Trade Agreement One-year retrospective.* (January 18, 1990).

Ehrenhaft, Peter.

*Private Rights and the Public Interest in International Trade.* Seminar presentation. Ottawa, Ontario. (May 3, 1990).

External Affairs & International Trade Canada.

*Free Trade news, implementation and issues update.* Ottawa, Ontario. (March, 1991).

External Affairs & International Trade Canada.

*Canada Export.* Periodical publication. Ottawa, Ontario.

External Affairs Canada.

*The Canada - United States Free Trade Agreement.* Ottawa, Ontario. (1989).

Feltham, Ivan R.

*Canada-United States Commercial and Trade Disputes Are we ready for Adjudication?* Hyman Soloway Public Lecture. University of Ottawa. Ottawa, Ontario. (May 16, 1991).

Ferguson, Keith B.

"Dispute Settlement under the Canada-United States Agreement." 47 *University of Toronto, Faculty of Law Review*. (1989): 317-353.

Fried, Jonathan T.

*Chapter 18 of the Free Trade Agreement. Conference, April 1991.* Paper presented at the Administrative Conference of the United States Forum on Binational Dispute Resolution Procedures under the United States - Canada Free Trade Agreement. (April 23, 1991).

Gilbert, Winham.

*Trading with Canada. The Canada-United States Free Trade Agreement.* Priority Press Publications. (1988).

Graham, William C.

*Dispute Resolution in the Canada-United States Free Trade Agreement: One part of a complex relationship.* Paper presented at Union Internationale des Avocats Mexico City, (July, 1991).

Greenwald Joseph A.

"Securing the free access. Dispute Resolution Mechanisms." Paper presented at *Conference of doing business in Mexico: The Free Trade challenge.* Session on establishing a North American Free Trade Agreement. Ottawa, Ontario. (August 16, 1991).

Hart, Michael.

*A lower temperature: The Dispute Settlement Experience*

under the Canada-United States Free Trade Agreement. Conference presentation, Bishop University. (March, 1990).

Hart, Michael.

*Dispute Settlement and the Canada-United States Free Trade Agreement.* Research paper. Centre for Trade Policy and Law. Ottawa, Ontario. (August 21, 1990).

Hart, Michael.

*A North American Free Trade Agreement. The strategic implications for Canada.* Research paper. Centre for Trade Policy and Law. Institute for Research on Public Policy. Ottawa, Ontario. (1990).

Horlick, Gary & Valentine, Debra.

"Improvements in Trade Remedy Law and Procedures under the Canada-United States Free Trade Agreement." in *Understanding the Free Trade Agreement.* McRae, D. & Steger D. (eds.) Halifax, The Institute for Research on Public Policy. (1988): 103-128.

Horlick, Gary & Debusk F. Amanda

"The functioning of United States - Canada Free Trade Agreement Dispute Resolution Panels." Paper presented at *Conference on North American Free Trade: Economic and Political implications.* Washington, D.C. (June 28, 1991).

Hudec, Robert E.

*The Judicialization of International Dispute Settlement.* Draft, Seminar Presentation at the Fifth Annual

conference on Canada and International Trade organized by the Centre for Trade Policy and Law and the Faculty of Law of the University of Ottawa. Ottawa, Ontario. (May 3, 1990).

Hudec, Robert E.

"The Free Trade Agreement Provisions on Dispute Settlement: The Lessons of the GATT Experience." in *Understanding the Free Trade Agreement*. McRae, Donald M. (ed) Halifax, Institute for Research on Public Policy. (1988): 31-42.

Hudec, Robert E.

"Dispute Resolution Under a North American Free Trade Area: The importance of the Domestic Legal Setting." (Conference proceedings: Competition and Dispute Resolution in the North American Context; conducted under the auspices of the Canada-United States Law Institute and Case Western Reserve University School of Law. Cleveland, Ohio, April (3-5) 1987. 12 *Canada-United States Law Journal*. (1987): 329-335.

Investment Canada.

*The Opportunities and Challenges of North American Free Trade: A Canadian Perspective*. Working paper Number 7. Ottawa, Ontario. (April, 1991).

Jackson, John H.

*Restructuring the GATT system*. Presentation at the Sixth Annual Conference on Canada and International Trade - Trade Policy in the 1990's. The Centre for Trade Policy

and Law and the Faculty of Law of the University of Ottawa. Ottawa, Ontario. (May 17, 1991).

Joint Working Group of the American Bar Association, the Canadian Bar Association and La Barra Mexicana.

*Dispute Settlement under a North American Free Trade Agreement*, January, 1992.

Johnson Jon R. & Shalter Joel S.

*The Free Trade Agreement. A comprehensive guide.* Canada Law Book Inc. (1988).

Kalnay, Michael.

*Dispute Settlement Mechanisms and North American Free Trade. Prospects and Portents.* Seminar Presentation at the Administrative Conference of the United States Forum on Binational Dispute Resolution Procedures under the United States - Canada Free Trade Agreement. (April 23, 1991).

Katz, Julius.

"Dispute Resolution." Reprinted in *Understanding the Free Trade Agreement.* McRae, Donald M. (ed) Halifax, The Institute for Research on Public Policy, (1988): 43-45.

Kennedy, Kevin.

"International Commercial Arbitration - Legislation in the State of Michigan: A proposal." *Detroit College of Law Review.* (Winter, 1990): 867-928.

Kerr, W.A. & Apuzzo, A.H.

"International Arbitration - the Dispute Settlement procedures chosen for the Canada-United States Free Trade Agreement." 5 *Journal of International Arbitration* (1988): 7-15.

Lavelle, Marianne.

"Trade pact gives birth to Arbitration Panel." *The National Law Journal* (December 5, 1988): 3.

Legault, L. H.

"Institutions and Dispute Settlement Procedures Under the Canada - United States Free Trade Agreement." in *Understanding the Free Trade Agreement*, McRae, Donald M. (ed.) Halifax, The Institute for Research on Public Policy, (1988): 21-29.

Legault, Leonard.

"The Free Trade Negotiations: Canadian and U.S. perspectives." (Conference proceedings: Competition and Dispute Resolution in the North American Context; conducted under the auspices of the Canada-United States Law Institute and Case Western Reserve University School of Law. Cleveland, Ohio, April (3-5) 1987. 12 *Canada-United States Law Journal*. (1987): 7-13.

Lowenfeld, Andreas.

*Binational Dispute Settlement under Chapters 18 and 19 of the Canada-United States Free Trade Agreement. An interim Appraisal.* Research Paper. December 1990 and update April 1991.

Lowenfeld, Andreas.

*United States-Canada Free Trade Agreement: The Institutional Provisions.* Discussion paper. (February 10, 1988).

MacDonald, Glenn.

*Negotiation/Rule application: Dispute Settlement Mechanisms under the Canada-United States Free Trade Agreement and the GATT.* Term paper. (1990).

MacDorman, Ted L.

"Dissecting the Free Trade Agreement: Lobster Panel Decision." 18 *Canadian Business Law Journal* (1991): 445-459.

MacDorman, Ted L.

"International Trade Law meets International Fisheries Law: The Canada-United States Salmon & Herring Dispute." 7 *Journal of International Arbitration* (1990): 107-121.

MacDorman, Ted L.

"The Dispute Settlement Regime of the Free Trade Agreement." 2 *Review of International Business Law* (November, 1988): 303:330.

MacDorman, Ted L.

"Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem." 4 *Canada-United States Business Law Review* (October, 1990): 177-189.

McRae, D. & Steger, D. (eds.)

*Understanding the Free Trade Agreement.* The Institute for Research on Public Policy, Halifax. (1988).

Martin, Keith.

*The North American Free Trade Agreement Negotiations and the Canada - United States Free Trade Agreement. Revisiting unfinished business.* Paper presented at the Conference on North American Free Trade: Labour, Industry and Government Policy perspectives. Ottawa, Ontario. (November, 1991).

Merkin, William S.

*The Resolution of Disputes under the United States-Canada Free Trade Agreement.* Conference presentation. Middlebury, Vermont, (May 3-5, 1989).

Moss, John J.

"Summary on Proceedings of the Seminar on Dispute Resolution under the Canada - United States Free Trade Agreement." 26 *Stanford Journal of International Law* (Fall, 1989): 153-204.

Morici, Peter.

*Making Free Trade work. The Canada-United States Agreement.* Council on Foreign Relations Press. (1990).

Murray, Smith.

*Assessing the Canada-United States Free Trade Agreement.* The Institute for Research on Public Policy. Halifax. (1989).

Parker, Robert P.

"Dispute Settlement in the GATT and in the Canada-United States Free Trade Agreement." 23 *Journal of World Trade*. (June, 1989): 83-93.

Pounsett, Donal.

"Litigation and Alternative Methods of Dispute Resolution in Canada Part I." 18 *Business and the Law*. (October, 1991): 73-78.

Pounsett, Donal.

"Litigation and Alternative Methods of Dispute Resolution in Canada Part II." 4 *Canada - United States Trade* (July/August, 1991): 41-44.

Puthon, Keri (ed.)

*Canada - U.S. Trade*. A Richard De Boo Publication, Thomson Canada Limited. Don Mills, Ontario. (1990).

Quinn, John J.

"A Critical Perspective on Dispute Settlement." in *Trade Offs on Free Trade*. Marc Gold and David Leyton-Brown (eds). Toronto: Carswell, (1988): 188-196.

Rugman, A.M. & Anderson, A.

"The Dispute Settlement Mechanisms cases in the Canada-United States Free Trade Agreement: An economic evaluation." 24 *George Washington Journal of International Law & Economics*. (Fall, 1989): 1-43.

Secretaria de Comercio y Fomento Industrial SECOFI

*Tratado de libre comercio en America del Norte. Solucion de controversias.* Monograph. (1991).

Smith, Bradbrooke.

"Comments on Dispute Resolution under a North American Free Trade Agreement." (Conference Proceedings: Competition and Dispute Resolution in the North American Context, conducted under the auspices of the Canada-United States Law Institute and Case Western Reserve University School of Law; Cleveland Ohio; (April 3-4 1987.) 12 *Canada-United States Law Journal* (1987): 328-332.

Smith, Bradbrooke.

"Discussion after the speech of Louis Sohn and the comments of Robert Hudec and Bradbrooke Smith." (Conference Proceedings: Competition and Dispute Resolution in the North American Context, conducted under the auspices of the Canada-United States Law Institute and Case Western Reserve University School of Law; Cleveland Ohio; April (3-4). 1987.) 12 *Canada-United States Law Journal* (1987): 333-339.

Sohn, Louis.

"Dispute Resolution under a North American Free Trade Agreement." (Conference proceedings: Competition and Dispute Resolution in the North American Context; conducted under the auspices of the Canada-United States Law Institute and Case Western Reserve University School

of Law. Cleveland, Ohio, (April 3-5 1987). 12 *Canada-United States Law Journal* (1987): 319-328.

Stein, Michael H.

*Panel concerning applicability of the Dispute Settlement Procedures to a North American Free Trade Agreement.* Seminar presentation at the Administrative Conference of the United States Forum on Binational Dispute Resolution Procedures under the United States - Canada Free Trade Agreement. (April 23, 1991.)

Steger, Debra.

"The Dispute Settlement Mechanisms of the Canada-United States Free Trade Agreement. Comparison with the existing system." Conference on the Canada-United States Free Trade Agreement. Analysis of the text. University of Ottawa, Faculty of law. January 21, 1988. in *Understanding the Free Trade Agreement*, McRae, D. & Steger, D. (eds.) Halifax, The Institute for Research on Public Policy, (1988): 49-72.

Steger, Debra.

"Dispute Settlement." in *Trade Offs on Free Trade*, Marc Gold and David Leyton-Brown (eds.) Toronto: Carswell. (1988): 182-187.

Steger, Debra.

*A concise guide to the Canada-United States Free Trade Agreement.* Toronto, Carswell. (1988).

Stone, Frank.

*Dispute Resolution under Chapter 18 of the Free Trade Agreement. How will it work?* Draft paper. The Institute for Research on Public Policy. Ottawa, Ontario. (February 8, 1989.)

Stone, Frank.

*Institutional Elements and Dispute Resolution under the Canada-United States Free Trade Agreement.* Research paper. The Institute for Research on Public Policy, Ottawa, Ontario. (April, 1989).

Summary of proceedings of the Seminar on Dispute Resolution under the Canada-United States Free Trade Agreement. 26 *Stanford Journal of International Law* (Fall, 1989): 153-204.

The Canadian Chamber of Commerce

"A North American Free Trade Agreement and its implications for Canada's relationship with the countries of the Asia-Pacific." *The Pacific Economic Conference.* Kuala Lumpur, August, (1991).

The Canada-United States (Free Trade Agreement: New directions in Dispute Settlement). *American Society of International Law Proceedings Annual* (1989): 251-271

Trakman, Leon E.

"Privatizing Dispute Resolution under the Free Trade Agreement: Truth or Fancy?" Presented at Conference on Alternative Dispute Resolution in Canada-United States

Trade Relations. 40 *Maine Law Review*. (July, 1988): 349-366.

Wang, Erik B.

"Adjudication of Canada-United States Disputes." 19 *Canadian Yearbook of International Law Ann.* (1981): 158-228.

Weiler, Joseph.

*Anatomy of a Trade Dispute. Lessons for newlywood trading partners.* Stanford Lectures - 1990. Canadian Institute of Advanced Legal Studies. Palo Alto, California. (July 17, 1990.)

Zwijdwijk, Ton J.M.

"Dispute Settlement Mechanisms under the Free Trade Agreement." Presented at Conference on Alternative Dispute Resolution in Canada-United States Trade Relations. 40 *Maine Law Review* (July 1988): 325-334.

## OFFICIAL DOCUMENTS

*Binational Secretariat/Canadian Section  
Status report of Cases (Chapters 18 and 19)  
January 21 - 1992*

*Code of Conduct for Proceedings under Chapters 18 and 19 of  
the Canada-United States Free Trade Agreement (1989) 123  
Canada Gazette, Part I, 96.*

*GATT. Basic Instruments and Selected Documents  
Various references through the text.*

*Letter from President Bush to the Senate Finance Committee and  
House Ways and Means Committee notifying Congress of Trade  
negotiations with Mexico. September 26, 1990.*

*Members of Panel Regulations.*

*SOR/89 - 70 (1989) 123 Canada Gazette, Part II, 134. (Extra  
No. 1, January 6, 1989)*

*Members of Committees Regulations.*

*SOR/89-71 (1989) 123 Canada Gazette, Part II, 137 (Extra No.1  
January 6, 1989)*

*Model Rules of Procedure for Chapter 18 panels.* (1989). 123  
Canada Gazette Part I, 100.

*The Canada-United States Free Trade Agreement.*  
Department of External Affairs - Canada, 1989.

*The United States - Canada Free Trade Agreement: Biennial  
report.* A report from the President to the Congress, January  
1991.

**FINAL PANEL REPORTS**

*Canada's Landing Requirement for Pacific Coast Salmon and Herring.* CDA-89-1807-01.

U.S. Government request for panel review - May 29, 1989.

Panel decision issued October 16, 1989.

*U.S. Regulations on Lobsters.* USA-89-1807-01

Canadian request for panel review - January 17 - 1990

Panel decision issued May 25, 1990.