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# Star Chamber Accountability: Appellate Review of NAFTA Chapter 20 Panel Decisions

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# STAR CHAMBER ACCOUNTABILITY: APPELLATE REVIEW OF NAFTA CHAPTER 20 PANEL DECISIONS

JOHN C. THOMURE, JR.\*

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## I. INTRODUCTION

Debate rages within academic circles over lingering issues involving the North American Free Trade Agreement (NAFTA).<sup>1</sup> Prior to NAFTA's enactment, media attention and the public debate focused on the economic, labor, and environmental effects that passage of NAFTA would impose on American stakeholders,<sup>2</sup> while little attention was placed on NAFTA's dispute resolution mechanism. Some scholarly work has addressed both the constitutionality of the Chapter 19 binational panel process which was drafted to resolve antidumping and countervailing duty matters,<sup>3</sup> as well as the effectiveness of Chapter 20 dispute

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1. The North American Free Trade Agreement was passed by the U.S. Congress and signed into law by President Clinton in December 1993. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified in various sections of 19 U.S.C.). NAFTA created a free trade zone among Canada, Mexico, and the United States in which tariffs are reduced and markets integrated to promote the relative free flow of goods throughout the trade region. See The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 296 and 32 I.L.M. 605 (1993) [hereinafter NAFTA]. NAFTA passed the House of Representatives on November 17, 1993, and the Senate on November 20, 1993. David E. Rosenbaum, *Without Earlier Drama, Trade Accord is Passed*, N.Y. TIMES, Nov. 21, 1993, at A22; see also LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT (1993); CLYDE HUFBAUER & JEFFREY J. SCHOTT, NAFTA: AN ASSESSMENT (1993); *Hearings on the NAFTA Implementation Act Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 35 (Oct. 21, 1993); *Significant Events in the History of NAFTA*, 10 Int'l Trade Rep. (BNA) 2089 (Dec. 15, 1993).

2. See Timothy Noah, *Cleaning Up: Environmental Companies Stand to Make a Bundle From the Trade Pact*, WALL ST. J., Oct. 28, 1994, at R8; Raju Narisetti, *Not Everybody Wins*, WALL ST. J., Oct. 28, 1994, at R10; Diane Solis, *The Small Shall Suffer*, WALL ST. J., Oct. 28, 1994, at R10; Asra Q. Nomani, *Empty Threats*, WALL ST. J., Oct. 28, 1994, at R11; Douglas Harbrecht et al., *What if NAFTA Loses?*, BUS. WK., Nov. 22, 1993, at 32; Jeffrey H. Birnbaum & David Wessel, *Unlikely Allies: President is Wooing, and Mostly Pleasing, Big-Business Leaders*, WALL ST. J., Nov. 19, 1993, at A1; Lawrence Ingrassia & Bhushan Bahree, *NAFTA Victory Keeps GATT's Chances Alive*, WALL ST. J., Nov. 19, 1993, at A7; Jacki Calmes, *How a Sense of Clinton's Commitment and a Series of Deals Clinched the Vote*, WALL ST. J., Nov. 19, 1993, at A7; Keith Bradsher, *Clinton's Shopping List for Votes Has Ring of Grocery Buyer's List*, N.Y. TIMES, Nov. 17, 1993, at A21; David E. Rosenbaum, *Both Sides Emphasize High Stakes of Trade Vote*, N.Y. TIMES, Nov. 15, 1993, at A14; Keith Bradsher, *Nafta: Something to Offend Everyone*, N.Y. TIMES, Nov. 14, 1993, at A14.

3. Some commentators argue that the dispute resolution mechanism employed in Chapter 19 is unconstitutional under Articles I, II, III, and VI of the U.S. Constitution. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995);

panel decisions, which are nonbinding on the parties and its concomitant enforcement questions when parties settle their disputes.<sup>4</sup>

The constitutional issue regarding the use of binational panel processes to supplant judicial review in American courts finally came to light outside academic circles with the public debate concerning the proposed amendments to the General Agreement on Tariffs and Trade (GATT) under the Uruguay Round.<sup>5</sup> However, in contrast, comments on the effectiveness of

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Demetrious G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 CORNELL INT'L L.J. 141 (1994). Under Chapter 19 of NAFTA, parties to the agreement can settle trade disputes involving antidumping and countervailing duty issues before binational panels selected from a pool of jurists appointed by each country's government. Supplanting American courts of judicial review of cases and controversies involving U.S. regulatory activity may constitute a violation of Article III of the U.S. Constitution. A crucial constitutional issue is whether the panel forum is exercising "the judicial Power of the United States," and therefore must possess the attributes of the U.S. courts as mandated under Article III, or whether that forum is merely carrying out congressional powers under Article I of the U.S. Constitution. See Gordon A. Christenson & Kimberly Gambrel, *Constitutionality of Binational Panel Review in Canada-U.S. Free Trade Agreement*, 23 INT'L LAW. 401 (1989). Moreover, whether NAFTA falls under the Treaty Clause in Article VI of the U.S. Constitution, or is a congressional-executive agreement under the Fast Track procedure pursuant to the Trade Act of 1974, has been strenuously debated before Congress and in the literature. Trade Act of 1974, Pub. L. 93-618, 88 Stat. 1978, 1982, 2001 (1975) (codified at 19 U.S.C.). See Ackerman & Golove, *supra*, at 801-02; Samuel C. Straight, *GATT and NAFTA: Marrying Effective Dispute Settlement and the Sovereignty of the Fifty States*, 45 DUKE L.J. 216, 235-40 (1995).

4. NAFTA Chapter 20 applies to all controversies arising under NAFTA with the exception of antidumping and countervailing duty laws and investment disputes. NAFTA, *supra* note 1, art. 2004. Such controversies include all disputes involving the interpretation and application of NAFTA, cases where nullification or impairment of the benefits of the agreement would occur, and wherever a party considers that a law of another party is inconsistent with NAFTA. *Id.* When such a dispute arises, the parties have agreed to utilize the procedures in Chapter 20; or, if the GATT is in issue, the parties may then choose between NAFTA and GATT. *Id.* art. 2005.

5. See U.S. Senate Hearings, 103d Cong., Oct. 22, 1994 (Testimony of Professors Lawrence Tribe and Bruce Ackerman); Ackerman & Golove, *supra* note 3, at 801-02; Straight, *supra* note 3, at 235-40. On April 15, 1994, representatives from 124 governments and the European Community signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. See *The Marrakesh Declaration*, FOCUS: GATT NEWSL. (Information and Media Relations Division of GATT, Geneva, Switz.) May 1994, at 7. Accordingly, the United States codified its membership in the World Trade Organization (WTO) and obligations under the GATT (as modified by the Uruguay Round agreements). Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stats. 4809 (1994). The House of Representatives enacted GATT legislation by a vote of 288-146 on November 29, 1994. David E. Sanger, *The Lame-Duck Congress: The Vote; House Approves Trade Agreement by a Wide Margin*, N.Y. TIMES, Nov. 30, 1994, at A1. The Senate approved the pact by a wide margin of 76-24 after much speculation that the gap would be much narrower. David E. Sanger, *Senate Approves Pact to Ease Trade Curbs; A Victory for Clinton*, N.Y. TIMES, Dec. 2, 1994, at A1; see also David E. Sanger, *After Years of Trade Talk, Trade Pact Now Awaits*

NAFTA Chapter 20 remain cloistered in the academy.

An effective dispute resolution process under Chapter 20 will depend upon the degree to which parties bargain in the shadow of the law, rather than in the shadow of political and economic power.<sup>6</sup> The concern that parties to the agreement may bargain trade disputes in the shadow of political and economic power will be more apparent if and when NAFTA is expanded from the current membership of three countries. In fact, it is contemplated that the membership will expand significantly in the twenty-first century. Accordingly, this Article should be reviewed based upon the assumption that NAFTA is an evolutionary trade agreement, like GATT, whose current members contemplate, at least for the moment, a significant expansion of the membership in the 21st Century.

One way to encourage parties to adhere to the principles in Chapter 20 is by ensuring the integrity of decisions under the panel process. NAFTA Chapter 20 does not provide appellate review of the arbitral panels' final decisions. Such an appellate process would strengthen the authority of decisions that interpret NAFTA and would give the parties a sense of continuity and legitimacy by resolving disputes according to a uniform set of principles. The appellate review process could safeguard the integrity of the Chapter 20 panel system and provide an additional incentive for the parties to use the panel process if negotiations fail to produce settlement. Thus, this Article recommends that the Free Trade Commission (Commission), the primary enforcement institution in NAFTA, provide for appellate review of panel

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*Congressional Fate*, N.Y. TIMES, Nov. 27, 1994, at A1; Helene Cooper & John Harwood, *The Vote on GATT—The Rules Change: Major Shifts in Trade are Ensured as GATT Wins U.S. Approval*, WALL ST. J., Dec. 2, 1994, at A1.

One of the most interesting developments for the world trading system is the establishment of the WTO to administer dispute resolution procedures for GATT. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. III, para. 3, reprinted in GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 6, 7 (1994), 33 I.L.M. 1144, 1145 (1994) [hereinafter WTO Agreement]. The Uruguay Round is the eighth round of multilateral trade negotiations within GATT. The other rounds include: Tokyo (1973-1979), Kennedy (1962-1967), Dillon (1961), Geneva (1956), Tourquay (1950), Annecy (1949), and Geneva (1947). See JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 37 (1990). GATT is recognized as the principle international organization and rule system governing the world's international trade since 1947. See General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stats. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

6. See John C. Thomure, Jr., *The Uneasy Case for the North American Free Trade Agreement*, 21 SYRACUSE J. INT'L L. & COM. 181 (1995).

decisions.

NAFTA's ultimate effectiveness depends largely on the success of its dispute resolution mechanism. A dispute resolution system that efficiently disposes of disputes and promotes compliance with NAFTA's obligations will succeed in advancing the agreement's goal of economic integration. Participants will not use a weak system, and a weak system will inhibit progress toward economic integration of the Americas. Accordingly, appellate review of Chapter 20 panel decisions will help to promote compliance with legal obligations under NAFTA and should increase the use of the dispute resolution mechanism established in Chapter 20.

Part I briefly describes the classic model which international lawyers use to evaluate dispute resolution processes—namely, the dichotomy between legalism and pragmatism present in dispute resolution frameworks. Part II sets out NAFTA's dispute resolution mechanism employed in Chapter 20 as compared to the classic model described in Part I. Part III provides evidence that the pragmatic approach to dispute resolution employed by the GATT, prior to the adoption of the Uruguay Round reforms and establishment of the World Trade Organization (WTO), caused significant delays and bargaining in the shadow of politics and economic power to resolve trade disputes. By denying an appellate process, NAFTA Chapter 20 creates a similar environment for allowing a repetition of the GATT dispute resolution experience. Part IV proposes that the Commission, a NAFTA enforcement institution, promulgate a rule to provide for appellate review of arbitral panel decisions.

## II. THE LEGALISTIC/PRAGMATIC FRAMEWORK

International lawyers assess dispute resolution rules through a bipolar framework.<sup>7</sup> In the lexicon of the trade, there

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7. See David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 408 (1993); Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving Toward Legalism*, 8 INT'L TAX & BUS. LAW. 38 (1990); OLIVER LONG, LAW AND ITS LIMITS IN THE GATT MULTILATERAL TRADE SYSTEM 61-64 (1985); KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970). There are variations on the lexicon employed to illustrate the same dichotomy. Professor Jackson introduced the distinction between "rule oriented" and "power oriented" diplomacy. See JOHN H. JACKSON, THE WORLD TRADING SYSTEM 85-89 (1989). Professor Davey's work employs the "adjudication-negotiation" dichotomy to illustrate this frame-

are "legalistic" and "pragmatic" dispute resolution regimes.<sup>8</sup> While there have been variations on this theme,<sup>9</sup> the conceptual framework remains the same. In a legalistic dispute resolution system, the model imposes upon the partisan adjudicatory decisionmaking process a strict enforcement mechanism.<sup>10</sup> A pragmatic system differs from the legalistic system in that it employs a consensus-oriented mechanism with rules and supporting resources geared to facilitate negotiation and settlement between disputing parties.<sup>11</sup>

The analytical framework used to assess trade regimes is simply that: a mere framework. No bilateral or multilateral trade agreement is truly legalistic or pragmatic.<sup>12</sup> Rather, agreements consist of a blend of framework characteristics.<sup>13</sup> The framework is valuable, however, because certain agreements reflect one attribute more than the other. Thus, no agreement is completely balanced between the two regimes. International lawyers employ an analytical framework that can assist the student of international law and dispute resolution in understanding the characteristics of certain agreements and proposed trade dispute systems.

### III. THE CHAPTER 20 FRAMEWORK

NAFTA Chapter 20 provides the mechanism to settle regular trade disputes among Canada, Mexico, and the United States.<sup>14</sup> By its terms, Chapter 20 covers disputes between par-

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work. See William J. Davey, *Dispute Settlement in GATT*, 11 FORDHAM INT'L L.J. 51 (1987). A more recent variation includes Professor Abbott's discussion of "public interests" and "private interests" dichotomy. See Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1 COLUM. BUS. L. REV. 111 (1992) [hereinafter Abbott, *Uruguay Round*]; Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31 (1992) [hereinafter Abbott, *GATT*].

8. See JACKSON, *supra* note 7, at 85-89 ("rule oriented" versus "power oriented" diplomacy); Davey, *supra* note 7, at 51 ("adjudication-negotiation" dichotomy); Abbott, *Uruguay Round*, *supra* note 7, at 113-15; Abbott, *GATT*, *supra* note 7, at 31-43 ("public interests" and "private interests").

9. See generally *supra* note 7.

10. *Id.*

11. *Id.*

12. See generally BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* (1991).

13. See Huntington, *supra* note 7, at 425-26.

14. NAFTA, *supra* note 1, art. 2003. Chapter 20 covers disputes concerning the interpretation and expansion of NAFTA, its alleged violations, and the nullification or impair-

ties regarding the interpretation and expansion of the agreement when one party believes it is being denied benefits granted under NAFTA.<sup>15</sup> Consequently, a party can use the Chapter 20 procedures when the party believes a violation has occurred or when a proposed or existing measure denies or impairs benefits under NAFTA.<sup>16</sup> As a result, Chapter 20 has a broad jurisdictional reach.<sup>17</sup>

The foundation of the dispute resolution mechanism under Chapter 20 is the Commission; a trilateral institution composed of representatives of the parties to the agreement.<sup>18</sup> The Com-

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ment of the benefits of NAFTA. *Id.* In addition to Chapter 20, NAFTA contains two other dispute resolution mechanisms. First, Chapter 11, Subchapter B extends to disputes between a party and an investor in another party. *Id.* art. 1100. Second, the Chapter 19 mechanism extends to disputes involving the antidumping and countervailing duty laws. *Id.* art. 1900. NAFTA follows the GATT and CFTA in permitting parties to file a claim under the dispute resolution mechanism to consider a case of "nullification or impairment" of expected benefits under the agreement, which do not involve specific violations of terms of the agreement. *Id.* art. 2004. For an analysis of NAFTA Chapter 20 and related issues, see Huntington, *supra* note 7; Jeffrey P. Bialos & Deborah E. Siegel, *Dispute Resolution Under the NAFTA: The Newer and Improved Model*, 27 INT'L LAW. 603 (1993); GLICK, *supra* note 1; HUFBAUER & SCHOTT, *supra* note 1; Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 AM. J. COMP. L. 917 (1992).

15. See *supra* note 4.

16. As noted earlier, other chapters of NAFTA deal with dispute resolution problems as well. In the case of securities and investments, Chapter 11 provides the proper forum to address trade issues. NAFTA, *supra* note 1, ch. 11. In cases involving countervailing and antidumping concerns, Chapter 19 provides the mechanism to resolve disputes. *Id.* art. 19. Under Annex 2004, a party can file for dispute resolution on the grounds of nullification or impairment of the benefits of NAFTA with respect to trade in goods. Exempted from this section are the automotive, energy, technical barriers to trade, intellectual property, and trade in services. These exceptions are addressed in other chapters of NAFTA. For a list of exempted sectors under Annex 2004, see NAFTA, *supra* note 1, annex 2004(1), (2).

17. In addition to the passage of NAFTA, which eliminates trade barriers across several sectors, Canada, Mexico, and the United States entered into side agreements concerning the environment and labor. The environmental accords are provided in the North American Agreement on Environmental Cooperation (NAAEC). See North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1480 (1993). As of December 1996, the NAAEC technically applied only in the United States, Mexico, and the provinces of Canada that ratified it. Ratification occurred in the Canadian federal government and the provinces of Alberta and Quebec. See *Quebec Signs on to NAFTA Environmental Cooperation Pact*, 14 Int'l Trade Rep. (BNA) 30 (Jan. 1, 1997). Moreover, Canada, Mexico, and the United States entered into the North American Agreement on Labor Cooperation (NAALC). See North American Agreement on Labor Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., 32 I.L.M. 1499 (1993). As with the NAAEC, the United States, Mexico, and only those provinces of Canada (Canadian federal government and Alberta) that ratified the NAALC are obligated under the agreement. See *Canadian Group Plans Labor Charge to be Filed with U.S. NAO*, U.S.-MEX. FREE TRADE REP., Nov. 30, 1996, at 6.

18. NAFTA, *supra* note 1, art. 2001(1).



mission is a troubleshooting entity with broad authority to help resolve disputes, to oversee NAFTA's implementation, and to supervise the work of committees and working groups.<sup>19</sup> Moreover, the Commission acts as a political group, rather than as an arbitral body independent of the parties. Accordingly, the Commission works to assist the parties through the procedural and substantive steps of the bargaining process until the dispute is settled.<sup>20</sup>

NAFTA establishes a three-step dispute resolution process. First, there are consultations between the disputing parties. Next, if the consultations fail, there is a meeting with the Commission. Finally, an arbitral panel may be convened upon request of the complaining party, which will provide reports and recommendations for the parties to consider in settling the dispute.<sup>21</sup> Each of these steps will be explored in turn.

#### A. *Consultations and Convening the Free Trade Commission*

When commencing suit under NAFTA Chapter 20, a party must request that the alleged wrongdoer submit to consultations.<sup>22</sup> The consultation process provides a negotiating forum for the parties in interest to initiate dispute resolution without the heavy hand of an adjudicatory system delineating the steps that parties must take to resolve their disputes.<sup>23</sup> If the parties fail to resolve the matter within thirty days, then any of the

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19. *Id.* art. 2001(2).

20. This discrete classification is designed so that the Commission makes decisions by consensus. NAFTA, *supra* note 1, art. 2001.

21. NAFTA, *supra* note 1, art. 2006. Unless otherwise determined by the Free Trade Commission, a third party that has a significant interest in the dispute may participate in the consultations. *Id.* art. 2006(3).

22. NAFTA, *supra* note 1, art. 2006(1)-(3). A party requesting consultations must inform the interested party in writing of the request for consultations. *Id.* This notice provides notice to parties in interest and third parties, as third parties can participate in the dispute resolution process. *Id.* art. 2006(3).

23. The parties are given a mandate to cooperate and consult on implementation and interpretive issues of the NAFTA. NAFTA, *supra* note 1, art. 2003. In the spirit of this mandate, the rules of the consultation process provide that parties are to make every attempt to arrive at a mutually satisfactory resolution of the trade dispute. *Id.* art. 2006(5). To effect such a standard, parties involved in consultations must provide for discovery of relevant materials; maintain confidentiality of proprietary information exchanged; and seek to avoid any resolution that adversely affects third parties. *Id.* art. 2006(5); *see also* Huntington, *supra* note 7, at 417; Bialos & Siegel, *supra* note 14, at 615.

participants can request that the Commission convene.<sup>24</sup> However, there is no requirement mandating that any party involved in consultations request a meeting of the Commission after thirty days of consultations have ensued.

The Commission has an arsenal of methods it can use to assist the parties in resolving disputes, although Chapter 20 does not authorize binding arbitration.<sup>25</sup> When the parties are unable to agree on the matter during the consultation stage, the Commission adds structure and provides technical assistance. By employing such methods to resolve disputes, the Commission acts as a facilitator and forum sponsor to assist in settling disputes. Nevertheless, the decision as to which dispute resolution method ultimately is employed rests with the Commission.<sup>26</sup>

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24. The Commission decides whether or not to convene within ten days after receiving notice from the requesting party. NAFTA, *supra* note 1, art. 2007(4). The language of the provision reads: "Unless it decides otherwise, the Commission shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly." *Id.* In effect, the Commission is not required to convene upon a party's request. Notice the prefix of the language of the provision: "[u]nless it decides otherwise." *Id.* Consequently, a party does not have an absolute right to have the dispute proceed throughout the entire dispute resolution mechanism because the Commission may deny a request to meet after consultations have failed. *Id.* This dilemma is compounded by the fact that it is possible for any Commission member, including the representative country being complained against, to prevent the Commission from convening, as Article 2001 provides that the Commission's decisions will be taken by consensus unless otherwise agreed. *Id.* art. 2001. Consequently, this means that a party does not have an absolute right to have a dispute heard by an arbitral panel under Article 2008 in the case where the Commission denies a request to convene after consultations. See Thomure, *supra* note 6, at 198-99, 199 n.115. The literature to date has glossed over this conundrum in Article 2007(4). See Huntington, *supra* note 7, at 419; Bialos & Siegel, *supra* note 14, at 616-17; Gary N. Horlick & Amanda DeBusk, *Dispute Resolution Under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 10 J. INT'L ARB. 51 (1993). These authors singularly argue that once consultations fail, the Commission *must* convene. An examination of the language in Article 2007(4) suggests otherwise. If the Commission convenes upon a party's request, it must use its power to effect settlement of the matter. NAFTA, *supra* note 1, art. 2007(4).

25. The Commission may seek assistance and reports from technical advisors, create working expert groups, utilize the powers inherent in good offices, conciliation, mediation, or other methods of ADR, and make recommendations to the parties. NAFTA, *supra* note 1, art. 2007(5); see also Huntington, *supra* note 7, at 417-18; Bialos & Siegel, *supra* note 14, at 616. For a discussion of ADR methods in the context of multinational and regional trade agreements see generally Abbott, *supra* note 7; JACKSON, *supra* note 7.

26. NAFTA, *supra* note 1, art. 2007. Notice that the Commission has power to choose which ADR mechanism to employ to assist the parties. This strongly supports the proposition that the Commission is both facilitator and forum provider. Under Chapter 20, the parties do not choose either mediation or conciliation to resolve their disputes once the matter has been brought to the attention of the Commission. See Huntington, *supra* note 7, at 418. The Commission decides which ADR method to employ to assist the parties. NAFTA, *supra* note 1, art. 2007. Once the mechanism is in place, the Commission provides resources to facilitate a continued discussion between the parties to resolve the dispute.

Once a method is selected, the Commission coordinates and facilitates continued discussion between the parties in an effort to help resolve their dispute.<sup>27</sup>

An examination of the dispute resolution mechanism reveals an emphasis on working toward negotiated settlement between disputing parties. Chapter 20, by encouraging negotiation and bargaining directly between the parties, creates the likelihood of compromise settlement between parties under NAFTA.<sup>28</sup> At this stage, the rules of Chapter 20 and the powers afforded the Commission apply the pragmatic approach to dispute resolution.<sup>29</sup>

### B. The Panel Process

If the Commission is unable to help the parties resolve the dispute after thirty days, then any party involved in the dispute may request that the Commission establish an arbitral panel to hear and resolve the dispute.<sup>30</sup> The Commission decides whether or not to establish an arbitral panel by consensus.<sup>31</sup> Conse-

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Huntington points out that the result of many alternative dispute resolution methods is compromise settlement, that is, the bargaining and settlement over legal and private rights. *Id.* Professor Abbott argues that such bargaining devalues a legal regime that seeks to promote the interests of parties in their attempts to realize maximum benefits under their rights. Abbott, *Uruguay Round*, *supra* note 7, at 122-24.

27. NAFTA, *supra* note 1, art. 2007; see also Huntington, *supra* note 7, at 418; Abbott, *Uruguay Round*, *supra* note 7, at 122-24.

28. See Huntington, *supra* note 7, at 418; Abbott, *Uruguay Round*, *supra* note 7, at 122-24.

29. See discussion *supra* Part II.

30. NAFTA, *supra* note 1, art. 2008(1). Upon delivery of a request from a party in interest, "the Commission shall establish an arbitral panel." *Id.* art. 2008(2). It is argued, however, that this process may be short-circuited or delayed significantly, as a party may make a request for the establishment of an arbitral panel under Article 2008 only if the dispute has not been resolved within the time period prescribed after the Commission has convened. If the Commission decides not to convene, then a party does not have a unilateral right to request the establishment of an arbitral panel. See *supra* Part II.A. Even if the Commission convenes, the Commission has the power to extend the time for resolving the dispute in the Commission stage beyond thirty days as they see fit. NAFTA, *supra* note 1, art. 2008(1).

31. NAFTA, *supra* note 1, art. 2001(4). Consequently, a party's right to an arbitral panel may be frustrated by the failure of the Commission to agree under consensus rules to establish an arbitral panel to resolve the dispute. Under the consensus rule of NAFTA, it is possible for a member of the Commission to prevent or delay the establishment of a panel by voting no. For a more detailed analysis of the Commission's voting procedure, see *supra* note 24 and accompanying text; see also Robert E. Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 185 (1980) (discussing the primacy of providing for the ultimate right to a panel in designing effective

quently, the establishment of an arbitral panel depends on the full agreement of the members of the Commission, including the member accused of wrongdoing. When the Commission decides that the claim warrants the establishment of an arbitral panel, Chapter 20 delineates the procedures which the panel should use to evaluate the claim.<sup>32</sup> NAFTA panels are authorized to make findings of fact, analyze the actions taken by the defending party in light of its obligations under NAFTA, and make recommendations for the parties to consider in resolving the dispute.<sup>33</sup>

A panel must issue a confidential initial report to the disputing parties within ninety days of its selection, unless the parties otherwise agree.<sup>34</sup> The initial report will contain the panel's factual findings, legal determinations, and recommendations for resolving the dispute.<sup>35</sup> The panel's determinations and recommendations in the initial report are to be conducted in accordance with the guiding principles of NAFTA.<sup>36</sup> This mandate suggests that NAFTA's provisions constrain arbitral panels in issuing initial reports and that such a panel must issue rec-

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dispute resolution systems).

32. NAFTA, *supra* note 1, art. 2016(2)(a)-(c). NAFTA panels are to be composed of five members who will be chosen from a pre-approved list of experts in the fields of trade, law, economics, business, dispute resolution, and government. *Id.* art. 2010. The list presently consists of 30 members and was selected by a consensus of the parties to NAFTA. Members on the panelist list serve three-year terms, but can be re-elected. *Id.* art. 2009. The disputing parties select a chairman before selecting other panelists. *Id.* art. 2011(1)(b). If the parties cannot agree on a chairman, then one of the parties will be chosen by lot to decide upon a chairman. *Id.* The chairman cannot be a citizen of the selecting country. *Id.* art. 2011(1)(b)-(2)(b). If a dispute involves two parties, then each disputing party selects two panelists who are citizens of the other party's country within fifteen days of selecting the chair. *Id.* art. 2011(c). If the dispute involves more than two parties, then parties select panelists on each side of the dispute from citizens of the parties on the opposite side of the dispute within fifteen days of selecting the chairman. *Id.* art. 2011(1)(d), (2)(c), (2)(d). If a disputing party fails to select a panelist, a panelist will be chosen by lot. *Id.* art. 2011(2). The result is a panel with at least four citizens of the disputing parties' respective countries. This process should take roughly thirty-five days to complete in the case of two disputing parties.

33. NAFTA, *supra* note 1, art. 2016(a)-(c). Panelists are required to adhere to the model code of procedure and a code of conduct prescribed by the Commission. *Id.*

34. *Id.* art. 2012.

35. *Id.* art. 2016(2). In conducting its analysis, the panel has the authority under NAFTA to consult any source which will guide the panel in its analysis. *Id.* art. 2014. The use of experts, however, is contingent upon the approval of all of the parties to the dispute, and limited to the restrictions, if any, put in place by the parties. *Id.* Where a factual issue concerning health, environment, safety, or scientific matters is raised during a proceeding, the panel can establish a scientific review board to assist the panel in understanding and assessing certain issues. *Id.* art. 2015. The panel is obligated to consult the parties in the selection of experts. *Id.*

36. *Id.* art. 2012(3).

ommendations consistent with the agreement.<sup>37</sup> If a party disagrees with the recommendations of the initial panel report, it has fourteen days to submit written objections.<sup>38</sup> Thereafter, the arbitral panel has several options. The panel may request additional comments either from the objecting party or from any of the parties. The panel may reconsider the initial report, make additional inquiries, or conduct further analysis that it considers appropriate.<sup>39</sup> Finally, the panel must issue a final report within thirty days from the date the initial report was issued to the parties.<sup>40</sup> The parties are required to submit the panel's final report to the Commission.<sup>41</sup> Within fifteen days of receipt, the Commission is obligated to publish the final report.<sup>42</sup> All proceedings before the panel are to be kept confidential with the exception of the final report.<sup>43</sup>

### C. *Enforcement*

Under NAFTA Chapter 20, panel decisions are nonbinding on the parties.<sup>44</sup> In effect, the parties are left to resolve the dispute on their own.<sup>45</sup> While the parties are obliged to agree on the interpretation and application of NAFTA, and to resolve disputes in a mutually acceptable manner, there is no mechanism to enforce such language.<sup>46</sup> At this stage of the negotiations the

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37. The mandate of the panels process is referred to as the "terms of reference." As stated earlier in note 33, the terms of reference require the panel to make factual findings, legal determinations, and recommendations to resolve the dispute. NAFTA, *supra* note 1, art. 2016(2). The parties may, however, alter the terms of reference and agree on different terms. This must be done within twenty days of the date of the delivery of the request for the establishment of the panel. *Id.* art. 2012(3). In this sense, the flexibility afforded the parties to alter the terms of reference invokes a pragmatic approach to resolving disputes in that the legalistic mandate of the terms of reference can be opted out of in favor of a bargained for approach as to what the panel will do for the parties in assisting them to resolve their dispute.

38. NAFTA, *supra* note 1, art. 2016(4). Actually, the NAFTA panel may reconsider its initial report on its own motion or at the request of one of the parties. *Id.* art. 2016(5).

39. *Id.* art. 2016(5).

40. *Id.* art. 2017(1). Neither the initial nor final report discloses which panelist was associated with the minority or majority opinions. *Id.* art. 2017(2).

41. *Id.* art. 2017(3). The parties must also submit to the Commission any findings from a scientific review board if one was established. *Id.*

42. *Id.* art. 2017(4).

43. *Id.* art. 2012(1)(b).

44. See Thomure, *supra* note 6, at 200.

45. NAFTA, *supra* note 1, art. 2018.

46. See Thomure, *supra* note 6, at 200.

Commission vacates the process.<sup>47</sup> However, the parties have a moral obligation to settle the dispute among themselves in a manner that conforms to the arbitral panel's recommendations.<sup>48</sup> As the panel report is nonbinding and there is no mechanism to enforce the good-faith bargaining obligations imposed on the parties at this point of the dispute resolution process, the parties are afforded the power to retaliate as the sole mechanism to enforce rights that a panel report recognizes.<sup>49</sup>

If the parties cannot agree to enforce the recommendations of the panel and the dispute continues, then, after thirty days, the aggrieved party can take retaliatory actions under the authority of Article 2019(2)(a).<sup>50</sup> Under this Article, the complaining party should first seek to suspend benefits in the same sector as that affected by the offending measure.<sup>51</sup> If it is neither impractical nor futile to suspend benefits in the same sector, then the complaining party may suspend benefits in other sectors.<sup>52</sup> Article 2019(2) does not prohibit the suspension of benefits in all sectors thirty days after receiving the final report when the dispute remains unresolved. The retaliatory measures may remain in effect indefinitely. Failing a resolution, the nonconforming party may pay compensation in lieu of compliance with a panel determination when a certain measure does not conform to NAFTA or impairs or nullifies benefits of NAFTA for the complaining party.<sup>53</sup>

#### *D. Assessment of Chapter 20 Process in Light of a Legalistic Versus a Pragmatic Model*

Chapter 20 is primarily a pragmatic dispute resolution mechanism.<sup>54</sup> The system is designed to facilitate negotiated settlement between the parties. The Commission, NAFTA's primary enforcement institution, can encourage parties to reach compromise settlements through the use of working groups,

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47. NAFTA, *supra* note 1, art. 2018.

48. See OFFICE OF THE TRADE REPRESENTATIVE, REPORT ON THE NORTH AMERICAN FREE TRADE AGREEMENT 26-28 (Aug. 28, 1992).

49. NAFTA, *supra* note 1, art. 2019.

50. *Id.* art. 2019.

51. *Id.* art. 2019(2)(a).

52. *Id.* art. 2019(2)(b).

53. *Id.* art. 2018(2).

54. Straight, *supra* note 3, at 229; Huntington, *supra* note 7, at 408.

panel reviews, and retaliatory enforcement powers.<sup>55</sup> Geared to facilitating agreement, Chapter 20 neither decides cases nor calculates damages. Additionally, Chapter 20 provides no binding arbitration or right to judicial review.<sup>56</sup> While Chapter 20 provides flexibility and decreases the potential for adversarial activity in resolving disputes, the highly politicized world of international trade poses significant problems for parties working to resolve disputes under Chapter 20.

Under the Chapter 20 system, bargaining power flows from the relative political and economic strengths of the parties. In a negotiated dispute resolution regime, parties do not bargain in the shadow of the law, as in a legalistic treaty regime. Rather, parties bargain in the shadow of the veto of a settlement proposal. The concern is that weak political and economic parties will be frustrated, and ultimately coerced into agreeing to terms of a settlement that underrepresent their rights under NAFTA. To the degree that such bargaining fails to appropriately address the merits of a party's claim, the agreement would be considered ineffective and, likely, underutilized by the parties. Under such a scenario, trade disputes may be politicized,<sup>57</sup> as political forces favorably affect disputes. The danger is that political forces may escalate the dispute, and this pressure may spill over into other areas of concern between the parties.<sup>58</sup> While the data concerning the Chapter 20 dispute resolution experience is very limited to date, these comments are supported by the GATT experience discussed previously and are of particular importance in contemplating the expansion of NAFTA's membership. Such an expansion will complicate the resolution of disputes under the agreement. Accordingly, the agreement should have a sufficient infrastructure to accommodate a fluid expansion of the membership with the concomitant diversity such an expansion will impose on the Commission. This Article turns to this set of probabilities in recommending that an appellate process be established for Chapter 20.

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55. For a discussion of the specific rules found in Chapter 20 and the concomitant rights parties enjoy under the agreement, see Part II.B, C. of the text and accompanying notes.

56. NAFTA, *supra* note 1, art. 2018.

57. See Thomure, *supra* note 6, at 185-91, 200-01.

58. *Id.*

*E. The NAFTA Chapter 20 Dispute Resolution Experience*

NAFTA has been in existence for a relatively short period of time, so the amount of the Chapter 20 dispute resolution experiences is somewhat limited. Accordingly, it is difficult to evaluate the empirical evidence regarding NAFTA Chapter 20's success. Moreover, the determinants of success in the multilateral trade agreement world are wide-ranging and controversial.<sup>59</sup>

As of January 1997, eight disputes were submitted for Chapter 20 consultations.<sup>60</sup> Five of the original eight disputes advanced from the consultations phase to the second stage of the dispute settlement process by convening the Commission.<sup>61</sup> Two of those five disputes have advanced to the third phase of the dispute settlement system by establishing an arbitral panel.<sup>62</sup> A brief discussion of the Chapter 20 controversies to date is provided below.<sup>63</sup>

In March 1994, Canada and the United States entered into consultations concerning Canadian uranium exports.<sup>64</sup> In February 1995, the United States requested consultations under Chapter 20 with Canada concerning high tariffs imposed upon

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59. Professor Lopez argues that determining "whether the various dispute mechanisms of NAFTA produce conclusive results, regardless of their substance or political effect," provides an outcome-based yardstick to measure neutrally NAFTA's dispute resolution system. David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 200 (1997). Others argue that a successful dispute resolution mechanism preserves the integrity of the trade agreement, promotes efficiency, and limits power oriented diplomacy between the members of the agreement. See O. Thomas Johnson, Jr., *Alternative Dispute Resolution in the International Context: The North American Free Trade Agreement*, 46 SMU L. REV. 2175, 2176-78 (1993). Put another way, a dispute settlement system is successful if it promotes compliance and reinforces the legitimacy of the broader agreement. See Huntington, *supra* note 7, at 428. See generally, JACKSON, *supra* note 7, at 83-89.

60. See Lopez, *supra* note 59, at 200. Professor Lopez's article catalogues and analyzes the cases resolved and pending under NAFTA's dispute resolution systems. The analysis is not limited to cases under Chapter 20, but also includes an analysis of the cases under Chapter 19 and the NAFTA side agreements. *Id.*

61. Lopez, *supra* note 59, at 170-71.

62. *Id.* at 172.

63. This section borrows liberally from Professor Lopez's article to summarize the controversies submitted to the Chapter 20 dispute settlement system to date, as the data and analysis is comprehensively presented in his article. See Lopez, *supra* note 59, at 167-72, 199-207.

64. Lopez, *supra* note 59, at 168.



dairy, poultry, and egg products imports.<sup>65</sup> Also in February 1995, Canada requested consultations with the United States on sugar and sugar-containing exports.<sup>66</sup> In April 1995, the United States requested Chapter 20 consultations with Mexico concerning Mexico's unwillingness to provide national treatment to United States based companies specializing in the delivery of small packages.<sup>67</sup> In January 1996, Mexico requested Chapter 20 consultations with the United States concerning denied increased access to the four United States border states with Mexico as specifically provided for under NAFTA.<sup>68</sup> Moreover, in January 1996, Mexico requested consultations with the United States concerning tomato exports from Mexico into the United States.<sup>69</sup> In March 1996, Canada and Mexico jointly requested Chapter 20 consultations with the United States concerning the Helms-Burton Act.<sup>70</sup> In August 1996, Mexico requested consultations concerning imports of straw brooms to the United States.<sup>71</sup>

Out of the eight controversies noted previously, only one, the uranium dispute, was resolved at the Chapter 20 consultation stage.<sup>72</sup> The Mexican tomato controversy was resolved outside of the Chapter 20 process by Mexico and the United States by agreement.<sup>73</sup> The small-package trucking dispute remained in the consultation stage as of the end of 1996. The remainder of the cases proceeded onward in the Chapter 20 dispute resolution process.

Five of the eight controversies under Chapter 20 convened meetings of the Commission.<sup>74</sup> The Commission met in June 1995 to discuss the agricultural products, the small-package delivery, and the sugar controversies.<sup>75</sup> The Commission was un-

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65. *Id.* at 168-69

66. *Id.* at 169.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* The official title of the Helms-Burton Act is the Cuban Liberty and Democratic Solidarity Act of 1996. *Id.*

71. *Id.* at 170.

72. *Id.*

73. *Id.*

74. The agricultural products, small-package delivery, sugar, Helms-Burton Act, and straw brooms controversies advanced to the Commission meeting stage of the Chapter 20 dispute resolution process. Lopez, *supra* note 59, at 171.

75. *Id.*

successful in resolving these disputes.<sup>76</sup> Accordingly, the parties to these controversies could have requested the convening of Chapter 20 arbitral panels in July 1995.<sup>77</sup> As of December 1996, no party requested the establishment of an arbitral panel.<sup>78</sup> Neither Canada nor Mexico has requested an arbitral panel concerning the implementation of the Helms-Burton Act even though each could have requested the establishment of a panel in July 1996.<sup>79</sup> Canadian, Mexican, and U.S. trade officials conducted informal meetings in June 1996, but the controversy was not resolved.<sup>80</sup> Moreover, as of December 1996, no request for the establishment of a Chapter 20 panel had been made by any NAFTA member.<sup>81</sup> However, President Clinton ordered a temporary suspension of the private right of action against foreign persons or entities.<sup>82</sup>

After consultations and a meeting of the Commission failed to resolve the Mexican straw brooms controversy, Mexico initiated retaliatory action against the United States under NAFTA's emergency provision by raising duties on various United States products in response to President Clinton's announcement that the United States was raising tariffs on Mexican straw brooms.<sup>83</sup> In December 1996, Mexico expressed its intent to advance the controversy to the Chapter 20 panel stage.<sup>84</sup>

The United States requested that the Commission establish an arbitral panel to resolve the agricultural products controversy in July 1995 after the Commission's efforts to resolve the dispute failed.<sup>85</sup> Accordingly, the agricultural products controversy was the first dispute submitted to a Chapter 20 panel.<sup>86</sup> The membership of the panel was not established until January 1996.<sup>87</sup> Oral arguments were presented to the panel in April 1996 and

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Canada and Mexico reserved their right to appear as third parties in interest before the WTO dispute resolution panel requested by the European Union relative to the validity of the Helms-Burton Act under international trade accords. *Id.* at 168-69.

82. *Id.*

83. *Id.* at 172.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

the panel issued its initial report in December 1996.<sup>88</sup> The panel should have issued its initial report in April 1996 under NAFTA's panel procedure.<sup>89</sup> Moreover, the final report should have been issued and published in May 1996.<sup>90</sup> The panel, however, issued the initial report in July 1996, and issued the final report in December 1996.<sup>91</sup> The panel unanimously decided that Canada's tariffs on U.S. dairy, poultry, and egg products did not violate NAFTA's provisions.<sup>92</sup> Since the panel determined that there was no violation of any NAFTA provision, the controversy did not advance to the implementation phase of the Chapter 20 dispute resolution process.<sup>93</sup>

#### IV. NEW RULES FOR DISPUTE SETTLEMENT UNDER THE WTO: LEARNING FROM THE GATT EXPERIENCE

##### A. *WTO Dispute Settlement Rules and Procedures Outlined: A Refined GATT*

In April 1994, representatives from 124 governments and the European Economic Community signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.<sup>94</sup> Accordingly, the Uruguay Round agreements established the WTO and significantly amended pre-existing GATT rules and institutions.

The WTO is drawing increased interest among students of and participants in international trade.<sup>95</sup> The institutional framework of the WTO includes the Ministerial Conference, the

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88. *Id.* at 172-73.

89. Under Articles 2016 and 2017, a Chapter 20 panel is obligated to issue the initial report ninety days after the chairman of the panel is selected and issue the final report thirty days after the initial report is issued. NAFTA, *supra* note 1, arts. 2016-2017; Lopez, *supra* note 59, at 172-73.

90. *Id.*

91. *Id.* at 173.

92. See Final Report of the Panel, *In re* Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products, File No. CDA-95-2008-01, at 1 (Dec. 2, 1996) (on file with NAFTA Secretariat); Lopez, *supra* note 59, at 173.

93. Lopez, *supra* note 59, at 173.

94. See WTO Agreement, *supra* note 5. There are thirty-one countries awaiting WTO membership. See Ian Jones, *Fair Deal or Foreign Threat?*, WORLD TRADE, Jan. 1997, at 24, 26.

95. Gabrielle Marceau, *The WTO's Dispute Settlement Mechanism*, 1 WORLD ECON. AFF. 44 (1996).

highest authority of the WTO,<sup>96</sup> which meets every two years to review the workings of the organization. The daily work of the WTO is performed by the General Council, the Dispute Settlement Body (DSB), and the Trade Policy Review Body.<sup>97</sup> These bodies are complemented by support councils and committees regulating goods, services, intellectual property rights, and other committees responsible for reviewing everything from dumping to textiles.<sup>98</sup>

The WTO dispute settlement system dramatically modifies the practice employed under GATT for over forty-five years.<sup>99</sup> The elements of this new dispute settlement system include shortened time limits to resolve disputes by way of automatic procedural steps, the binding nature of panel decisions, and the newly established Appellate Body.<sup>100</sup> Moreover, if the prevailing member in a dispute is not satisfied with the legislative modifications or settlement terms offered by the losing member, the winning party is authorized to enact retaliatory measures against exports from the losing country.<sup>101</sup> Retaliation is not limited to the product in question, but rather extends across all trade sectors that the WTO covers.<sup>102</sup>

With these highlights in mind, the Uruguay Round agreements created the DSB to provide rules and procedures to administer dispute settlement, including the establishment of panels, adoption of panel reports, supervision of rulings and panel recommendations, and oversight in the suspension of GATT obligations in retaliation for breaching activity.<sup>103</sup> Despite having its own chairman<sup>104</sup> and establishing its own rules of pro-

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96. Jones, *supra* note 94, at 26.

97. *Id.* at 24.

98. *Id.* at 28.

99. The Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 2; General Agreement on Tariffs and Trade Multilateral Trade Negotiations (The Uruguay Round): Understanding of Rules and Procedures Governing the Settlement of Disputes (Apr. 15, 1994), art. 2(1), *reprinted in* The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 404-05; 33 I.L.M. 112, 114 (1994) [hereinafter Understanding of WTO Dispute Settlement].

100. See Marceau, *supra* note 95, at 44.

101. *Id.*

102. *Id.*

103. See Understanding of WTO Dispute Settlement, *supra* note 99, art. 2(1). Straight, *supra* note 3, at 222.

104. See WTO Agreement, *supra* note 5, art. IV, para. 3, at 9. Australian Ambassador Donald Kenyon was elected to chair the DSB on January 31, 1995; Straight, *supra* note 3, at 222 n.30.

cedure, the DSB is ultimately accountable to the General Council of the WTO.<sup>105</sup>

Settlement of disputes under the Uruguay Round agreements adopt the practices applied in GATT Article XXII, the right of consultation, and Article XXIII, the primary framework for dispute resolution. Furthermore, they adhere to the evolution of rules and procedures adopted by the contracting parties of GATT.<sup>106</sup> Under GATT, consultations between disputing parties and panels of three to five trade experts were provided to decide trade disputes that remained unresolved after the consultation process.<sup>107</sup> Moreover, the Uruguay Round agreements provide that members of the WTO affirm their adherence to the principles utilized in resolving trade disputes applied under GATT Articles XXII and XXIII.<sup>108</sup> Generally, Article XXIII is invoked when consultations under Article XXII fail and an injured party claims that there is nullification or impairment of the benefits of GATT by another party.<sup>109</sup> Moreover, a labyrinth of rules and procedures evolved in interpreting and implementing GATT Article XXIII over four decades of practice under GATT.<sup>110</sup>

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105. See WTO Agreement, *supra* note 5, art. IV, para. 3, at 9. Straight, *supra* note 3, at 222 n.31.

106. GATT Article XXII provides for consultation between the disputing parties when one party claims a violation of GATT standards. GATT, *supra* note 5, 61 Stat. pt. 5 at A64, 55 U.N.T.S. 266. Moreover, Article XXIII provides that in cases when a party claims that the benefits of GATT have been impaired or nullified by the actions of another party, then the injured party can file a written complaint with the alleged offending country. If the injured party believes that there is insufficient cooperation from the other party, then the matter can be referred to the contracting parties that are responsible for investigating the claim and then either make recommendations to the parties, formally rule on the dispute, or, in extraordinary cases, suspend GATT obligations to the other contracting parties. GATT, *supra* note 5, 61 Stat. at A64-65, 55 U.N.T.S. at 266; GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 797-808 (6th ed. 1986) [hereinafter GATT INDEX]; JACKSON, *supra* note 7, at 94-95.

107. See GATT INDEX, *supra* note 106, at 586; Pierre Pescatore, *The GATT Dispute Settlement Mechanism—Its Present Situation and Its Prospects*, 27 J. WORLD TRADE 5, 5-7 (1993).

108. Understanding of WTO Dispute Settlement, *supra* note 99, art. 3(1); Pescatore, *supra* note 107, at 16.

109. JACKSON, *supra* note 7, at 94.

110. *Id.* Historically, it has not been necessary to find a breach of obligation under GATT to find that there has been a nullification or impairment of the benefits of GATT, although later practice shows that doing so was highly important. Moreover, in the beginning of GATT, disputes were decided at the semi-annual meeting of the contracting parties. Subsequently, disputes were decided by an "intercessional committee" of the contracting parties. Later, disputes were relegated to a working party established to examine all disputes. *Id.* at 95. In 1955, disputes were delegated to panels of experts in which three to five experts were named and required to act in their own capacities and not as representatives of

In the beginning of GATT, dispute resolution was handled along informal lines, moving to the more formal and less partisan panel process later, and gradually developing both procedural and substantive legal principles.<sup>111</sup> During the 1960s, the use of GATT's dispute settlement process decreased, but recovered during the 1970s, as the United States brought a number of cases under GATT.<sup>112</sup> This history of the dispute settlement experience under GATT reflects what Professor John H. Jackson noted as having "its ups and downs."<sup>113</sup>

An inventory of disputes brought to GATT primarily under Article XXIII, but also other GATT articles as of 1986, reveals that eighteen percent were settled or withdrawn before a panel or working party was formed or were settled before the panel reported its findings.<sup>114</sup> Moreover, the same study revealed that panel reports were completed in seventy-three cases.<sup>115</sup> Of the panel reports forwarded to the contracting parties, most were adopted by the broader body, but many remained pending for several years.<sup>116</sup> In addition, a significant portion of the adopted panel reports gained compliance, but in some cases compliance took many years to achieve.<sup>117</sup> There were even cases involving noncompliance of affirmed panel reports. In some instances, noncompliance was very significant in scope and size.<sup>118</sup>

While compliance under GATT was respectable generally, the cases of noncompliance demonstrate pointedly the weakness of the former GATT dispute settlement process. In noncompliance cases, the panel reports were blocked for lack of consensus or the losing party argued that there was no requirement binding them to follow the panel's recommendations contained in the report.<sup>119</sup>

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any government as was the prior practice. *Id.* Jackson argues that this latest development in GATT dispute resolution procedure represents a shift from a negotiating atmosphere of multilateral diplomacy to a judicial procedure designed to arrive impartially at the truth of the facts and the best interpretation of the law. *Id.* Subsequent GATT dispute resolution procedures utilize panels of experts.

111. *Id.*

112. *Id.*

113. *Id.* at 98.

114. *Id.* at 98-99; see also JAGDISH BHAGWATI, 1 *THE WORLD TRADING SYSTEM AT RISK*, app. III (1991) (listing disputes formally submitted to GATT from 1980-1988).

115. JACKSON, *supra* note 7, at 99.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 101.

Analyzing the statistics of successful completion of the panel process and compliance does not address the issue of who utilized the dispute settlement procedures under GATT, however, an analysis of the noncompliance cases does. Seventy-six percent of complaints under GATT were made by industrial countries and over eighty-eight percent of the complaints were against industrial countries. Accordingly, the procedure was used primarily by industrial countries against industrial countries. Moreover, the significant noncompliance cases involved the United States and the European Community.<sup>120</sup>

These noncompliance cases also highlight significant examples in which large, industrial countries or groups utilized obstructionist measures to block enforcement of panel reports submitted to the contracting parties for adoption or refused to comply with panel reports after their adoption.<sup>121</sup> Hence, the GATT dispute resolution experience provided considerable evidence to move away from the negotiation/conciliation model of dispute settlement regimes to the rule/integrity system.<sup>122</sup> The Uruguay Round reflects the evolution of GATT from an informal negotiation-based dispute resolution system to a rule-based system. The rules and procedures outlined below demonstrate this evolution.

The process of dispute settlement under the WTO begins when a complaining member requests consultations with the defending member.<sup>123</sup> If the consultations between the members fail to result in settlement within sixty days of the commencement of consultations, then the complaining member may request the establishment of a panel.<sup>124</sup> The establishment of panels by the DSB differs from prior GATT rules. Before the implementation of the DSB, GATT did not provide for the establishment of a dispute resolution panel unless consensus existed

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120. *Id.*

121. *Id.*

122. *Id.* at 98. For an explanation of the dispute resolution models and terms international lawyers employ in labeling dispute resolution models, see *supra* Part I.

123. Understanding of WTO Dispute Settlement, *supra* note 99, art. 4(2), (7). It should be noted that the complaining member is not required to seek consultations with the defending member to resolve a dispute. *Id.*

124. *Id.* Article 6 provides that "[i]f the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel." *Id.* art. 6(1).

preventing the formation of a panel.<sup>125</sup> Specifically, the threshold requirement to forming a panel was the consensus of the GATT Council. Accordingly, an accused party could vote to block the establishment of a panel. As a result, the GATT experience reveals that there were significant delays in convening a dispute resolution panel and further delays in the decisionmaking process when a panel was formed.<sup>126</sup> The new dispute resolution system eliminates the consensus requirement.<sup>127</sup>

The panel is obligated to determine whether the contested measures are compatible with WTO agreements.<sup>128</sup> Moreover, members may request good offices, conciliation, and mediation at any time during the panel process.<sup>129</sup> Both parties must agree on the panelists who are generally drawn from a list of current and former trade diplomats and legal scholars.<sup>130</sup> The Secretariat proposes nominees for each panel.<sup>131</sup> Panels generally consist of three panelists, but the disputing parties may agree to establish a panel of five.<sup>132</sup> Once the panel is established, the disputing

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125. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210, 217(ii) (1980). The tradition of decision making by consensus evolved under GATT, but is not specified in the rules of procedure prior to implementation of the Uruguay Round agreements. Bialos & Siegel, *supra* note 14, at 605. Under prior practice, a complaining party could request that the GATT Council form a panel to resolve a dispute between parties. *Id.* The Council generally did not vote to form a panel until after the defending party had a sufficient opportunity to review the complaint and prepare a response for the Council. *Id.* Moreover, since the Council vote required consensus, the responding party to a complaint could block the formation of a panel. *Id.*

126. Straight, *supra* note 3, at 225; Bialos & Siegel, *supra* note 14, at 605; John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 549-50 (1993); Miguel Montana Mora, *A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 115 (1993); PIERRE PESCATORE ET AL., *HANDBOOK OF GATT DISPUTE SETTLEMENT* 73 (1991); Eichmann, *supra* note 7.

127. *Understanding of WTO Dispute Settlement*, *supra* note 99, art. 6(1). The procedure does provide a safety valve allowing an appeal of a panel's report to a special review group. Straight, *supra* note 3, at 225; Barton & Carter, *supra* note 126, at 549-50.

128. Marceau, *supra* note 95, at 44; Straight, *supra* note 3, at 223.

129. *Understanding of WTO Dispute Settlement*, *supra* note 99, art. 5(1), (3), (5); see also Straight, *supra* note 3, at 224-25.

130. *Understanding of WTO Dispute Settlement*, *supra* note 99, art. 8(1). Under this rule, individuals who are from the member countries to the dispute are excluded from the panel unless waived by agreement of the disputing members. *Id.* art. 8(3).

131. *Id.* art. 8(6).

132. *Id.* art. 8(5). Panelists may be added to the list generally without first being recommended by member governments. *Id.* art. 8(4). Moreover, the Secretariat maintains the list of panel nominees. *Id.* Members, however, may recommend individuals to the Secretariat for inclusion on the list of panel nominees. *Id.* art. 8(4); Straight, *supra* note 3, at 226.



members submit at least two sets of written briefs and meet twice with the panel.<sup>133</sup> The DSB establishes panels to objectively assess claims and to provide it with sufficient information and findings to enter recommendations and rulings.<sup>134</sup> Usually, within five months from being impaneled, the panel issues its Interim Report, which contains findings of fact and conclusions of law.<sup>135</sup> At this stage, the disputing members may request a review of these findings.<sup>136</sup> Accordingly, the members conduct another meeting with the panel.<sup>137</sup> Thereafter, the panel issues its Final Report.<sup>138</sup> The Final Report is then adopted by the DSB, comprised of all WTO members, unless the losing party appeals to the Appellate Body within sixty days.<sup>139</sup> This panel process remains GATT's primary dispute resolution mechanism, even though there are ways to block the adoption of a panel's Final Report. One of the members to the dispute may formally file a notice of appeal with the DSB, or the DSB may decide by consensus to not adopt the Final Report.<sup>140</sup> Accordingly, adoption of a panel's Final Report contains specific time limits for adoption and provides for appeal. As a result, the problems of adoption and enforcement of panel reports under the prior GATT rules may be obviated in favor of a more efficient and less political process of dispute resolution.<sup>141</sup>

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133. Marceau, *supra* note 95, at 44.

134. Understanding of WTO Dispute Settlement, *supra* note 99, art. 11. The terms of reference for panels are:

[t]o examine, in the light of the relevant provisions in (name of the covered agreement/s cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement.

*Id.* art. 7(1).

135. Marceau, *supra* note 95, at 44.

136. *Id.*

137. *Id.*

138. *Id.* The panel serves the Final Report on the disputing members first and then the report is circulated to all WTO members. *Id.*

139. Understanding of WTO Dispute Settlement, *supra* note 99, art. 17(1).

140. *Id.* art. 16(4).

141. Straight, *supra* note 3, at 226; Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 483 (1994). The GATT dispute resolution experience provides that enforcement of GATT panel decisions was fraught with delays and obstructionist maneuvering on the part of losing parties and its allies. Lowenfeld, *supra*, at 483; Mora, *supra* note 126, at 115; Abbott, *GATT*, *supra* note 7, at 55; JACKSON, *supra* note 7, at 98-103; Thomure, *supra* note 6, at 197.

Of significance is the adoption of the Appellate Body to hear appeals of Final Reports adopted by the DSB.<sup>142</sup> While the Appellate Body consists of seven individuals,<sup>143</sup> a panel of three hears and decides each case.<sup>144</sup> Members of the Appellate Body are not representatives from any government, which differs from the membership of panels of first review of cases handled by the DSB.<sup>145</sup> The Appellate Body's scope of review of panel decisions is limited to issues of law and legal interpretations.<sup>146</sup>

Once the consultations, panel, and appellate process are completed, the DSB has wide authority to implement, supervise, and enforce its rulings and recommendations. Members are required to comply immediately with rulings and recommendations unless impracticable.<sup>147</sup> The DSB has authority to provide a schedule for compliance if compliance is impracticable.<sup>148</sup> Moreover, the DSB has the authority to survey the implementation of adopted rulings and recommendations.<sup>149</sup> In addition to the enforcement remedies, an injured member may obtain compensatory damages and suspend GATT benefits from another member who fails to comply with the recommendation or ruling of an affirmed panel decision.<sup>150</sup>

In contrast to prior GATT law, the WTO limits the use of retaliatory trade measures such as suspension of GATT benefits, concessions, or obligations. Members are also required to have claims of harmful trade activity resolved through the DSB only.<sup>151</sup> Moreover, members agree to suspend GATT benefits and obligations only upon DSB approval.<sup>152</sup>

### *B. A Measure of Success*

An indicator of the success, legitimacy, and integrity of a dispute resolution system is the degree to which members utilize

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142. Understanding of WTO Dispute Settlement, *supra* note 99, art. 17(1).

143. *Id.*

144. *Id.*

145. *Id.* art. 17(3).

146. *Id.* art. 17(6).

147. *Id.* art. 21(1).

148. *Id.*

149. Understanding of WTO Dispute Resolution, *supra* note 99, art. 21(6).

150. *Id.* art. 22.

151. *Id.* art. 23(2).

152. *Id.* art. 23(2).

the system, rather than bargain unilaterally in the shadow of the system.<sup>153</sup> As implementation of the revised dispute resolution process under the WTO has taken effect, many disputes that were formerly handled bilaterally in the light of the previous GATT rules are now brought to the WTO for resolution.

In the first twenty-two months of the WTO's existence, there have been sixty requests for consultations, and several cases were concluded.<sup>154</sup> Ten disputes have reached the panel stage.<sup>155</sup> Moreover, there has been a broad spectrum of members utilizing the WTO dispute resolution system. This stands in stark contrast to prior GATT practice, where the United States, Canada, and the European Union (EU) represented the majority of participants in the GATT dispute settlement system. Presently, twenty-five different members have initiated requests for consultations under the WTO, of which forty percent were from developing countries.<sup>156</sup> Clearly, the implementation of the WTO dispute resolution system has proven to be reliable and effective in the administration of trade disputes among members. Moreover, the membership has shown an increased interest in utilizing the system to resolve disputes.

Thus far, the United States has been the most active participant in the WTO dispute settlement process. The United States filed forty percent of the claims formally submitted to the WTO.<sup>157</sup> As of March 1, 1997, the United States has been the complainant in twenty-one cases, with five cases before dispute settlement panels, fifteen cases in the consultation phase, and one case resolved by a panel and presently in the implementation phase of the DSB dispute resolution process.<sup>158</sup>

A sampling of the cases includes Venezuela and Brazil's claim that a recent U.S. environmental regulation concerning gasoline standards discriminated against imported gasoline and

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153. Thomure, *supra* note 6, at 197-201.

154. Marceau, *supra* note 95, at 44.

155. *Id.*

156. *Id.*

157. See Testimony of Deputy U.S. Trade Representative Jeffrey Lang before the House of Representatives' Ways and Means trade subcommittee on February 26, 1997, concerning the release of a comprehensive evaluation of the WTO by the Clinton Administration in the forthcoming annual Report of the President on the Trade Agreements Program. See USIA: *The United States and the WTO* (visited Mar. 21, 1997) (<http://www.usia.gov/80/topical/econ/wto/wtxt226.html>) [hereinafter Lang Testimony].

158. *Id.*

violated the GATT/WTO national treatment obligations.<sup>159</sup> In another case, Peru, Chile, and Canada requested consultations with the EU concerning a French regulation limiting the use of a trade description, Coquille Saint-Jacques, for scallops harvested in France.<sup>160</sup> The claim was settled by the disputing members after a panel, which had been established, issued an Interim Report.<sup>161</sup> After analyzing the Interim Report, the French government amended its regulation of the trade description to permit all scallops, wherever harvested, to be marketed under the French trade description Saint-Jacques or Noix de Saint-Jacques, provided that the country of origin is specified on the label.<sup>162</sup>

Japan's taxation of alcoholic beverages was the focus of yet another case resolved by the WTO panel process.<sup>163</sup> The dispute concerned the variation in taxation of locally produced "shochu," whiskey, and similar imported spirits.<sup>164</sup> The panel determined that the differing tax rates on the spirits were discriminatory against imports from Canada, United States, and the EU.<sup>165</sup> Japan appealed and the Appellate Body affirmed the conclusions of the panel.<sup>166</sup>

A fourth case concerned a claim by the Philippines that an antisubsidy border measure imposed by Brazil on imports of desiccated coconut from the Philippines was invalid under GATT/WTO.<sup>167</sup> The panel ruled that the Brazilian subsidy was valid under GATT/WTO law, and the matter is pending appeal.<sup>168</sup> Moreover, in another case, Costa Rica was successful in a claim against a U.S. regulation imposed against imported textiles. While textiles were previously outside the scope of GATT, they are now within the ambit of the WTO as part of a phase-in of the sector.<sup>169</sup>

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159. Marceau, *supra* note 95, at 44.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Marceau, *supra* note 95, at 44.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

Another case concerned a claim brought by Colombia, Ecuador, Honduras, Mexico, and the United States alleging violations of several provisions of the WTO by the EU's regulatory regime on the importation of bananas.<sup>170</sup> This particular case represented the third occasion that the EU's banana import regime was challenged in the GATT/WTO.<sup>171</sup> Other pending disputes in the WTO involve EU regulations concerning the import of meat from hormone-fed animals, a challenge to a Canadian regulation limiting importation of and advertising in certain periodicals, an allegation that Brazilian export subsidies in the Civil Aviation sector violates GATT/WTO, and a claim that members are unable to access the Japanese film/photographic paper sector on a competitive basis as the GATT/WTO rules allow.<sup>172</sup> Moreover, more than twenty other consultations are pending in the WTO for which panels may be established.<sup>173</sup>

### *C. WTO Disposes of What NAFTA Chapter 20 Embraces*

As a central point of comparison, the previous sections provide compelling evidence that the WTO has disposed of what NAFTA Chapter 20 embraces. For example, Chapter 20, a pragmatic dispute resolution design, provides for dispute resolution along the lines found in the GATT process prior to the establishment of the WTO. Moreover, Chapter 20 may be flawed relative to a party's right to convene the Commission, which ultimately would defeat the party's right to have a panel established to decide the controversy. Furthermore, Chapter 20 does not provide for appellate review of panel decisions and contains only the remedy of retaliation if a losing party does not implement the recommendations set forth in the panel's Final Report. Accordingly, the Chapter 20 experience, while quite limited to date, sets the stage for a dispute resolution experience similar to the GATT experience described above.

The WTO dispute resolution process, a legalistic regime, includes rules and procedures designed to facilitate efficient, well-reasoned settlement and resolution of disputes by way of strict

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170. *Id.*

171. *Id.* at 45.

172. *Id.*

173. *Id.*

deadlines, appellate review to correct panel penalties for gross misconduct, and broader enforcement powers of panel decisions.

While the controversies and cases subjected to the Chapter 20 process to date are limited in number and provide little statistical assistance in evaluating Chapter 20, it is significant to note that the parties involved in Chapter 20 cases do not abide by the time deadlines and have, at least on one occasion, removed a case from Chapter 20 and filed the matter with the WTO.<sup>174</sup> Moreover, the WTO experience to date provides a broader sampling of cases to analyze in evaluating the success and efficiency of that dispute resolution system. The DSB process has moved efficiently in resolving a range of disputes in its short history. Accordingly, the WTO may be a more efficient dispute resolution system than NAFTA Chapter 20. However, the definition of what constitutes success in this area remains controversial and is fraught with complex hurdles in designing any model that attempts to quantify the efficiency and quality of such dispute resolution models consistent with accepted social science norms.

#### V. RECOMMENDATION FOR APPELLATE REVIEW OF NAFTA CHAPTER 20 PANELS

NAFTA Chapter 20 does not provide for appellate review of panel decisions. This is in contrast to NAFTA Chapter 19 which is, for all intents and purposes, an appellate procedure designed to review administrative agency decisions determining whether dumping occurred and whether the practice injured a domestic industry.<sup>175</sup> On the other hand, the WTO does provide for appellate review of panel reports.<sup>176</sup> While GATT has enhanced its provisions for enforcement by implementation of stronger appellate procedure under the WTO, NAFTA Chapter 20 relies upon the parties to reach agreement through negotiation, cooperation, and respect for the trade agreement regime. Accordingly, NAFTA Chapter 20 is a pragmatic trade dispute scheme.

Despite the intent to have the parties negotiate the settlement of disputes under Chapter 20, it is suggested that appellate review of Chapter 20 panel decisions is appropriate and neces-

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174. Lopez, *supra* note 59, at 170.

175. NAFTA, *supra* note 1, art. 1904(2); see also Lopez, *supra* note 59, at 173-74.

176. Understanding of WTO Dispute Settlement, *supra* note 99, art. 17(1).

sary to ensure that decisions are not biased and remedies are provided when gross misconduct occurs. Moreover, appellate review of panel decisions would ensure that panel decisions are made in accordance with the law and the facts, rather than for political reasons, as was apparent from the GATT experience. Furthermore, appellate review of Chapter 20 panel decisions would maintain the integrity and continuity of the panel process thereby strengthening the authority of panel decisions which interpret NAFTA and provide incentives to utilize the panel process if negotiations fail to produce settlement. While the data concerning the success of NAFTA Chapter 20 is limited, if barely anecdotal, the concerns expressed previously provide ample support for the Commission to debate the proposal to establish an appellate body for Chapter 20 panel decisions if Chapter 20 is to provide a sufficient infrastructure to accommodate an expansion of the membership of NAFTA and the increased diversity of disputes flowing from such an expansion.

Appellate review of Chapter 20 panel decisions can be established by the Commission. Article 2001(2) provides, in part, that the Commission shall resolve disputes that may arise regarding the interpretation or application of NAFTA and shall consider any other matter that may affect the operation of the agreement.<sup>177</sup> Article 2001(4) grants the Commission the power to establish rules and procedures to carry out its duties as the organization responsible for the successful implementation and further elaboration of NAFTA.<sup>178</sup> Therefore, the Commission has the authority to establish rules providing for appellate review of panel decisions as proposed in this Article without having to enact enabling legislation in the Canadian, Mexican, and U.S. legislatures.

## VI. CONCLUSION

This Article suggests that the Commission, the primary enforcement institution in NAFTA, should provide for appellate review of Chapter 20 panel decisions. The classic model international lawyers employ to assess dispute resolution processes was described and utilized as a compass to evaluate the GATT and NAFTA dispute resolution processes. That is, the dichotomy

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177. NAFTA, *supra* note 1, art. 2001(2).

178. *Id.* art. 2001(4).

between legalism and pragmatism present in dispute resolution frameworks. By denying an appellate process, NAFTA Chapter 20 creates an atmosphere that may cause a repetition of the GATT dispute resolution experience prior to the adoption of the Uruguay Round reforms and establishment of the WTO. This can be avoided, however, as the Commission, a NAFTA enforcement institution, is empowered to promulgate a rule to establish appellate review of arbitral panel decisions and should do so in light of the GATT dispute resolution experience, which mirrors the NAFTA Chapter 20 panel scheme.