

ESSAY

NAFTA INSTITUTIONAL ARRANGEMENTS AND DISPUTE SETTLEMENT PROCEDURES

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I. BACKGROUND

The North American Free Trade Agreement, known in Mexico by the initials TLC and in the United States, Canada and other countries by the initials NAFTA, was initialled by the Executives of the three signatory countries in San Antonio, Texas, on October 7, 1992.

Now it will undergo the process of approval by the legislative bodies of each of the countries Party to the Agreement, in accordance with their own constitutional systems.¹ After its signature by the heads of State of each of the three countries, it will be ratified in due course by the respective legislative bodies and finally enacted. If these steps are followed through, the Agreement is expected to become effective on January 1, 1994.

The instrument is a lengthy document comprised of twenty two Chapters and numerous Annexes, totalling approximately 2000 pages in length.² It formally provides for the creation of a free trade zone between Mexico, Canada and the United States, within the scope of the General Agreement on Tariffs and Trade (GATT).³ It is intended to eliminate trade barriers, foster fair competition, multiply investment opportunities, provide adequate protection to intellectual property rights, and establish effective procedures for the application of the Treaty and for the settlement of disputes which may arise in the course of its implementation. The NAFTA provides that other countries or groups of countries may become Parties to the Agreement with

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1. As general information of interest, the instrument shall be a Treaty for Mexico, which will be ratified according to the applicable constitutional procedures (arts. 76, I and 133 of the Mexican Constitution). For the United States it will be an Executive Agreement signed by the Federal Executive and which will have to be first approved by Congress. After its approval a law to implement it will have to be enacted. With respect to Canada, the Agreement must be first approved by Parliament and then it will require legislation for its implementation.

2. As per the final published version of the NAFTA approved by the Mexican Secretariat of Commerce and Industrial Promotion.

3. North American Free Trade Agreement, text prepared October 7, 1992, U.S.-Can.-Mex., art. 2204 [hereinafter NAFTA].

the consent of the three original Parties, in accordance with the terms and conditions established by the original Parties.⁴

If indeed it is true that the NAFTA negotiators kept the provisions and overall context of the Free Trade Agreement (FTA) between Canada and the United States (which has been in effect since January 1, 1989) very much in mind, it is also true that many of its chapters were modified, and several of its basic frameworks, including the one regarding mechanisms for the settlement of controversies, acquire innovative features in the NAFTA Agreement.

The FTA between the United States and Canada has two chapters, chapter 18 and chapter 19, which govern the settlement of disputes. Chapter 18 provides for institutional arrangements and deals primarily with the settlement of disputes arising from the interpretation or application of the treaty.⁵ Chapter 19 outlines the mechanisms for the settlement of disputes arising from unfair trade practices.⁶

The context of Chapter 18 of the FTA has been transferred to Chapter XX of the NAFTA with changes addressing only the mechanisms of implementation. Likewise, the general outline of Chapter 19 of the U.S. - Canada Agreement has been followed in Chapter XIX of the new trilateral treaty. The mechanisms outlined in Chapters XX and XIX are the most significant in the treaty concerning dispute settlement, however similar mechanisms are present in other chapters that deal with investment,⁷ financial services⁸ and agriculture.⁹

The purpose of this article is to examine the provisions that address the institutional arrangements and the procedures for dispute settlement established in Chapter XX of the treaty.

II. SOME DIFFERENCES BETWEEN CHAPTER 18 OF THE FTA BETWEEN THE U.S. AND CANADA AND CHAPTER XX OF THE NAFTA

It is important to emphasize the fact that negotiations on this issue were arduous and protracted. Clearly, the experience gained in solving controversies between the United States and Canada since the FTA has been in effect was a fundamental factor in the final wording of the new trilateral text.¹⁰

4. Art. 2204.

5. U.S.-Canada Free Trade Agreement, January 2, 1988, U.S.-Can., arts. 1801-1808 [hereinafter FTA].

6. *Id.* arts. 1901-1904.13. Primarily those are antidumping provisions and provisions addressing the imposition of countervailing duties.

7. NAFTA, *supra* note 4, ch. XI, sec. A, including its annexes.

8. *Id.* arts. 1414-1415.

9. *Id.* art. 707.

10. Mexican bibliography on this issue is not abundant. See Julio C. Treviño, *El Arbitraje en el Contexto del Tratado de Libre Comercio*, and José Luis Siqueiros, *La solución de controversias en el tratado trilateral de libre comercio entre México, Estados Unidos de América y Canadá*, in PANORAMA JURÍDICO DEL TRATADO DE LIBRE COMERCIO (Universidad

With regard to controversies under the U.S.-Canada FTA only two or three such disputes have been submitted for consideration to the Trade Commission, which is an option that has been specifically provided for in Chapter 18 of the of the U.S.-Canada Agreement.¹¹ The majority of disputes are submitted to non-binding arbitration by a panel of experts and have concerned unfair market practices within the context of Chapter 19 of the FTA.

Under the general framework of institutional arrangements established in Chapter 18 of the FTA, the Trade Commission must, when conciliatory action has failed, refer the matter to binding arbitration. In emergency actions it must do so.¹² If the dispute is not submitted to binding arbitration, the Commission will, at the request of either Party, submit it to non-binding arbitration by a panel of experts as provided in article 1807.¹³ Thus, Chapter 18 of the U.S.-Canada FTA provides for two separate types of "arbitration:" binding or obligatory arbitration,¹⁴ and non-binding arbitration.¹⁵

The "obligatory" nature of binding arbitration is relative. If the Party deemed to be in non-compliance in the findings of the final panel report does not take the necessary steps to modify its behavior, or does not agree upon the payment of compensation or other redress to the complaining Party, the injured Party may take retaliatory action against it, such as the suspension of equivalent benefits in the affected sector.¹⁶

This dual system (binding arbitration and panel procedure), has been eliminated in the NAFTA. There is no binding arbitration in Chapter XX. If the Parties' attempts to settle such a dispute through consultation have failed and the Commissions attempts to bring the Parties to an understanding through its good offices, conciliation and mediation have also failed, any Party may request that an arbitral panel be established and that the mater be submitted to the Commission which will make determinations and recommendations to settle the controversy. The arbitral panel is required to issue two reports (an initial and a final report), through this process. Once the recommendations have been made by the panel, the Parties (and not the Commission) must mutually agree upon the means of implementing the recommendations.¹⁷ If the Parties cannot agree upon a mutually satisfactory means of implementing the resolution, the complaining Party may suspend,

Iberoamericana, Departamento de Derecho, ed. 1992).

11. See Report of the Canada-U.S. Trade Commission, Aug. 3, 1990, at 29,025.

12. FTA, *supra* note 5, art. 1806.

13. *Id.* art. 1807, paras. 1, 2, and 4.

14. *Id.* art. 1806, paras. 1, 3 and 3.

15. *Id.* art. 1807, paras. 6 and 7. Which results in a final report issued by the panelists, reviewed by the Commission and implemented with the reciprocal cooperation of the Parties involved.

16. *Id.* art. 1807, paras. 8 and 9.

17. NAFTA, *supra* note 4, art. 2018.

to the detriment of the non-complying Party, benefits of like effect. In other words, the Party has the right to retaliation or retorsion.

A careful examination of Chapter XX of the NAFTA will allow us discern the similarities and differences with respect to Chapter 18 of the FTA. The touchstone seems to be article 2003, which underscores that the Parties shall strive, at all times, to agree on the interpretation and application of the Treaty, and to resolve in a mutually acceptable manner any issue which might affect its operation.¹⁸ Panels will only issue determinations and recommendations, and not arbitral awards. The authority for execution vested in the Commission is greatly diminished (with respect to the final report) and the disputing Parties are directly charged with the task of reaching an agreement on the manner of compliance with the panels recommendations.

There are also changes in the way the Secretariat is established, a body which was already contemplated in Chapter 19¹⁹ of the U.S.-Canada FTA. These changes include the procedures and mechanisms for the settlement of disputes with respect to unfair practices. The Secretariat is now an entity of the Free Trade Trilateral Commission and is made up of three national sections which have one seat in the territory of each of the three Parties. This body must give administrative assistance to the panels and committees created in accordance with Chapter XIX.

The procedure by which panels²⁰ are created and panelists chosen is also different in the NAFTA from the U.S.-Canada FTA. A new concept, the so-called Model Rules of Procedure, have been introduced. Regulations on third Party participation have also been included and the NAFTA foresees the possibility of requesting advice from scientific review boards. Lastly, and as an important addition, recommendations are in place for international commercial arbitration which will facilitate the use of arbitration in the case of private disputes within the free trade zone.

III. THE TRADE COMMISSION

The NAFTA establishes a Trade Commission with cabinet level officials made up of representatives of the three Parties. One of the goals of this Commission will be to strive to prevent or resolve all the controversies which may arise by reason of the interpretation or application of the Treaty or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of the Agreement or cause nullification or impairment in the sense of Annex 2004.²¹ A common

18. *Id.* art. 2003. Additionally, article 2003 provides that the Parties shall make every attempt through cooperation and consultations to arrive at a mutually satisfactory agreement.

19. FTA, *supra* note 5, art. 1909.

20. *Id.* The word "panelist" has been translated in the Spanish version as "árbitro" but most of the time as "panelista," a new term in Mexico's legal nomenclature.

21. NAFTA, *supra* note 4, art. 2001, para. 2, item (c), and art. 2004.

situation where dispute settlement will be necessary is where a Party takes an action that appears to be inconsistent with the Treaty. Another more troubling situation is where a Party's action is not blatantly inconsistent with the treaty but it appears the action will impair²² the benefits that are reasonably expected to derive from the provisions of the treaty that deal with:

- a) The trade in goods, except for the provisions regarding investment in the automotive sector or the energy sector;
- b) Technical barriers to trade;
- c) Trade in services across borders; or
- d) Intellectual property.²³

Under the NAFTA, the Commission has authority to establish ad hoc or standing committees, which are working groups or groups of experts, and may delegate responsibilities to them. The Commission is to establish its own rules and procedures and all its resolutions must be arrived at by consensus.²⁴

The Commission will utilize the Secretariat made up of the three national sections. The Secretariat will give administrative assistance to the panels and committees established in accordance with Chapter XIX and those formed pursuant to Chapter XX, according to the procedures set forth in each of the chapters.

IV. SETTLEMENT OF DISPUTES

The underlying principle of Chapter XX is that of amicable agreement. The Parties undertake to come to an agreement on the interpretation and application of the Treaty, and by cooperation and consultation, to reach a mutually satisfactory solution to all disputes.

A. GATT Dispute Settlement

If any controversy arises with respect to the provisions of the NAFTA which is also a controversy under the General Agreement on Tariffs and Trade (GATT), or those agreements negotiated under the GATT or under a successor agreement, it may be resolved in either forum the complaining Party chooses.²⁵

However, before the complaining Party initiates proceedings before the GATT, it will have to notify any third Party. If the third Party would rather

22. *Id.* annex 2004, para. 1, Chapter XX authorizes the Parties to have recourse to the mechanism provided therein in the cases mentioned, when they consider that the expected benefits are impaired or nullified.

23. *Id.* annex 2004, para. 2, which provides for exceptions to the four items of para. 1.

24. *Id.* art. 2001, para. 4.

25. *Id.* art. 2005.

resort to the procedures established by the NAFTA it shall so inform the notifying Party, and both, by reciprocal consultation shall strive to agree upon a single forum. If they do not reach an agreement, the controversy will be settled according to the guidelines established in the NAFTA.

There are, however, exceptions to this rule. The exceptions deal with matters related to environmental and conservation agreements, the agricultural sector, and sanitary and phytosanitary measures or standards (Chapter IX). In these areas, the responding Party may object to the dispute being brought before the GATT, and may request that the Commission follow the procedures for dispute settlement set out in the NAFTA. If the complaining Party had already initiated procedures pursuant to Article XXIII of the GATT those procedures must be stayed without delay. Except for the situation just described, once a procedure has been initiated under either the GATT or the NAFTA, the chosen forum shall exclude the other.

B. Consultation

When a Party believes that any actual or proposed measure taken by any other Party may have an adverse effect on the operation of the Treaty, it may resort to the mechanism of consultation through the offices of its Section in the Secretariat. To do this, the Party must submit sufficient information to allow for an in-depth review of the measure being contested. Then an exchange of opinions will take place and the Parties should attempt to find a solution that will not have a detrimental effect on any of the Parties.²⁶

C. The Commission—Good Offices, Conciliation and Mediation

In the event the Parties are unable to agree upon a solution through consultation within certain time limits, usually between 30 and 45 days, any Party may request in writing that the Commission meet. The requesting Party must state the provisions of the Treaty it deems to be applicable, and must provide the other Parties and its Section with copies of its request.

The Commission must attempt to settle the controversy without delay, and to this end it may:

- a) seek the advice of technical consultants or create working groups or groups of experts;
- b) have recourse to good offices, conciliation, mediation and other procedures for the settlement of controversies; or
- c) issue recommendations to enable the Parties to come to a mutually satisfactory solution of the dispute.

26. *Id.* art. 2006.

The Commission may consolidate two or more proceedings if its deems that such a course of action is advisable.²⁷

E. Panel Proceedings

In the event the efforts of the Commission do not meet with success within the specified terms, any of the consulting Parties may request that an arbitral panel be established, and must inform the other Parties and its Section of the Secretariat. When a third Party believes it has a substantial interest in the matter, it may participate as a complaining Party,²⁸ or limit itself to submitting oral or written communications.²⁹ The Commission will then establish an arbitral panel.

The arbitral panel will have five members, chosen from a list of 30 individuals who meet the required qualifications. The individuals on the roster of panelists will be elected by consensus of the Parties for three year terms. Panelists may be reelected.

The panelists must be versed in the areas of law, international trade, dispute settlement, multinational business and other aspects of the NAFTA; moreover, they must evidence objectivity, reliability and sound judgement.³⁰ An important factor will be their impartiality, therefore, they must be independent and not in any way related to any of the Parties.³¹ They must furthermore adhere to the code of conduct established by the Commission.³² They may be nationals of any country, even if their country of origin is not a Party to the NAFTA. In exceptional cases, individuals not on the roster may be designated as panelists, but in such an event, any of the disputing Parties may challenge the designation without stating the cause. If a panelist does not adhere to the code of conduct, the Parties, after consultation, may remove him and replace him according to the foregoing rules.

The two disputing Parties must first agree upon the designation of the chair. If they do not do so within fifteen days following the date the request is made, one Party, chosen by lot, will elect a chair from the roster of panelists. The elected chair cannot be a national of the Party designating him, but may be a national of a country that is not a Party to the NAFTA.

Within a fifteen day term following the designation of the chair, each one of the Parties in the dispute must choose two panelists from the list. The Parties cannot choose their own nationals as panelists. This innovative

27. *Id.* art. 2007, para. 6.

28. *Id.* art. 2008, para. 3.

29. *Id.* art. 2013.

30. *Id.* art. 2009.

31. *Id.* art. 2009, para. 2(b).

32. *Id.* art. 2009, para. 2(c).

procedure, very unique in mechanisms of this kind, is known by the term "inverse selection process."³³

If there are more than two disputing Parties, once the chair has been designated, each one of the complaining Parties must choose a panelist and the Party complained against must choose the other two, by the inverse selection process mentioned above.³⁴

The Treaty provides a special list of experts for controversies in the field of financial services.

F. Rules of Procedure

The Commission must establish Model Rules of Procedure. The Annexes to Chapter XX establish a general framework and parameters for these rules. According to article 2012 of the NAFTA the rules must make provision for the following:

- a) the right to at least one hearing before the panel must be guaranteed, as well as the opportunity of submitting initial and rebuttal briefs;
- b) all hearings before the panel, deliberations and the initial report, as well as all submissions and communications shall be kept confidential.

Except in the event the Parties agree upon an ad hoc procedure, the procedure shall be governed by the Model Rules. Moreover, the panel must, unless otherwise agreed upon by the Parties within 20 days, abide by the following terms:

To examine, in the light of the relevant provisions of the NAFTA, the matter referred to the Commission (as set out in the request for a commission, meeting) and to make findings, determinations and recommendations as provided in Article 2016(2).³⁵

The language above refers to the initial report which the panel must prepare. Any one of the Parties can request that the terms include, as subject matter of the dispute, any matter giving rise to the nullification or impairment of benefits and include the Party's wish that the panel issue determinations on the degree of adverse trade effects caused by the measure under dispute.³⁶

G. Experts and Scientific Review Boards

The panel may, at the request of one of the contending Parties or on its own initiative, request information and technical advice. The panel may also request that a scientific review board issue a written report on any matter of

33. *Id.* art. 2011, para. 1.

34. *Id.* art. 2011, para. 2.

35. *Id.* art. 2012, para. 3.

36. *Id.* art. 2012, para. 5.

fact relating to the environment, health, safety and other scientific issues. The scientific review board will be appointed by the panel, and will be made up of highly qualified independent experts. The panel will take into consideration the report submitted by the scientific review board, as well as any observations made by the Parties.³⁷

H. Initial and Final Report by the Panel

Within 90 days following the date on which the last panelist is designated, or within any other term agreed upon by the Parties or established by the Model Rules, the panel will submit an initial report to the disputing Parties which will include:

- a) the findings of fact;
- b) the determination on whether the measure under dispute is or would be incompatible with the obligations deriving from the Treaty or if it gives rise to its impairment or nullification; and its recommendations for the settlement of the dispute.

Within 14 days following its presentation, the Parties may make their observations on the initial report. The panel can also request that any interested Party submit its observations. The panel may also reconsider its report or conduct subsequent reviews.

Within 30 days following the presentation of the initial report, the panel will present its final report which will explain how the votes were cast, if there was not a unanimous vote. However, the identity of the panelists voting for or against will not be disclosed. The disputing Parties will transmit the final report to the Commission by confidential communication, including all relevant annexes, and the report will be published within 15 days after it is received by the Commission.³⁸

I. Implementation of Reports Issued by the Panels

Once the final report has been presented to the disputing Parties, they will (hopefully) agree upon the resolution of the controversy. It must not be forgotten that we are dealing with a dispute between sovereign nations, and that the final report is not an arbitral award and thus it is not compulsory in nature, unless explicitly provided for by the Treaty itself. The Treaty only anticipates that the resolution which the Parties reach will normally comply with the panel's determinations and recommendations, and that the resolution will result in the non-implementation or removal of the measure under dispute which does not conform with the Treaty itself or which has caused

37. *Id.* arts. 2014-2015.

38. *Id.* arts. 2016-2017.

impairment of its benefits. If no such resolution is agreed upon, the non-complying Party may make redress to the prejudiced Party with the payment of compensation.³⁹

If the Party complained against does not reach a satisfactory agreement with the complaining Party or Parties, the latter may suspend benefits of equivalent effect, i.e., it may take retaliatory measures, which will last until the dispute is finally settled. If the Party affected by the retaliatory measure considers that the measure is excessive, it will request the Commission to establish a new panel to determine if the level of the benefits suspended is in fact excessive.⁴⁰

J. Interpretation of the NAFTA in Domestic Judicial and Administrative Proceedings

If a matter concerning the interpretation or application of the Treaty arises in a domestic judicial or administrative proceeding, the possibility exists that the court or administrative entity may request the views of a Party. In such an event, the Party so requested will notify the other Parties and its Section of the Secretariat. Once the matter has been turned over to the Commission, the Commission will determine the appropriate response, which will then be provided to the requesting entity through the offices of the Party in whose territory the entity is located. When the Commission is unable to agree upon the adequate response, any one of the Parties may submit its own views to the interested court or entity, in accordance with the rules of the forum.⁴¹

The Parties to the NAFTA also agree not to utilize proceedings in their internal legislation which will allow private persons the right to file suit to enforce treaty provisions.⁴²

K. Settlement of Private Commercial Disputes

To the extent possible, the Parties shall promote and facilitate the use of arbitration and other alternative mechanisms for the settlement of commercial disputes between private Parties. To this end, the Parties shall make provision for domestic proceedings which will ensure the compliance, recognition and enforcement of arbitral awards.

The Parties will be considered to be in compliance with the provisions mentioned above if they are Party to the New York (1958) and Panama (1975) Conventions on the Recognition and Enforcement of Foreign Arbitral

39. *Id.* art. 2018, paras. 1-2.

40. *Id.* art. 2019, paras. 1-3.

41. *Id.* art. 2020, paras. 1-3.

42. *Id.* art. 2021.

Awards and on International Commercial Arbitration, respectively, and abide by their provisions.

The Commission will establish an advisory committee whose members will be experts in the area of commercial disputes. This committee will submit reports and issue recommendations to the Commission on matters for which an arbitral or other analogous procedure may be advisable in order to settle disputes within the free trade zone.⁴³

V. CONCLUSION

a) During 1991 and 1992 the American Bar Association, the Canadian Bar Association and the Mexican Bar created a study group whose main objective was to review the results of the U.S.-Canada Free Trade Agreement, primarily with regard to the issue of dispute settlement. Once the Group had assembled the mass of experience deriving from the regulations set forth in Chapters 18 and 19, the Group issued a set of recommendations which in its opinion would strengthen the legal framework for dispute settlement in the new trilateral instrument.⁴⁴

The cornerstone of these recommendations, as sent to the respective teams of negotiators, was that the treaty should provide for the creation of a permanent body responsible for the settlement of disputes arising among the Parties by reason of interpretation and application of the treaty. This body should provide the foundation for the resolution of controversies, and should only be called in session where controversies arise.

It was emphasized that this body should not act as an arbitral board or panel, but instead as a trilateral tribunal having jurisdiction to recognize of any complaint presented by any of the Parties. The body should be made up of three members and their alternates, (each Party to appoint one), at the time the Treaty becomes effective. This number could later grow to six, as the number of matters brought to its attention increase. In choosing the members and their alternates, the Parties should strive to elect individuals who are impartial, suitable, qualified, experienced and competent to hold this position. A body comprised in this manner, having quasi-judicial attributes, can give support to the mechanism created for the settlement of disputes involving the interpretation and application of the NAFTA Treaty.

The trilateral group of lawyers also considered the possibility of continuing with the panel mechanism provided by Chapter 18 of the U.S.-Canada FTA, in the event Canada and the United States wished to do so. If this is to be the case, it is important to negotiate to safeguard the right of Mexico to request the participation of the standing tribunal, if in its opinion a case calls for this course of action. The decisions of the Tribunal would

43. *Id.* art. 2022, para. 4.

44. 26 Int'l Lawyer 855-869 (1992). The final text of the report by the Group of the three Bars appears here.

be binding upon the Parties and they would undertake the commitment of complying with them. In the event of non-compliance, the appropriate retaliatory mechanisms would be brought into action.

However, it appears that the recommendations by the three Bars did not receive the blessing of the negotiators. The proposal of a Standing Tribunal was disregarded, as well as the alternative of binding arbitration as provided in Chapter 18 of the U.S.-Canada FTA. The author believes that the desire to reconcile any possible disputes through cooperation and consultations prevailed among the drafters, thus dismissing the alternative of forming a permanent tribunal whose quasi-jurisdictional functions might have caused friction among the Contracting States.

b) This author also believes it was a mistake to curtail the authority of the Trade Commission to enforce the final report of the panel. As provided by the U.S.-Canada FTA, the arbitral panel submits a report to the Joint Trade Commission and the Commission is charged with its implementation once the method of implementation is agreed upon. Now it is the Parties themselves, not the Commission, who must agree upon how to enforce the decision. The higher authority of the Commission has now been disregarded in favor of the Parties reaching their own agreement. However, if no agreement is reached with respect to the recommendations of the panel, the Parties will resort to measures of retorsion.

c) A positive contribution to the NAFTA with regard to dispute settlement is article 2022. According to article 2022, the Parties agree to foster and facilitate, as far as possible, the access to arbitration and other alternative means for the settlement of international commercial disputes between private entities. In order to do this, it is provided that each Party will establish suitable mechanisms to guarantee the compliance of arbitral agreements and the recognition and enforcement of arbitral awards, within the general framework of the 1958 New York Convention and 1975 Panama Convention. Mexico and the United States are both signatories to these instruments. Canada is only a signature to the 1958 New York Convention.

Without detracting from the merits of the provision mentioned above, it is important to point out that Chapter XX is designed to bring about the settlement of disputes which may arise between the Parties to the Treaty with respect to the interpretation and application of the North American Free Trade Agreement, and not with regard to the settlement of controversies between private Parties. The inclusion of article 2022 must be construed as dealing with private trade agreements which will surely occur within the free trade zone.⁴⁵

It is also important to note that the establishment of an advisory committee which will present reports and make recommendations to the Commission on issues of a general nature relating to the existence, use and effectiveness of arbitration is a very positive aspect of the NAFTA.

45. Technically this provision is out of context.