January 1997

The NAFTA Chapter 20 Dispute Resolution Process: A View from the Inside

Sidney Picker, Jr.

Follow this and additional works at: https://scholarlycommons.law.case.edu/cuslj
Part of the Transnational Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/cuslj/vol23/iss/55
THE NAFTA CHAPTER 20 DISPUTE RESOLUTION PROCESS: A VIEW FROM THE INSIDE

Sidney Picker, Jr.

There have been, to date, two cases brought under Chapter 20 of NAFTA. The one on which I served has proceeded through the entire process; the other is still at the beginning stage. The first one is the dairy/poultry case, which has caused some (not altogether surprising) reaction among at least some of the government personnel.

Someone suggested yesterday that with apparently no one from NAFTA at the conference, there was no one to be offended by some of the remarks that were being made here. That was not quite true. I am one of the five people who, as it was suggested last Friday, provided the best reason for adding a professor exclusion provision to Chapter 20 of NAFTA.

I will have more to say later this morning about the role, generally, of professors. But I will note this: After his remark, one of my students rather cynically stopped me and said he did not see anything to be offended about. After all, he thought it was a miracle that five professors could get together and actually reach a decision. Not only that, but we did it with one opinion. I looked surprised and I said that I really expected five opinions. Then he thought, no, ten opinions, because you each dissent from what you have decided. My wife who, incidentally, is also a law professor, summed it up when she looked at me and said that I had better enjoy all this now because from here on in, no one is going to ask me even to settle a playground dispute at a day care center, meaning my career is over.

In any event, I certainly would regret any harm that I or my colleagues may have caused or inflicted on NAFTA. But I readily admit that it is a humbling experience for a law professor to have to decide, when we are used to deriving.

I have no intention of discussing the dairy/poultry decision. I do not think that is something that I should do. Nor am I going to discuss any aspect of what actually went on in the process. Indeed, I am absolutely prohibited by the model rules and procedure from doing so. So anything that I say here will not disclose in any way what actually happened.
there. You may draw any guesses you might wish, but I leave that up to you.

What I would like to do is share with you some observations about the Chapter 20 process. And I am going to focus, for the most part, on three aspects of it: The panel selection process, the rationale and the effect of the initial report/final report process producing the final decision, and picking up on Larry Herman’s comments last Friday, I want to add some thoughts relating to the institutionalization of dispute resolution under NAFTA.

While there are a number of references in NAFTA, most of them have been referred to a dispute resolution, and most of them have been referred to in this conference and we have heard a great deal about them. Two are considered particularly significant. Those two, of course, are Chapter 19 and Chapter 20.

Chapter 19, which bore the same chapter number under its predecessor, the Canada/United States Free Trade Agreement (FTA), deals with anti-dumping and countervailing duties. Chapter 19 provides an international dispute resolution, a process which reviews national law. It reviews actions taken by national administrative agencies. Private individuals can be parties before this international tribunal, and that makes it unique.

By contrast, however, Chapter 20 of NAFTA deals with international law. Its job is to interpret and apply the international agreement itself, which NAFTA is. I am not going to get into the treaty agreement distinction because it is basically irrelevant for our purposes here. Furthermore, only the three sovereign states which were parties to the agreement can be parties before a Chapter 20 panel. A private person cannot bring up a dispute.

Those are basically the two distinctions between Chapter 19 and Chapter 20. Chapter 19 deals with national law, and private parties can participate. Chapter 20 really deals with international law and only states can participate. I do not intend to make any comparisons between Chapters 19 and 20 and the panel processes in those two chapters but I will, however, from time to time make references between Chapter 20 of NAFTA and its predecessor, Chapter 18 of the Canada/U.S. Free Trade Agreement.

Chapter 18 of the Canada/U.S. Free Trade Agreement is like Chapter 20 because it deals with international law, and only states can be parties. But Chapter 18’s process served as the direct model for Chapter 20. In turn, if any of you would like some history, Chapter 18 served as a predecessor. You will find that it contains the GATT panel process.

As most of you in this room are relatively familiar with NAFTA
and we have already had sessions in this conference on dispute resolution, so I will not outline for you the entire dispute resolution process. This is not a class, and I do not have to go through that kind of a procedure. You are familiar, I am sure, with the fact that NAFTA established, somewhat like the FTA, a commission.

In the NAFTA case, it is a trilateral commission, which operates by consensus, and we have heard a number of comments about it and its non-institutionalization. It is meeting sporadically. The commission’s basic job is to oversee the agreement itself. It is not much of an institution. Prior to the panel appointment stage, Chapter 20 does provide this commission supervising it with a number of non-adjudicatory opportunities to resolve any disputes that might arise between the parties. I am now using the word parties to refer to governments. These non-adjudicatory opportunities include consultations, good offices, conciliation, mediation, and the like.

Without spending any time on it, let me also remind you that like the FTA’s Chapter 18, Chapter 20 also provides an election forum, and a complaining country, one of the signatories, may choose either the NAFTA process or the GATT WTO process. Like its predecessor, Chapter 18, once elected, there is no second bite of the apple.

As a dispute proceeds along in the arbitral process, it should be noted that it is considered, once elected, to be almost entirely confidential. This confidentiality requirement is similar to what was in the original FTA and it is similar as well to GATT and the WTO process. In the case of NAFTA, unless the commission decides otherwise, the final report of the panel is made public within very rigidly specified time limits. That is the first public disclosure of what has occurred. Also confidential, and it remains confidential even after publication of the final report, is the list of names of any separate authors of opinions. In our case, as in most of the panel reports that have come down under FTA — ours is the only one under NAFTA — most of the decisions have been unanimous. But if they were not, you can read the opinions. We can never disclose the names of the authors of those opinions. That confidentiality remains, presumably, for our own protection and, I suppose, to assure further fairness.

In practice, confidentiality is extended straight through to the names of the panelists during the process itself so that when the appointment is made, no one is supposed to know who we are. Only after that final report does anyone else ever know the names of the five people who have participated, regardless of how they voted. That confidentiality aspect was violated in our case. If any of you are familiar, we were appointed in January of 1996, and within twenty-four hours, the com-
mittee and the press posted a full list of who we were, along with our nationalities. When that happened, incidentally, to my surprise, I found that I was listed as one of the Canadians. I was not offended by the fact that I was listed by the Canadians in the Canadian press. I was offended that they misspelled my name. That was troublesome.

When that occurred, we never did know who was responsible for the leak. It had not happened before. But it did not appear to us to create any substantial problem. As far as we were concerned, there seemed to be something of a star chamber quality about the process where you do not know who the decision makers are supposed to be. We had suggested to the secretariats that the names should have been made public, anyway. It is prohibited by the rules under which they operate which interpret the agreement, and they would not do so. Thereafter, we could not even confirm or deny if we were actually panelists for the remainder of the almost year that we served.

It did not seem to disrupt the process in any way. Perhaps the reason for trying to keep our identities confidential was so we would not be harassed by interested parties. Perhaps it had no effect on us because we were law professors, after all. Who could harass a law professor, but another law professor or a dean?

In any event, if they fail to resolve a dispute, a party may refer the matter in question to the commission for the establishment of a nonbinding arbitral panel of these five members who are supposed to be confidential. If a dispute involves two parties, the third party under NAFTA is entitled, if it wishes, to join as a complainant. It alone determines if it has a substantial interest, and if it does, it could supply a panel member. If it chooses not to do so, as happened in our case, it, nevertheless, is entitled to participate in the process. That includes being able to make a presentation to the panel, both written and oral.

There are a few quirks or anomalies which were not relevant to our case, but they were interesting to note in passing, if any of you actually read through what Chapter 20 contains. The third party, Mexico in our case, since the United States initiated the action against Canada, could and did submit a written submission to us, and it was entitled to participate and make a presentation at hearings. We held one hearing, as is called for in the procedures. However, it is not a disputing party; it is a participating party. As a result, it is not entitled to receive the initial or the final report. And we had the right to, whenever the panel chose to do so, to make inquiries of any participating party, and that would include Mexico. And we might have asked them a question about which they would not have had sufficient information because they were not entitled to some of the information that we supplied only to a disputing
party, again in this case, Canada and the United States. Those quirks remain as little wrinkles that really need to be ironed out in due course, but they had no effect on our process. It was basically a dispute between Canada and the United States.

Once an arbitral panel is requested, a panel must be established. In preparation for this, Canada, Mexico, and the United States were obliged to create a roster of thirty persons. It does not specifically state that they must be balanced, ten from each nation, but since they must be agreed to by consensus, that would have been the normal assumption. That was to have been done by January 1, 1994, but it has never happened. We have heard that comment before. It has not been established. Does it affect the process? Yes and no.

There was never a requirement under NAFTA that a panel must be drawn exclusively, or even at all, from the roster. Under the agreement the three countries are free to assemble the panel from anybody outside the roster that they wish; however, the hooker is if you draw from the roster, then there can be no complaint about the person drawn. If each country selects a person who is on the roster, there is no veto. If a person is put forward who is not drawn from the roster, there is a system of what is virtually unlimited peremptory challenges. Each opposing party may cast as many vetoes as it wishes. That is one of the problems of not having a roster, and that is one of the reasons why you ended up with five professors. Many of the people who would be put forward are likely to be vetoed by one government or another for political or other reasons.

There is a second problem that is created by not having the roster in place, and that is the conflict-of-interest provisions. NAFTA has fairly rigid conflict-of-interest provisions, and I am not questioning the reasons for them. But there should be no conflicts of interest with respect to the panelists, nor should there be the appearance of conflicts of interest. But the fact that these very strong provisions are in place makes it very difficult to put together a panel without either a conflict or an appearance of a conflict, especially when the matter is so broad as dealing with so much of the dairy and poultry industry, and much of agriculture was actually affected by that decision.

As a result, with most people and most of those who were not academic types, there would tend to be a conflict of interest. If you do not have a roster in place, which would have been a pre-clearance process, then what you end up with is having a relatively small pool of people from which you can draw where that conflict is not present.

It is interesting to note that those conflict-of-interest provisions, incidentally, apply to assistants as well. While the agreement itself does
not say so, each panelist is entitled to an assistant, like a clerk. Actually it is not limited to one, and one of our panelists had two assistants, making eleven people altogether. It comes as no surprise that, of the eleven people who participated in the process, five panelists and six assistants, ten of them were drawn from academia. I am not saying that that is good, bad, or indifferent; it was a fact of life. The eleventh person was an assistant who was a young law clerk in a law firm. He had to withdraw halfway through the process because his firm engaged a client where there could have been the appearance of a conflict of interest. This is a continuing problem that one needs to address. It would be minimized if the roster process had been in place.

And as long as I have touched on the question of law professors, let me say that Robert Cassidy’s suggestive professorial prescriptions last Friday may have some basis in the agreement. There is nothing in the agreement that says you should be appointing professors. I am not the slightest bit ashamed of that in my profession. But if you examine the qualifications of a panel participation under Article 209, Section 2, you do not find anything about academics.

The qualities that are required in addition to the obvious objectivity, reliability, and the sound judgment provisions, which may question academics, I suppose, but aside from them, what is specified is “expertise in law, international trade, other matters covered by this agreement or the resolution of disputes arising under international trade agreements.” It does not mention academics. Clearly, the drafters of NAFTA had contemplated people who were experienced in international law, international trade, and dispute resolution. The reference to resolution of disputes arising under international trade agreements, clearly, was if you promised to participate under the old GATT processes and the WTO processes.

However, again you have this problem because of the conflict-of-interest provisions that those who tend to qualify would be professors. The rest of the group who qualify under the criteria that I have mentioned would likely be precluded as long as there is no roster under the conflict of interest provisions, although they are experts in international law and international trade and may have participated in the panel process. I think that contributes to some of this difficulty of how one ended up not only on our panel, but on many of the panels that have existed under the Chapter 18 predecessor with a collection of academics.

By the way, as a footnote to these criteria, it may be interesting to note that it is slightly different from what it was under Chapter 18 of the FTA. In the FTA, they stated in the qualifications in addition to the sound judgment, reliability, and objectivity, the only thing there was that
the person should "have expertise in the particular matter under consideration." In other words, someone like the chair of the panel I served on, Professor Lauderback, who was a noted professor of international law at Cambridge University's Trinity College and one of the foremost people in the world in that area, would probably not have qualified as a panelist under the Chapter 18 process, but he clearly did under the Chapter 20 process. One again questions if one believes someone like Professor Lauderback should not be there, then the quarrel perhaps goes with those who drafted NAFTA because NAFTA, clearly, changed the qualifications from what they had been under the Chapter 18 process. I think the appointment, in fact, did meet what was specified or expected under the chapter, the intention of the parties as expressed in Chapter 20.

Under NAFTA, the panel chair is selected first. Under the Canada/U.S. Free Trade Agreement, the panel chair was selected last. I am not sure whether this makes any difference. It probably does as a strategic matter. If the parties who are supposed to come to an agreement can agree on a chair, then knowing who that person is, they can decide what kind of a panel they would like to assemble and to see to what degree that person would or would not be influenced by the chair. But they would know who would, generally, be in charge of having control of the process.

The chair is chosen by mutual agreement. There is no nationality requirement with respect to a chair. Anybody can be chosen, and in this case the person chosen, as I mentioned, was Professor Lauderback who was British. He was not a national of either party. It could have been a Mexican; it could have been anybody. If they fail to agree on a chair, the person is chosen by a lottery. You can contrast this, if you want, with the Canada/U.S. Free Trade Agreement, where the chair was selected by the commission. The commission was involved in that process, and the chair was the last person chosen. So, under the Canada/U.S. Free Trade Agreement, the four panelists came first, and not the parties but the commission could look over these four panelists and then say, we think we can control this group. The commission would make the selection, and if they could not do it, then the four previously selected got to choose their own chair. The NAFTA process, therefore, transfers greater control to the disputing parties under the FTA system.

The selection of the remaining four roster members is somewhat unique, although it may be a distinction without substantive difference. Under the NAFTA process, each disputing party puts forward the name of a person who is not its own national but a national of the other disputing party. In effect then, because, I guess, notwithstanding the
Canadian press, I was really an American, I must have been put up by the Canadians. Because I was not a roster member, I was, clearly, subject to a peremptory challenge, and somehow I survived. I am not sure I will survive it again. But the United States could have passed a veto.

The same thing applied to the Canadians. There were two Canadians and two Americans who were put forward. It was a reversal of the usual procedure where a country would put forward its own national. Had there been a roster in place, and if I were on the roster, Canada would still have been obliged to put forward the name of a person who was not its national, but if they chose someone from the roster, then there is no peremptory challenge process in place.

Why the nationality requirements? There are a number of different reasons for having it. First, I do not think the reverse nationality process really makes any substantive difference. It is interesting, but I do not think it makes any substantive difference from the old system where there was still a nationality requirement. The reasons for imposing these nationality requirements may rest on the assumption that a national arising from his or her own country’s legal culture will best understand and interpret that legal culture and explain it to the other parties. We heard yesterday about the aspects of legal culture, and that may be one of the reasons why this was imposed. Although it was present in the FTA as well and it was already in place before Mexico had joined the NAFTA, there was a commonality of legal culture there. But if that is true, what you have is a balancing bias that is going to be presented under the construction of the panel.

Will the panelists, in fact, support their own country? There seems to be no evidence that that actually occurs in either the Chapter 18 or Chapter 20 processes. If you look at other panel decisions in Chapter 18, or if you look at the Chapter 19 processes and the countervailing duty, for a surprising number of cases, decisions were unanimous. There may be a number of other reasons as to why that may be unanimous, but the point is that there does not seem to be, with one or two exceptions, any real likelihood that the nationality of the panel actually affects the process. I think the significance is that it is important politically. It may make the decision more credible and more acceptable to governments when you have nationals present, and I do not think it actually affects the process.

I think I am not disclosing anything that was confidential to our proceeding to note that the only evidence I ever saw of this was some very funny discussions with respect to whose punctuation and spelling rules were to be employed in the final report. In my naiveté, I had not realized that the Canadians and the British have separate rules as well.
So we had a number of very interesting discussions about which was to be employed. When I actually read the final opinion, to my horror, we never did come up with uniformity. But absent that, there was absolutely no evidence that the nationality of our panelists had anything to do with the process.

Let me turn to the distinctions between the initial report and the final report. If you read Chapter 20 and the model rules, there are rigid time limits that are imposed, probably for good reason. After all, this looked originally to its GATT origins, and a GATT panel process went on forever, years and years. Decisions are important both economically and politically to a country. When first Chapter 18, the labor chapter of the FTA, and the labor Chapter 20 of the NAFTA were written, time limits were imposed. We were not to let these decisions drag on. There is about a three-month period between the appointment of the panel and the issuance of the report. The report is issued in two stages, an initial report and, thirty days later, a final report. The initial report is presented to the disputing parties, who have fourteen days to look it over and make any comments that they wish to make with respect to it. And they do. At least they did in our case.

The entire process is confidential. The final report, when it comes out, is precisely that in Chapter 20. It is final; it is nonappealable. It is presented to the disputing parties who are required to transmit it to the commission who, in turn, within an unspecified but reasonable period of time, must make it public. While the disputing parties are free to attach to the final report any separate opinions or views they may have when they transmit this to the commission; all of this process is required; it must happen; and the parties must thereafter come to a final agreement on how they will resolve the dispute.

In coming to that agreement, the parties are expected, but not required, to conform with the report’s determination. They could come to any agreement that they wish. They are rather flexible. That is a bit broader than the procedure which existed under the FTA. If they fail to reach an agreement, then the so-called balance of terror or retaliatory provisions you are familiar with would tip into place.

What is the purpose of this initial report and final report process? I tried to figure it out because, in our case, it had some significance. As many of you know, the initial report was leaked to the public. This is the second leak that occurred in the Chapter 20 process, and there was no precedent in Chapter 18 for this having occurred. It raised the question of why do you have an initial report? What is it designed to do? It is not clear. But it can be either of two things. One, it can be a part of the work process of the panel; that is, an opportunity for the panel to
test out its ideas; present them to the parties who are going to be affected in absolute confidence; let the parties give you some additional feedback and then you can take that into account and revise and polish the opinion in any way that you think appropriate.

Alternatively, it is possible to look at the interim report as a mini-appeal, just like the publication of a decision. And what follows is the equivalent of an appeals court or perhaps a full-court review of the initial decision, so that we would have either an appeal process or a work-in-process private product that is going on.

There is a third possibility as a reason for why we have the interim report. I tried to puzzle it out for myself and I am not sure I found any evidence for it. It may be that, by issuing an interim report in confidence to the disputing parties, they may take it into account and decide to settle a case at that point seeing what is coming. There is no evidence, however, that the interim report process in Chapter 18 has actually led to a settlement, but it is possible. If the reason for the interim report/final report process is something like an appeal, a mini-appeal, then I do not think a press leak, like that which occurred in the Chapter 20 process is of any great significance. If that is true, it would be like publishing an opinion. The public is aware of the opinion and the appeals court or the final court equivalent would be expected to take into account and react to whatever is in the initial report, and any distinction between them is significant.

If, on the other hand, this is meant to be not a mini-appeal process, but a work-in-process kind of a process, then there is something more significant about the leak because it will have a chilling effect on the panel’s work product. There would be suspicion on the part of outsiders if a leak occurs that the panel might be hesitant to modify its interim report and not exercise the flexibility that it might otherwise have because it would be open to public scrutiny, and the public would compare any nuance or any distinction from punctuation to spelling to whatever for the final report to interim report. It would affect the work product, and if that is true, I wonder if that might be a reason for aborting the entire process at that stage.

I do not know the answer to the question. I do not know which of these purposes it is, but I do think it is quite significant. I will notice that, if you look at NAFTA, it would appear that the purpose is work product. The panel certainly has substantial flexibility. If I can get the precise quoting of language, on its own initiative to reconsider its own interim report, it can make any further examination it wishes to do. It appears free to be able to reverse itself on its own, regardless of what the parties have commented upon within that thirty-day period. If that is
true, it sounds like work product.

By contrast, the only place I can look for something similar is the new WTO. In the new WTO process, which also has interim reports and final reports, there is a difference. The interim report, which is issued by a WTO panel, will automatically become the final report if the parties do not comment. The panel is substantially more restricted in what it is allowed to do between the interim report and the final report. If the interim report cannot be considered by the panel, it looks more like an appeal because you are frozen into what you have done. And perhaps the leak, which occurred, again, between Canada and the United States, and the recent culture dispute in WTO would be less serious, in my view, than it would be if it was a work product purpose.

Anyway, I leave that to you to think about. Certainly it suggests a clear need for tighter security controls over this process, whatever goes on.

That leads me to institutionalization. You all heard the prior participants, starting with Larry Herman, commenting on the fact that NAFTA lacks in institutional permanency and organizational core. Suggestions were made for consideration of a permanent tribunal to replace the present panel system. Henry King pointed out that such an institution, which was, by the way, called for and recommended in the joint working group on dispute settlement of the ABA, the CBA, and the Bar Mexicana, would provide any institutional memory, that was important. I concur in those recommendations. I think there is a need for some form of permanent or ongoing tribunal. It would probably better serve what the objectives of the dispute resolution process are about.

The panel dispute resolution mechanisms, which are built into the FTA and the later NAFTA, are not the equivalent court or a similar tribunal. They are ad hoc, and I suspect they were intended to be so. The panels are hand-tailored to each dispute. There is no reason that any panel member will have the opportunity to participate in any later panel. Each panel then, in other words, will face the problem of substantially indulging in the cliche in re-inventing its own grief.

Institution-building in due course will, nevertheless, occur. I do not care how clumsy an entity is. If it is going to go on for some time, there is a clear need to institutionalize. There is a need for that memory, there is a need for continuity. The most clumsy of agreements will do it. GATT is an example. You all know that GATT was never intended to be an institution. The ITO was supposed to be that, and GATT was merely a one-shot trade agreement. But when the ITO failed, because it was caught in a two-year political cross-fire created by the United States at the time, the GATT itself, badly drafted as it was and without any
real institutional structures there, was tortured by fact, by just the operation of the parties. By need they made it an institution. It was not a great one, but they did it, anyway. You had to do that. And with all its creaks and rattles, it proceeded for almost forty years before they finally said enough is enough and went and drafted the WTO, which we now have.

How did that institutionalization process come about? Well, it makes a very interesting history in looking at GATT and you wonder what its first executive secretary, Eric William White, had done to help establish de facto institutional processes and memories. But it did so. So, too, with NAFTA under the existing processes. NAFTA with panel processes will, nevertheless, institutionalize. It will establish memory. But like GATT, it may do it with distortions in place, and one should be aware of the likely distortions as this goes on. Let me just give you several examples.

There is one ongoing entity in NAFTA, a secretariat. There are actually three. There is a secretariat structure with three offices in Mexico City, Washington, and Ottawa. For your information or in case you are not familiar with it, the secretariat services the panel, among other things, and when a dispute arises, the secretariat responsible for management of that dispute is the secretariat of the defending country, the party complained against, which is the formal language of the agreement based on the defending country. Since the United States was the complaining party and Canada the complained-against party in our dispute, that meant that the NAFTA secretariat in Ottawa was responsible for administering and helping in assisting our panel.

I will say as a footnote that in my experience in dealing with administrators, I have never seen a higher quality or integrity of service that has come out of that panel. So any comments that I may have about thoughts of speculation of secretariats has nothing whatsoever to do with that. That was an incredible panel.

Nevertheless, what will happen is that institutional memory will develop. The secretariat is present and will participate in whatever the panel process is, the deliberations, and so forth. It is only there to help and to assist and to administer, but over time it cannot help to either have or have the appearance of having some influence over the decision-making process. It, inevitably, must provide some things that the panel will have. It has been around, and the panelists have not. So some of that function, that institutional memory, will occur with the secretariat rather than a panel or a tribunal.

Is that a good or a bad thing? Again, in my experience, it was incredible. But the point is that over time if this process continues, what
will happen is the secretariat will do so, and I’m not sure the drafters of the agreement really intended that the secretariat have that role. I would be a little troubled by it because the secretariat is not exclusively responsible to the panel. Among its other jobs is to service the commission which created it. That is the master. So it would have a certain divided loyalty that over time, I think, would be of some consideration.

A second aspect that I think would be a problem is precisely what was referred to, I think by Mr. Cassidy the other day. That was the suggestion that the panelists themselves will be the institutional memory. I believe in the Chapter 19 discussion, and I cannot recall which person had made the statement, the panelists who are reappointed will come with their own memory and that will be a countervailing effect and we do not really need a formal tribunal. I disagree. I think that that is precisely a reason for a tribunal.

In the Chapter 19 process, if you actually look at the people who are appointed, statistically, many of them have been appointed many times. So you have multiple appointments, and it is true that the person who served before will bring to the process his or her memories of prior cases and that will influence the process. If everyone has done it before, I suppose we would all cancel each other out.

But in the Chapter 18-20 process, that is not true. Only one person has served on more than one panel, if you put Chapters 18 and 20 together. And while that person who I have unquestionable respect for his judgement, Professor Prick of Ottawa Law School, the person in their case is not relevant. What is relevant is that when you have only one or two panels who may have been there before, those persons will also provide memory. They provide institutionalization, and that may give them a greater than one-fifth influence over the process. That I would in due course of time find trouble if that process continued. In any event, my point is that institutionalization will take place anyway, but you will distort it and it will occur in places where you do not always think it should be.

Now, if I can, let me just say a few additional comments about the institutionalization. I think that the establishment of a permanent panel or a tribunal would avoid not only many of the distortions to which I have referred, but it will also provide for more opportunities for establishing procedures and related processes on its own as the parties come together on a regular and an ongoing basis. Increasing familiarity with processes if you have an ongoing tribunal and interaction between the same tribunal members would establish an institutional culture that courts normally provide. And eventually that will create a more independent and, I think, a more professional formal dispute resolution mecha-
nism. That may be one of the very reasons why it is not there because I believe that the parties never intended that to happen. Nevertheless, I think it's worth noting.

I will give you some pragmatic reasons why I think it would also help if there were a tribunal, and I will try to list them very briefly. First, if you had an ongoing tribunal of permanently appointed people, you would avoid the conflict of interest problems we talked about. You would just go through that headache once for each of the appointments of these people on an ongoing tribunal and you do not have to repeat that.

Second, it would save a lot of time. The loss of time in establishing panels is unavoidable. In the case of the dairy/poultry case, for the year-and-a-half the process took place, at least one-third of it was merely putting the panel together. That could have been saved. You also would not have had so many professors on that, if you had this process in place.

Third, for panelists who, inevitably, have to juggle a number of conflicting schedules and obligations because they have other career paths, you avoid what is a de facto kind of conflict of pressures on your time and on your career. This is particularly true when, as happened in the dairy/poultry case, the time limits specified in the agreement or in the model were slick. In theory, we thought, the last panelist was appointed in January. We should have finished in April of last year, a year ago. We did not finish until December of last year. And that meant for everyone involved a practical problem of juggling one's schedule and trying to figure out how to compete with commitments that had been made for the periods of the summer and the fall and so forth, and that adversely influences how the process is going to work.

I think also if you had a more permanent tribunal, there would be less pressure on worrying about the time limits. I think when you loosen the time limits and give more time for the appropriate consideration as required in these cases, an ongoing tribunal would not have competing interests in order to try to juggle the schedule.

I think also that, because these panels are aware, inevitably, or they would appear to be aware of what they are doing, there is a subtle pressure that is in place or would appear to be in place to reach one decision and one opinion. That may or it may not be a good thing. I do not think there would be any difference in dissents, but there might be differences in concurring opinions, slightly different variations in the thought process that would be expressed if there was an ongoing tribunal, and that might add to a development jurisprudence to NAFTA. If, instead, with a panel process because of a need to get respectability,
continuity, or such substantial pressure on obtaining a single opinion, we might frustrate the process of being able to develop an ongoing jurisprudence. I think a court process would provide that.

They would also make it much easier to control the security problems. Everyone would be in a single place. You would have greater control over your materials. It is rather cumbersome when you are a panelist and you are scattered all over North America or, in our case, substantial parts of the world and you are responsible for the security of the materials, for the receipt of materials, for being able to communicate and interact with each other, and it becomes difficult. As a practical matter, just working out the schedules when we can get together and when we can deliberate and where we can deliberate, we had to resort to telephone conferences.

In one case, and I do not think I am breaching my obligation, we had an extraordinary combination of people scattered from Ottawa; Saskatoon; Houston; Mexico City; Washington; London; Cambridge, England; St. Petersburg, Russia; and New Haven, Connecticut, trying to figure out how to communicate across twelve time zones with conference calls or trying to figure out for our schedules what is the most convenient city to come together and talk. These would all be eliminated if there were a panel process.

While I am on this ideological roll, I want to comment on Bill Graham's suggestion that private parties should be allowed to bring actions under NAFTA. You recall he had made that comment in his luncheon talk, thereby breaking down some of the formal distinctions under international law, public and private international law, and you have to instead under this process go to the government and get the government to take up your case.

As an international law professor, I tend to agree with you. I think that we need to blur the distinction between public and private international law. I would be quite happy. I do not see any serious problem with a private party being able to bring such an action that will, indeed, develop the law. I do not think the governments would like it because they would, clearly, lose a certain sense of control, if that occurs.

Where I would probably disagree with Bill Graham is the suggestion that the private party be able to bring such an action in a national forum. I think the one problem with having that under the system with NAFTA is that you would have three separate jurisdictions adopting three separate interpretations of a single agreement. I do not think that would help all that much. If, on the other hand, you did have a single tribunal and you allowed the private parties, as well as governments, to bring a case before a single tribunal, then you would see the develop-
ment of NAFTA law and it would only get a single interpretation. So, in part, it is, again, one of these yes-and-no things.

These are my views on a permanent tribunal versus the panel process. I will now close by saying it ain't gonna happen. I do not see in the reasonably foreseeable future that the parties are going to amend the agreement in any way in order to establish an ongoing tribunal. I think they intended the results that they have here. It does give them greater control. If that is what the parties intended, well, that is the agreement, and that is what we have. I do think that without any amendment, you can, nevertheless, do a better job institutionalizing than is now being done.

For example, notwithstanding what Cassidy said the other day, we need to start with the establishment of a roster. If one puts together the thirty-person roster and uses that as the basis for institutionalization, one can find perhaps a better de facto institution develop than merely the secretariat or past panelists. And that can be done in many ways the way Bill Graham referred to it. He talked about how members of the legislatures of the two countries get together and sail off to Alaska, or whatever they do periodically, which brings them together so they meet face to face. They get to know each other, exchange views, and build a rapport and a relationship. And they build an ongoing process. That could happen if a roster were not only established, but, going further, the roster is brought together periodically.

In the United States we have, for example, judicial conferences. Each of the Federal districts annually gets together, and the judges, often with lawyers, get together and they exchange information. They get to know each other. If the thirty-person roster did that and were brought together by a secretariat or secretariats, they would get to know the secretariats; they would understand secretariat problems; they would understand problems that panelists face, and because they got to know each other, if they end up on the panel one day, they will have some idea what each of them is like. It would really contribute substantially to the institutionalization process. Even within this framework, it requires no amendment to anything. It merely requires the establishment of the roster and then administratively simply bringing the roster together on an ongoing basis.