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Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process

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Abstract: Without a properly functioning dispute process, the obligations in a trade agreement may not be worth much. As part of the NAFTA renegotiation, the NAFTA parties should try to fix certain flaws in the NAFTA Chapter 20 dispute settlement process that emerged a few years after NAFTA came into force. Chapter 20 was used regularly in its early years, but usage dropped considerably after panel selection was blocked in a case involving US restrictions on Mexican sugar. In this paper, we examine recent innovations on panel selection in the TPP, CETA, and JEEPA dispute provisions, and draw from those to develop principles that can guide revisions to the NAFTA Chapter 20 panel selection process.

1. Introduction

Trade agreements establish legal obligations for their signatory nations, and to determine if those obligations have been violated, some kind of adjudication system is needed. Without it, the obligations are not enforceable, and therefore not worth nearly as much. Under most trade agreements, disputes are not heard by permanent courts, but rather by ad-hoc panels. Unlike full-time judges, trade dispute panelists are part-timers who are selected for particular disputes. This approach offers flexibility and cost-efficiency in a system with a limited number of disputes. However, the requirement that panelists be selected for each case can cause difficulties for complainants wishing to have their case heard. If the rules allow the respondent to delay the selection process, a complainant's access to justice might be impaired.

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At the World Trade Organization (WTO), when the parties cannot agree on panelists, the WTO Director General can step in and make appointments. But bilateral and regional trade agreements do not usually have an equivalent position, which means that a complainant's ability to get a panel may not be guaranteed. In the North American Free Trade Agreement (NAFTA),[1] the process of selecting panelists has presented a serious obstacle to its ability to function. Three early disputes were heard by a panel. However, in a dispute that began in the late 1990s, selection of panelists to hear the case was effectively blocked by the responding party. Since then, no panels have been formed.

While a number of other factors help explain why NAFTA's dispute resolution system fell into disuse, such as a preference for the World Trade Organization (WTO) process in particular cases,[2] or political sensitivities like with the Helms–Burton Act,[3] the blocking of panel selection stands out as a fundamental flaw in the process.[4] This paper examines in detail the process for selecting panelists in NAFTA, and highlights flaws in the provisions of the dispute settlement chapter that lead to this problem. The paper then argues that the NAFTA parties should try to resolve this issue as part of the ongoing NAFTA renegotiation. With guidance from the dispute procedures recently developed in the Trans-Pacific Partnership (TPP), the Canada–EU Comprehensive Economic and Trade Agreement (CETA) and the Japan–EU Economic Partnership Agreement (JEEPA), we identify the specific weaknesses of the NAFTA panel selection provisions and propose reforms that could prevent the blocking of a panel in the future.

Political realities may stand in the way of these proposals, as press reports indicate that the Trump administration, rather than trying to fix existing flaws in the NAFTA state-to-state dispute process, is trying to weaken it by allowing responding parties who are found in violation of the rules to disregard rulings that they

1 North American Free Trade Agreement, 17 December 1992, US–Can.–Mex., 32 I.L.M. 289 (chs. 1–9); 32 I.L.M. 605 (chs. 10–22).

2 Marc L. Busch, 'Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade' (2007) 61, 4 *International Organization* 735–761.

3 David Lopez, 'Dispute Resolution under NAFTA: Lessons from the Early Experience' (1997) 32, 2 *Texas International Law Journal* 163–208.

4 A number of scholars have noted the potential for delays or the complete blocking of panels as a particular problem, with some pointing to the US actions in stalling panel appointments: David A. Gantz, 'The United States and NAFTA Dispute Settlement: Ambivalence, Frustration and Occasional Defiance' (2009) Arizona Legal Studies Discussion Paper No. 06-26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=918542 (accessed 29 September 2017); Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" Is Cooking' (2006) 9, 1 *Journal of International Economic Law* 1–10; as well as procedural delays: David A. Gantz, 'Government-to-Government Dispute Resolution Under NAFTA's Chapter 20: A Commentary on the Process' (2000) 11 *American Review of International Arbitration* 481; Gary C. Hufbauer and Jeffrey J. Schott, *NAFTA Revisited: Achievements and Challenges* (Institute for International Economics 2005); or the lack of a complete roster of potential panelists: Sidney Picker Jr., 'The NAFTA Chapter 20 Dispute Resolution Process: A View from the Inside' (1997) 23, 55 *Can–US Law Journal* 525–540.

believe are 'clearly erroneous'.[5] We offer our proposals nonetheless, because there is no final agreement yet, and thus there is still an opportunity for real reform if the NAFTA parties are interested. In addition, the exercise of evaluating state-to-state dispute settlement provisions is useful for countries outside of NAFTA, since dispute settlement has seen increased calls for reform more generally. The EU, Japan, Canada, and others are currently negotiating their own bilateral and regional trade agreements, and as the United Kingdom exits the European Union, another major trading country will begin drafting its own trade agreements, so a careful consideration of how dispute provisions function is worthwhile.

The paper proceeds as follows: first, we provide a brief summary of why state to state dispute settlement is an essential feature of trade agreements; second, we explain the NAFTA Chapter 20 process; third, we detail the sugar dispute that brought the issue of panel selection problems to light; fourth, we explore recent innovations in dispute settlement procedures from the TPP, CETA, and JEEPA; finally, we develop a set of principles that can guide the reform of the panel selection provisions in the NAFTA renegotiation.

2. The flawed NAFTA dispute settlement process

A core feature of trade agreements is an enforcement mechanism to ensure that governments comply with the obligations they have undertaken. Without enforcement, trade commitments may not have much impact. While 'soft law' can have some value, 'hard law' is more desirable if it can be achieved. Compared to many areas of international law, there is a long tradition of relatively strong enforcement in trade agreements. Trade enforcement takes places through an adjudication process heard by a neutral body of experts, typically referred to as a 'panel'. The panel hears the arguments from both sides, as well as the views of third parties, and issues a report in which it determines whether the challenged measures are in violation of the agreement (or otherwise nullify or impair benefits). When there is a finding of violation, there is a further process by which trade sanctions can be used to induce compliance with the panel's ruling.

5 'US proposes non-binding state-to-state dispute settlement chapter in NAFTA', *Inside US Trade* (15 October 2017), https://insidetrade.com/trade/us-proposes-non-binding-state-state-dispute-settlement-chapter-nafta (accessed 7 January 2018). As is well-known in trade policy circles, the United States is also currently taking actions that could undermine WTO dispute settlement, which combined with its NAFTA proposals could leave Canada and Mexico without any effective international recourse for bringing trade disputes against the United States. The US approach presents a serious risk to the global trading system and to state-to-state dispute settlement generally. It remains to be seen how strongly the Trump administration will push on this issue, and whether it is amenable to negotiating a solution. See, Manfred Elsig, Mark Pollack, and Gregory Shaffer, 'Trump is fighting an open war on trade. His stealth war on trade may be even more important', *The Washington Post* (27 September 2017), www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.b54250d51c47 (accessed 22 January 2018).

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Before any of this can happen, however, a panel needs to be selected. Without a panel, there can be no ruling, and the complaining party will not have its case heard. While a responding party might prefer this situation in a particular case, and may fight to delay or block the panel, the system cannot function without these panels. Respondent governments may object to specific panels that hear complaints against them, but because they may be the complainant in other cases, governments have an incentive to sign on to a system that ensures the composition of a panel.

Despite these incentives, in the NAFTA, the rules on composing panels have been drafted – either by intention or carelessness – in such a way that panel composition can be blocked, and no panel has been composed since 2000. We examine this situation in the next section.

2.1 The NAFTA panel selection process

The NAFTA came into force in 1994 as a cutting edge trade agreement that broke new ground in a number of areas, such as liberalizing trade in services and offering protections for intellectual property. Along with the WTO in 1995, it was part of a major expansion of international trade obligations. With regard to dispute settlement, NAFTA Chapter 20 provides the core state-to-state dispute procedures, designed to make the agreement enforceable (succeeding the similar provisions in chapter 18 of the Canada–US FTA).[6]

On their face, the NAFTA dispute provisions seem to offer a clear path for selecting panelists. Under Article 2008, once a panel request has been made, and delivered to the other Parties and to the complainant's section of the Secretariat, the Free Trade Commission 'shall establish an arbitral panel'. At that point, the procedures in Article 2011 govern the selection of the five panel members.

The process starts with the selection of the panel chair. Where there are two disputing parties, as is usually the case, the provisions of Article 2011, paragraph 1 apply. Under sub-paragraph (b) of paragraph 1, the parties 'shall endeavor' to agree on the chair 'within 15 days of the delivery of the request for the establishment of the panel'. However, if they are unable to agree on the chair within this period, 'the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen of that Party'. The provision does not explain how the choosing by lot is to be carried out, or where the chair is selected from, but once it is done, that party shall select a chair who is not one of its citizens.

With regard to the other panelists, sub-paragraph (c) of paragraph 1 states that within 15 days of selection of the chair, 'each disputing Party shall select two panelists who are citizens of the other disputing Party'. Sub-paragraph (d) anticipates the problem that a responding party may not select any panelists, stating that [i]f

6 Please see our online appendices for further details. Appendix A provides a brief summary of all NAFTA Chapter 20 disputes to date, and Appendix B lists them in table format.

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a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party'. (If there are three disputing parties, rather than two, Article 2011, paragraph 2 applies.)[7]

With regard to the roster, under Article 2009, paragraph 1, '[t]he Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists'. Article 2011, paragraph 3 makes clear the importance of the roster for panel selection, explaining that '[p]anelists shall normally be selected from the roster'. In addition, it provides that '[a]ny disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 15 days after the individual has been proposed'. Through these peremptory challenges, a responding Party can effectively block composition of a panel when there is no roster in place.

A number of potential roadblocks are apparent from this text. First, it is left somewhat vague as to who will do the choosing/selecting by lot in sub-paragraphs (b) and (d). Is the Secretariat supposed to do it? If so, which country's section should be responsible (the NAFTA does not have one unified Secretariat, but rather a separate section for each NAFTA party), and how can it be forced to act if it does not do as required? Second, without a roster, a responding party can object to any proposed nominee with a preemptory challenge. The problem is that there is no guarantee of having a roster. Article 2009, paragraph 1 states: 'The Parties shall establish by January 1, 1994 and maintain a roster of up to 30 individuals who are willing and able to serve as panelists. The roster members shall be appointed by consensus for terms of three years, and may be reappointed.' The consensus requirement means that one party can block the roster from ever being set up, or its members being reappointed. Thus, without a roster, panel selection might be difficult where a responding party wants to stand in the way.

2.2 *The NAFTA sugar dispute (Restrictions on Sugar from Mexico)*

In the first three NAFTA Chapter 20 disputes to be heard by a panel, the panel selection process was completed successfully. The first case, *Agricultural Products*, took about six months from panel request to panel selection;[8] the second, *Safeguards on Brooms*, also took about six months.[9] The third case,

7 In this situation, the Party that is complained against chooses two panelists, one from each of the complaining Parties, and the complaining Parties shall select two panelists who are citizens of the responding Party. There is also a fifth panelist, selected by agreement of the Parties, who serves as chair.

8 *See In re* Tariffs Applied by Canada to Certain US–Origin Agricultural Products, CDA-95-2008-01, Final Report of the Panel (2 December 1996), paras. 2–3, www.nafta-sec-alena.org/Home/Dispute-Settlement (accessed 22 September 2017).

9 *See In re* The US Safeguard Action Taken on Broom Corn Brooms from Mexico, USA-97-2008-01, Final Report of the Panel (30 January 1998) , paras. 17–18, www.nafta-sec-alena.org/Home/Dispute-Settlement (accessed 22 September 2017).

Trucking Services, took a bit longer, with over 14 months passing between the panel request and panel selection.[10] With this experience in mind, when Mexico initiated a NAFTA dispute with the United States over sugar barriers, it may have realized that the panel selection process would be more difficult and time-consuming than is apparent from the text of Chapter 20, but nevertheless assumed a panel would be appointed eventually. Unfortunately, the sugar dispute exposed a fatal flaw in the Chapter 20 process: without a full roster of panelists, the responding party can fairly easily block the panel selection process.

The most detailed account of the problems that arose in the selection process comes from an investment arbitration award in the *Cargill* v. *Mexico* case under NAFTA Chapter 11, where Mexico's inability to get a panel in the NAFTA Chapter 20 sugar case was an issue. That award describes the situation as follows.[11] On 13 March 1998, Mexico requested consultations with the United States regarding restrictions on sugar imports from Mexico,[12] and the parties held consultations on the matter on 15 April 1998.[13] After unsuccessful attempts to resolve the matter through NAFTA's Free Trade Commission (essentially, the cabinet-level representatives of each NAFTA party), Mexico requested a panel on 17 August 2000. On 17 September 2000, the Mexican section of the NAFTA Secretariat requested that the US section 'proceed with [the] appointment' of panelists. Subsequently, Mexico proposed a panel chair on 17 October. The United States rejected this proposal, and indicated that it would propose its own candidate by the week of 26 November. Over the next 16 months, however, despite Mexico pressing the United States on this issue, no panel chair was ever proposed. The dispute over panel selection continued until December 2001, at which point Mexico turned to unilateral action by imposing countermeasures in response to the US barriers.[14]

A key reason why the US was able to prevent panel selection was that, according to statements made in the context of the Cargill arbitration award, no roster existed at that time. Recall that Article 2011, paragraph 1(b) and (d) both set out procedures for panel selection to be utilized in case the disputing parties cannot agree or one party fails to appoint. But the assumption is that such selection will be done from the roster. Under Article 2011, paragraph 3, however, any individual not on the roster is subject to peremptory challenge. Without a roster, conflict

10 *See In re* Cross-Border Trucking Services, USA-MEX-98-2008-01, Final Report of the Panel (6 February 2001), paras. 21, 23, www.nafta-sec-alena.org/Home/Dispute-Settlement (accessed 22 September 2017).

11 *Cargill, Inc.* v. *United Mexican States* (2009) ARB(AF)/05/Z (ICSID), paras. 85–100, www.italaw.com/cases/documents/226 (accessed 28 February 2018).

12 Letter from Herminio Blanco Mendoza, Secretary of Trade and Industrial Promotion, Mexico, to Charlene Barshefsky, United States Trade Representative (13 March 1998, facsimile of the original consultations' request on file with authors).

13 Supra n. 9, paras. 85–100.

14 Ibid.

over panel selection makes it very difficult to appoint a panel, as the parties must agree on each panelist.

With regard to the status of the NAFTA roster, the facts are not completely clear. While some commentators have suggested there was no roster at the time,[15] which caused the problems in panel selection, the situation may be more complex than that. Nevertheless, there appears to have been some degree of failure to form a full roster at the time of panel selection in the sugar case. As described in the Cargill award, as of 1998, there were 15 people on the roster, although Mexico argued in the Cargill case that this roster 'had lapsed at some point'.[16] A full 30 person roster was not agreed to until November 2006. Subsequently, according to Canadian and American government officials, the roster lapsed again in 2009.[17] No new roster has been established. As a result, presently, there is no active NAFTA Chapter 20 roster of panelists.

3. Recent innovations in the panel selection process

The problems revealed by the sugar dispute became clear in the early 2000s. Since then, the three NAFTA governments and others have engaged in many new trade negotiations, and the result has been provisions that address, to some extent, the problem of responding parties blocking panel composition. In this regard, we consider the innovations in this area in the TPP, CETA, and JEEPA. The TPP was negotiated between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. The United States pulled out of the agreement on 23 January 2017.[18] The TPP provided an opportunity for the three NAFTA countries to revise the dispute settlement rules that would apply to them in the future. In a sense, the TPP could be considered an 'upgrade' of NAFTA. In addition, we examine the CETA, and the JEEPA, two of the most recently completed, modern trade agreements, which may provide insights into other approaches to common challenges in crafting a functioning dispute settlement chapter. The CETA is a trade agreement between Canada and the European Union, which has been provisionally applied since 21 September 2017, as it awaits ratification. The JEEPA is a partial draft of a trade agreement under negotiation between Japan and the European Union. An agreement in

15 Joost Pauwelyn, 'Editorial Comment: Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" is Cooking' (2006) 9, 1 *Journal of International Economic Law* 197–206.

16 Supra n. 9, para. 87.

17 Authors' conversation with NAFTA Secretariat, Canadian Section. Renée Lagacé, 'NAFTA Chapter 20 roster', email message to Andrej Arpas, 1 September 2017; Authors' conversation with NAFTA Secretariat, Paul E. Morris, 'NAFTA Chapter 20 Roster', email message to Andrej Arpas, 15 September 2017.

18 Despite this, the other Parties that signed the agreement are working towards implementing the deal, after making some revisions to the text to account for the absence of the United States.

principle was reached on 6 July 2017, which is serving as a basis for ongoing negotiations.

3.1 Trans-Pacific Partnership (TPP)

The dispute settlement provisions of the TPP are found in Chapter 28. A TPP dispute panel consists of three panelists. Article 28.9 sets out, sequentially, provisions for appointing a complainant's panelist, a respondent's panelist, and a jointly appointed chair.

Starting with the party appointments, under Article 28.9.2(a), the complaining party and the responding party can each select a candidate ('shall each appoint a panellist and notify each other of those appointments') within 20 days after the date of delivery of the request for the establishment of a panel. For the complainant's selection, there is no way for the respondent to block the appointment, so panellist number one is set. However, the respondent has the ability to be uncooperative and refuse to appoint its own panelist. What happens in this situation? Sub-paragraph (c) of the same Article addresses this, as it gives the complainant several options to get this panelist appointed. First, it can select the second panelist from a list created by the responding party, as stipulated by Article 28.9.2 (c)(i): '(c) If the responding Party fails to appoint a panellist within the period specified in subparagraph (a), the complaining Party or Parties shall select the panellist not yet appointed: (i) from the responding Party's list established under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists).'

Article 28.11.9 provides the following with respect to the roster: 'At any time after the date of entry into force of this Agreement, a Party may establish a list of individuals who are willing and able to serve as panelists.' Unfortunately, because a party *may* establish a list, but does not have to, Article 28.11.9 may not be sufficient here, as the responding party may simply refrain from creating a list. However, Article 28.9.2(c)(ii) says that if there is no Article 28.11.9 list, the complainant can then appoint from 'the roster of panel chairs established under Article 28.11'. Again, though, this may be insufficient. There is no guarantee of appointment of a roster because the responding party could block its establishment. In this regard, there are two, sequential obligations under Article 28.11: Under paragraph 1, the parties 'shall establish a roster'; under paragraph 2, if they do not, the Commission shall do so. However, while these provisions do use 'shall', it is not clear how such an obligation could be enforced, that is, how a party could be forced to agree to the establishment of a roster; or how the Commission (which is composed of all the parties) could be forced to act over the objections of a party.

It may be the case that once the initial roster has been established, which presumably it will be if and when the TPP comes into force, the complainant will, in practice, be able to choose a panelist from the roster. It would take quite a lot of bad faith for a TPP Party to prevent a roster from being established. On the other

hand, people will not stay on the roster forever.[19] Because any new appointments have to be made by consensus,[20] there will be opportunities down the road for a party who is not happy with the dispute process to get in the way of appointments.

In the end, though, panelist number two will be appointed, because Art. 28.9.2(c)(iii) allows for the complainant to select on its own: '(c) If the responding Party fails to appoint a panellist within the period specified in sub-paragraph (a), the complaining Party or Parties shall select the panellist not yet appointed … (iii) if the responding Party has not established a list under Article 28.11.9 (Roster of Panel Chairs and Party Specific Lists) and no roster of panel chairs has been established under Article 28.11 (Roster of Panel Chairs and Party Specific Lists), by random selection from a list of three candidates nominated by the complaining Party or Parties'. Importantly, the *complainant* is given the ability to do the selection, so there is no way for the respondent to block. In this way, selection of the second panelist is also guaranteed.

Moving to the third panelist, who will serve as the chair, Article 28.9.2(d)(i) calls for both of the disputing parties to 'endeavour to agree on the appointment'. The problem with this approach is that the responding party can simply disagree on the appointment, and in this way block panel composition.

In the event that the Parties fail to agree on a chair, sub-paragraphs (ii–vii) outline the various situations under which a chair may be selected. First, sub-paragraph (ii) foresees the two already selected panelists appointing a chair by agreement 'from the roster established under Article 28.11'. One problem here is that the panelists might not agree. But even if they do, there is the problem mentioned earlier, where a party might, at some point, impede the establishment of the roster. This brings us to sub-paragraph (iii), which directs the two previously appointed panelists to appoint the chair 'with the agreement of the disputing Parties'. Here again, though, as agreement of the parties is required, the respondent may simply not agree. If sub-paragraph (iii) does not lead to a panel chair, the Parties have two choices on how to proceed, set out in sub-paragraphs (iv) and (v). Sub-paragraph (iv) directs the disputing Parties to 'select the chair by random selection from the roster'. Here, there are two problems. First, it is the disputing parties who shall select the chair, but the responding party might simply opt not to participate in the selection process, thereby preventing it from happening. And, second, there is the problem of establishing the roster, referred to earlier.

At this stage, the TPP text suggests the role of an outsider. Sub-paragraph (v) allows for a disputing Party to 'have the chair appointed from the roster … by an independent third party'. Again, though, there is the problem of the roster never having been established, or having been subsequently undermined. In

19 Para. 7 notes that: 'The Parties may appoint a replacement at any time if a roster member is no longer willing or available to serve'.

20 Office of the United States Trade Representative, 'TPP Chapter 28: Dispute Settlement', Art. 28.11, para. 5, https://ustr.gov/sites/default/files/TPP-Final-Text-Dispute-Settlement.pdf. (accessed 28 February 2018).

addition, sub-paragraph (B) further elaborates that 'the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties'. The problem here is that if the request is to be made jointly, the respondent may simply elect not to participate in the request. If the process under sub-paragraph (v) does not work, sub-paragraph (C) sends the process back to sub-paragraph (iv).

If a roster has not been established, however, the Parties would follow the process outlined in sub-paragraph (vi). In that event, the complainant 'on the one hand, and the responding Party, on the other hand, may nominate three candidates. The chair shall be randomly selected from those candidates.' This provision might look like it resolves the issue, as the complainant can nominate three candidates, so even if the respondent does not act, there will be three people to select from.

However, a problem may arise with the selection process. Whereas for panelist number two, the complainant does the selection, sub-paragraph (vi) does not indicate who is to do the selecting. It says that the chair 'shall be … selected', but does not indicate a selector. Some actual individual or entity will have to make the selection. In the absence of any specification in this regard in the text, the respondent will have an opportunity to object, and, if that were to happen, it is not clear how a complainant could force the selection process along.

Finally, under sub-paragraph (vii), which allows for 'a disputing Party', i.e., either one of them, to 'have the chair appointed from those candidates by an independent third party'. However, sub-paragraph (vii)(B) and (C) set out certain conditions: '(B) the request to the independent third party to appoint the chair shall be made jointly by the disputing Parties … (C) if the independent third party is unable or unwilling to complete the appointment as requested within a period of 60 days after the date of delivery of the request for the establishment of the panel, then the chair shall be randomly selected within a further period of five days using the process set out in sub-paragraph (vi)'. But, of course, with a joint request required, the responding party can block; and there is once again the problem of who exactly is supposed to do the selecting.

It is hard to know what to make of all these very detailed procedures. The process for selecting panelist number two indicates that the parties knew how to guarantee the appointment of a panelist when they wanted to. Why not do the same thing for the chair? Why create potential for mischief by the respondent? Regardless of the motivations, while the TPP panel selection process improves on that of the NAFTA (including the reduction of the number of panelists from five to three), it does leave some uncertainty.

3.2 Canada–European Union Comprehensive Economic and Trade Agreement (CETA)

The dispute settlement provisions of the Canada–EU Comprehensive Economic and Trade Agreement (CETA) can be found in Chapter 29. Article 29.7 addresses the composition of the arbitration panel, which consists of three panelists. Article

29.7.2 states that: 'The Parties shall consult with a view to reaching an agreement on the composition of the arbitration panel within 10 working days of the date of receipt by the responding Party of the request for the establishment of an arbitration panel.' Ideally, the Parties will act in good faith and make an effort to agree on panelists.

However, if the Parties cannot agree on a panel, Article 29.7.3 states that 'either Party may request the Chair of the CETA Joint Committee, or the Chair's delegate, to draw by lot the arbitrators from the list established under Article 29.8'. The Chair of the Joint Committee (or the Chair's delegate) are given five working days to make their selections. One arbitrator must be selected from each of three sub-lists. One panelist is from a sub-list of the requesting party, the other from the responding party's sub-list, and the chairperson is drawn from a sub-list of chairpersons. If the Parties agree on one or more arbitrators, Article 29.7.3 states that 'any remaining arbitrator shall be selected by the same procedure in the applicable sub-list of arbitrators'. Also, '[i]f the Parties have agreed on an arbitrator, other than the chairperson, who is not a national of either Party, the chairperson and other arbitrator shall be selected from the sub-list of chairpersons'.

The lists play a crucial role, and thus it is important to understand how they are established. Article 29.8.1 states:

> The CETA Joint Committee shall, at its first meeting after the entry into force of this Agreement, establish a list of at least fifteen individuals, chosen on the basis of objectivity, reliability and sound judgement, who are willing to serve as arbitrators. The list shall be composed of three sub-lists: one sub-list for each Party and one sub-list of individuals who are not nationals of either Party to act as chairpersons. Each sub-list shall include at least five individuals. The CETA Joint Committee may review the list at any time and shall ensure the list conforms with this Article.

Ideally, the Parties will act in good faith to put forward names at their first meeting. It is entirely possible, however, that one or more of the lists may not be established at all, or that there may not be enough individuals to choose from. What happens in this case? Article 29.7.6 clarifies that 'If the list provided for in Article 29.8 is not established or if it does not contain sufficient names at the time a request is made pursuant to paragraph 3' (a request by either Party to the Chair of the CETA Joint Committee to appoint arbitrators) 'the three arbitrators shall be drawn by lot from the arbitrators who have been proposed by one or both of the Parties in accordance with Article 29.8.1'. Therefore, at least in theory, the complainant can be assured of panel composition as long as it has proposed arbitrators of its own.

In addition, the composition of the CETA Joint Committee raises an interesting question regarding panel selection. Since the 'Chair' of the Joint Committee is actually co-chaired by an individual from both Parties,[21] what happens if one of the

21 CETA Article 26.1.1 states that the Chair of the CETA Joint Committee is 'co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees'.

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co-chairs chooses not to cooperate in the selection of arbitrators? Article 29.7.4 states that, '[o]ne of the Chairpersons can perform the selection by lot alone if the other Chairperson was informed about the date, time and place of the selection by lot and did not accept to participate within five working days of the request referred to in paragraph 3'. This seems to address the issue of what happens when one of the co-chairs, presumably, the respondent in the dispute, chooses not to participate in the selection of arbitrators. However, it is unclear what is meant by 'did not accept to participate'. Does this require a formal acknowledgement of a desire to not participate, or is the silence of one of the co-chairs in the five working days following a request to the Joint Committee sufficient?

Article 29.7.4 adds an additional complication, by requiring that 'The Chair, or the Chair's delegate, shall give a reasonable opportunity to representatives of each Party to be present when lots are drawn.' What constitutes a reasonable opportunity? If the Chair is given only five working days to select the arbitrators, how much time is sufficient here? There is some uncertainty, and room for objections and arguments by the respondent.

It might be a stretch to say these provisions leave enough room for maneuver to block panel selection completely. However, there is certainly space for delaying the formation of a panel. What is clear is that, in the event of disagreement among the Parties, the functioning of the dispute settlement mechanism largely hinges on the CETA Joint Committee. How the Joint Committee functions in practice remains to be seen. The provisions assume the Parties will act in good faith, but the co-chairs of the Joint Committee are political appointees, and it is not hard to imagine how they could delay panel formation if they chose to. Though there may be no reason to believe the Parties would not act in good faith, the lack of an independent appointing authority in the final selection process leaves room for skepticism.

3.3 Japan–European Union Economic Partnership Agreement (JEEPA)

The dispute settlement provisions of the Japan–EU Economic Partnership Agreement (JEEPA), which at this time is an agreement in principle but is not yet completed, are also informative.[22] Article 8 of the draft dispute settlement chapter addresses the composition of the panel, which is to be made up of three arbitrators, one from each Party, and one from a sub-list of individuals that could serve as chairpersons, who are not nationals of either Party. Article 8.2 states that 'the Parties shall consult with a view to reaching an agreement on the composition of the panel' within ten days of the request for establishment of a panel by the complaining Party.

22 Commission, 'EU–Japan trade agreement: texts of the agreement in principle' (6 July 2017), http://trade.ec.europa.eu/doclib/press/index.cfm?id=1684 (accessed 22 September 2017).

If the Parties cannot agree on the composition of a panel within that time frame, Article 8.3 states that 'each Party shall appoint an arbitrator from the sub-list for that Party established pursuant to Article [9] (List of Arbitrators) within 5 days from the expiry of the time period provided for in paragraph 2'. It goes on to say that, '[i]f a Party fails to appoint an arbitrator within that time period, the co-chair of the Joint Committee from the complaining Party shall select by lot, within 5 days from the expiry of the time period, an arbitrator from the sub-list for the Party that has failed to appoint an arbitrator'. This suggests that the responding Party cannot block the formation of a panel by failing to select an arbitrator, because the complaining Party (through its co-chair) is able to select an arbitrator from the other Party's sub-list. A similar process exists for the selection of a chairperson (Article 8.4) in the event of a disagreement.

Article 9 states that each of the sub-lists are to include 'at least three individuals' and '[t]he Joint Committee will ensure that the list is always maintained at this level'. However, it is possible that at some point these lists could either not be established, or include fewer than the required nine individuals. What happens in that case? Article 20.8.5 states that if the sub-lists do not contain at least nine individuals (or if the lists have not been established), there is a procedure that can be applied for the selection of the chairperson (20.8.5 (a)) and for the selection of an arbitrator other than the chairperson (20.8.5 (b)).

For the selection of a chairperson, there are three options that can be pursued, depending on the number of individuals that appear on the sub-list of chairpersons (Article 8.5 (a)). First, under sub-paragraph (i), the co-chair of the Joint Committee from the complaining Party can select the chairperson within five days of the request from either Party pursuant to Article 8.4 if the sub-list 'contains at least two individuals agreed by the Parties'. Or, under sub-paragraph (ii), 'when the sub-list of chairpersons contains one individual agreed by the Parties, that individual shall act as chairperson'. But if there is no individual on the sub-list agreed to by the Parties, under sub-paragraph (iii), the co-chair of the Joint Committee from the complaining Party shall 'select by lot the chairperson from the up to six individuals who had been formally proposed as chairperson by one or both Parties at the time of establishing or updating the list of arbitrators'. This means that if the complaining Party has formally proposed at least one individual for the sub-list of chairpersons, it can select that person to serve as chairperson in the event that the Parties have not agreed to a sub-list of chairpersons in the first place.[23]

23 There is some ambiguity in language here because in Article 8.5 (a) subparagraph (iii) it states that in the event that there are no agreed upon individuals in the lists, 'the complaining Party shall … select by lot … from the up to six individuals who had been formally proposed … by one or both Parties.' This leaves unclear whether the complaining Party must select from the other Party's sub-list if a single individual has been formally proposed there, or whether the complaining Party may just make a selection from the individuals it had formally proposed.

The procedure is similar for selecting an arbitrator other than the chairperson (Article 8.5 (b)). Under sub-paragraph (i), if 'the sub-list of a Party contains at least two individuals agreed by the Parties, that Party shall select an arbitrator from those individuals', meaning that if either Party has at least two individuals that have been agreed to on their sub-lists, they must select one of those individuals to serve as an arbitrator. Similarly, in sub-paragraph (ii), in the event that 'the sub-list of a Party contains one individual agreed by the Parties, that individual shall act as an arbitrator'. But, in sub-paragraph (iii), 'when the sub-list of arbitrators for a Party contains no individual agreed by the Parties, the co-chair of the Joint Committee from the complaining Party shall select an arbitrator *mutatis mutandis* the procedure referred to in sub-paragraph 5(a)'. This means that the same procedure used for selecting a chairperson shall be applied, which suggests that an arbitrator can be selected from the formally proposed list of arbitrators ('from the up to six individuals who had been formally proposed … by one or both Parties') at the time of establishing or updating the list of arbitrators. Essentially, even if one Party has not formally proposed *any* individuals for its sub-list, the complaining Party can select arbitrators from its own proposed sub-list.

Basically, in both cases, whether selecting a chairperson, or an arbitrator other than a chairperson, any arbitrators formally proposed as part of the list-making process, even if they are not on the sub-lists that have been agreed to by the Parties, can be called upon in making a selection. Though this requires that the Parties first propose their lists, the fact that the lists can be updated at any time allows for formal proposals to be made in the event that a complaint is brought and there are no established sub-lists.[24] How this operates in practice remains to be seen.

This highlights one critical distinction from CETA that is worth mentioning. Though the chapter on administrative and institutional provisions has not yet been published, from reading the dispute settlement chapter it appears that it may have a similar structure to the CETA (the Joint Committee is co-chaired with one representative from each Party). However, in contrast to CETA, where one of the co-chairs may select arbitrators only if the other co-chair does not agree to participate in selection (and is given reasonable opportunity to be present when lots are drawn), the JEEPA language suggests that the Co-Chair of the Joint Committee from the complaining party can make the selection alone, in the event of the other Party failing to appoint an arbitrator. However, this solution does appear to be the very last resort in the event of disagreement.[25] Therefore, it

24 It could be imagined that a Party could propose just one person for its sub-list and select an individual that it knows the other Party may disagree with. This could, presumably, delay the formation of a panel if the complaining Party is required to select an arbitrator from the proposed sub-list of the other Party.

25 One reason in particular that this fall-back could be considered as the ultimate last resort is because it is possible that the co-chair could select an individual on the basis of its proposal, even if that individual had previously been rejected by the other Party when the list was being established.

appears as if delaying the formation of a panel will be more difficult under the JEEPA.

4. Principles for panel selection in the NAFTA renegotiation

With the problems experienced in panel selection in the NAFTA sugar dispute in mind, and the recent innovations in the TPP, CETA, and JEEPA as a guide, there are three principles that can be useful in informing the NAFTA renegotiation of the dispute settlement chapter: the roster should not be a hurdle to appointing panelists; an independent third party can act as a facilitator in the panel appointments; and, without an independent third party, the complainant should have the power itself to appoint, in order to prevent the respondent from delaying panel formation.

First, while it is helpful to have a roster/list of possible panelists, this should not act as a hurdle to panel selection.[26] If a roster is to be used, there needs to be a clear procedure in place for what happens when there are not enough individuals on the roster, or the roster is not established. In this regard, when the Parties propose an individual to serve on a panel who is not already on the established roster (as can be done in NAFTA rules), peremptory challenges from the other Party should not be allowed. In addition, if the Parties propose individuals for the roster, but they have not reached agreement on a roster prior to a panel request, the complainant should be able to choose from individuals that have been proposed for the roster, even if there is no formal agreement at that time (as TPP, CETA, and JEEPA all provide for in some context).

In addition, while the difficulty of establishing an initial roster is probably inevitable, the problems caused by roster creation can be limited by making the term of service indefinite, rather than time limited. If rosters need to be frequently reconstituted, there will be more opportunities for meddling in a way that interferes with panel selection. With indefinite roster time periods, the Parties would be prevented from allowing the roster to lapse, and then have additional delays in proposing new members that would again be subject to peremptory challenge.

Second, who has the power to select panelists in the event of disagreement between the Parties is important. An independent Secretariat is a great way to ensure that panel composition takes place. At the WTO, if either party is causing difficulty in this process, the other party can request that the WTO Director General appoint the panelists. The TPP makes reference to a role for an 'independent party', but it is a much more limited role than the one played by the WTO Director General. To ensure that appointments take place in this way, an agreement

26 It should be noted that these 'fall-back rules' are purposely constructed to be complex and multi-pronged, so as to give the Parties an incentive to establish a list in the first place. Therefore, while having these provisions in place is important to prevent the blocking of a panel, there is an argument that they should not be too easy to use. Thanks to Thomas Juergensen for this point.

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would have to go further in terms of giving the power of appointment to the Secretariat or some independent outsider.[27]

Third, if an independent party is not permitted to appoint panelists when needed, the complainant must be given this authority. Recall that in the TPP, the second panelist appointment can be carried out by the complainant if the respondent does not cooperate. This approach keeps the power away from the institution, but still ensures that a complainant can have a panel when it needs one.

CETA and JEEPA also give the complaining Party (through its Co-Chair of the Joint Committee) the ability to choose a panelist, although in the CETA there appears to be some possibility of meddling by the responding party. It is not clear how it will work in practice. Delegating this authority to Co-Chairs of a Joint Committee (as in CETA) could pose a problem, as one of the Co-Chairs could plausibly hold up the formation of a panel, as noted earlier. Ensuring that one of the Co-Chairs (preferably the Co-Chair of the complaining Party) can act alone, as in JEEPA, would be a positive reform in this regard.

5. Conclusion

The prospects for the NAFTA renegotiation are unclear at the moment, with the United States having proposed what some people have referred to as 'poison pills', and much speculation about a possible US withdrawal.[28] As long as the negotiations are continuing, however, we believe it is worthwhile to make good faith reform proposals. In addition, even if NAFTA fails, this discussion would still be useful because well-functioning dispute settlement procedures are important beyond North American trade relations. As major trading countries other than the United States continue their efforts to negotiate bilateral and regional trade agreements, and as the United Kingdom begins crafting its post-Brexit trade policy, there will be a need for effective state-to-state dispute settlement procedures, and the appointment of panelists to hear disputes is a crucial part of this process.

The problems with NAFTA Chapter 20 dispute settlement might have been partly resolved for the NAFTA parties by the TPP, which would have had the

27 A number of agreements give the parties the power to request the WTO Director-General to appoint panelists. See, e.g., EFTA–Singapore FTA, Article 60, para. 5. It is worth noting in this regard that under the 2006 Softwood Lumber Agreement, Canada and the United States bypassed both NAFTA Chapter 20 and the WTO's dispute settlement mechanism in favor of the London Court of International Arbitration. See, Softwood Lumber Agreement between the Government of the United States of America and the Government of Canada (SLA 2006) US Department of State, www.state.gov/documents/organization/107266.pdf (accessed 7 January 2018). The secretary general of the LCIA, or of the Hague Court of Arbitration, could play the role of independent appointing authority. Thank you to an anonymous reviewer for pointing out this possibility.

28 'NFTC head: US NAFTA approach a "de facto withdrawal", benefits China', *Inside US Trade* (26 October 2017), https://insidetrade.com/inside-us-trade/nftc-head-us-nafta-approach-de-facto-withdrawal-benefits-china (accessed 8 January 2018).

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effect of renegotiating parts of NAFTA by superseding its rules in many areas. With the Trump administration's withdrawal from the TPP, and its focus on renegotiating NAFTA directly, there is now an opportunity to develop a full solution to the problems with panel selection under Chapter 20. Drawing from several recent agreements, and relying on the three principles described above, the NAFTA renegotiations could achieve an outcome that restores NAFTA dispute settlement to its original promise: an enforceable and effective dispute settlement mechanism that allows complainants to have their day in court.

Supplementary Material

To view supplementary material for this article, please visit https://doi.org/10.1017/S147474561800006X