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ALTERNATIVE DISPUTE RESOLUTION IN THE INTERNATIONAL CONTEXT: THE NORTH AMERICAN FREE TRADE AGREEMENT

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THE term "alternative dispute resolution" is something of a misnomer in the international context because it begs the question: Alternative to what? The answer to this question is clear in the domestic context where national courts provide a generally acceptable means of resolving disputes whenever the parties cannot agree on some alternative means. In many international disputes, however, resort to national courts is not possible absent consent of the parties, and where it is possible without consent at least one of the parties will usually view it as a most undesirable option. Thus, the only formal means of dispute resolution that find broad acceptance in the international context are those created by agreement of the parties.

Three basic types of dispute-resolution mechanisms exist that are based on the agreement of the parties: mediation, in which no report or decision is issued; nonbinding arbitration, in which there is a decision but the parties are not bound to comply with it; and binding arbitration. This article will discuss the differences between these types of mechanisms in the specific context of the North American Free Trade Agreement (NAFTA),[1] which employs all three to handle different types of disputes. First, however, the article will discuss the considerations that lead governments to employ particular dispute-settlement mechanisms in agreements like NAFTA.

I. WHY DO INTERNATIONAL TRADE AGREEMENTS HAVE DISPUTE-SETTLEMENT MECHANISMS?

Long before ADR had become a term of art, or even a subject of any real interest, international trade agreements were incorporating formal dispute-settlement mechanisms. It did not, and does not, have to be this way, for there is always the alternative of leaving trade disputes to be resolved through informal negotiations, the means by which friendly countries resolve the vast majority of their disagreements. Moreover, this informal, minimalist alternative leaves the parties free to submit any particular dispute

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1. Signed at Washington by Canada, Mexico, and the United States, Dec. 17, 1992. North American Free Trade Agreement (Westlaw, NAFTA 1992) [hereinafter NAFTA].

to arbitration or mediation whenever they might agree to do so. And nothing in such a trade agreement would necessarily prevent the parties from exercising their rights under international law to respond appropriately to violations by other parties.[2]

There are, however, good reasons why states incorporate formal dispute-settlement procedures into trade agreements. The most obvious reason is the desire of the parties to preserve the agreement and to promote its smooth functioning. Without a formal dispute-settlement procedure, a party that believes it has been wronged has only three options if it cannot persuade the offending party to change its behavior: (1) it can do nothing; (2) it can retaliate pursuant to its rights under customary international law; or (3) the party can withdraw from the agreement.[3] The disadvantages of doing nothing are obvious. Retaliation entails the risk of counter-retaliation that might produce a destructive downward spiral of retaliatory acts.[4] And withdrawal deprives the withdrawing party of the benefits of the agreement. Almost any type of formal dispute-settlement mechanism improves the situation by delaying, if not preventing, the onset of retaliation and by providing an alternative to withdrawal or inaction.

Another, less obvious, difficulty with the minimalist approach to international dispute settlement is that it leaves the post-agreement bargaining power of the parties at pre-agreement levels. In any agreement, compromises are struck that reflect the different levels of bargaining power enjoyed by each party. Without some formal dispute-settlement mechanism, weaker parties justifiably fear that they will be at the same disadvantage in any post-agreement dispute as they were in the original negotiations, and thus might be denied the benefits of the original bargain. Canada and Mexico no doubt labored under such fears in the NAFTA negotiations.[5]

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2. Article 60 of the Vienna Convention on the Law of Treaties provides that a material breach of a multilateral treaty by one party entitles the other parties "to suspend the operation of the treaty in whole or in part or to terminate it either (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, *in* 8 I.L.M. 679, 701. Although the United States has not ratified the Vienna Convention, it is generally regarded as codifying customary international law that governs international agreements. *See* 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (the Vienna Convention is discussed further at 144-45).

3. It is common for modern treaties, including trade agreements, to recognize a right to withdraw on a stated period of notice. The NAFTA provides for such withdrawal on six months notice. NAFTA Art. 2205. NAFTA's predecessor, the Canada-United States Free Trade Agreement, contains an essentially identical provision (Article 2106). Canada-United States Free Trade Agreement, 27 I.L.M. 281 (1988).

4. For an excellent discussion of how a dispute-settlement mechanism can stop a retaliatory spiral in a trade dispute, see the discussion of the 1963 "chicken war" between the United States and the European Economic Community ("EEC") in ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE 249-306 (1968).

5. During the negotiation of the Canada-United States Agreement, Canada's Deputy Attorney General, made the following comments on dispute settlement:

> We have done pretty well [at resolving trade disputes] in the past, but there are two reasons that I would advance have kept us from doing better. The first is what I would call the level playing field reason. This reason recognizes that the negotiating strengths of the two parties are not equal. . . . [M]echanisms to solve disputes are vital to Canada. The existence of such mechanisms are going to

In any negotiation, the party with the most to give and the least to gain will have the greatest bargaining power.[6] This describes the position of the United States in the NAFTA negotiations. Although bilateral trade between the United States and both Canada and Mexico is roughly in balance, this does not mean that NAFTA is of equal importance to the three economies. The U.S. economy is approximately ten times the size of Canada's and twenty-five times the size of Mexico's.[7] Thus, while the United States sells as much to both Canada and Mexico as it buys from them, that trade is ten times more important to Canada than it is to the United States, and twenty-five times more important to Mexico. These differences in the relative economic importance of the agreement mean that any given concession or retaliatory act will have an enormously greater impact on Canada or Mexico than on the United States.[8] This fact has been an important source of bargaining power for the United States in the NAFTA negotiations. Without some dispute-settlement mechanism, the United States will continue to have substantially greater bargaining power in any post-agreement dispute.

Differences in bargaining power are also found in domestic disputes. What distinguishes those disputes from international disputes, however, is the existence of a dispute-settlement mechanism—the courts—resort to which does not require the agreement of both parties. Thus, in negotiating a resolution of a domestic dispute, both parties know that whatever their relative bargaining strengths might have been when their agreement was originally negotiated, their dispute ultimately can go to a court where those strengths will be irrelevant. In most international disputes, there is no way to prevent pre-agreement bargaining power from becoming post-agreement bargaining power other than an agreed-upon means of settling disputes. This need to neutralize a post-agreement imbalance in bargaining power is

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> make or break the issue in Canada. Quite apart from the substantive disagreements, any agreement without a satisfactory dispute resolution mechanism will not be acceptable. We cannot have a system that will see differences resolved on the basis of raw power.

T. Bradbrooke Smith, *Comments on Dispute Resolution Under a North American Free Trade Agreement*, 12 CAN.-U.S. L. J. 337, 337 (1987). Given the history of relations between the United States and Mexico, and the vast difference in the sizes of the two economies, it would be surprising if Mexican negotiators were any less concerned about U.S. power than was Mr. Smith.

6. The party with the least to gain from a successful negotiation might also be described as having the best alternative to a negotiated agreement, or "BATNA". *See* ROGER FISHER & W. URY, GETTING TO YES, 99-111 (1981). The party with the least to gain, by definition, is the party that sees the least difference between its BATNA and a negotiated agreement. Parties with worse BATNA's need the agreement more and, therefore, are prepared to make greater concessions to obtain an agreement than are parties with better BATNAs.

7. In 1989, the gross national product of the United States was $5.2 trillion. Canada's GNP, by comparison, was only $530 billion, and Mexico's was $201 billion (all values in U.S. dollars). GARY C. HUFBAUER AND J. SCHOTT, NORTH AMERICAN FREE TRADE: ISSUES AND RECOMMENDATIONS 5 (1992).

8. In absolute terms, the effects would be the same in each country. For example, if the United States made a concession that cost it $10 billion in exports and increased Canada's exports by $10 billion, that concession would have equal absolute costs and benefits. But the negative impact of that concession on the United States, other things being equal, would represent only two tenths of one percent of U.S. GNP, while its favorable impact on Canada would represent a full two percent of Canada's GNP.

probably the most important reason why NAFTA contains a strong mechanism for handling intergovernmental disputes.[9]

NAFTA also provides for mechanisms to handle certain disputes between nationals of one party and the governments of the other parties.[10] The reason for these provisions, however, is not a concern over unequal bargaining power. It is rather a concern over the impartiality of the domestic courts that otherwise would be hearing the disputes. This is the same concern that motivates virtually every arbitration clause written into an international commercial contract.

Thus, at a very basic level, international trade agreements incorporate agreed-upon dispute-resolution mechanisms for the same reason that domestic antagonists resort to various types of ADR: fear of the default option. The reasons for this fear, and the level of fear, are quite different, however. Domestic parties generally worry about efficiency, not the impartiality of domestic courts, and any concerns they may have about impartiality do not approach those of international litigants with respect to foreign courts. Nor are domestic parties faced with a default option in which they have no choice but to negotiate away their differences in the face of unequal bargaining power. It is thus no wonder that what are called Alternative Dispute Resolution mechanisms domestically appear frequently in the international context, for there they are usually the only alternative.

II. THE THREE BASIC TYPES OF INTERNATIONAL DISPUTE-RESOLUTION MECHANISMS

As noted above, the three basic types of international dispute-resolution mechanisms are: (1) mediation; (2) nonbinding arbitration; and (3) binding arbitration. NAFTA employs all three types in one context or another.

A. MEDIATION

The basic attributes of a mediation procedure are: (1) a requirement that the parties attempt to arrive at a negotiated resolution of their dispute, subject to a time limit that can be extended only by agreement; (2) an opportunity for either party to refer the dispute to a mediator; and (3) a time limit on the mediation process, extendable only by agreement of the parties, after which the parties are free to pursue whatever other remedies are available to them under international law, including appropriate retaliation.[11]

The primary shortcoming of mediation is that it does not really compensate for differences in post-agreement negotiating power. A party can go through the motions of a negotiation, ignore the efforts of a mediator, and, at the end of the day, be in the same position it would have been in had there

9. *See* NAFTA, *supra* note 1, arts. 2005, 2007-08.

10. *See* NAFTA, *supra* note 1, arts. 1103-06 (concerning investment disputes); *infra* notes 32-37 and accompanying text. *See* NAFTA, *supra* note 1, arts. 1903-04 (concerning review of antidumping and countervailing-duty determinations).

11. The parties would at all times retain whatever right they had under the agreement to withdraw. Generally, this right is conditioned only on a specified notice period.

been no procedure at all. There is, on the other hand, the advantage that an opportunity for mediated negotiations can increase the chances of reaching an amicable settlement, at least if the parties are prepared to negotiate in good faith. In addition, the time limits inherent in a conciliation procedure restrict a party's ability to drag out negotiations in the hope of postponing retaliation, thus creating an additional incentive to take both the dispute and the negotiations seriously.

Mediation is generally not viewed as a sufficient dispute-resolution procedure for a trade agreement since it does not neutralize differences in bargaining power. It is often, however, the required first step of such a procedure. This is true of the general dispute-resolution procedure set forth in Chapter 20 of NAFTA, which, as is explained more fully below, can result in the referral of a dispute to nonbinding arbitration after all required mediation procedures have failed.[12]

Most often, the mediation provisions of trade agreements provide for some sort of permanent commission composed of representatives of all the parties to the agreement.[13] Such commissions are usually given the tasks of facilitating day-to-day communication among the parties and negotiations concerning particular disputes. They may also act as mediators, or as the bodies authorized to appoint mediators.[14]

Chapter 20 of NAFTA establishes such a commission, the Free Trade Commission, which is composed of cabinet-level representatives of each party. The Commission is the heart of NAFTA's mediation process. Among the Commission's duties are the supervision of the implementation of the Agreement and the resolution of "disputes that may arise regarding its interpretation or application."[15] More specifically, Article 2007 of NAFTA

12. NAFTA, *supra* note 1, art. 2008, para. 1.

13. The United States' free trade agreements with both Israel and Canada provide for such commissions. In both cases, the commission (the "Joint Committee" in the former agreement; the "Canada-United States Trade Commission" in the latter) is composed of representatives of the parties, with the principal representative of each party being the cabinet-level officer with primary responsibility for international trade. Canada-United States Free Trade Agreement, *supra* note 3, art. 1802; Israel-United States Agreement on the Establishment of a Free Trade Area, H.R. Doc. No. 61, 99th Cong., 1st Sess. 82 (1985), art. 17, *reprinted in* 24 I.L.M. 653, 657 (1985).

14. *E.g.*, Protocol Establishing the Final Mechanism for the Settlement of Disputes Within the Latin American Free Trade Association, Chapter II, *reprinted in* 7 I.L.M. 747, 748 (1968) (stating that the Standing Executive Committee is empowered to assist the parties to a dispute in their negotiations but "may not express an opinion on the merits of the case in dispute"); Treaty of Montevideo Establishing the Latin American Integration Association, art. 35(m), *reprinted in* 20 I.L.M. 672, 680-81 (1983) (explaining that the committee which acts as the "permanent body of the Association" is empowered to "[p]ropose formulas for resolving" disputes between parties concerning the principles of the agreement); Israel-United States Agreement on the Establishment of a Free Trade Area, H.R. Doc. No. 61, 99th Cong., 1st Sess. 82 (1985), art. 19(1)(c), *reprinted in* 24 I.L.M. 653, 665 (1985) (stating that either party may refer a dispute to the "Joint Committee," which "shall endeavor to resolve the dispute"); Canada-United States Free Trade Agreement, *supra* note 3, art. 1805 (stating that the Commission is empowered to appoint technical advisers or a mediator acceptable to both parties "in an effort to reach a mutually satisfactory resolution" of any dispute referred to it by a party).

15. NAFTA, *supra* note 1, art. 2001.

authorizes the Commission to call on technical advisers and to create working groups as it deems necessary, to engage in conciliation or mediation procedures, and to make such recommendations to the parties as it believes may assist them in resolving their disputes. NAFTA puts mediation on a fast track, however. If agreement is not reached within 30 days, the dispute may be submitted to arbitration.

Four chapters of NAFTA provide for additional mediation procedures that are unique to the subjects addressed in those chapters. In three of these cases, the special mediation procedures—which include consultations with specialized committees or working groups—substitute for part of the mediation process described in Article 20.[16] In the remaining case (investment disputes), the special procedure is nothing more than a requirement that the parties attempt to negotiate a settlement before submitting the dispute to arbitration, and it substitutes fully for the mediation procedure of Article 20.[17] In all of these cases, either party may take the dispute to arbitration if mediation is unsuccessful.[18]

Thus, NAFTA makes rather full, and typical, use of mediation. While it does not place sole reliance on mediation, NAFTA does find it to be a useful first step in a process that includes arbitration. Indeed, with arbitration to back it up, international mediation begins to look very much like domestic mediation because, in either context, the parties know that the alternative to mediation is another process in which differences in their bargaining power will matter little.

B. NONBINDING ARBITRATION

The essential difference between mediation and nonbinding arbitration is the role played by the third party. A mediator does not issue a report or openly assign blame to one party or the other; an arbitrator does.[19]

Even though an arbitrator's report may not be viewed as binding, it radically alters the relative positions of the parties to the dispute. It does this by stating who is right and who is wrong, thereby changing the question at issue. With a report in hand, the question becomes not whether a particular

16. *Id.* arts. 513 (concerning customs procedures), 723 (concerning sanitary or phytosanitary measures), and 914 (concerning standards-related measures).

17. *Id.* arts. 1118-20.

18. This would be nonbinding arbitration under Chapter 20 for disputes involving Customs Procedures (ch. 5), Sanitary or Phytosanitary Measures (ch. 7, sec. B), and Standards-Related Measures (ch. 9). Arbitration would be binding in the case of investment disputes between a national of one NAFTA state and another NAFTA state (arts. 1118-20) and in reviews of antidumping and countervailing-duty determinations pursuant to Chapter 19 (art. 1904, para. 9). *See infra* parts II. C. 1-2.

19. Not all authorities would accept the notion that non-binding arbitration is distinguishable from mediation. *See* Linda C. Reif, *Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes*, 14 FORDHAM INT'L L. J. 578, 601-06 (1991). These authorities apparently view the binding or nonbinding nature of a decision as being all-important, and categorize all proceedings resulting in a nonbinding decision as a form of mediation. As explained in this section and following, this writer attaches critical importance to the question of whether the third party does or does not assign blame and not to whether the parties agree to be bound by the third party's decision.

action violated the agreement but, if it did, whether the offending party takes the agreement seriously. This raises the stakes in the dispute with no need of threats from the innocent party. The offending party is thus simultaneously permitted to modify its behavior without seeming to respond to threats and at the same time given a far stronger reason for doing so facing the possibility of sanctioned retaliation.

Nonbinding arbitration is the mechanism chosen in NAFTA for resolving virtually all intergovernmental disputes that cannot be resolved by mediation.[20] NAFTA's arbitration procedures are modeled after the United States' only other free trade agreements (with Canada and Israel) and provides a good example of nonbinding arbitration in the international-trade context.

NAFTA arbitration panels are required to issue first an initial report and then, following an opportunity for comment, a final report.[21] Nowhere, however, do the parties agree to comply with a final arbitration report. Instead, they are given 30 days following issuance of the final report to arrive at an agreed resolution of their dispute, "which normally shall conform with the determinations and recommendations of the panel."[22] When the parties cannot agree on a resolution within 30 days of receiving the final report, the complaining party is free to suspend performance of its obligations under the Agreement to an extent that compensates for the benefits it has been denied by the offending party "until such time as they have reached agreement on a resolution of the dispute."[23] This is, of course, the same sanction that customary international law would provide to the offended party even in the absence of an arbitration procedure.[24]

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20. NAFTA, *supra* note 1, ch. 20. NAFTA carves out an exception for disputes over so-called "emergency action," which may not be referred to arbitration under Chapter 20 but may be referred to mediation. These emergency measures are unilateral protective measures that parties are permitted to take if increased imports caused by implementation of the Agreement result in substantial injury to an industry in the importing country. It is interesting that disputes concerning emergency measures were accorded precisely the opposite treatment in the Canada-U.S. Free Trade Agreement, which made them the only disputes under that agreement that were subject to binding arbitration. Of course, if both parties agreed to do so, other disputes could also be referred to binding arbitration. Canada-United States Free Trade Agreement, *supra* note 3, art. 11.

21. NAFTA, *supra* note 1, arts. 2016-17.

22. *Id.* art. 2018.

23. *Id.* art. 2019. The free trade agreements between the United States and Israel and the United States and Canada contain similar provisions. Article 19(2) of the Israel-United States Agreement provides: "After a dispute has been referred to a panel and the panel has presented its report the affected Party shall be entitled to take any appropriate measure." Article 1807, paragraph 9 of the Canada-United States Free Trade Agreement is more specific. It provides that if the Commission does not achieve a mutually satisfactory resolution of the dispute within 30 days of receiving the expert panel's report, and if a party "considers that its fundamental rights . . . or benefits . . . are or would be impaired by the implementation or maintenance of the measure at issue, the Party shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."

24. *See supra* note 2.

C. BINDING ARBITRATION

Whenever a state enters into an international agreement, it surrenders a certain measure of its sovereign freedom of action by committing itself to do, or not to do, certain things. When that agreement provides for compulsory binding arbitration of disputes, the state surrenders even more of its sovereign freedom. It is one thing to assume an obligation; it is something else to be bound to comply with another's interpretation of that obligation. It is this surrender of an additional measure of sovereignty that distinguishes binding from nonbinding arbitration in the international context.

In practical terms, this distinction is more apparent than real. The essence of nonbinding arbitration is the commitment of the parties to seek the opinion of a third party as to who is right and who is wrong in any dispute that they cannot otherwise resolve. Merely by committing themselves in advance to seek such opinions, the parties greatly limit their real ability to ignore the opinions once they are issued. Moreover, as a basis for retaliation, a nonbinding opinion is virtually the equivalent of a binding one, particularly when the agreement expressly authorizes retaliation in cases of noncompliance.[25] Thus, it is the step from mediation to nonbinding arbitration that is the truly significant one.

If nonbinding arbitration goes far toward equalizing post-agreement negotiating power, it is also true that binding arbitration goes at least somewhat further in that direction. Thus, one might have expected Canada and Mexico to insist on binding arbitration in order to further level the post-agreement playing field. But when the stakes are high, the ability to continue a contested practice without seeming to flout one's international obligations may seem too valuable to surrender, even if retaliation by the aggrieved party is certain. Canada, Mexico, and the United States all may have viewed the stakes as being this high. On the other hand, these countries may simply have recognized that, in an international-trade agreement, there is little difference between binding and nonbinding arbitration, particularly when retaliation is expressly permitted.

Although neither of the United States' other two free trade agreements provides for comprehensive binding arbitration, most multilateral trade agreements do. Indeed, many go so far as to create a permanent adjudicative body of some sort. Examples include the European Economic Community,[26] the Andean Pact,[27] and the Latin American Free Trade Associa-

25. There is a school of thought — known as the "French view" within GATT circles — that holds the obligations created by trade agreements are not to be absolute rules of behavior, but rather standards, the violation of which is acceptable so long as appropriate compensation is provided to the damaged party. In the words of one writer, "All . . . [a trade obligation] means is that you have to *pay* for your sin. It does not mean that you *cannot* sin." Robert E. Hudec, *Dispute Resolution Under a North American Free Trade Area: The Importance of the Domestic Legal Setting*, 12 CANADA-U.S. L. J. 329, 331 (1987).

26. Treaty Establishing the European Economic Community (Treaty of Rome), Jan. 1, 1958, arts. 169-77, 298 U.N.T.S. 11, 75-77. The European Court of Justice issues binding decisions not only with respect to disputes between member states, but also with respect to disputes between member states and EEC administrative bodies. *Id.*

27. Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979, ch.

tion.[28] The Convention Establishing the European Free Trade Association provides for nonbinding arbitration in much the same terms as does NAFTA, but, unlike NAFTA, establishes a permanent adjudicative body.[29]

Whatever concerns the NAFTA parties may have had about binding arbitration of disputes among themselves, they had no such concerns (or at least overcame them) when it came to disputes between themselves and the nationals of other parties. Two categories of such disputes, both of them very important and contentious, are consigned to binding arbitration under NAFTA: (1) investment disputes between a party and a national of another party;[30] and (2) disputes arising under the antidumping or countervailing duty laws of one party that involve nationals of another party.[31]

1. Investment Disputes

At one time, few nations would have considered committing themselves to submit disputes with foreign investors to binding arbitration. This situation has gradually changed, however, as more and more states have found that

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3, *translation reprinted in* 18 I.L.M. 1203, 1206; Agreement on Andean Subregional Integration [hereinafter the "Cartagena Agreement"], May 26, 1969, ch. 2, *translation reprinted in* 8 I.L.M. 910, 911-16 (1969). Like the European Court of Justice, the Andean Group's Court is empowered to decide not only disputes between member states, but also disputes between member states and Andean Group administrative bodies. 18 I.L.M. at 1206. A dispute between member states concerning noncompliance with the Cartagena Agreement is initially brought to the "Junta," which is the "technical organ" of the Cartagena Agreement, roughly comparable to the EC Commission. *Id.* Following an investigation, the Junta presents its written observations on the dispute to the member states concerned. *Id.* at 1207. Following an opportunity for response by the member states, the Junta issues a "considered opinion." *Id.* If a member state fails to comply with the Junta's opinion, the Junta must present the matter to the Court. *Id.* The complaining member state also may bring the matter to the Court if the Junta does not act in a timely fashion. 18 I.L.M. at 1207. If a member state fails to comply with a decision of the Court within three months, the Court may authorize members to limit or suspend "advantages deriving from the Cartagena Agreement which benefit the noncomplying member country." *Id.*

28. Protocol Establishing the Final Mechanism for the Settlement of Disputes Within LAFTA, Sept. 2, 1967, *translation reprinted in* 7 I.L.M. 747. The LAFTA dispute-settlement procedure bears a striking resemblance to the procedures set forth in Chapter 20 of the NAFTA (particularly the arbitration procedure) discussed in part III, *infra*. Under the LAFTA procedure, disputes must first be referred to LAFTA's "Standing Executive Committee," which tries to bring the parties to a negotiated settlement. *Id.* at 748. If negotiations fail, the parties may then invoke binding arbitration. *Id.* at 749. The parties to the dispute are required to agree on three arbitrators from a pre-existing roster of persons already designated by all the LAFTA parties as potential arbitrators. *Id.* at 751. Any arbitrators with respect to whom agreement cannot be reached are selected from the roster according to a previously established system of rotation. *Id.* at 752. "The award is compulsory for the Parties to the dispute from the time notice of it is given, and it shall have the force of *res judicata* with respect to the Parties." *Id.* at 916.

29. Convention Establishing the European Free Trade Association, Jan. 4, 1960, arts. 31-32, 370 U.N.T.S. 5, 22-23. The EFTA's Council, composed of representatives of each member state, may refer any dispute that is before it to an "examining committee." *Id.* Such a reference must be made if requested by a concerned member state. *Id.* After considering the dispute, including any report of an examining committee, the Council makes such "recommendations" as it deems appropriate. *Id.* If a member state does not comply with the Council's recommendations, the Council may then authorize any member state to suspend such of its obligations to the offending member state as the Council considers appropriate. *Id.*

30. NAFTA, *supra* note 1, ch. 11.

31. NAFTA, *supra* note 1, ch. 19.

they are better able to attract foreign capital if they have entered into agreements with capital-exporting countries. These agreements, usually called bilateral investment treaties, almost always commit the parties to submit investment disputes between one party and a national of the other party to binding arbitration.[32] The investment provisions of NAFTA amount to a trilateral investment treaty among the three parties that includes such a customary commitment to submit investment disputes to binding arbitration.[33]

NAFTA's investment arbitration provisions are quite detailed, consuming about half of the agreement's investment chapter and consisting of 23 articles.[34] Some of this length is necessary to deal with relatively technical matters, such as: ensuring that investors of one party may submit claims even if their investment is in an enterprise incorporated under the law of another party (Articles 1116-17); ensuring that awards will be enforceable under the New York Convention (Articles 1121-22, 1130)[35]; and providing for the consolidation of claims that present common questions of law or fact (Article 1126). More substantive provisions include: Article 1134, which empowers arbitration panels to order interim measures (not including attachments); Article 1133, which permits panels to seek independent advice from appropriate experts; and Articles 1123-24, which set forth the procedure for appointing arbitrators in investment disputes. This appointing procedure is rather typical of what one finds in international arbitration agreements. The parties are each required to appoint one arbitrator and to attempt to agree on a presiding arbitrator.[36] The Secretary General of the International Center for the Settlement of Investment Disputes ("ICSID") is empowered to appoint the presiding arbitrator if the parties do not reach agreement, and to appoint other arbitrators if any of the parties fail to make their separate appointments.[37]

2. *Review of Antidumping and Countervailing-Duty Determinations*

Each of the NAFTA parties has domestic laws that prohibit the dumping of imported products ("antidumping laws") as well as laws that provide for the imposition of countervailing duties on subsidized imported products. All of these laws remain in force under NAFTA, and each party retains the right to enforce its laws and to amend them, subject to certain limitations.[38] NAFTA, however, replaces judicial review of antidumping or counter-

32. *See, e.g.*, Treaty Between the United States and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, Dec. 3, 1985, art. 7, *reprinted in* 25 I.L.M. 87, 96-97.

33. The NAFTA's investment provisions are set forth in Chapter 11. Articles 1115-38 set forth the procedures to be followed in an investment dispute. NAFTA *supra* note 1, art. 1115-38.

34. NAFTA, *supra* note 1, arts. 1115-38.

35. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

36. NAFTA, *supra* note 1, art. 1123.

37. NAFTA, *supra* note 1, art. 1124.

38. NAFTA, *supra* note 1, art. 1902.

vailing-duty determinations by national courts with review by binational panels.[39] These panels are charged with applying the law of the importing country, including the standard of review that the appropriate court in that country would apply.[40] The procedure for appointing panelists is very similar to that set forth in Chapter 20 of NAFTA for appointing arbitrators for other disputes between parties. Panels consist of five members, two appointed by each party to the dispute[41] and a fifth to be appointed by agreement of those parties. A roster of potential panelists is to be prepared in advance by the parties, and it is expected that panelists will come from this roster. There are also provisions to limit delay in the appointment of a panel and to deal with situations where the parties are unable to agree on the fifth panelist.[42]

NAFTA's provision for the nonjudicial review of antidumping and countervailing-duty determinations is probably the only dispute-resolution mechanism in NAFTA that can truly be viewed as a type of alternative dispute resolution similar to that seen in the domestic context. First, and most importantly, the binational review panels are an alternative to some other formal means of dispute resolution that do not depend on the agreement of the parties: *i.e.*, the American, Canadian and Mexican courts that otherwise would hear these appeals. That is not generally true of dispute-resolution mechanisms in the international context. Moreover, the motivation for creating the binational panels was, in part, a concern over the impartiality of the parties' national courts. This concern can be a contributing motivation to a domestic ADR scheme. Indeed, the only real motivational difference between NAFTA's binational panels and domestic ADR is the lack of any real concern over efficiency on the part of the NAFTA parties.[43]

III. TYPES OF ARBITRAL BODIES AND THE PROCEDURES FOR SELECTING THEIR MEMBERS

There are two fundamental types of international arbitral bodies: *ad hoc* panels and permanent tribunals. Permanent tribunals have at least two significant advantages over *ad hoc* panels. First, permanent tribunals are better able than panels to develop a consistent jurisprudence over time. Such a jurisprudence increases the clarity of the agreement and thus, at least in theory, makes disputes less likely. In addition, a permanent tribunal makes it unnecessary for the parties to appoint arbitrators every time there is a dis-

39. NAFTA, *supra* note 1, art. 1903.

40. NAFTA, *supra* note 1, art. 1904, 1911 and, Annex 1911.

41. In antidumping cases, the parties in the initial determination are the government of the importing country and the specific foreign producers charged with dumping. These private parties do not appoint panelists, however. All members of Chapter 19 binational panels are appointed by the involved governments. NAFTA, *supra* note 1, Annex 1901.2.

42. *Id.*

43. Chapter 19 of the NAFTA was closely modeled after the antidumping and countervailing-duty review procedures contained in the Canada-United States Free Trade Agreement. These procedures were adopted in the Canada-United States negotiations as a last-minute compromise when the parties were unable to agree on a provision that would have restricted their ability to apply their antidumping and countervailing-duty laws to each other.

pute, a process which can itself become a source of friction and which often results in the selection of particular arbitrators more because of their known support for a position than because of their reputations for ability and fairness.

The NAFTA parties, however, chose not to provide for a permanent tribunal. There are at least two reasons that might explain this decision. First, it is hardly clear that such a tribunal would have enough work to justify its existence. The arbitration procedure established under the Canada-U.S. Free Trade Agreement has been used five times since that agreement came into force in 1988, and it is unclear why one should expect substantially greater demand for arbitral panels under NAFTA.[44]

In addition, the principal advantage of a permanent tribunal—its superior ability to develop a consistent jurisprudence—can also be seen as a disadvantage. An ad hoc panel hears but one dispute and is then dissolved; its potential for doing mischief is therefore limited. A permanent tribunal, on the other hand, could potentially hear many disputes before any change was made in its membership, and even then its membership would change only gradually. The damage that could be done by an uncongenial tribunal is therefore substantial. It would not be surprising if all three of the NAFTA parties thought that the advantages of such a tribunal did not justify the risk that it might prove to be both long-lived and unfriendly.

In the end, the NAFTA parties agreed upon a procedure that avoids the risks inherent in a permanent tribunal and also avoids some of the problems that can arise when parties try to agree on arbitrators for particular disputes. If mediation is unsuccessful, a dispute is referred to a five-member arbitral panel.[45] The members of the panel come from a roster of up to 30 individuals selected in advance by consensus of the parties.[46] Each disputing party is required to name two panelists who are citizens of the other party.[47] The chairman of the panel is to be selected by agreement of the parties, but if that fails, one of the disputing parties, selected by lot, will select a chairman who is not a citizen of that party.[48] If any party fails to name its panelists within the time specified, those panelists are to be selected by lot from that group of

44. In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Final Report of the Panel CDA-89-1807-01 (Oct. 16, 1989); Lobsters from Canada, Final Report of the Panel USA-89-1807-01 (May 25, 1990); Treatment of Non-Mortgage Interest Under Article 304, Final Report of the Panel USA-92-1807-01 (June 8, 1992); The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales, Final Report of the Panel CDA-92-1807-01 (Feb. 8, 1993); Puerto Rico Regulations on the Import, Distribution and Sale of UHT Milk from Quebec, Final Report of the Panel USA-93-1807-01 (June 3, 1993).

45. NAFTA, *supra* note 1, art. 2008, 20011.

46. *Id.* art. 2009.

47. *Id.* art. 2011.

48. *Id.* Where there are two parties complaining against the third party, the selection procedures are similar. The panel still has five members, the party complained against must appoint two panelists who are citizens of different complaining parties, the complaining parties must jointly appoint two panelists who are citizens of the party complained against, and the chairman is to be selected by agreement, failing which one side of the dispute (chosen by lot) will select a chairman who is not a citizen of the party or parties on that side of the dispute. *Id.*

roster members who are citizens of the other party.[49]

Most procedures for appointing ad hoc arbitral panels permit the parties to appoint virtually anyone as an arbitrator; there is no list of arbitrators designated in advance. Otherwise, they are not very dissimilar from the appointment procedures set forth in Chapter 20 of NAFTA. Thus, under most ad hoc arbitration schemes, the parties must first try to agree on a panel or on a sole arbitrator; if they cannot, they each appoint a member of the panel, and those members attempt to agree on a third member (the chairman); if agreement cannot be reached on the third arbitrator, the parties look to an appointing authority, designated in the arbitration agreement, who appoints the third member.[50]

While such procedures are quite workable, they present one important difficulty: Arbitrators appointed at the sole discretion of one party will often be appointed because their views on an important question are known and favor the appointing party. When this happens, a party-appointed arbitrator can end up acting more as an advocate than as a judge. Strictly speaking, an arbitrator appointed because of his views on a particular question does not violate his obligation of independence either by accepting the appointment or by acting consistently with those views in the arbitration.[51] Whenever a party makes such an appointment, however, the obligation of independence is violated in spirit because the appointing party has, in effect, "packed the court," and done so after being put on notice of precisely what the important questions in the arbitration will be.[52]

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49. *Id.* art. 2011.

50. In the case of agreements calling for a sole arbitrator, the appointing authority will be called upon once the time allowed for the parties to agree on a designation has expired. In the case of five-member panels, each party will appoint two members, who will then try to agree on a fifth member. *See, e.g.*, Arbitration Rules of the United Nations Commission on International Trade Law, arts. 5-8 [hereinafter UNCITRAL Rules]; International Chamber of Commerce, Rules of Arbitration, arts. 3-6 (1988).

51. The obligation of international arbitrators to be independent of the parties that appoint them is clear. For example, the International Bar Association's "Ethics for International Arbitration" (*reprinted in* 2 INT'L ARB. REP. 287 (1987)) takes the position that international arbitrators should be "impartial, independent, competent, diligent and discreet" and makes no distinction between party-appointed arbitrators and chairmen or sole arbitrators. Similarly, both the ICC Rules (Article 7) and the UNCITRAL Rules (Articles 9-10) expressly require independence of all arbitrators operating under those rules. Finally, Article 2009, Paragraph 2, of the NAFTA requires that all arbitrators "be independent of, and not be affiliated with or take instructions from, any Party . . . ." NAFTA, *supra* note 1, art. 2009.

It is also clear that this obligation of independence does not preclude the appointment of arbitrators who have prior views on questions at issue in the arbitration. W. Lawrence Craig, et. al., *International Commercial Arbitration*, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION BOOKLET 4, 210-12 (1990). Nor does it prevent parties from trying to learn what those views are from sources other than the arbitrator. There are widely accepted limitations on the subjects that an appointing party can appropriately discuss with an individual being considered for appointment as an arbitrator. Coombe, *The Selection and Conduct of the Party-Appointed Arbitrator: International and Domestic Ethical Considerations*, 1 Newsletter of the Int'l Commercial Arb. Comm., A.B.A. SEC. ON INT'L L. 1 (1993).

52. How much good such court-packing actually does parties in international arbitrations can be debated. If both parties pack the court, the chairman effectively makes the decision. Some argue that the appointment of advocate-arbitrators is often counter-productive. *See* Craig, *supra* note 51, at 212. In this writer's view, that very much depends on how the advo-

The appointment of advocate-arbitrators is not a trivial matter. First, it reduces a panel's ability to function as a deliberative, as well as an adjudicative, body. When party-appointed arbitrators act as advocates, deliberations are replaced by a contest for the chairman's vote. Second, the parties research the relevant views of arbitrators (if not before, then after they are appointed) and thus know when their opponent has appointed someone who is likely to prove unpersuadable on important issues. No doubt such circumstances can have an adverse effect on the willingness of parties to accept a panel's decision, or possibly even to cooperate in the arbitration.

NAFTA's procedure for selecting arbitrators represents an effort to produce panels that will reflect a substantial level of agreement among the parties. By forcing the parties to reach an agreement on the roster of possible arbitrators before any particular dispute has arisen, and by leaving open the possibility that any person on the roster might be named to a panel by any party, the parties are given an incentive to select people for the roster primarily because of their ability and fairness. Known views on particular questions are of little importance at the outset of an agreement because the subjects of any future disputes usually cannot be predicted with any particularity[53] and, in any event, the members of the roster are selected by consensus, thus giving the other members a veto over individuals with known uncongenial views.[54]

The NAFTA procedure achieves the advantages just described while at the same time avoiding the most serious danger presented by a permanent tribunal: long-term hostility to the views of one party. While no party can prevent another party from reappointing a particular arbitrator, any party can ensure that a panel has at least two members who are different from the members of the preceding panel.[55] The procedure thus consists of a cross between appointing different arbitrators for each dispute from an essentially unlimited pool, and referring all disputes to a permanent tribunal.

This hybrid method of selecting arbitrators distinguishes arbitration under NAFTA, as well as the Canada-U.S. Free Trade Agreement, from arbitration in most other contexts. This is not to say that the NAFTA method

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cate-arbitrator handles himself in the panel's deliberations. It also depends on whether both parties are trying to appoint advocates.

53. It is doubtful that anyone would have predicted at the signing of the Canada-United States Free Trade Agreement that the first two, intergovernmental disputes under that agreement would involve Canadian landing requirements for Pacific coast salmon and herring and a U.S. restriction on the size of lobsters that could be sold in this country. *See supra* note 44. The subjects of trade disputes tend to be very specific and, thus, very unpredictable.

54. In this respect, as in many others, the NAFTA arbitrator-selection procedure follows the Canada-United States Free Trade Agreement, albeit with a difference in form. Article 1807 of the Canada-United States Agreement simply required that arbitrators (or "experts" as they are denominated in that agreement) be chosen from the roster. Article 2011, Paragraph 3, of the NAFTA achieves the same result but by a more circuitous route. It states that "[p]anelists shall normally be selected from the roster," but then goes on to give any disputing party the right to "exercise a peremptory challenge" against any proposed arbitrator who is not on the roster, so long as the challenge is made within fifteen days. The purpose served by this peculiar provision is unclear, to say the least.

55. In addition, the chance that a biased arbitrator will appear on the roster is lowered by the requirement that individuals listed on the roster be selected by consensus.

should serve as a model in all other contexts. No doubt the parties to most commercial contracts would not find it worth their trouble to name in advance several individuals who might serve as arbitrators in the event of a dispute.[56] In many cases the parties probably would prefer to appoint arbitrators who, because of their views on important questions, will essentially act as advocates within the arbitration panel. But there are likely other circumstances in which the parties to an agreement would value some advance assurance that, should they need to resort to arbitration, the entire panel will consist of people who all parties agree are able and fair. If the parties value such advance assurances enough, they will find it worthwhile to try to agree on a list of potential arbitrators, or on a sole arbitrator, before a concrete dispute clouds their judgment.

IV. CONCLUSION

Because the primary considerations that underlie most international dispute-resolution mechanisms are fundamentally different from those behind most domestic ADR mechanisms, any comparisons of the two must be made carefully. The most important consideration in the international context, which is absent in the domestic context, is the need to equalize post-agreement bargaining power with a strong dispute-settlement mechanism. Domestically, this need can be met by the courts without any assistance from an ADR mechanism.

In both the international and the domestic contexts, it is important to be clear about the real differences between the various types of dispute-settlement mechanisms available. In disputes between states, the greatest difference is between mediation and nonbinding arbitration, rather than between binding and nonbinding arbitration, because the means of enforcing binding and nonbinding decisions are essentially the same — retaliation. This difference does not carry as much weight in the domestic context, where the domestic courts are available to enforce binding, but not nonbinding, decisions. Similarly, in the international context, when the dispute is between private parties of different nationalities, or even between a state and a private party of a different nationality, awards, if binding, can be enforced in domestic courts.[57]

The ways of selecting arbitrators can also be important. Indeed, it is in this connection that NAFTA's dispute-resolution procedures may be most worth studying. NAFTA's way of selecting arbitrators requires an amount of time and attention from the parties that probably could not be justified in most situations. The selection process does, however, offer a way out of the advocate-arbitrator paradigm that parties so often feel compelled to follow.

56. Not only would it be difficult to agree on the initial list of potential arbitrators, but also there would be the question of how long persons stayed on the list before coming up for review. In the NAFTA, potential arbitrators remain on the roster for three years but may be reappointed by consensus. NAFTA, *supra* note 1, art. 2009.

57. *See* New York Convention, *supra* note 35, at 2519, 330 U.N.T.S. at 40.