

**SERIES ON SUCCESSFUL HEMISPHERIC PRACTICES:
ADMINISTRATION OF FREE TRADE AGREEMENTS**
Report No. 4 of the Series

**REPORT ON THE SEMINAR
“ADMINISTRATION OF DISPUTE SETTLEMENT REGIMES IN
FREE TRADE AGREEMENTS”**

Puebla, Mexico
March 22-24, 2006

Event organized by:

**The Department of Trade, Tourism and Competitiveness of the
Organization of American States and the
Subsecretariat of International Trade Negotiations of the
Secretariat of Economy of Mexico**

With funding from the:
Canadian International Development Agency

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Canadian International
Development Agency

Agence canadienne de
développement international

Canada

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PREFACE

This report on the seminar on the "Administration of Dispute Settlement Regimes in Free Trade Agreements" is the fourth in a series published as part of the seminars held in the context of the "Program on Successful Practices on the Implementation and Administration of Free Trade Agreements." The Program is a joint initiative of the Department of Trade, Tourism and Competitiveness of the General Secretariat of the Organization of American States and the Subsecretariat of International Trade Negotiations of the Mexican Secretariat of Economy, and it is funded by the Canadian International Development Agency (CIDA).

The "Program on Successful Practices on the Implementation and Administration of Free Trade Agreements" was designed to address requests for assistance from Latin American countries in the context of their participation in trade and economic integration processes in the Americas.

The first seminar analyzed the experiences of Mexico, Chile, Costa Rica and Canada in the administration of free trade agreements (FTAs). The second seminar addressed the issue of the administration of rules of origin and customs procedures. The third seminar dealt with trade statistics for international trade negotiations.

The publication of this report is very timely since most Latin American countries are in the process of organizing and strengthening their institutional infrastructure for the administration of trade agreements. The Department of Trade, Tourism and Competitiveness of the OAS Executive Secretariat for Integral Development supports Member States in their efforts to promote economic diversification and integration, trade liberalization and market access contributing to the objectives of the Mar del Plata Summit of creating jobs to reduce poverty and strengthening democratic governance in the Americas.

I wish to recognize the support of the Mexican Subsecretariat of International Trade Negotiations and, particularly, the efforts of Dr. Luz María de la Mora and her very professional team who have made possible the "Program on Successful Practices on the Implementation and Administration of Free Trade Agreements."

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February 2007

ACKNOWLEDGEMENTS

This seminar was co-organized by the Subsecretariat of International Trade Negotiations of the Secretariat of Economy of Mexico and the Department of Trade, Tourism and Competitiveness of the General Secretariat of the Organization of American States with funding from the Canadian International Development Agency (CIDA)

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The organizers would like to acknowledge the support of Jacquelin Paz, Amelia Runyon, and Ivonne Zúniga (OAS); Gustavo Prado and Blanca Reyes (Subsecretariat of International Trade Negotiations of Mexico); as well as Natalia Andrade, Rona Barnett, Blanca Barney, Liliana Cajas, Gerardo Cárdenas, and Barbara Cohen (FTAA Administrative Secretariat). The organizers would also like to thank the authorities of the State and City of Puebla for their hospitality.

LIST OF ACRONYMS

| | |
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| APEC | Asia-Pacific Economic Cooperation |
| BIT | Bilateral Investment Treaty |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO) |
| FTA | Free Trade Agreement |
| FTAA | Free Trade Area of the Americas |
| FTC | Free Trade Commission (NAFTA) |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of other States |
| Itamaraty | Ministry of Foreign Affairs (Brazil) |
| LAFTA | Latin American Free Trade Association |
| MERCOSUL/MERCOSUR | Common Market of the Southern Cone |
| NAFTA | North American Free Trade Agreement |
| OECD | Organization for Economic Cooperation and Development |
| UNCITRAL | United Nations Commission on International Trade Law |
| VCLT | Vienna Convention on the Law of Treaties |
| WTO | World Trade Organization |

REPORT ON THE SEMINAR ON THE
"ADMINISTRATION OF DISPUTE SETTLEMENT REGIMES
IN FREE TRADE AGREEMENTS"

I. INTRODUCTION

With participation of officials from throughout the Western Hemisphere, a seminar on the "Administration of Dispute Settlement Regimes in Free Trade Agreements" took place on March 22-24, 2006, at the headquarters of the FTAA Administrative Secretariat in Puebla, Mexico. The seminar is part of a series of seminars jointly organized by the Subsecretariat of International Trade Negotiations of the Secretariat of the Economy of Mexico and the Department of Trade, Tourism and Competitiveness of the General Secretariat of the Organization of American States (OAS), with funding by the Canadian International Development Agency (CIDA), to respond to the keen interest expressed by many countries in the hemisphere to learn from the experiences of Mexico and other countries in administering and implementing their trade agreements.

The aim of the seminar was to:

- a) Present the experience of countries that have implemented the dispute settlement mechanisms envisaged in their free trade agreements;
- b) Exchange experiences on handling disputes initiated or defended under international trade dispute settlement procedures, based on the presentation of actual cases involving Argentina, Brazil, Canada, Chile, Mexico and the United States, with a view to understanding how the administration and application of the various mechanisms set forth in the various models of free trade agreements are organized;
- c) Train officials who will in due course negotiate dispute settlement models similar to those currently contained in the free trade agreements subscribed to by the countries in the hemisphere; and
- d) At the conclusion of the seminar, compile a directory of officials responsible for handling dispute settlement issues in order to facilitate the exchange of information between countries.

This report provides a synopsis of the presentations made¹ and the ensuing discussion in the seminar. Any views expressed are those of the speakers and do not necessarily reflect those of the OAS, its General Secretariat or its member states. The list of speakers, who came from Argentina, Brazil, Canada, Chile, Mexico and the United States, is included with their short biographies at the end of this report, along with the list of participants. The latter list constituted an important deliverable of this seminar; namely a directory of officials responsible for handling dispute settlement issues in order to facilitate the exchange of information between countries and maybe even avoid disputes in the future.

¹ The full text of the written presentations that were circulated at the seminar can be found at <http://www.economia.gob.mx/index.jsp?P=2561>

A well-functioning dispute settlement system is a guarantor that the obligations subscribed to under a trade or investment agreement will be fulfilled and that the benefits the parties expect to derive from the agreement are realized. A good system can in fact avoid more disputes than it has to settle. This seminar explored *inter alia* how a government organizes itself to comply with its obligations and how it ensures compliance by its partners; how government agencies coordinate with one another and with private stakeholders; what strategies can be used for choosing the best forum to advance or defend one's rights and to obtain remedies; how to marshal the best talent and expertise to present one's case; how to select one's judges and have the proper rules of procedure in place to make sure that the right decision is arrived at in a fair way; and what happens after that decision is rendered. The seminar covered State-to-State, investor-State and anti-dumping dispute settlement procedures.

II. SEMINAR PROCEEDINGS

A. Brief Overview of the Dispute Settlement Mechanisms in Free Trade Agreements

Speaker: Máximo Romero Jiménez

The following briefly describes the three main mechanisms for the settlement of trade disputes negotiated in the free trade agreements signed by Mexico. In certain cases, there will be agreements that only provide for one of these three mechanisms. However, the general features of these are reflected in most mechanisms. Explained below are the dispute settlement models of Chapter XI on investment; Chapter XIX on anti-dumping and countervailing duties and Chapter XX on State-to-State disputes under the North American Free Trade Agreement (NAFTA).

1. Disputes between a foreign investor and a State (NAFTA – Chapter XI)

By means of this mechanism an investor of another Party may submit a claim to arbitration against the host Party of its investment for alleged violations of the provisions of the investment chapter. Section A of NAFTA Chapter XI deals with principles, Section B with the arbitration mechanism and Section C with definitions. This paper will address the arbitration mechanism.

Arbitration Mechanism

- The disputing parties are the investor and the State Party.
- The investor must deliver its notice of intent to submit a claim to arbitration at the offices designated for each Party pursuant to annex 1137.2 and according to the format stipulated by the Free Trade Commission (FTC).
- Delivery of the notice marks the beginning of a six-month period for consultations and negotiations (so-called cooling-off period as the intention is that not all claims should proceed to the arbitration stage).
- In the event that no negotiations have been held three months after the notice of intent is delivered, the investor may file the notice of claim, which shall include a notice of waiver of the right to initiate further proceedings and the investor's consent to arbitration.
- At the time of the filing of the notice of claim, the investor shall have selected the applicable arbitration rules. The Agreement provides for three types of rules: (1) International Center for Settlement of Investment Disputes (ICSID); (2) ICSID Additional Facility Rules; or (3) United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL).
- Where the investor opts for the ICSID arbitration rules or for those of the Additional Facility, the notice of a claim shall be filed with the ICSID office.
- In the case of UNCITRAL, the notice of a claim will be filed with the same office with which the notice of intent was filed.

Appointment of arbitrators

- Arbitration Tribunal: three arbitrators. One appointed by the investor, one appointed by the Party and the Presiding Arbitrator appointed jointly by both parties.
- Roster of 45 possible presiding arbitrators established by the Parties.
- Once agreement is reached the Tribunal is constituted.

Procedural Processes

- Arbitration proceedings are divided into written and oral arguments.
- The Agreement provides for possible participation by the other Parties to the Agreement (Art.1128).
- Once both written and oral stages have been completed the tribunal issues its award.
- Where there are uncertainties, the Parties may request clarification.
- If one of the parties does not agree with the award, it may request that the award be revised, set aside or annulled.

Notification

- The disputing Party shall notify the other Parties of the claim 30 days after the date that the claim is filed.
- The disputing Party shall deliver to the other Parties copies of all pleadings filed during the proceedings (Art. 1127.2).

Documents

- A non-disputing Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party, a copy of the evidence that has been tendered as well as of the written arguments of the disputing parties (Art.1129).

Expenditure and costs

- Without prejudice to the final award, the disputing parties bear equally the expenses of the tribunal for administering the proceedings.
- Generally if a Party wins, it has the right to request costs.

Free Trade Commission (FTC)

- The FTC is the final interpreter of the provisions of the Agreement. Its role is to safeguard the integrity of the Agreement (Art. 1131.2).
- The most relevant interpretation with respect to investment has been on the scope and coverage of Article 1105 (minimum standard of treatment), confidentiality, notice of intent. Notwithstanding the above, some Parties have assumed unilateral obligations; for example, Canada committed to having all its hearings open to the public.

2. Disputes between State Parties to an FTA (NAFTA-Chapter XX)

The provisions of Chapter XX on dispute settlement apply to all disputes relative to the interpretation or application of the Agreement, except for the mechanisms in Chapters XI, XIV (in part) and XIX.

- The mechanism starts with consultations;
- If consultations fail, a meeting of the Free Trade Commission is convened; and
- If the FTC does not resolve the matter, the Party has the right to proceed to the establishment of an arbitral panel.

Free Trade Commission

- Composition: three Cabinet-level representatives
- Functions:
 1. Supervise the implementation of the Agreement.
 2. Oversee the further elaboration of the Agreement.
 3. Supervise the work of all committees and working groups.
 4. Consider any other matter that may affect the operation of the Agreement.

5. Resolve disputes that may arise regarding its interpretation or application.

Secretariat

- Functions:
 1. Provide assistance to the Commission.
 2. Provide administrative assistance to the panels established under Chapters XIX and XX.
 3. Support the work of all other committees and groups established under this Agreement (as directed by the Commission).
 4. Facilitate the operation of the Agreement (as instructed by the Commission).

Scientific Review Boards

- To assist them in arriving at determinations, panels may select scientific review boards, in consultation with the disputing Party.
- These boards will file a written report on factual issues concerning environmental, health, safety or other scientific matters.

Appointment of the Panel

- A panel is formed through a reverse selection process – five members.
- Each party selects two panelists who are citizens of the other Party to the dispute.
- The Chair of the panel is selected by the parties to the dispute and may be a citizen of a NAFTA Party or of any other country.
- In order to be a part of any given panel, candidates on the roster must complete an initial disclosure statement pursuant to the NAFTA Code of Conduct.

Remuneration and Payment of Expenses:

- The NAFTA Free Trade Commission shall establish the amounts of remuneration and expenses.
- The remuneration shall be borne equally by the disputing parties.

Arbitration Mechanism

- Chapter XX is guided by the model rules of procedure and it is envisaged that the duration of the process will be five months.
- During this proceeding, participants may submit their observations in writing to the panel, and at least one hearing will be held.

Contents of the Panel Report

- All reports must contain:
 1. Determinations of fact.
 2. Determination as to whether the measure in question is or would be incompatible with the obligations of a Party under the agreement; or nullifies or impairs the benefits that the complaining government or governments would reasonably have expected to obtain from the Agreement.
 3. Any recommendation the panel might offer with a view to settling the dispute.

3. Disputes on Antidumping and Countervailing Duties (NAFTA-Chapter XIX)

Arbitration Mechanism

- Procedure for reviewing statutory amendments on antidumping or countervailing duties (Art. 1903).
- Procedure for reviewing and settling disputes on antidumping and countervailing duty matters (Art. 1904).

- Procedure for the extraordinary challenge of the panel's decision (Art. 1904. 13).
- Procedure to safeguard the mechanism provided for in article 1904 (Art. 1905).

Review of Antidumping and Countervailing Duties (Art.1904)

- Request for a review before a binational panel.
 - Establishment of a panel.
 - Written and oral proceedings.
 - Panel decision.
 - Review of the measure adopted by the authority.

Parties in the Proceeding

- Investigating authority.
- The parties that requested the establishment of the panel.
- Any other person requesting to participate, as long as this is in accordance with the laws of the country in which the final determination is issued, is duly authorized to appear and be represented in the procedures for judicial review of said determination.

Appointment of Panel Members

- 30 days following the request for a panel.
- Comprising five members.
- Each involved Party shall appoint two members normally from the roster of 75 persons in consultation with the other involved Party and agree on the selection of a fifth panelist.
- The panelists shall appoint the Chairperson from among themselves by majority vote or by lot if there is no majority.

Procedure

- Once the panel has been established and its members appointed, the panel must conduct a review of a final determination in accordance with the rules of procedure of Article 1904 adopted by the Parties.
- The mechanism before the panel involves one single instance, which in principle must conclude with a final decision within 315 days after the date on which the request for a Panel is made.
- The panel may only uphold the final determination or remand it to the prior instance for action not inconsistent with the Panel's decision.
- The panel's declaratory opinion is final and not appealable.

Review of the New Decision

- The measure adopted by investigating authority pursuant to the panel's remand may be reviewed.
- This review is conducted by the original panel.
- The final decision must be issued within the following 90 days.

B. Establishing a National Office Responsible for Handling the Settlement of Disputes Arising from Free Trade Agreements

Speaker: Rafael Serrano²

The entity known as the Secretariat Office is mentioned in various free trade agreements, including the following:

- North American Free Trade Agreement, between Canada, the United States of America and the United Mexican States (Art. 2002).
- Northern Triangle Free Trade Agreement, between El Salvador, Guatemala, Honduras and the United Mexican States (Art. 18-03).
- Free Trade Agreement between Bolivia and the United Mexican States (Art. 18-02).
- Free Trade Agreement between Chile and the United Mexican States (Art. 17-02).
- Free Trade Agreement between Nicaragua and the United Mexican States (Art. 19-02).
- Free Trade Agreement between Costa Rica and the United Mexican States (Art. 16-02).

The other treaties signed and ratified by Mexico do not provide for a Secretariat Office, however, there are several administrative units that meet all such kinds of needs under these treaties.

Each State must establish as many units as may be necessary to implement any signed agreement, including those of a procedural nature that would contribute to the settlement of disputes arising from the application or interpretation of the Agreement, based on the designated Rules of Procedure or Model Rules of Procedure. These Rules of Procedure or Model Rules of Procedure refer to any procedural rule, formulated within the international agreements or determined by the competent forum to which a dispute has been submitted, and which sets the guidelines for the settlement of the dispute.

The function of the Secretariat Office to intervene in the various dispute settlement fora is of significant importance, since this body shall be in charge of directing the operative and administrative logistics for the competent fora. The Secretariat Office's administrative functions shall be set by the competent body settling the dispute; however, they will always be primarily administrative. The functions set forth in the free trade agreements that make provision for a Secretariat Office are to:

- Provide assistance to the various fora;
- Provide technical and administrative support to commissions, sub-commissions, panels, committees, arbitral tribunals and groups of experts;
- Be responsible for paying the fees and costs of the arbitrators, their assistants, experts and members of the scientific review boards as provided in the various agreements;
- Act as an office to receive and process disputes initiated by the parties;
- Facilitate the operation of agreements based on the functions assigned by the fora.

² The full text of the written submission, which, inter alia, elaborates further on the dispute settlement procedures under NAFTA chapters X, XI, XIX and XX as well as the conflict of interest provisions of the NAFTA Code of Conduct can be found at <http://www.economia.gob.mx/index.jsp?P=2561>

The North American Free Trade Area (NAFTA) Secretariat, comprising the National Sections of Canada, United States and Mexico is a single organization, established by the Free Trade Commission, pursuant to Article 2002 of the same Agreement. The National Sections are "mirror offices" that work together and are located in the cities of Ottawa, Washington and Mexico respectively.

The Secretariat's role is to assist the Free Trade Commission and to support administratively the panels, scientific review boards and working groups established for the purposes of settling trade disputes among the NAFTA Parties. The mission of the Secretariat also includes supporting the work of other committees and groups established under the Agreement that are not directly related to dispute settlement.

More specifically, the NAFTA Secretariat administers the dispute settlement procedures set forth in NAFTA Chapters XIX and XX, and carries out four main activities:

- legal support to the panels (advising, follow-up, processing and notification of procedural documents, support to external consultants, procedures for accessing confidential information, monitoring compliance with procedural rules);
- record-keeping and control of documents (receipt and archiving of public documents, confidential documents and documents containing privileged information, posting each panel's deadlines on the web page and scanning public documents, exchanging documentation with counterpart sections);
- administrative to panels (organizing panel meetings, facilitating accreditation with the competent authorities for the members of the panel, public hearing (Ch. XIX), confidential hearing (Ch. XX)); and
- financial administration of panels (payment of panelists, audits).

In addition, the Secretariat has certain responsibilities with regard to the dispute settlement provisions in Chapter XI and the provisions on rectifications or modifications in Chapter X .

The NAFTA national sections were established to serve as intermediary--and to maintain distance--between the disputing States and the panelists and their assistants. There are no *ex parte* communications. The section provides guidance to the panel, such as in relation to deadlines, but does not influence the decision, which is the sole responsibility of the panel. The national section of Mexico depends administratively on the Secretariat of the Economy. The three sections have their own respective budgets. Panelists are paid as providers of services to the section, not directly to the government. The governments of the parties to the dispute bear equally the costs of the panel. Not all panels entail the same workload. Generally, a national section consisting of ten people suffices to cover the registry, legal, and administrative tasks. The national section of Mexico has administered around fifteen cases under Ch. XIX and no cases under Ch. XX. The three NAFTA national sections are in permanent communication with one another.

Under the Northern Triangle Free Trade Agreement, the Northern Triangle members can designate which office acts as the national section, which can administer dispute settlement procedures for all of them.

This office carries out its duties without any participation in the decisions made by the panels or the dispute settlement committees regarding the merits of the case to which they are privy and act independently of the participants involved in the

procedures. For the Secretariat to perform its duties well, it is very important to preserve the following principles: impartiality, independence and transparency. From the outset, it is very important to select public servants with a low profile. This position requires discretion and supportiveness.

The conduct of the members of the national section is governed by the Code of Conduct for Dispute Settlement Procedures, Chapters XIX and XX of the North American Free Trade Agreement.

The Code of Conduct regarding the Northern Triangle Agreement is set forth in Annex 1908 of that Agreement.

Regarding impropriety or the appearance of impropriety, the Code provides that the Parties shall ensure the respect of the principles of integrity and impartiality in the performance of responsibilities or duties by panel members. The Code also applies to Secretariat staff members with regard to their conduct and integrity in carrying out their duties.

The North American Free Trade Agreement sets forth a series of innovative dispute settlement procedures which brought Mexico into the more advanced practice of settling trade disputes via arbitration. The arbitral nature of the Panels and the awareness of this feature on the part of the participants in the procedures are the endorsement of reliability leading to unchallenged acceptance of its resolutions, within the framework of transparency and impartiality guaranteed by the National Sections of the Secretariat.

C. Preparing for and Conduct of the Hearing in Investor-State Dispute Settlement

Speaker: Hugo Perezcano Díaz

Preparing a written brief and an oral presentation are both intensive exercises. In countries with a common law tradition, such as Canada and the U.S., the hearing holds a prominent place.

With respect to the written part, there is a first round with a counter-reply, and in the experience of Mexico, often a second round. Both written presentations will contain exhaustively all the arguments accompanied by evidence. While the written presentation needs to be exhaustive, the oral presentation must focus on the principal aspects of the case, given time limitations. There can be more than one hearing, especially if there are issues of jurisdiction involved. To prepare adequately for a hearing, one must have a good written presentation.

There are three parts to an oral hearing: a first part where preliminary arguments are presented to the panelists, examination of witnesses, and a final part for conclusions. Each stage requires careful preparation as well as procedural strategy, particularly regarding how much information to give initially to the panel, which also means to the other party.

With respect to the second phase for testimony, one has to consider which witnesses to call who will add to one's case. Most witnesses for Mexico in investor-State cases have been government officials testifying voluntarily—since a forced witness is probably not a good witness. In Latin America, lawyers generally have less training and experience than their common law counterparts in examining and cross-examining witnesses. Witnesses, including expert witnesses, should be prepared but not coached in their testimony.

The conclusions may be schematic or more detailed depending on what arose during the proceedings. Any problems of credibility of the witnesses called by the other party have to be emphasized, and any problems with one's own witnesses minimized. This phase is the last opportunity to recapitulate one's principal points, address any useful points that arose in testimony, and lead the tribunal to conclude in one's favor. There follows a period of further written exchanges. The hearing is generally the last time one can put a face on the case and witnesses before the tribunal.

Since NAFTA, Mexico has used outside counsel. The private sector has been involved in some cases. It is important for government with its broader political vision to retain quality control. Foreign counsel may advise and the private sector may comment, but it is the government that takes the decisions and makes/signs the submissions. There may be a good argument to be advanced in a particular case that a government would choose not to pursue because it would be not conducive to public policy and interest in the longer term. The Secretariat of Economy negotiates and litigates trade and investment agreements for Mexico, consulting with other agencies as appropriate, depending on the case. The U.S. government has a more complex inter-agency coordination system.

In relation to choice of forum for State-to-State disputes, this has not been much of an issue for Mexico since generally only one forum has been available in most cases.

D. Particularities of the Investor-State Dispute Settlement Mechanism

Speaker: Hugo Perezcano Díaz

1. Nature of the Proceedings

Investor-State dispute settlement is really public international law notwithstanding that in the first cases, complainants thought it was private commercial dispute settlement. These proceedings take time and are procedurally more difficult than private sector actors and governments expected. The claim consists of measures taken by a government such as a law or an expropriation—measures taken by a State as a governing entity. It would not cover, for example, resort to arbitration on a matter involving the rent of a building—that is a private commercial matter. Investor-State arbitration covers measures taken for a public purpose.

If successfully challenged, the consequences can be, depending on the treaty, restoration of the property or payment of damages or compensation. This comes out of taxpayers' money and thus implicates more than and reaches beyond the civil servants of the Secretariat of Economy. These are public resources at stake. It is important for officials and the tribunal not to lose sight of this.

The tribunal will decide whether the expropriation, the promulgation of a law or a regulation is consistent with treaty provisions. If the tribunal determines that a law or provision is contrary to international law provisions, the guilty party is the State; this has repercussions not only internationally but also domestically; e.g., WTO tax measures on soft drinks case (*Mexico – Taxes Measures on Soft Drinks and Other Beverages*). This is a law, promulgated by legislators who are the representatives of the citizenry, and thus the tribunal's decision has an impact, without prejudging whether the decision was good or bad, on more than certain civil servants in their offices.

There have been findings by tribunals of violation by Mexican municipalities and states. The federal government has assumed the costs of compliance with the award—in an improvised way. There is draft legislation being considered on how to assign more specifically the responsibility and budgetary burden in this respect.

One issue that has been discussed is how much to pay arbitrators—whether at the scale of the international rate (tariff) charged by an International Chamber of Commerce or American Arbitration Association arbitrator or a more negligible amount like under NAFTA. Mexico considers that arbitrators should be paid remuneratively but governments should not have to bargain with them.

Governments don't work like private firms. This has repercussions on how governments organize themselves internally. Governments have difficulties in having a written presentation ready in one month, for example, because they need more time to consult the different dependencies and municipalities involved. Governments take decisions that perhaps are not the right or most appropriate ones to take, but the fact remains it was an official that took that decision. Governments have the obligation to look after and evaluate the interests of all involved. The International Court of Justice that deals with disputes between States has understood this but not all *ad hoc* tribunals under trade agreements fully appreciate this.

2. Precautionary Measures

This is a complicated issue for parties and tribunals. It is not necessarily limited to preserving evidence. In the experience of Mexico, precautionary measures have been sought for a government to cease closing a site, or if a government has suspended an action, for the government to continue taking it. Mexico has usually offered an alternative route to precautionary measures to satisfy the other party and avoid having the tribunal take a difficult decision.

3. Selection of Arbiters

Bilateral investment treaties (BITs) have been around for over 100 years but the proliferation of investment and trade disputes is a recent phenomenon. When it entered into NAFTA and the GATT, Mexico had no experience in this area. When it passed from a closed economy to one that was opening significantly, Mexico did not have lawyers trained in anti-dumping and subsidy matters. This is less and less the case now but still a reality. An Advisory Centre on WTO Law has been established to help countries present cases. Similarly, Mexico does not have enough qualified people to serve as arbitrators to resolve cases. This is a very specialized field: foreign investment law, trade law and also public international law. There are relatively few experts and even fewer Spanish-speaking ones. While Spanish is an official language of the International Center for the Settlement of Investment Disputes (ICSID), the pool of potential arbitrators that are Spanish-speaking is limited. For Mexico, each case presents the challenge of selecting arbitrators.

4. Jurisdictional objections

Many of Mexico’s cases have presented jurisdictional issues. These cases are extraordinary because they represent alleged violations of a State’s international legal obligations. Protection to investors has been offered in order to attract foreign direct investment in a world where competition is fierce to attract capital. When competing for investment, having a lot of cases against you may work against you. Jurisdictional objections have to be resolved as soon as possible.

In terms of strategy—jurisdictional objections have to be part of the written reply to the complaint but if they affect the jurisdiction of the tribunal, probably it is preferable to raise such objections early. Mexico has sometimes raised jurisdictional objections preliminarily with mixed results. In one case, the tribunal accepted Mexico’s substantive argument and did not address jurisdiction.

5. Preparation of Witnesses

In State-to-State dispute settlement, the facts are rarely in dispute and the arguments focus on the law at issue. In investor-State dispute settlement, the facts are presented by the investor and are in opposition to the government so part of the probative process involves witnesses. Under ICSID and UNCITRAL, there is a balance between written submissions (why this is a first important step) and common law hearings. In Mexico, the judge would examine the written evidence. At a common law hearing the calling of one’s own witnesses and the cross-examination of the witnesses of the other party are both equally important. (See also above section C.)

6. Recourse to Challenge

What will be site for the investment dispute proceedings? This question involves issues of costs (travel, experts, etc.). More importantly, as Mexico is not a member of ICSID, the arbitration *situs* is important because it affects the scope of recourse to possible challenge to the arbitral decision. For countries who are ICSID members, this is less important because there are rules governing challenges, including

recourse to the Challenge Commission, which is exclusive. For those who are not ICSID members, the choice is whether to resort to ICSID arbitration or to an *ad hoc* tribunal. If one elects to challenge under the UNCITRAL rules, the *situs* is important. If the proposed *situs* were Paris, for example, Mexico has to consider not only having to pay perhaps a US foreign counsel to assist in arguing the case, but may also have to contract French lawyers for an eventual challenge because they alone are competent to argue before French tribunals.

Challenging an arbitral decision is not a typical appeal. Generally under the New York Convention³, grounds are limited to the tribunal not having been established properly in accordance with the rules, exceeding jurisdiction or corruption. No errors of facts or law are allowed on appeal.

7. Procedural Costs

The cost to Mexico for defending an investor-State claim runs around US\$100,000-500,000—more if foreign counsel is used. Administrative costs for an ICSID case include paying for stenographers, members of the tribunal and hospitality as well as travel costs for witnesses, fees for testimony, and payment of experts, sometimes foreign market investigators.

In addition to damages, sometimes administrative costs are awarded but they do not generally cover all costs incurred by a party. In *Methanex Corporation v United States of America*, the U.S. sought the award of all its costs incurred, including the time spent by government lawyers working on the case, and the U.S. prevailed.

There are no rules on implementing the award. A government can take as long as it wants, but interest accrues at international interest rates. The longer one takes to comply, the more costs one incurs; this also has repercussions that affect a government’s own claims for execution of its awards. If a State refuses to pay, it is not in compliance with its international obligations. This affects the State’s standing in the international community as well as its attractiveness for foreign investors. Mexico has litigated its disputes to the end but has always complied with the final award.

Awards of damages are required to be paid and this is ultimately enforceable in the domestic courts of all the NAFTA parties—all are parties to the New York Convention and UNCITRAL rules.

³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

E. Choice of Forum and Procedural Rules and Applicable Law in Investor-State Dispute Settlement; Coordinating with Other Government Agencies and Entities in Defending a Claim

Speaker: Matthew Kronby

1. Choice of Forum and Procedural Rules

Typically, commencement of investor-State dispute settlement under a free trade agreement (where the investor or investment can bring the action) involves a series of steps (e.g. NAFTA Articles 1118-1121):

- a consultation and negotiation period (NAFTA 1118);
- a waiting ("cooling-off") period before the investor may bring a claim (NAFTA 1120.1: six months from events giving rise to the claim and NAFTA 1119: at least 90 days after delivering notice of intent);
- a choice of forum by the investor (NAFTA 1121); and
- a choice of arbitration rules (NAFTA 1120.1).

Choice of Forum

Choice of forum involves choosing whether to bring a claim under the investment provisions of the agreement or to a local domestic court. It is different from selecting arbitral procedural rules. Under customary international law, exhaustion of local remedies is required before resorting to international law remedies. Not so for investor-state dispute settlement under most FTAs. Under NAFTA 1121 an investor must choose between the remedies provided under local law and those provided through NAFTA arbitration; an investor must forego its rights "to initiate or continue" actions in local courts. As an exception, an investor may still pursue kinds of relief unavailable under NAFTA (where the principal relief is for damages), such as injunctive or declaratory relief that does not involve payment of damages.

There is some debate in the various NAFTA arbitrations as to: (1) whether 1121 really waives the exhaustion of the local remedies rule, at least when the alleged breach arises out of a judicial proceeding (e.g. *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. AR(AF)/98/3)); and (2) the extent to which investors must forego local remedies when pursuing investor-State dispute settlement (e.g. dissent in *Waste Management Inc v United Mexican States*) by the chief arbitrator who considered that the waiver was not intended to cover local commercial claims as opposed to international law treaty claims). However, the general implication of 1121 is that an investor must choose whether to pursue damages for a particular State measure through local courts or through investor-State dispute settlement.

Some FTAs do require exhaustion or modified exhaustion of remedies but most do not since the objective is to remove the dispute from local courts. When negotiating an FTA, one needs to consider the extent to which one wants exhaustion.

There is an additional choice for investors in Mexico where NAFTA is self-executing and investors therefore can allege a violation of NAFTA as a basis for a domestic legal claim. This is not possible in the U.S. or Canada. In order to avoid duplication of proceedings, Annex 1120.1 prohibits an investor from submitting a claim against Mexico for a breach of Chapter 11 in both Chapter 11 arbitration and before a Mexican domestic court or tribunal.

Therefore one may also need to think about the extent to which one is willing to have the State defending both a domestic case and an investor-State arbitration. Duplication increases expense (double recovery) and the possibility of determinations that are mutually inconsistent. The latter risk is slight if only extraordinary relief for claims not covered under the agreement can be pursued in local courts as under NAFTA.

Choice of Rules

An FTA will give the parties or the investor a limited choice of arbitral rules that apply to the dispute; e.g. under NAFTA, an investor can elect choice of arbitral rules:

- ICSID Convention⁴ if both the disputing Party and the Party of the investor are parties to the ICSID;
- ICSID Arbitration (Additional Facility) Rules if either the disputing Party or the Party of the investor is a party to the ICSID Convention; or
- UNCITRAL Arbitration Rules.

Because only the U.S. among the NAFTA states is as yet a party to the ICSID Convention, no NAFTA arbitrations fall under the ICSID Convention.

Applicable arbitral rules will apply except as modified by the FTA (e.g. NAFTA 1120.2). Most modify and impose more specific and elaborate procedural requirements.

In practice, there is not much difference among the rules. All three sets of rules take a flexible approach to the process. All allow the tribunal to decide questions of procedure not covered by the rules or agreed by the parties.

The flip side of flexibility is that it can be very frustrating to try to find guidance or precedents on rules. Lack of uniformity and predictability under the applicable rules has led the U.S. in its Model Bilateral Investment Treaty (2004) and Canada in its Model Foreign Investment Promotion and Protection Agreement (2003) to be much more detailed and prescriptive as to the process, especially concerning transparency obligations and requirements to decide preliminary matters. Experience has shown that it is better practice to be more explicit in the FTA as to procedural expectations and not just leave everything to the tribunal. If parties have a sense of what they want procedurally, it is best to include this for security and predictability.

In addition to rules, when drafting investor-State provisions, Parties should consider putting rates for arbitrators into a schedule to the treaty, which can be updated as necessary. Arguing about rates at the beginning of an arbitration is a terrible way to start (*Metalclad Corporation v United Mexican States*).

Generally, outcomes on procedural matters have not tended to be a function of which arbitral rules are chosen; i.e. outcomes have tended to be fairly similar under UNCITRAL and ICSID (Additional Facility) Rules. Even on pleadings, on which NAFTA is essentially silent and there are differences between UNCITRAL and ICSID (Additional Facility) Rules, tribunals have taken similar approaches in terms of memorials, counter memorials, replies and rejoinders.

⁴ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965

One noteworthy difference among the rules is administrative. The administrative burden is less onerous for the tribunal where arbitration is administered by an institution as under the ICSID Convention. However parties may use ICSID administrative services when proceedings are under ICSID (Additional Facility) Rules or may request ICSID to administer proceedings governed by UNCITRAL rules. Otherwise, logistical arrangements become the responsibility of the tribunal or the parties. Generally, administered arbitrations seem to be much more efficient than non-administered, and hence in the long run more cost-effective. Therefore one should not let the administration costs frighten one into choosing non-administered arbitration.

2. Applicable Law

Normally applicable law includes the FTA itself, e.g. NAFTA 1131.1: tribunals are to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." This "Agreement" encompasses the substantive investment obligations but can also capture the rest of the FTA as interpretive context. Be careful of seemingly innocuous language in the preamble or objectives which a creative arbitrator may interpret as a substantive obligation in ways that the parties did not intend.

The applicable rules of international law certainly encompass the canons of treaty interpretation as codified in the *Vienna Convention on the Law of Treaties* (VCLT), Articles 31 and 32. NAFTA tribunals, like the WTO Appellate Body and panels, have looked to the VCLT as the principal source of rules on treaty interpretation. With respect to supplementary means of interpretation per VCLT Art. 32, the relevance of negotiating texts and demands for their production has arisen in a number of cases (e.g. *Pope & Talbot, Inc. v Government of Canada*, *Canfor Corporation v United States of America*, *Methanex Corporation v United States of America*) – demonstrating the value of State parties maintaining good negotiating records. Investors have demanded production of negotiating text whether or not that text needed to be clarified outside normal interpretive means, and tribunals have granted investors this latitude. Other sources of international law are sometimes considered, e.g. ILC [Draft] *Articles on State Responsibility for Wrongful Acts* (in *Loewen*).

Domestic law is not germane as a matter of law. However, it can be central as a matter of fact since investor-State arbitrations address government measures which will generally be products of domestic law. Numerous NAFTA cases have examined the operation of domestic law.

With respect to other investor-State awards:

- Under the same FTA – NAFTA 1136(1): "an award made by a Tribunal shall have no binding force except between the disputing parties in respect of the particular case." This is formally true of WTO dispute settlement as well, but WTO practice arguably is closer to *de facto stare decisis*. Nevertheless, under Chapter 11, decisions of other Chapter 11 tribunals can, and often do, have persuasive effect. There is no requirement to be bound by precedent, and there are examples where tribunals have decided not to be bound.
- Under other investor-State dispute settlement regimes - e.g. in *Metalclad* where the tribunal found persuasive *Biloune v. Ghana Investment Centre*,

which presented similar issues of compliance with local requirements. Some have also looked to the ICJ for guidance.

With respect to other trade jurisprudence, tribunals (e.g. *Methanex*) have made clear that GATT and WTO jurisprudence could be persuasive, if relevant. There may be superficially similar concepts like national treatment and most-favored-nation treatment. Relevance should, and usually will, be determined in part by the similarity of the treaty provision in the FTA with that at issue in the decision under the WTO Agreement or the BIT. (For example, in examining a national treatment claim, the *Methanex* tribunal rejected GATT Article III like products analysis as appropriate guidance in the context of the like circumstances analysis required under NAFTA 1102).

With respect to agreed interpretations by the State Parties, under NAFTA 1131, agreed interpretations are binding on tribunals. This has proven very useful for producing more consistent jurisprudence (e.g. minimum standard of treatment *Pope & Talbot*). Agreed interpretations, along with the right of participation by other FTA Parties helps to address problems in investor-State dispute settlement: only States have obligations under the treaty while the claimant has no obligations, will never be sued, and never has to comply with the treaty.

3. Coordinating with other government agencies and entities in defending a claim

Which agencies and entities to bring into the defense team will depend greatly on the particulars of the case but two key questions serve as a guide:

- Who has the relevant expertise to defend a case?
 - Legal: investment and trade law; litigation especially cross-examination skills; relevant regulatory scheme/measure;
 - Policy: investment and trade policy; domestic regulatory policy;
 - Administration: of the impugned measure.
- Who is going to pay?
 - Cases can be hugely expensive (e.g., US\$2-3 million);
 - Costs: Pay as you go for legal counsel, experts, arbitrators, arbitration facilities;
 - Potential award.

Canadian practice includes the Canadian government agencies entering into funding agreements among involved entities. The payment of awards is, in principle, the responsibility of the agency whose measure has been successfully challenged, but since this could bankrupt the agency in question, it comes out of the Canadian central treasury.

While there are mechanisms under NAFTA whereby regulatory agencies of the three member countries discuss and coordinate with one another and make efforts towards regulatory harmonization, there do not appear to have been any instances when the regulatory agencies have coordinated together to avoid an investment claim. In the area of trade law, the trade policy units concerned in coordination with other regulatory agencies are acutely aware of potential treaty liability from potential regulatory action.

In cases involving sub-national measures, there is a moral hazard problem for federal states. Sub-national measures may breach investment obligations but the federal government is legally responsible under the FTA and legally responsible to pay damages. Canadian practice includes outreach to provinces and municipalities.

The case is a “one-off” affair for the claimant; thus the claimant can advance any interpretation of an obligation and does not have to live with the consequences. The investor does not have a systemic interest in an investment law system that balances investor protection against the government’s right to govern to advance public welfare. By contrast, State Parties undertake obligations, must ensure that their measures comply, are liable in damages if they do not comply, will be bound indefinitely and these obligations will attach in many different contexts. State interests are not just defensive. A State has an equally compelling interest in ensuring protection for its own investors abroad and promotion of foreign investment at home.

States share a systemic interest in a coherent, logical and consistent interpretation of the FTA. Having a provision like NAFTA 1128 creating right to participation by other State Parties can help to achieve this.

The effect of all treaty Parties being in agreement on an interpretation is persuasive but not binding as is the formal NAFTA 1131(2) agreed-upon interpretation. Some even argue it establishes a subsequent practice for the purpose of Article 31(3) (b) of the VCLT.

Canada’s experience with investor-State dispute settlement under NAFTA has been mixed with some frustration as to how tribunals have operated even though they have basically done the right thing. When NAFTA was concluded, the expectation was that the cases would only involve US investors suing mostly Mexico and to a certain extent Canada but a lot of the more recent cases have been brought against the U.S. — which has never lost a case. Where Canada has lost on technical grounds, the awards have been significantly smaller than the costs to plaintiffs. This has calmed concerns and helped to dissuade over-ambitious investors from bringing cases not solidly grounded in facts and law.

F. Experiences in Defending Investor-State Claims

Speaker: Ignacio Pérez Cortés⁵

1. Claims against the Republic of Argentina before the ICSID

There were thirty-six international arbitration claims brought against the Republic of Argentina as a result of measures adopted within the framework of the crisis that gripped that country towards the end of 2001. The amounts claimed in twenty-four of these cases (not including interest) amounted to some 11 billion dollars and in the twelve remaining cases the totals have not yet been determined (eleven arbitrations have now been suspended). The claims that have been calculated represent fifty percent (50%) of current spending of Argentina's public administration for this year and represent more than ten percent (10%) of the gross domestic product (GDP) of the Republic of Argentina. Twenty-nine of the thirty-six arbitrations deal with issues regarding the provision of essential public services:

- Water and wastewater disposal (six)
- Electricity (nine)
- Natural gas (seven)
- Fuel (five)
- Telecommunications (two)

2. Economic, monetary and foreign policy of the Republic of Argentina in the 1990s and the 2001 crisis

In order to understand how this situation came about, it is necessary to describe briefly the economic, monetary and foreign policy reforms introduced in the 1990s. With regard to monetary policy, through the application of the Convertibility Law, the Republic of Argentina adopted a fixed exchange regime where the value of the peso was pegged and equal to the United States dollar. To avoid inflationary spirals, the Convertibility Law prohibited price adjustments based on the price indexes. This prohibition would be a decisive factor in the policy adopted for calculating rates for public services.

One of the strengths of this monetary policy was the fact that it had been sanctioned by a law of the Argentine Congress. To abandon this exchange regime of change would have required another law of the Congress, and this provided assurance that the regime would be maintained. One of the central objectives of the Convertibility Law was to fight inflation, and this was achieved. In the ten years prior to the introduction of the Convertibility Law, average annual inflation according to the Consumer Price Index (CPI) was 1,186.91%. In the ten years following the law (from 1992 to 2001), average annual inflation was 2.62%.

From an economic policy standpoint, the government of Carlos Menem (that took power in 1989) implemented an ambitious privatization program that included broad sectors of the Argentine economy (telecommunications, electricity, natural gas, potable water and wastewater disposal, railways, airlines and hydrocarbons, etc.). The first major privatization was that of the telephone service. In that case, the rates were set in pesos and were adjusted as the local price index evolved. However, shortly thereafter the Convertibility Law was passed and this halted the adjustments.

⁵ The full text of the written submission as well as the PowerPoint presentation, which, *inter alia*, elaborate further on the economic crisis of Argentina of 2001 as well as substantive and procedural issues that have arisen in specific cases brought against Argentina in ICSID, can be found at <http://www.economia.gob.mx/index.jsp?P=2561>

In this context, it was considered that calculating the rates in dollars and adjusting them based on North American prices did not violate the Convertibility Law nor generate an inflationary spiral.

In the case of the telephone companies, the calculation of rates in pesos was replaced by dollars and the local price index (LPI) was replaced by a United States price index (Consumer Price Index, CPI), without any compensation whatsoever for the Argentine State or for the companies. From then on in most privatization cases, it was established that rates would be calculated in dollars and would be converted into pesos at the convertibility rate of exchange and that the rates would be adjusted based on United States price indexes such as the CPI or the Producer Price Index (PPI).

From a foreign policy standpoint, during the 1990s, the Republic of Argentina ratified more than fifty bilateral investment treaties and, in 1994, ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention).

These three elements (monetary, economic and foreign policy) combined towards the end of 2001 to give rise to the current situation of the Republic of Argentina before the International Centre for Settlement of Investment Disputes (ICSID).

As of the third trimester of 1998, the Argentine economy was in a recession that lasted four years and culminated in the worst economic, social and institutional crisis the country has ever had. The recession started with the August 1998 Russian crisis and was worsened by Brazil's currency devaluation (the *real*) at the beginning of 1999. One of the chief problems of the convertibility regime was its rigidity and the fact that in order to make a real adjustment to improve Argentina's economic productivity it was necessary to implement an adjustment policy involving recession and deflation of prices.

The State of Argentina could not honor its debt payment and entered into default in 2002.

Against this backdrop, the Congress of the Republic of Argentina ratified Law 25.561, known as the Emergency Law, which:

- Abandoned the fixed exchange rate;
- *Pesified* the entire Argentine economy;
- Directed dollar-denominated contracts to be adjusted via bilateral negotiations;
- Directed licenses and concessions for public services to be adjusted via bilateral negotiations.

In light of the measures adopted, several foreign investors initiated arbitral claims against the Republic of Argentina, mainly before the ICSID.

3. Administrative structure for dealing with arbitral claims

Given the huge volume of claims initiated before arbitral tribunals, the Republic of Argentina adopted a series of measures aimed at dealing with those claims. During the first half of 2003 the Federal Council for Amicable Negotiations was established consisting of the Minister of Foreign Affairs, International Trade and Worship, the Minister of Economy and Production and the Attorney General with a view to defining the guidelines and strategies for the Argentine State and approving proposals in the

amicable negotiation process arising from the disputes brought by foreign investors. Moreover, the Administrative Unit for Amicable Negotiations (UGENA) was established within the Attorney General's Office, to manage the amicable negotiation phase for foreign investment disputes under Bilateral Treaties for the Reciprocal Promotion and Protection of Investments.

In the second half of 2003, the Unit for the Renegotiation and Analysis of Utility Contracts (UNIREN) was established under the Ministry of Economy and Production and the Ministry of Federal Planning, Public Investment and Services, and presided over by both respective Ministers. The UNIREN's mission was to renegotiate all contracts for public services that were affected by the emergency measures.

Of the 64 original contracts subject to renegotiation, 23 are yet to be renegotiated. The analysis of the agreements reached shows that there is a direct link between, on the one hand, successfully negotiating agreements and, on the other hand, coming out of default on the public debt and claims brought before the ICSID. As debts were renegotiated, there was a significant acceleration in the pace at which agreements were being concluded, most likely due to the fact that the country risk factor for the Republic of Argentina was substantially reduced, making it possible to make reasonable projections on the future of the Argentine economy. However, it proved more difficult to conclude agreements in the sectors and with the enterprises that were involved in arbitration claims.

In October 2003, *la Unidad de Asistencia para la Defensa Arbitral* (UNADAR – the Arbitration Defense Assistance Unit) was created and replaced the Federal Council for Amicable Negotiations (ANFC) and the Administrative Unit of Amicable Negotiations (UGENA). The role of the UNADAR was to formulate strategies and guidelines to be used in the amicable negotiation phase as well as in arbitration proceedings under Bilateral Treaties for the Reciprocal Promotion and Protection of Investments. The UNADAR is responsible for maintaining relations with the UNIREN, and operates within the Attorney General's Office. It is comprised by the Attorney General, two representatives from the Ministry of Economy and Production, two representatives from the Ministry of Federal Planning, Public Investment and Services, and two representatives from the Ministry of Foreign Affairs, International Trade and Worship. In addition to this, an official from the Legal and Technical Secretariat of the *Presidencia de la Nación* (Presidency of the Nation) attends UNADAR meetings.

Currently in the Attorney General's Office, there is a team of thirty persons, lawyers and economists, for preparing documents, participating in hearings and preparing Argentina's defense in the arbitration proceedings. The team is divided into three broad areas: energy (electricity, gas and oil), water and other. Each one of these areas has a lawyer assigned to it. There is a Coordination Committee from the International Affairs Division of the Attorney General's Office, composed of the heads of each area, a specialist in international law and another in regulatory law.

4. Procedure and specific concerns

Appointing arbitrators is a key element in any arbitral process. In the case of the Republic of Argentina, it is a decision that is taken by the Attorney General, assisted by experts in international law. It has not always been easy to find independent arbitrators with sufficient knowledge in the complex issues being litigated.

A brief description of the legal proceeding underscores that the process to be followed during the hearing must be agreed upon at the first session of each arbitral

tribunal. Usually, it is agreed that there will be a written and an oral phase. During the written phase, four memorials are usually presented: The Memorial; the Counter-Memorial; the reply; and the rejoinder. Each memorial is accompanied by supporting documentation and witnesses and expert statements offered by each party. In the arbitrations initiated against the Republic of Argentina, witnesses presented by it are mostly public officials with expertise in the matters at issue in the arbitrations, and the experts are generally professors at the most prestigious Argentine, and in some cases, international universities. During the hearings, in addition to the opening and closing arguments, the witnesses and experts testify regarding the scope of the evidence and written reports submitted in the written phase.

It is important to be clear in one's opening argument to the tribunal as to what one is going to prove or demonstrate. Arbitrators tend to remember the first and last things that are said. If one can structure the order of one's witnesses, you should try to put the strongest ones first and last. When cross-examining, you should set forth the strongest arguments first and last. You should follow the rule of three reasons: my government is right because of 1)... 2)... and 3).... When asking a rhetorical question, you should answer it. In direct examination of a witness, usually open questions work well so that the witness can testify as to what he or she knows. In cross-examination, the technique is to try to cut or shorten the response. You should ask leading questions with a yes or no answer. In your closing argument, you should remind the tribunal what you said on the first day you would prove, then review the testimony by witnesses and repeat the conclusion.

The following three issues are of concern. Firstly, the principle of transparency and publication of government acts, especially with regard to arbitration proceedings which involve essential public services, could be affected by the confidentiality principle which is applied in trade arbitration. Secondly, in many cases there is an excessive demand for damages by the plaintiffs. In contrast to what occurs in the judicial systems in countries like the Republic of Argentina, an overstated claim for damages incurs no adverse consequences for those who make it in an ICSID arbitration proceeding. As a result, a court judgment that orders the payment of one-half of the amount claimed for could be interpreted as a Solomonic award when in reality it could represent an excessive judgment.

Finally, *ad hoc* arbitral tribunals are not the most appropriate mechanism for dealing with systemic crises such as the one that erupted in the Republic of Argentina at the end of 2001. The benefits of creating a permanent appellate tribunal within the scope of ICSID could be considered. This would allow for the harmonization of frequently contradictory jurisprudence with respect to similar provisions set forth in Bilateral Investment Treaties and, on occasion, even to the same set of facts. It would also imply the creation of a body comprised of competent persons who, by virtue of receiving a salary from the organization, would have no connection to law firms that litigate before the ICSID.

5. Certain questions raised in the arbitrations

The *Azurix Corporation v Republic of Argentina* case (ICSID ARB/01/12) is an arbitration claim against the Republic of Argentina for acts committed prior to the crisis at the end 2001, and which is linked to the provision of an essential public service. In this case, *inter alia*, issues regarding the choice of forum clause and the recusal of the president of the tribunal were addressed.

One of the concerns of the Republic of Argentina is the eagerness of some ICSID tribunals to assert jurisdiction. Argentina submitted a jurisdictional objection in this case. One aspect of its argument was that Azurix agreed upon a specific forum with regard to the concession contract and expressly renounced any other jurisdiction, including those agreed upon in bilateral investment treaties. In spite of this, the arbitral tribunal rejected the jurisdictional objection lodged by the Republic of Argentina.

Also in the *Azurix* case, the Republic of Argentina challenged the president of the arbitral tribunal because the lawyer for the plaintiff had been appointed as an arbitrator for a case handled by the law firm of the tribunal's president in another ICSID case, while the *Azurix* case was in process. The President of the tribunal stated that he had worked on this other case (although he had not participated in the appointment of the arbitrator). In addition, the President's law firm had represented the Azurix Corporation throughout the course of the arbitration (on issues outside the arbitration). All of this brought into question, in the opinion of the Argentine Republic, the necessary impartiality of the arbitrator, who no longer may be relied upon to exercise the independent judgment referred to in Article 14(1) of the ICSID Convention. The challenge was rejected.

G. Effective Administration of a Team Responsible for Bringing and/or Defending against Claims: Investor-State and/or State-to-State Dispute Settlement. Practical Experiences of Brazil, Chile and the United States (Panel)

BRAZIL

Speaker: Celso de Tarso Pereira⁶

Brazil occupies first place among developing country users of WTO State-to-State dispute settlement, followed by Mexico and India. Brazil has participated in 51 cases, either as complainant (21 cases), defendant (ten) or third party (20). Brazil has also been a party in seven of the 12 arbitral cases under MERCOSUL's dispute settlement regime.

The *modus operandi* in MERCOSUL's arbitral tribunals is as follows:

- Actors: Government (different Ministries); private sector; diplomats; MERCOSUL Division.
- Relatively short submissions (50-100 pages compared to 300-400 pages for WTO) Streamlined process. Hearing is short. All is resolved in 90 days or 30-60 days later in appeal stage (introduced in Olivos Protocol).
- Practical cases: Import Licenses; Poultry.

The *modus operandi* in the WTO's dispute settlement mechanism:

- Actors: Government; CAMEX (Foreign Trade Chamber, Inter-ministerial Organ that decides on important foreign trade issues); Foreign Ministry (Brasília and Geneva); private sector; Brazilian and foreign lawyers; experts (econometry, agriculture); private research institutions (Icône).
- More complexity. Higher costs; Expertise; Longer process.

The aircraft disputes with Canada (*Brazil - Export Financing Programme for Aircraft*); *Canada - Measures Affecting the Export of Civilian Aircraft*) played a pivotal role in awakening Brazilian public opinion to the importance of the WTO. The government was under pressure to establish a structure to handle trade disputes. In Brazil, the main institution in charge of trade disputes is the Foreign Ministry, which defines the national interest and decides whether to bring a case to the WTO. Usually the complaint from the private sector comes to other Ministries initially but lands on the desk of the Foreign Ministry. If it is an important case, it may require the approval of the Foreign Trade Chamber (CAMEX) composed of the Foreign Ministry, the Ministries of Agriculture, Industry and Planning and the President's cabinet. This is a high-level group that meets once a month and has as agenda items possible cases to be brought to the WTO or MERCOSUL. Each organ will plead its case; e.g., this is important for the cotton sector, and other organs may argue that it is too politically-charged or not ripe or there is no technical basis for the case. It is a way of sharing responsibility.

Most MERCOSUL cases are handled by diplomats with inputs from the private sector, usually represented by their lawyers. Diplomats write the submissions and make presentations before the arbitral tribunal. A government can usually deal with such disputes within its own structure. Going to the WTO is more complex. One needs

⁶ The full text of the written submission, which, *inter alia*, lists the WTO and MERCOSUR cases in which Brazil has participated, can be found at <http://www.economia.gob.mx/index.jsp?P=2561>

greater expertise, and one must be prepared for a longer process and coordinate well.

The basic structure that Brazil has today consists of a dispute settlement unit (CGC) in Brasilia, which was only formed at the end of 2001 with four-six diplomats, not all of whom are lawyers. Knowledge of the WTO agreement – every word, comma and interpretation by past panels, even if there is no *stare decisis* only a *de facto* one – is essential. The private sector can provide assistance and inputs, usually through trade associations, and there are private research institutions, particularly on agriculture, that may produce data important for the case. Brazil can also have foreign lawyers working on the case.

The cotton case that Brazil brought against the U.S. was a leading case in the WTO which touched on domestic support, export subsidies, export credit and the scope of the peace clause that prevented countries from bringing disputes. In that case, Brazil knew it would be targeting the core of U.S. farm policy and had to be prepared. Brazilian cotton producers organized themselves, brought the case to the Ministry of Agriculture, which brought it to Itamaraty, the Ministry of Foreign Affairs. At the same time, Brazil was bringing the sugar case against the EU. Brazil filed both on the same day. The litigation team as approved by the Foreign Trade Chamber consisted of government lawyers and officials (in Brasilia and Geneva), foreign lawyers and foreign experts. The private sector bore most of the cost of foreign lawyers, which were needed to better understand how the U.S. Congress works and to obtain hard to get data. To prove that U.S. domestic subsidies on cotton were causing serious prejudice to Brazilian products, Brazil had to provide an economic model to prove causal link. Brazil hired a US economist and developed a model based on the ones used by the USDA. Brazil also provided, Brazilian producers affected by US subsidies as witnesses. Preparation took a long time. The guideline of Itamaraty's trade unit is not to bring a case unless it has the first written submission ready otherwise there is not enough time under the fixed deadlines.

In the sugar case, Brazil used foreign lawyers and experts to figure out the costs of producing sugar in the EC and the level of cross-subsidization. The case was made more complex to organize because there were two other co-complainants, Australia and Thailand.

In the salted poultry case against the EC, Brazil relied on its network of diplomatic missions to provide facts and customs classification in the main ports of entry of Brazilian products.

To expand its ability to pursue cases successfully, Brazil started a program for young lawyers doing internships in Geneva. They stay four to five months and participate in panels providing research. With time, Brazil will have a pool of lawyers knowledgeable in this area. In the cotton case, some interns were very helpful in searching for databases of US planting areas.

CHILE

Speaker: Alejandro Buvinic

Chile has a vast network of over fifteen trade agreements, including economic complementation agreements. This is a complex situation to handle institutionally. There are good arguments for having the Foreign Ministry or for having a section of the Ministry of Economy responsible. A state has agreed to commitments and then

takes measures which may be inconsistent with its international obligations. How does one implement commitments? How does one defend against legal challenges?

A key in administering agreements is dispute prevention; i.e., resolving a trade conflict before the matter becomes a formal dispute. This could entail having a quick response to a measure that is imposed, which may be inconsistent with the WTO or another trade agreement, and obtaining the suspension of the measure, thus avoiding a larger conflict.

Chile has used large foreign firms to prepare briefs in WTO dispute cases. Bilateral trade matters are more complex and delicate sometimes, with less jurisprudence and no appellate review of awards.

In investor-State dispute settlement, it is the Ministry of Economy, which defends Chile. This decision was taken in order to depoliticize investor-State disputes and remove them from foreign policy concerns. The Ministry of Economy was selected because it sets regulations and has a stable pool of persons administering regulations. Chile also contracts foreign firms to assist.

In State-to-State dispute settlement, Chile opted for a horizontal legal unit like Brazil did in Itamaraty. The unit handles bilateral as well as multilateral trade matters. Unlike Brazil or the U.S., Chile does not have a lot of trade disputes at a sustained level so it did not consider that it needed a big permanent staff of specialized lawyers. The unit also negotiates the dispute settlement chapters in trade agreements. This helps to ensure that there is a consistent approach among the rules and disciplines across bilateral trade agreements; e.g., rules of origin. The unit coordinates among the various Ministries that may be involved in a specific case. There is an inter-Ministerial committee, including the office of the President, to assure a single vision not only for negotiating trade agreements but also implementing them.

Chile has been conscious of the need for specialized training in the private sector to develop an organized mass that understands trade and can participate as a counterpart and provide inputs.

UNITED STATES

Speaker: Charles E. Roh

Based on the experience of the United States government, the following are practical considerations in organizing an effective team, mostly with respect to investor-State dispute settlement, but with possible application to State-to-State dispute settlement also. It is the Office of the Legal Advisor of the State Department which defends the United States in all investor-State disputes. They have a large in-house staff and generally do not use outside counsel except for expert opinions. In State-State dispute settlement, the Office of the United States Trade Representative is responsible for WTO and FTA cases with some involvement of other U.S. agencies depending on their expertise.

I. Initial Planning

- A. Be realistic about how large a team you will need, and for how long
 - Disputes can last two-three years.

- Disputes can require three-eight man years of work. Given that people have other responsibilities, expect to have a team that ends up with six-ten persons.
- Determine where you will get the team to do the work: within your own agency or in other government ministries.
- Decide whether you will hire outside counsel, and for what portion of the work.

B. Establishment of Adequate Administrative Support

- Secretaries
- Paralegals
- A file room and electronic data base
- There will probably be a lot of documents to understand and prove the facts, and there will certainly be a lot of submissions (memorials), exhibits, correspondence. Keeping this organized is essential.

II. Dividing up the work

- One person in charge;
- One deputy who is a good organizer and knows everything;
- Lines of responsibility among the rest of the team, including outside counsel, should be as clear as possible, with clear deadlines on when work is due.
- Clear understanding as to when team members may speak for or take actions on behalf of the team – clear lines of authority.

III. Building an Effective Team

- Periodic meetings among the whole team to make sure arguments are coherent and work is neither duplicated nor falling between the cracks;
- Feedback and communication.

H. Scope and Coverage, Consultation, Free Trade Commission, Choice of Forum (FTA v. WTO) in State-State Dispute Settlement

Speaker: Matthew Kronby

NAFTA-type mechanisms are usually somewhat more streamlined than WTO dispute settlement system. There are no permanent institutions for resolving disputes.

The NAFTA-like and WTO processes are similar in that consultations are followed by panel review. The NAFTA-like process differs from WTO with respect to:

- intervening requirement to refer the matter to the Free Trade Commission if consultations fail;
- no appeal, no reasonable period of time to comply or compliance panel process;
- instead, 30 days to resolve matter or complaining party may suspend benefits (retaliate);
- challenges to level of suspension are *ex post*, not *ex ante* like WTO.

Canada's approach in FTAs has been to use NAFTA as model. Canada-Chile and Canada-Israel follow NAFTA; Canada-Costa Rica provides for reasonable period of time to comply and compliance panel process.

The experience that FTA state-state mechanisms are not used much has prompted efforts in subsequent negotiations to try to simplify procedures, e.g. three panelists rather than five.

1. Scope and coverage

NAFTA 2004:

Except for anti-dumping/countervailing duty measures (Chapter 19) and obligations to maintain, enforce and cooperate on competition laws (NAFTA 1501), NAFTA Chapter 20 procedures apply to all disputes respecting the interpretation or application of NAFTA.

NAFTA procedures apply not only to actual measures but also to *proposed* measures. (different from WTO); e.g., an act under consideration by Congress but not yet enacted. They apply whenever a Party considers another Party's measure is/would be inconsistent with NAFTA obligations. They also apply in some cases (most trade in goods excluding automotive sector, technical barriers, trade in services, and intellectual property) where a non-inconsistent measure nullifies or impairs reasonably expected benefits (non-violation nullification or impairment).

Other Canadian FTAs are similar in scope and coverage.

2. Consultation

Consultations under NAFTA are much like the WTO process but timelines are tighter: generally 30 days rather than 60.

One needs to consider in plurilateral FTAs whether to provide for third party participation as NAFTA does.

The utility of consultations in resolving the dispute depends very much on the desires of the parties. It can be a genuine opportunity to clarify issues and seek a basis for a solution, or simply a prelude to the litigation stage.

Suggestions:

- Do not go through consultations unless ready to go to a panel.
- A complainant should submit questions well in advance.
- Include in the consultations process the lawyers who will be litigating.

3. The Free Trade Commission

This is an additional step not found in the WTO. The Free Trade Commission (FTC) is at cabinet-level or designees. It must convene within a limited time following the request (NAFTA 2007.4: ten days unless it decides otherwise). Once convened, the FTC has limited time to resolve the matter before a Party can request a panel (NAFTA 2008.1: generally 30 days unless the Parties otherwise agree). The FTC can call on technical advisors, create working groups, have recourse to dispute resolution mechanisms such as good offices, conciliation and mediation.

In practical terms how useful is this stage? Would cabinet-level officials be engaged anyway?

4. Choice of Forum (strategic options to select between free trade agreement vs. WTO dispute settlement mechanism)

Generally, the complaining Party can choose either FTA or WTO dispute settlement but not both. Once a Party has initiated proceedings under one, it becomes the exclusive forum. The FTA should specify what constitutes "initiation." Under NAFTA 2005, it is the request to the FTC or WTO panel request. Therefore a party can hold consultations in one forum without prejudice to panel recourse in the other. This does not mean that consultations in one forum can count in the other.

NAFTA imposes certain limitations on the right of the complaining Party to select the forum: in cases involving certain environmental agreements or health, safety or environmental measures, the responding Party can require that the dispute be considered under NAFTA (NAFTA 2005).

There have been just three cases under NAFTA Chapter 20 that have gone through the panel process (*Tariffs Applied by Canada to Certain U.S. Origin Agricultural Products* 1996; *U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico* 1998 and *Cross-border Trucking Services* 2001). Why has NAFTA Chapter 20 been so seldom used, especially when compared to the WTO DSU? In the first seven years of NAFTA, with all the trade among the three member countries, only three cases were brought and in the last five years, zero.

Some considerations in selecting one forum over the other:

- Which forum has the more favorable substantive obligations (for the complainant who chooses the forum)?
- Which forum offers a more accommodating scope of dispute settlement?
- Which forum has the more advantageous timelines?
- Which forum has the better-functioning institutions?
- Which forum offers a more predictable legal outcome?
- What other Parties/Members do you want involved as co-complainants or third parties?

Why have NAFTA parties chosen to go the WTO route? The following are some considerations:

- The U.S. brought the magazines case (*Canada - Certain Measures Concerning Periodicals*) in the WTO because of the cultural exception under NAFTA. The U.S. won. The case demonstrates that when one negotiates an FTA and attempts to carve out certain things from its dispute settlement regime or not have certain obligations apply, one should not lose sight of the fact that the same issue may be subject to WTO dispute settlement. Other parties may be able to challenge the measures. Exempting certain substantive provisions of the FTA from FTA dispute settlement does not necessarily provide security for all the measures one may think it would. An FTA may offer more favorable dispute settlement possibilities; e.g., an investment obligation is not only subject to investor-State but also to State-State dispute settlement. If there is a dispute over investment rules, we would proceed under NAFTA because there are few substantive obligations on investment in WTO.
- NAFTA offers dispute settlement over potential measures. This might prevent them from becoming actual measures.
- When NAFTA is working properly for dispute settlement, timelines are roughly the same as the WTO at the front-end. The addition of going to the FTC is offset by the ability to block the first panel request in the WTO. At the back-end, NAFTA is more streamlined; there is no Appellate Body or potential compliance process. One can get to conclusion of the dispute faster through NAFTA. In the WTO, going through the whole process, with appeals and reasonable period of time to comply, arbitration on the level of retaliation, takes around three years. NAFTA should be shorter.
- The absence of rosters of dispute settlement panelists makes it easy to thwart the operation of NAFTA's State-State dispute settlement model. Mexico has learned this in the soft drinks case with the U.S. In NAFTA, complete rosters were not in place although there were partial rosters later. With the three-year life span, they expired. The roster has not been replaced yet.
- There is a large body of jurisprudence under WTO that has built up over time and may offer more predictability than resort to FTAs. There is a virtuous/vicious circle of more cases, more body of law, more frequency of use.
- There may be some disputes where one wants to confine the dispute to just oneself and the other party. There are others where it may be advantageous to have co-complainants or third parties. This is a factor not only in persuading a panel but if one gets to retaliation as the only option for trying to secure compliance if you are a small country and retaliation is not much of a credible threat. Having other co-complainants with you can help a lot e.g., the Byrd case (*United States – Continued Dumping and Subsidy Offset Act of 2000*), where the threat of retaliation would not have been as big under NAFTA as with the Europeans in the WTO.

I. Preparing a Claim or Defense in State-to-State Dispute Settlement

Speaker: Charles E. Roh

1. Preparatory Work -- the most important part -- begin as soon as there are signs that there will be a dispute settlement case. The complainant has a long time to prepare a claim, and in this sense the system is not as fair to defendants.

- A. Analyze the claim and the likely best arguments of each side, drawing on
 - The agency whose actions are the subject of the claim;
 - Outside counsel (a relatively cheap use of outside counsel).
- B. Determine how much time you need to prepare the claim, or, if you are on the defense, determine how much time the rules allow you for the defense.
- C. Decide what resources you have available internally and whether you want to and have funds to hire outside counsel. Consider creative financing -- making the industry that benefits pay for outside counsel.
 - Benefits of (good) outside counsel -- experience and a potentially stronger case and political cover against domestic criticism (don't hire any beginners).
 - Disadvantage of outside counsel -- expense, especially if it is a hopeless case.
 - Outside counsel is much more expensive if you don't keep them in the loop and have steady communication.

2. Coordination with Other Government Agencies

- Depends on the culture of the government.
- Most important where other agencies have factual or legal expertise that you need.
- Also a politically wise move if another agency (or level of government) has caused the problem, and it is likely that you will lose.

3. Mandate (Terms of Reference)

Under NAFTA, there is a requirement that the request for a panel go to the Free Trade Commission. This may have been for appearance's sake and provides the complaining party an additional 30 days to edit its brief.

In WTO and FTA model dispute settlement mechanisms, the letter setting out the complaint and the request for a panel set the jurisdiction of the panel. If the complainant fails to include everything about which it wants to complain, it has to start all over again. It may be embarrassing to find out you have identified a wrong measure after you have launched a dispute, but it is better to go back and fix the terms of reference than to carry on with a partial case.

Third party participation was included in NAFTA to address the concern that there might be a bilateral settlement at the expense of the other. Third party participation is more of an issue at the WTO.

4. Selection of Arbiters (Panelists)

Arbiters make more of a difference in the FTA dispute settlement process than in the WTO, because there is no real secretariat and there is no appellate body.

Establish the mechanism for panel selection before there are disputes, or the roster of panelists will never be completed.

In a three person panel, a conspicuously biased choice of panel member may be unwise. Get arbiters who are intellectually open to your arguments.

This issue merits time and attention in the negotiations of the dispute settlement provisions of the agreements.

5. Rules of Procedure/Code of Conduct

There exist good models for rules of procedures and codes of conduct. This is an area on which to reach agreement before a dispute arises.

In State-to-State dispute settlement under current WTO and FTA rules, the defendant has every incentive to stall at every stage. Under the WTO and, to a lesser extent under an FTA, a party that has been found non-compliant is given a reasonable period of time to comply. This creates a pro-defendant bias in State-State arbitration.

J. Preparing Written Submissions, Expert and Technical Advice, Confidentiality in State-State Dispute Settlement

Speaker: Alejandro Buvinic

The higher authorities must take decisions on:

- General guidelines for the prosecution or the defense.
- Manner in which the prosecution or the defense must be carried out (internal or external team).

Necessities:

- Ongoing consultations by law firms.
- Prior analysis of conflict.

1. Preparation of written submissions

Preparation of written submissions by government officials

- Establishment of a crisis committee comprising government officials from the different ministries involved.
- Appointment of a coordinator that will depend on the predetermined institutional framework in existence. In the case of the General Directorate of International Economic Affairs (Direcon) of Chile, it is the Sub-Department of International Disputes.
- Adoption by the Committee of the guidelines for drafting written submissions, which will be entrusted to a Direcon attorney.
- Once a draft of the written submission has been prepared, it is circulated among the Ministers for their comments, and based on this the presentation is made.
- The Coordinator serves as liaison between the ministries involved, especially for the purposes of compiling facts.

Preparation of written submissions by contracted law firms

- The Crisis Committee is created.
- The selected law firm is contracted.
- A coordinator is appointed that will be the counterpart of the coordinator selected for the law firm.
- The general guidelines are delivered to the firm.
- The law firm drafts the written submissions. Once drafting has been completed, the submissions are circulated among the ministries involved for their comments.

Language

- The language in which the submission is written will depend on the composition of the arbitral group or tribunal.
- Translations are always done in-house.

2. Confidentiality

Subject to confidentiality requirements

- Public officials
 - If the individual is part of the public administration, internal legislation is applicable.
 - If the individual is a paid contractor/consultant, confidentiality clauses must be included in the pertinent contract
- External Lawyers
 - Drafting the pertinent contract.

Process

- Public
- Secret
- Depending on the rule established in the trade agreement:
 - Open
 - Closed
 - Mixed

The Parties to a dispute must maintain the confidentiality of the hearings held before an arbitral tribunal, the arguments and the interim report, as well as all the written submissions and communications with the arbitral tribunal.

Information

- A dispute is based on an objective analysis of the matter submitted to the arbitral tribunal.
- Information is a fundamental pillar of the process.
- The Parties to a dispute must be willing to reveal and receive the evidence necessary to defend a specific measure.
- This evidence may include business-confidential or government-confidential information.
- Hence governments and private parties would only agree to submit confidential information to an arbitral tribunal if they were assured that this information would be kept confidential.
- They therefore must designate as confidential specific information in their written submissions or in presentations before an arbitral group hearing.

3. Experts and technical assistance

- This point refers to the possibility that an arbitral tribunal might obtain information and technical assistance from any individual or entity that it considers appropriate, especially with regard to a specific matter of a scientific or technical nature raised by a party to the dispute.

In the dispute with Colombia on Chile's price bands on sugar (*Chile – Safeguard Measure on Imports of Sugar*), each party presented an expert and allowed the tribunal to pick a third.

K. Decision: Preliminary/Final Report Implementation of the Final Report/Suspension of Concessions, Costs in State-State Dispute Settlement

Speaker: Charles E. Roh

Under NAFTA and the WTO, a panel provides an interim report to the parties prior to its final decision. The idea is to give the parties an opportunity to correct any factual errors and a last chance to change the panel's mind, which, candidly, does not happen very often. This process may be more useful under bilateral free trade agreements, where there is no appellate review and the panelists may be less experienced than in the WTO. The interim report was introduced into GATT practice before the advent of the Appellate Body.

The expectation is that the losing party will fix the incompatible measure in a way acceptable to the winner. Under NAFTA and the WTO, a losing party cannot be forced to comply but the right to retaliation by the winning party to suspend concessions provides some leverage. Retaliation is always less than satisfactory as a remedy for non-compliance because it involves harming the wrong industry and limits one's own country's consumer choices. It is rare to have two-way trade in the same sector, so "mirror" restrictions are usually ineffective. Import sanctions against another trade sector from the losing party do little good for the industry of the winning party affected by the illegal measure. This fact often makes the winning party settle for less than it is entitled to.

If a government proceeds to retaliate, the retaliation should be aimed carefully at getting the illegal measure corrected as quickly as possible, and not at buying off another domestic industry. The latter may be so pleased with the retaliation that it will oppose its ever being lifted. Retaliation is more effective when one is suspending concessions that are politically sensitive to the losing party (e.g., intellectual property rights for the developed world), so as to create pressure on the industry resisting the change in illegal measures. Another precept to be followed in retaliation is to avoid harming ordinary people in one's own country (e.g., hit against a luxury item but not baby food).

The retaliation should be set at the correct value of the inconsistency. NAFTA provides that the losing party may challenge the retaliation for being "manifestly excessive."

In addition to retaliation by the winning party against the losing party for failure to comply with the panel's final decision, there exists the possibility of the losing party offering compensation. In practice, compensation rarely occurs as it may be easier for the losing party to face retaliation.

The investor-State tribunal has discretion on how costs will be split, e.g., a losing party pays. Under the WTO, most costs are absorbed by the organization and thus indirectly by its members. Under bilateral free trade agreements, the costs are split between the disputing parties.

L. Dispute Settlement Mechanism—Chapter XIX, NAFTA

Speaker: Natividad Martínez⁷

Mexico, the United States and Canada have signed various trade agreements with different countries which contain specific provisions that envisage various dispute settlement mechanisms aimed at resolving differences that arise in the application of each agreement. However, the only international trade law instrument that has a specialized mechanism for dispute settlement in antidumping and countervailing duty matters is the NAFTA agreement, signed between the three countries. It is generally known that the review procedure before binational panels of antidumping and subsidy determinations was a mechanism that was included under chapter XIX of the Free Trade Agreement signed between United States and Canada, which is why the existence of the mechanism and the longstanding nature of the systems that Mexico was faced with, were the main reasons for Mexico supporting Canada regarding the inclusion of a procedure with the same characteristics as those in Chapter XIX.

In particular, NAFTA's Chapter XIX applies to four types of procedures for unfair international trade practice matters, such as:

- Review of legislative reforms;
- Review of final antidumping and countervailing duty determinations;
- Extraordinary challenge; and
- Safeguarding the system.

The common object and purpose of the interrelated procedures is to maintain "effective disciplines on unfair trade practices" (Article 1902 d) ii)) by establishing a system of arbitration proceedings, which:

- Guarantee that national legislation reforms are consistent with the objectives of the Agreement, the GATT and its Agreements;
- Review the final antidumping and countervailing duty determinations (binational panel);
- Preserve the integrity and legitimacy of the binational panels (Extraordinary Challenge Committee (ECC)); and
- Incorporate a mechanism to ensure the safeguarding of the operation of the binational panel review system.

1. Review of the national final determinations on unfair dumping and subsidy practices.

The procedure most resorted to up to now is the one provided in Article 1904 of NAFTA, namely, that relating to the review of final domestic determinations on unfair dumping and subsidy practices, which when compared to other means of challenge has the following advantages:

- The review is submitted before an arbitral group, comprising five experts, and the proceeding itself has very particular characteristics, as distinct from others (*sui generis*);
- Specialized, especially conceived for antidumping and countervailing duty matters;
- Efficient and expeditious (compared to the duration of internal challenge procedures in each country);

⁷ The full text of the written submission as well as the PowerPoint presentation, which, *inter alia*, elaborate further on the binational panel procedures under NAFTA Chapter XIX, can be found at <http://www.economia.gob.mx/index.jsp?P=2561>

- Specialization of the panelists, each of the arbitrators must be an expert on the matter;
- Impartiality, the system establishes precise rules that make it possible to guarantee impartiality on the part of the panelists (Code of Conduct);
- Allows the participation of individuals, as distinct from other types of arbitration proceedings arising from international agreements, participation is open to those directly affected by the determinations issued by the authorities of the three countries;
- Replaces domestic judicial review of the final determinations (Federal Tribunal of Fiscal and Administrative Justice, in the case of Mexico); and
- The Parties' compliance with the ruling of the panels and internal review mechanism of the compliance determinations of the investigating authority.

When NAFTA entered into force, Mexico had not participated in this type of procedure, making it a challenge to create the legal infrastructure in order to participate adequately in the defense of the final determination on unfair international trade practices and this apprenticeship took place during the course of the proceedings. Assessing its experience in the matter, Mexico considers that the decision to push for the inclusion of NAFTA chapter XIX was the appropriate one.

The review proceeding before binational panels of final determinations in the United States, Canada and Mexico has been resorted to on 109 occasions, since the Agreement entered into force. Of the 109 proceedings that have been requested, the majority have been requested against final determinations issued by the United States authorities, 73 proceedings in all, of which 34 involve Mexican products (steel, cement and kitchen utensils, *inter alia*). This situation shows how much confidence Mexican and Canadian exporting producers have in the system.

Of the panels requested from 1994 to date, 86 have been concluded, 35 withdrawn by the petitioners and 51 resulted in a final decision by the panels, of which only 13 have upheld the determination of the investigating authority, while in 38 cases, the final determination has been remanded to the investigating authority for a new determination to be issued in conformity with the panel's ruling.

Of the 16 panel cases in Mexico, four reviews are still in process, those of caustic soda, apples, carbon steel pipes with straight longitudinal seams, and hams from the United States; in the case of bovine meat from the United States, even though the final decision of the panel was issued and the investigative authority has complied, the determination on remand by the authority was submitted for the review of the same binational panel, and despite the fact that the ordinary proceeding (*procedimiento ordinario*) has been concluded, the review has still not been completed.

Four of the panel reviews requested in Mexico were concluded because the petitioners withdrew the case. One determination by the Secretariat of Economy was upheld. Seven were remanded to the Secretariat for a new determination in conformity with the panel's decision (the bovine case is still pending in this regard). Three of the cases remanded concluded with the elimination of antidumping duties (United States cut-to-length steel plate, plate, heavy plate and medium plate; Canadian hot-rolled sheets, United States high-fructose corn syrup). For the remaining four, there was a modification of the determination or of the antidumping

duty originally imposed (urea, US covered flat steel, Canadian rolled steel plate, and duties were eliminated on bovine meat).

In NAFTA Chapter XIX a dispute settlement mechanism was implemented, consisting of an arbitral system of binational panels, for reviewing, at the request of an interested party, the legality of the final determinations issued by the investigating authorities on dumping and subsidy matters. Once the binational panel has reviewed the challenged determination, it can uphold it or remand it to the investigative authority to adopt measures not inconsistent with the decision.

In using this mechanism to review the final determinations, the panel applies the legal provisions on dumping and subsidies of the importing country; that is, in the case of Mexico, the Foreign Trade Law and its Regulations, as well as the Antidumping Agreement and the Agreement on Subsidies. The legislation comprises obligations under the NAFTA, which were aimed at providing greater transparency during the proceeding and harmonizing the systems of the three countries.

The Mexican investigating authority has intervened before bilateral dispute settlement proceedings on unfair international trade practices under NAFTA Chapter XIX, and has complied with the decisions issued by panels. However, Mexico considers that certain binational panel determinations have gone beyond the scope of the panel's authority and jurisdiction.

The authority of the binational panel, in accordance with NAFTA Chapter XIX and the Rules of Procedure, is limited to conducting the review proceedings on the basis of the administrative record, the law applicable to the matter and the allegations of error of fact or law stated in the complaints by the firms requesting the review proceedings. *De jure*, there is no possibility of these arbitral bodies conferring upon or attributing to themselves more authority than is expressly contained in the Agreement, as some panelists have tried. That is, binational panels may only remand or uphold the determinations by the investigating authority, but can never revoke them, nor may panels broaden their scope of application to other matters not contained in the final determination under review.

Review proceedings of final determinations

NAFTA Chapter XIX establishes an alternative dispute settlement mechanism for unfair international trade practices, in the form of price discrimination (dumping) and subsidies. Under this mechanism final determinations issued by the competent authority of each of the three countries are reviewed at the request of a party by a binational panel, which is made up of members from the two countries in the dispute.

- **Classification of information:** The administrative records, on which the review of final determinations is based, generally include several volumes that contain a wealth of information submitted during the ordinary proceeding by the parties, as well as the conclusions and findings by the investigating authority, which therefore also comprise different types of information. The information in these records is classified according to its characteristics, in compliance with the provisions of the Foreign Trade Law and its Regulations.

With respect to panels, the Rules of Procedure set out specific procedures for handling information; information is classified according to its content as:

- non-proprietary information
 - proprietary information
 - privileged information and
 - government information.
- **Initiation:** The binational panel review commences upon request by an interested party: national producers, exporters, and importers that have participated in the ordinary proceeding, in the administrative review or in any special proceeding, by means of a request filed with the Secretariat, within 30 days⁸ of the publication of the determination in the official publication (*Diario Oficial de la Federación*).

When a request for binational panel review is submitted, the Secretariat notifies all the interested parties of this submission, including the investigating authority, in accordance with Rule 23(b). The notice of request for the establishment of a panel is published in the official publication.

All written submissions filed with the Secretariat must observe to the letter the format set forth in Rule 55(2). The originals and eight copies of all the documents of the parties must be filed with the Secretariat on a regular business day between the hours of 9:00 and 17:00. Other parties must be notified of all documents submitted by participants in the panel review proceedings.

- **Motions:** Motions are documents filed at any time during the review proceeding for the members of the panel to resolve an issue related to the principal matter at hand. In accordance with Rule 61(1) motions are filed in writing unless the circumstances make it unnecessary or impracticable, and are accompanied by an appendices when reference is made to agreements, laws, regulations, judicial precedents and any other document cited that does not appear in the administrative record. A proposed order for the panel is also attached to the motion and proof of service to all participants, in accordance with Rule 61(2).

Any participant wishing to respond to a notice of motion must do so within ten days after that notice is filed. Absence of a response to a notice of motion from the participants is taken as consent, as indicated in Rule 61 (5).

The *sub judice* nature of a motion does not affect the original deadlines of the proceedings. The panel must dispose of the motion by no later than the day on which its final decision is issued or, in the case of a notice of motion filed in accordance with Rule 76, on the day on which the notice of final action is issued.

When a panel decides to hear the arguments of the parties contained in the notices of motion in accordance with Rule 64, it may fix a date for the hearing of the motion. The Secretariat shall notify the parties of the date, time and venue of this hearing.

- **Orders:** The panel communicates its decisions and opinions via orders. These orders are issued after the filing of a notice of motion by any of the participants, each time an event occurs to change the course of the proceedings (for example, a suspension); to advise of issues related to the public hearing or to request

⁸ In binational panel review proceedings, reference to days is understood as natural days unless otherwise indicated.

extraordinary information, *inter alia*. Orders may be issued during the proceeding or at the end of the review, just before the panel issues its final decision.

- **Complaint:** The complaint is the document through which the issues in the lawsuit are established and may be filed by any of the participants that intend to make allegations of errors of fact or law with respect to a final determination, including challenges to the jurisdiction of the investigating authority. It may be filed by companies requesting the establishment of the panel or by those wishing to appear in support of the complaint. The complaint must be filed within 30 days after the filing of a first request for panel review with proof of service on all participants in the binational panel review proceedings by the complaining firms.

Should the enterprises fail to file their complaint, the binational panel review proceeding does not continue since there is no lawsuit, and if this document is not filed on time or does not comply with the format requirements of the Rules of Procedure, the investigating authority may submit a notice of motion requesting that the panel terminate the review proceeding. It is also important to note that Rule 39 allows for the filing of an amended complaint as long as it is filed no later than five days after the submission of the notice of appearance. An amended complaint may, with leave of the Panel, be filed after this period by enterprises that are parties to the complaint, but no later than 20 days before the expiration of the time period for submitting briefs.

- **Notice of appearance:** All parties interested in participating in the binational panel review, including the investigating authority, must file, pursuant to Rule 40 (1)(d)(i) and (ii), a notice of appearance in which they must indicate whether they are appearing in support of or in opposition to any or all of the arguments put forward in the complaint; this is filed with the Secretary within 45 days after the filing of a first request for a binational panel review.
- **Administrative record:** Pursuant to Rule 41(1), within 15 days after the expiration of the time period fixed for filing a notice of appearance, the investigating authority shall file two copies of the administrative record with the responsible Secretary. The administrative record, accompanied by proof of official notice, is filed with the Secretariat in two versions: a public copy and a confidential copy omitting the documents that contain privileged or government information, pursuant to the provisions of Rule 41. The confidential copy must be filed under seal or served in an envelope with a seal that distinguishes it, so as to protect the information contained therein.
- **Briefs:** Pursuant to Rule 57(2), enterprises that have filed a complaint may file a brief, setting forth grounds and arguments supporting allegations of the complaint: This brief shall be filed no later than 60 days after the filing of the administrative record. When a brief of a complaining enterprise contains arguments that are not substantiated in its complaint, or when the arguments put forward in the complaint have not been developed in the brief, the investigating authority shall request by means of a notice of motion that the new or undeveloped arguments be dismissed, pursuant to Rule 57(1).

Based on the study and analysis of the arguments put forward by the complaining firms, the investigating authority prepares its arguments to be used in defending its position. In the elaboration of the investigating authority's brief, arguments are supported, justified and substantiated with mandatory case law

(*jurisprudencia*), relevant prior rulings (*tesis aisladas*), doctrine, general principles of law, and decisions of other binational panels (which may be cited only as a guide, since they do not constitute a mandatory precedent) and applicable legislation, *inter alia*. Pursuant to Rule 57(2), the brief of the investigating authority is filed with the Secretariat within 60 days of the filing of the brief by the complainants.

The participants who support the investigating authority's arguments must file their brief with the Secretariat within the same time limit and following the same procedure as the investigating authority. The complainant and those who file a brief in support of the complaint may file a reply brief in response to the brief filed by the investigative authority and by those who support it. This reply brief shall be limited to rebuttal of matters raised in the briefs mentioned, since no new arguments may be presented. The reply brief shall be filed within 15 days after the deadline for filing the investigating authority's brief, as set forth in Rule 57 (3).

- **Appendix to the briefs:** According to Rule 60(1), all the authorities cited in each brief filed by the parties that are not in the administrative record, such as treaties, statutes, regulations, judicial precedents, doctrine and expert opinions, *inter alia*, shall be compiled and filed by one of the participating enterprises.
- **Public hearing:** Pursuant to Rule 67(1), the panel shall commence the hearing of oral arguments no later than 30 days after the expiration of the time period for filing reply briefs, although if the panel deems it necessary, a different date may be set.
- **Final decision:** Once the panel has studied all the arguments submitted by the participants in the various pleadings and in the hearing, the panel issues its final decision. As previously mentioned, the Panel can in this decision either uphold the final determination that was reviewed or remand it for action by the investigating authority in compliance with this decision. In the event that the panel decides to remand the determination to the investigating authority for action in compliance with the decision, panel must give a deadline for compliance with the remand. The action taken by the authority in compliance with the decision is called the determination on remand.
- **Challenging the determination on remand:** The participants that filed a brief during the review may challenge the authority's determination on remand within 20 days of its being filed. The authority must respond to this challenge within 20 days. When this occurs, the Panel must issue an order within 90 days of the submission of the determination on remand, either affirming or remanding the revised determination. Pursuant to Rule 73(2)(a), the Panel may order that the administrative record be supplemented during the remand, that is, that new evidence be produced and that new documents be compiled. If this occurs, an index must be filed identifying the new documents and must be accompanied by a copy of these documents. This supplementary record must be filed with the Secretariat within five days of the determination on remand being handed down and is compiled just like any other record. If the determination on remand complies with the panel's order, with effects on third parties, it is published as a determination in the official publication, and has the effect of a final determination with respect to the specific points modified as a result of the panel's decision.

- **Notice of final action and notice of completion:** Rule 77(2) establishes that the notice of final action shall be issued once the Panel has issued an order that constitutes the final act in the review proceeding. In such a case, the Panel directs the responsible Secretary to issue this notice, which is sent to each of the participants. The notice of completion of binational panel review is issued in a case where the proceedings have been definitively concluded. It should be duly noted that the completion of panel review must be published in the official publication. The panelists are discharged from their duties on the effective date of this notice.

The procedure of binational panel review of determinations regarding unfair international trade practices has the advantage of granting individuals the opportunity to defend their interests without intermediaries against actions of the investigating authority, which must act as another participant and defend its determination before the arbitral group. Over the last 12 years, national producers, exporters, and importers of the three countries have on repeated occasions asserted their right to request review proceedings against determinations issued in the United States, Canada and Mexico, which attests to the confidence that they have in the alternative dispute settlement mechanism.

M. Practical Experiences

Group Discussion

During this exercise, participants in the seminar were organized into four sub-regional groups and were asked to discuss within these groups: 1) problems that their governments had encountered in negotiating dispute settlement regimes in trade agreements and 2) how their governments had organized themselves in defending State-to-State or investor-State disputes. Each group then chose a spokesperson to report to the plenary about the experiences they had exchanged and common problems. An open discussion in plenary ensued.

N. Conclusions

Speaker: Rosine M. Plank-Brumback

Using the three-point rule of Ignacio Pérez Cortés, these conclusions from the seminar are organized according to: history/evolution, policy, and practical tips.

As regards the settlement of trade disputes, Hugo Perezcano reminded us that in the beginning (post-WWII) were the few words contained in GATT Articles XXII and XXIII. These provisions made no mention of *ad hoc* panels and even less *amicus curiae* briefs, just referring to giving sympathetic consideration to representations made by another contracting party and if there were no satisfactory adjustment of the matter within a reasonable time, the CONTRACTING PARTIES might investigate, make recommendations or authorize suspension of concessions to rebalance the GATT contract. Then things became more complicated and interesting with the deepening of substantive obligations culminating in the WTO Agreements and the Dispute Settlement Understanding swung the pendulum away from a system based primarily on diplomatic resolution and conciliation (where Celso de Tarso Pereira reminded that a panel could get away with issuing a decision of a couple of sentences) to more legalistic adjudication and the introduction of appellate review.

At the same time the WTO was being negotiated, so was NAFTA, which took bits and pieces of the GATT system, including the GATT panel system as it had evolved and such things as non-violation nullification and impairment. But unlike the WTO, NAFTA contained broad substantive obligations on investment, distinct dispute settlement mechanisms for different parts of the treaty (Chapters XI, XIX, XX, of which Máximo Romero provided an overview), a weaker institutional underpinning (e.g., Rafael Serrano admitted that the national sections provide no legal support to the panels), greater party control over the process (including direct cost-sharing of the panel), and importantly, a more automatic and faster right to retaliation by the winning party. NAFTA and this institutional model were then exported, especially by Mexico and Chile (veritable NAFTA missionaries).

Alejandro Buvinic highlighted that Chile had entered into 15 free trade agreements (FTAs) and the risk this posed not only for judicial economy (if all give rise to simultaneous testing of similar obligations) but judicial cohesion (if different panels decide similar obligations differently); this is made more acute by the lack of provision for appellate review. Thus far any conflict between WTO and FTA jurisprudence remains more theoretical than actual, although the issue of competing jurisdictions has been alluded to in cases, more recently in the Mexican soft drink case. Matthew Kronby provided key considerations for selecting a forum: where are the more favorable substantive obligations, the more accommodating scope of dispute settlement, the better-functioning institutions, a more predictable legal outcome, and what other Parties/Members do you want involved--an important factor to take into account for maximizing any potential retaliation.

In the latest iteration of NAFTA US-style, we saw the provision of greater public access to the dispute settlement system, including open hearings, and the introduction of monetary assessments, a form of compensation for non-compliance--this as an alternative to retaliation. Charles Roh explained how retaliation was almost always a bad idea, but gave useful advice on what to do against the other party if it comes to that; e.g., retaliate against an innocent sensitive industry with lots of offensive trade interests and sufficient political clout to press its own non-complying government to comply. There was a discussion of the debate in the DSU review on

alternatives to retaliation with agreement that compliance was, of course, the best outcome and the current WTO system perhaps the best one could get for now.

The development of MERCOSUR's dispute settlement system was also referred to. The system has evolved from two presidents resolving a matter over the phone to *ad hoc* tribunals, and most recently to appellate review with the signing of the Protocolo de Olivos. Parties seem to be satisfied with the overall outcome of the more than one dozen cases that have gone to a tribunal thus far—this is more than the cases brought under NAFTA Chapter XX. It was noted that proceedings under MERCOSUR are far simpler, certainly, as compared with the WTO where Brazil is the leading developing country user.

The discussion on investor-State dispute settlement was very dense, particularly policy-wise and certainly challenging to summarize. In terms of investment treaties, we saw the gamut from Argentina, which has entered into a lot of BITs to Brazil which has decided not to ratify any of the 14 it negotiated. There was discussion on the pros and cons of concluding any investment treaties or subscribing to trade agreements containing investment rules and investor-State dispute settlement. It was noted that the motivations that would lead a government to conclude that it was in its interest to enter into such investment protection obligations were whether it was an exporter of capital and wanted protection for its national investors overseas and/or whether it wanted to attract more foreign direct investment to its own country, especially in situations where foreign investors might not have much confidence in the state of art of domestic courts to resolve their disputes. As Charles Roh commented, whether a country would attract more capital if it subscribed to international investment rules or would have attracted more capital than it did in the absence of such rules was basically not provable.

There was discussion on the merits of joining the ICSID Convention: U.S., Argentina and Chile are members; Brazil and Mexico are not members nor is Canada (yet). Depending on the nationalities of the parties, cases involving non-members can nevertheless have access to the Additional Facility offered by ICSID as well as to arbitration under UNCITRAL rules with respect to administering the arbitration. Matthew Kronby noted that there was little difference in procedural outcomes under the ICSID, Additional Facility and UNCITRAL rules but much merit in using ICSID to administer the arbitration. This is as opposed to any substantive outcome of an ICSID arbitration, which was a function, he noted, of the substantive investment rules at issue and the competence of the arbitrators. His paper elaborates on exhaustion of local remedies and choice of forum issues in investor-State dispute settlement.

Hugo Perezcano highlighted the distinctive nature of investor-State dispute settlement as compared with State-State dispute settlement. Under investor-State, the State is always the defendant, and therefore, as Charles Roh noted, any case is always perceived by a government as a hostile action. Precautionary measures are also available under investor-State but not granted that often. If you have any procedural jurisdictional objections, sometimes it is good to include these with your substantive arguments as well rather than prior, Hugo Perezcano noted. He gave insights on how the government of Mexico prepares its cases, including the selection and preparation of witnesses and the importance of telling a good, coherent story for the tribunal to understand. He also informed on the very limited grounds for challenging awards under international arbitration as compared with local court systems, particularly as regards issues of public policy.

As for individual arbitration outcomes, perhaps the U.S. can be said to have experienced the best results under NAFTA with not only getting its right to regulate for environmental purposes validated but being awarded costs for defending the *Methanex* case. Canada seems to be satisfied with its overall result; perhaps Mexico a little less, but nevertheless it seems to believe things could have been worse. Then there is perhaps the worst case scenario for a government as elaborated by Ignacio Pérez Cortés, where Argentina has had to defend 36 arbitrations against it in ICSID since 2001, 24 of which with a collective claim of \$11 billion or 10% of its GDP. Argentina has had virtually every jurisdictional objection raised by it rejected by a tribunal. Pérez Cortés highlighted that Argentina experienced grave violations of conflict of interest by its presiding Chair in one tribunal and the violation of a prior confidentiality agreement by a former government witness. He provided a detailed description of the Argentine crisis.

Regarding anti-dumping dispute settlement under Chapter XIX of NAFTA, Natividad Martínez described these proceedings in detail. The Mexican government and exporters seem to be satisfied with the impartiality of this binational review mechanism, which they believe has been favorable to trade. Most cases submitted have been referred back to investigating authorities to adopt measures consistent with the respective panel rulings. These do not have the force of precedent in subsequent rulings. Unlike WTO panels, Ch. XIX panels have to determine whether measures are in conformity with domestic anti-dumping law. The two fora are not exclusive (unlike as provided in NAFTA Ch. XX for State-State disputes) because they are adjudicating different obligations. She gave an example where Ch. XIX and WTO rulings on the same matter were consistent with one another. There was an interesting discussion on incorporation of WTO law into domestic law. It was noted that NAFTA Chapter XIX regime is *sui generis* and unlikely to be reproduced in any other FTA.

Alejandro Buvinic underlined the importance of dispute avoidance and of expending the effort to stop a matter from blowing up to a formal dispute.

Matthew Kronby noted that the scope of NAFTA dispute settlement encompasses proposed measures—but this has never gone as far as a ruling. As he pointed out for consultations: go to make peace but go with your war machine. Bring a list of questions, have your brief ready and bring the lawyers. The claimant should be prepared to go to a panel directly.

Celso de Tarso Pereira noted how Brazil used its time to prepare for the cotton case. Be alert for potential claimants and prepare yourself.

There was a discussion on why the interim report was introduced in the GATT and how it operates as a preliminary appeal, helping to prepare parties to go before the Appellate Body. The interim report is also a feature of current NAFTA-like agreements, perhaps even more necessary in the absence of appellate review there.

It was noted that under NAFTA, parties can arrive at their own interpretation of their own treaty and it seems that tribunals have been following these interpretations. This is also available under the WTO but harder to reach at a Ministerial Conference of almost 150 WTO members.

The rise of civil society is a factor that cannot be ignored as Rafael Serrano discussed. They are stakeholders not only commercially but systemically. Alejandro Buvinic explained how his government had organized for this fact of life, being proactive in its dialogue with civil society. Celso de Tarso Pereira noted that the Brazilian press carries headlines about WTO decisions.

There was discussion on transparency and its reverse side of the coin, confidentiality, including business confidential information, on which Canada has submitted a proposal in the context of DSU review. The trend appears to be to keep everything open except for confidential information but the definition of what is confidential can provide a slippery slope for restriction.

All this is increasing the burden on governments to be ever more sophisticated in negotiating and administering dispute settlement regimes. The following practical tips emerged from the discussions:

- Expect to experience shock and awe at your first case—be prepared to be surprised. It is inevitable that there is a learning curve and you will have to improvise—try to work out a process ahead of time on how to resolve procedural issues that arise.
- Be careful about the preamble and objectives, as Matthew Kronby noted, which may give rise to creative interpretation by activist arbitrators.
- Avoid leaving the negotiating table without agreeing to rules of procedures and the roster of arbitrators no matter how tired you are (a point stressed by Rafael Serrano and several others). All agreed that the quality and impartiality of the judges are at the heart of the system. The absence of rosters may thwart any advantages from a more streamlined panel and retaliation process of the FTA at the start.
- How to organize and where to locate your dispute settlement unit seems a matter of personal preference with pros and cons for every kind of structure. The gamut runs from Brazil where Itamaraty plays a leading role (although it consults with other agencies) and also the Secretariat of Economy in Mexico, to the separation of negotiation and litigation as for investor-State in Chile and to the U.S. which has a strong inter-agency consultative mechanism and where USTR trade negotiators and litigators sometimes outsource the defense of cases to other agencies. How the unit is organized depends on how much business it anticipates; e.g., Chile does not have much activity but Brazil started experiencing a lot with the WTO aircraft dispute.
- Invest in your own people—need to develop your own in-house resources for negotiation or litigation, and preparing arbitrators—get the training you need. We come from different legal traditions and cultures in the hemisphere. The fact remains that there is lot of common law influence particularly in investor-State dispute settlement; e.g., in examination of witnesses and the conduct of the oral hearing. Ignacio Pérez Cortés gave the three point rule and the importance of the opening and closing statements on each day. Matthew Kronby suggested that a government be a third party to a WTO case where your participation is limited and not that demanding—good for training but not when your key interests are on the line (as the Caribbean Regional Negotiating Machinery noted). The Mexicans have successfully used a sort of apprenticeship in negotiations, where the backbenchers become the negotiators at the table in the next negotiation.

- Get free help where you can: WTO training, Advisory Center on WTO Law, friendly NGOs, deep-pocketed private sector that has its own lawyers or can pay for outside lawyers; however, the government needs to remain in control.
- Resort to outside counsel as necessary: Canada, Mexico, Brazil, Chile, US have all used external assistance, some in more limited fashion than others. Chile is using outside counsel for selective purposes, including reviewing briefs. It was noted that governments should give outside counsel the information they need to give advice. Charles Roh mentioned the tensions that can exist between private sector and government interests and some techniques to deal with private sector views that are not in line with long-term broader national interests (e.g., put in an annex).
- Invest in technology to organize your case and archive your data. Roh mentioned using paralegals, and also the need to designate a senior person and deputy with a clear line of command.

III. CLOSING SESSION

Address by Dr. Luz María de la Mora, Head of the International Negotiations Coordination Unit of the Secretariat of Economy of Mexico

Regional free trade agreements (RFTA) play a key role within the current context of integration. This has been recognized in international fora such as the WTO, APEC, OECD, ALADI, FTAA and the OAS. These bodies all point out that the current challenge facing countries is to ensure that their societies benefit from the increased opportunities and advances in well-being that the multilateral trade system generates and offers, recognizing that economic reforms oriented towards this system will bring about increased prosperity, development, employment and a better standard of living for our citizens.

Twelve years after the entry into force of the North American Free Trade Agreement (NAFTA), this instrument has undoubtedly been an element that has facilitated the accelerated integration of the region, which has impacted other areas of the continent as a result of the formation of new integration agreements.

Economic and political factors may explain the increase and proliferation of regional trade agreements (RTA). Issues such as market access, greater integration and consolidation of investments, locking-in of political and economic reforms or the increase in negotiating power in multilateral fora, *inter alia*, are certainly the cost-benefit to be considered. However, whatever the reason it is clear that insofar as these RTAs are accompanied by clear rules and a legal framework that includes rules on the amicable settlement of disputes, the proper application, integrity and well-functioning of the international trade agreements will be guaranteed. This Seminar focused on the "Administration of Dispute Settlement Regimes in Free Trade Agreements", starting with investor-State dispute settlement, continuing with State-State dispute settlement; and closing with unfair trade practices.

It should be noted that within the current context of globalization and integration, the hemisphere plays a significant role within the world context that cannot be ignored; economies like China and India loom like great racehorses to beat in the international trade context. Insofar as our economies can be integrated with clear and homogeneous rules, we can be more competitive and thus face foreign competition as well as advance in our development.

We are obliged to look towards integration with other countries in order to achieve development, as well as increased opportunities and improvements in well-being that are created by the multilateral trade system.

These economic and trade policy issues in which our countries are involved within the international context are closely related to international law and the internal law of countries, since without international law, the decisions would have no weight whatsoever.

In the hope that this seminar will have fulfilled your expectations, and that your stay in Puebla was beneficial and a pleasant one, I bid you farewell and hope that our paths will cross again in the near future.

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Matthew S. Kronby: Director of the Government of Canada's Trade Law Bureau, a unit of some thirty lawyers that litigates Canada's international trade and investment disputes and advises the Canadian government on trade and investment law and the negotiation of international agreements. Mr. Kronby is highly experienced in WTO litigation, having led Canadian teams at all stages of the WTO dispute settlement process, in cases concerning, among other things, softwood lumber, the Byrd Amendment, regional aircraft financing, automotive trade and Australian quarantine restrictions. He is also Canada's lead negotiator in the ongoing efforts to improve the WTO Dispute Settlement Understanding. Mr. Kronby has been with the Trade Law Bureau since 1996, first as counsel, then as Deputy Director. In the latter capacity he led practice groups responsible for NAFTA investment disputes and services trade, as well as market access issues involving sanitary and phytosanitary measures and technical barriers to trade. He was chief counsel on negotiations toward a Canada-Singapore Free Trade Agreement and a Canada-U.S. understanding on market access for agricultural products, and was Canada's trade counsel in the negotiation of the Cartagena Biosafety Protocol, a United Nations agreement on genetically-modified organisms.

From 1993-1996, Mr. Kronby served in the Congressional and Legal Affairs section at the Canadian Embassy in Washington, D.C. There, he worked to advance Canadian interests with the U.S. Congress on a range of trade, political and environmental issues, including the Helms-Burton Cuba sanctions legislation, market access for agricultural commodities, arctic energy exploration and fisheries conservation.

He began his government career as a foreign-service officer in 1991, negotiating and advising on the operation of international criminal law agreements in the Legal Advisory Division of the Department of Foreign Affairs and International Trade.

Mr. Kronby holds an LL.B. from the University of Toronto, a B.A. from McGill University, and is a member of the Ontario and New York bars.

Natividad Martínez Aguilar: Holds an LLB from the National Autonomous University of Mexico. She received an Honorable Mention for her thesis, entitled: "Certain Considerations with Regard to Co-Authorship." She was subsequently awarded an LLD from that same university.

Since 1997, she has served as Director of Bilateral Legal Procedures in the Department of International Trade Practices of the Secretariat of the Economy. She is mainly responsible for representing the Secretariat of the Economy before binational panels on NAFTA Chapter XIX.

Ms. Martínez Aguilar also participates in the negotiation of international trade agreements or treaties in which Mexico is involved, specifically in the area of chapters related to unfair international trade practices and safeguards.

Her experience includes serving as:

- Assistant Director of Procedures and Projects, Department of International Trade Practices. (1994 – 1997)

- Legal Advisor to the "Experimental Research and Development Laboratory" Consultancy Office (Consultancy specializing in research and technology projects). (1992 – 1993)
- Advisor to the Deputy Attorney General in the Deputy Attorney General's Office on the monitoring of the processes carried out by the Attorney General's office in Mexico City. (1989 – 1991), and
- Advisor to the Director General of the National Institute of Criminal Sciences. (1986 – 1988)

Ms. Martinez Aguilar currently lectures on International Trade Regulation in the Master of International Law Program at the Graduate School of Public Administration of the Monterrey Institute of Technology and Higher Studies.

She has attended various courses and seminars to upgrade her legal research methodology in international trade practices, foreign trade and international law.

Celso de Tarso Pereira: Second Secretary at the Embassy of Brazil in Ottawa, Canada.

University Studies: 1983-1987: Law Degree – Universidade Federal do Paraná (Curitiba – Brazil)

1991-1992: Master of Laws (LL.M.) – Christian-Albrechts-Universität (Kiel – Germany) . Dissertation in "Arbitration clauses in Joint Venture Contracts" (in German).

Academic Activities

1993-1994: Professor of International Law at the "Pontificia Universidade Católica" (Curitiba – Paraná)

1996-1999: Professor of International Law at the UNICEUB (Brasília)

1999-2001: Assistant Professor of International Law to Professor Antonio Cançado Trindade at the "Instituto Rio Branco" (Diplomatic Academy) - Brasília

Professional Activities:

1993-1995: Chief Legal Advisor to "Soceppar SA" (cereals handling and exports) Curitiba-Paraná

1996-2001: Ministry of Foreign Affairs (Brasília)– Mercosur Division.

2001-2005: Brazilian Mission in Geneva (Switzerland)

Publications: (in Portuguese)

2003: "An Introduction to Gabrielle Marceau's 'A call to prohibition of clinical isolation in WTO dispute settlement'" ("Solução e Prevenção de Litígios Internacionais, vol. III, Porto Alegre)

2004: "Between Apology and Utopia: in search of the Possible Ethics" (Revista de Informação Legislativa, Senado Federal/Brasília)

(in English)

2005: "DSU Review: A view from the inside" (with David Evans), in "Key Issues in WTO Dispute Settlement", R. Yerxa and B. Wilson (Ed.), WTO/Cambridge, University Press.

Ignacio Pérez Cortés: Earned his law degree at the Catholic University of Argentina in 1998, and his Bachelor of Science degree in Economics at that same university two years later. In 2001, he was awarded a Fulbright Scholarship to pursue a Master of Laws degree at Yale University.

Since 2003, Mr. Pérez Cortés has worked in the International Division of the Attorney General's Office, where he is responsible for arbitration brought against the Republic of Argentina in relation to energy (petroleum, gas and electricity) issues. He has been actively involved in such cases as *CMS v. Argentina*, *Azurix v. the Republic of Argentina*, *LG&E v. the Republic of Argentina* and *Enron v. the Republic of Argentina*, and has recently published an article on the ruling handed down in the first of these cases.

Mr. Pérez Cortés lectures on "Regulation and Competition Economics" at the Catholic University of Argentina.

Hugo Manuel Perezcano Díaz: Mr. Perezcano Díaz received an LLB from the Instituto Tecnológico Autónomo de México in 1992.

Since 1994, he has worked as Director General of the Legal Advisory Office for Negotiations in the Subsecretariat of International Trade Negotiations of the Secretariat of the Economy. His responsibilities include international legal affairs, particularly trade negotiations and international litigation. He also serves as the Legal Representative and Legal Advisor of the United Mexican States in international lawsuits initiated within the context of free trade agreements, as well as agreements for the reciprocal protection of Mexican investments, and the Agreement establishing the World Trade Organization.

Mr. Perezcano Díaz previously held the post of Director of Legal Support for Trade Negotiations at the Ministry of Trade and Industrial Development, where he was the legal counsel responsible for free trade agreement negotiations with various Latin American countries.

He has authored several articles on such topics as NAFTA dispute settlement, investment protection agreements and international arbitration, among others.

Rosine M. Plank-Brumback: Is Chief of the Ministerial Meetings Follow-up Section of the General Secretariat of the Organization of American States. Prior to that she was a senior trade specialist with the OAS Department of Trade, Tourism and Competitiveness where she provided the lead substantive support to the FTAA Negotiating Group on Dispute Settlement and to the Technical Committee on Institutional Issues, which is charged with drafting the overall architecture and general provisions of the FTAA Agreement. She served as the OAS representative to the FTAA Sub-Committee on Budget and Administration, and has been a member of the teams that prepared the transfer of the FTAA Administrative Secretariat from Miami, Florida to Panama City, Panama, and then to Puebla, Mexico, the current venue for the FTAA negotiations. She also assisted the Negotiating Group on Subsidies, Anti-Dumping and Countervailing Duties, as well as supported and monitored several other FTAA entities. She was the only member of the Tripartite Committee (OAS, IADB, ECLAC) providing support to the FTAA negotiating process to be posted on-site in Miami and Panama. Ms. Plank-Brumback also participates in numerous trade capacity-building and training programs for government officials in the hemisphere.

Ms. Plank-Brumback has held positions in the USDA Foreign Agricultural Service, at the U.S. Mission to the European Communities in Brussels, and at the GATT

Secretariat in Geneva where she was a counsellor in the Agriculture Division during the Tokyo and Uruguay Rounds. She was panel secretary to three GATT panels. She has served as a consultant to various inter-governmental institutions and trade associations, and as an international commercial arbitrator. She is on the roster of arbitrators under the Chile-Central America Free Trade Agreement and the Costa-Rica Mexico Free Trade Agreement.

Ms. Plank-Brumback holds a Bachelor of Science in Foreign Service (international affairs) degree from Georgetown University School of Foreign Service and a Juris Doctor degree (*magna cum laude*) from the University of Miami School of Law, where she was the Edward D. Berger scholar. She is licensed to practice law in the State of Florida.

Charles (Chip) E. Roh: Co-heads the International Trade practice of Weil, Gotshal & Manges. Mr. Roh concentrates his practice in international trade and international investment matters. He represents and advises US and foreign businesses, associations and governments in international dispute settlement proceedings, international arbitrations, and negotiations. He has served as party counsel in four investor-state treaty arbitrations and more than 25 dispute settlement proceedings under the WTO and GATT, and has been outside counsel to businesses, associations and governments in bilateral regional and WTO negotiations. Mr. Roh also regularly counsels regarding compliance with US laws pertaining to economic sanctions, export controls, national security, anti-boycott, and anti-bribery.

Mr. Roh served as Assistant US Trade Representative for North America from 1989 to 1994, where he was also the Deputy Chief Negotiator of the North American Free Trade Agreement (NAFTA) for the United States. Previously, Mr. Roh was the associate general counsel of the Office of the United States Trade Representative (USTR) and legal counsel for the USTR Mission to the GATT in Geneva. In those positions he represented the United States in many GATT dispute settlement proceedings and in the drafting and negotiation of numerous international agreements, as well as implementing legislation.

Prior to joining USTR, Mr. Roh served on the trade staff for the US Senate Finance Committee and in the Office of the Legal Adviser at the Department of State.

Mr. Roh serves by presidential appointment on the Panel of Conciliators of the International Center for the Settlement of Investment Disputes (ICSID), and he teaches world trade law as an adjunct professor at Johns Hopkins University School of Advanced International Studies. He has been recognized by *Chambers* and by the *International Who's Who of Trade and Customs Lawyers*.

Máximo Romero Jiménez: Mr. Romero Jiménez earned his LLB with a Major in International Law at the University of the Americas and his LLM in International Law at Anáhuac University, Mexico City. He holds several diplomas, among them: "Diploma on WTO Principles", Geneva, Switzerland; "2nd Summer Academy on International Commercial Arbitration", Cologne University, Germany; and "Diploma on International Commercial Arbitration", Mexico.

Since 1999, Mr. Romero Jiménez has served as Director of the Legal Advisory Office for Negotiations, in the General Directorate of the Legal Advisory Office for

Negotiations, Subsecretariat of International Trade Negotiations, Ministry of the Economy. His responsibilities include negotiating dispute settlement mechanisms in investment; and coordinating the defense of the Mexican Government against claims filed by foreign investors, under the dispute settlement mechanisms to which Mexico is a party. He has represented the Mexican government in some international arbitration cases under the Investment Chapter XI of NAFTA, such as *Fund Insurance Company v. United Mexican States*, *Waste Management Inc. v. United Mexican States*.

Mr. Romero Jiménez has authored several publications on international commercial arbitration and investment in FTAs.

Rafael Ángel Serrano Figueroa: Mr. Serrano Figueroa earned a Bachelor's Degree in Economics at the Universidad Iberoamericana (1981), an LLB from UNAM (1985), a Diploma in Public Enterprises and Development from the *Institut International d'Administration Publique* (1989 - Paris, France); and an LLD from UNAM (2002).

Mr. Serrano Figueroa lectures in undergraduate and postgraduate courses at the UNAM Faculty of Law. Since May 1996, he has held the post of Secretary General, Mexico Section, at the Free Trade Agreements Secretariat of SECOFI. He has also worked in the General Directorate of the Legal Advisory Office for Negotiations, Ministry of the Economy.

In addition, he has held positions at the General Directorate of International Financial Affairs of the Ministry of Finance and Public Credit, the most recent being Deputy Director of Foreign Investment and Multilateral Organizations (June 1992-February 1994), and Head of the Foreign Investment Analysis Department (August 1991-June 1992); at the Ministry of Programming and Budget (Head of Special Projects).

He is the author of several articles, including "El Terrorismo y el Derecho Internacional" (Terrorism and International Law), in: *Anuario Mexicano de Derecho Internacional* (Mexican Yearbook of International Law), and "Controversias Sobre las Prestaciones Artísticas: Regulación y Jurisprudencia en México, E.U. y Canadá" (Disputes over Artistic Performances: Regulation and Jurisprudence in Mexico, United States and Canada), in: *El Derecho en México* (Mexican Law).

The Organization of American States

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. The establishment of the International Union of American Republics was approved at that meeting on April 14, 1890. The OAS Charter was signed in Bogotá in 1948 and entered into force in December 1951. Subsequently, the Charter was amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force in January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 Member States. In addition, the Organization has granted Permanent Observer status to 44 States, as well as to the European Union.

The basic purposes of the OAS are as follows: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of non-intervention; to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; to provide for common action on the part of those States in the event of aggression; to seek the solution of political, juridical and economic problems that may arise among them; to promote, by cooperative action, their economic, social and cultural development, and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.

MEMBER STATES: Antigua and Barbuda, Argentina, The Bahamas (*Commonwealth of*), Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (*Commonwealth of*), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay and Venezuela.

PERMANENT OBSERVERS: Algeria, Angola, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Equatorial Guinea, Estonia, European Union, Finland, France, Georgia, Germany, Ghana, Greece, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Kazakhtan, Korea, Latvia, Lebanon, Luxembourg, Morocco, Netherlands, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saudi Arabia, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, The United Kingdom of Great Britain and Northern Ireland, and Yemen.

**Publications in the Series on Successful Hemispheric Practices:
Administration of Free Trade Agreements:**

- Report on the Seminar: "Experiencias Hemisféricas en la Administración de Tratados de Libre Comercio," 2005 (available only in Spanish).
- Report on the Seminar "La Administración de las Reglas de Origen y Procedimientos Aduaneros en los Tratados de Libre Comercio," 2005 (available only in Spanish).
- Report on the Seminar, "Trade Statistics for International Trade Negotiations," 2006 (available in English and Spanish).
- Report on the Seminar "Administration of Dispute Settlement Regimes in Free Trade Agreements," 2007 (available in English and Spanish).