

Dispute Resolution Under the NAFTA: The Newer and Improved Model

As trade agreements take on increased significance in the international economy, the processes for resolving disputes between contracting states are receiving greater scrutiny. To the extent that dispute resolution procedures established under these agreements are viewed as fair and effective, trading partners are more likely to resort to these means of resolving trade frictions rather than take unilateral actions that may threaten to undermine the fabric of the international trading system.

The North American Free Trade Agreement (NAFTA), recently signed by Canada, Mexico, and the United States,¹ appears to be another step forward in the ongoing evolution of legal means for resolving trade disputes. Dispute resolution under chapter 20 of the NAFTA is neither a radical departure from the past nor a bold new approach. Rather, chapter 20 of the NAFTA, which builds on prior trade agreements and the practice thereunder, establishes strengthened dispute mechanisms, procedures for disputes including multiple parties, and firmer dead-

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1. North American Free Trade Agreement [hereinafter NAFTA]. At this writing, the NAFTA Parties, at the behest of the United States, are negotiating supplemental agreements concerning, *inter alia*, environmental and labor issues. These agreements may establish additional mechanisms for resolving disputes or addressing issues beyond those covered by chapter 20 of the NAFTA, including questions as to whether national environmental and worker laws are being enforced. Some of the same issues addressed herein (public participation, expert evidence, transparency, and enforceability) as well as other legal issues (constitutionality, degree of compulsory discovery, and the like) apply to any dispute resolution procedures established under such agreements. The NAFTA is now awaiting implementation through the constitutional procedures of each signatory country. All references to NAFTA are to the December 15, 1992, text.

lines. These improvements in dispute resolution, if appropriately implemented, may help to ensure the integrity of the process, may encourage the NAFTA Parties to employ the dispute resolution measures incorporated into the agreement and, consequently, may reinforce the rule of law in the resolution of international trade disputes.

The NAFTA also extends the frontiers of dispute resolution by covering disputes that arise with respect to the agreement's significant rules concerning such nontraditional subjects as intellectual property, standards (sanitary, phytosanitary, environmental, and health), and services. As dispute resolution under the NAFTA moves into such areas, which involve complex technical matters and affect large constituencies, the process itself is likely to evolve even further to accommodate those types of issues.

Section I of this article reviews the evolution of dispute resolution under the General Agreement on Tariffs and Trade (GATT),² the ongoing Uruguay Round of the GATT negotiations, and the U.S.-Canada Free Trade Agreement (CFTA).³ Section II examines dispute resolution under the NAFTA, focusing on: improvements vis-à-vis the GATT and the CFTA; the coverage of disputes in non-traditional subjects (such as the environment); and the emerging issues of public participation in dispute resolution, the role of expert opinion, and the transparency of the process.

I. Dispute Resolution: The Track Record

The basic rules of dispute resolution, which evolved under the GATT, have been formalized and expanded under the CFTA and are being further refined in the Uruguay Round of the GATT.

A. THE GATT

While the GATT, by its terms, established a basic approach to dispute resolution among the contracting parties, it provided little guidance as to what mechanisms or procedures should be utilized. Specifically, with regard to dispute resolution, the GATT provides for: (1) general consultations among contracting parties concerning any matter affecting the operation of the agreement; and (2) consultations based on a specific complaint by a contracting party that any benefit accruing to it under the GATT has been nullified or impaired, or that the attainment of any objective under the agreement is being impeded due to specified actions or inac-

2. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat., 55 U.N.T.S. 187 [hereinafter GATT].

3. U.S.-Canada Free Trade Agreement, Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA].

tions of a contracting party.⁴ If no satisfactory resolution of a specific complaint is effected within a "reasonable time," the complaining party may refer the matter to the GATT Council,⁵ which is required to "promptly investigate" and make appropriate recommendations or give a ruling on the matter.⁶ If the Council determines that the circumstances "are serious enough to justify such action," it may, as it deems appropriate, authorize a contracting party to suspend the application of concessions or other obligations under the GATT.⁷

Originally, dispute resolution under the GATT was informal; complaints were presented at sessions of the contracting parties and were merely referred to the chairperson for rulings. Over time a regime of review by a panel of independent experts developed as a matter of custom.⁸ Under the current practice, a complaining party may, after consultations have failed to generate a satisfactory solution, request that the Council form a panel to review the dispute. The Council generally will not vote to form a panel until "after the party concerned has had an occasion to study the complaint and prepare its response before the Council."⁹ As the Council vote must be by consensus, a responding party may block the formation of a panel.¹⁰

1. *Panel Proceedings*

The Council forms panels on an ad hoc basis by selecting legal experts from a roster of eminent international experts maintained by the director general.¹¹ The

4. Article XXII, which authorizes general consultations on matters relating to the agreement, does not include provisions for further action and, hence, is viewed as a less contentious means of conveying dissatisfaction with a trade measure. GATT, *supra* note 2, art. XXII. In contrast, article XXIII does include provisions for further action (i.e., dispute resolution). *Id.* art. XXII. The article XXII and XXIII mechanisms often are used sequentially by member countries.

5. The GATT Council was established under authority of article XXV as "joint action" taken "with a view to facilitating the operation and furthering the objectives" of the General Agreement. 9S B.I.S.D. 7, 8 (1961). The Council is authorized to "consider matters arising between sessions of the CONTRACTING PARTIES [*i.e.*, the full membership] which require urgent attention, and to report thereon . . . with recommendations as to any action which might appropriately be taken . . ." *Id.*

6. Under GATT art. XXIII(1) a contracting party may request consultations for the following types of complaints: "(a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation. . . ." GATT, *supra* note 2, art. XXII, para. 1, cls. a-c.

7. *Id.* para. 2.

8. *Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance*, 26S B.I.S.D. 210 (Nov. 28, 1979) [hereinafter *Dispute Resolution Understanding*].

9. *Id.* at 217(ii).

10. The tradition of decision making by consensus has evolved in GATT practice, but is not specified in the rules of procedure. Under this practice the contracting parties reach a decision by consensus if no contracting party formally objects to the acceptance of a proposed decision.

11. The Director General maintains "an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement" from which panelists are selected. *Dispute Resolution Understanding*, *supra* note 8, at 212.

disputing parties may make oral and written presentations to the panel, which will then issue a factual report for review by the disputing contracting parties. After offering the disputing parties opportunity to comment on the factual portions of the decision, the panel will issue a final report with factual and legal conclusions. All stages of the proceeding are confidential. A panel report does not become an official ruling of the GATT until the contracting parties adopt the report at a Council meeting.¹² Significantly, since Council decisions are taken by consensus, all Council members, including the disputants, vote on whether to adopt the report.

The panel reports generally call for the offending party to eliminate practices found contrary to the GATT or to provide appropriate compensation. Under the GATT a complaining party dissatisfied with the implementation of the report cannot unilaterally institute countermeasures (such as raising tariffs on imports from the offending country), but must request authority from the Council to do so. The authorization of countermeasures is also a decision that must be made by consensus.¹³

2. Participation of Other Parties

As a matter of custom, nondisputant contracting parties have been permitted to participate in dispute resolution proceedings essentially "as of right" if they express an interest in the subject of the dispute at the Council meeting where the complaining party initially presented the dispute. Historically, however, the nondisputants have not attended the full panel proceeding; rather, their participation generally has been limited to presenting their arguments before the panel and the disputants.¹⁴

3. Effect of Panel Reports

A GATT panel report has legal effect only between the disputing parties, much like a court decision in a domestic case. Thus, a ruling against one contracting

12. The official reporter of GATT documents such as panel rulings is *Basic Instruments and Selected Documents of the GATT*.

13. See GATT, *supra* note 2, art. XXIII, para. 2.

14. For example, in *United States—Customs User Fee*, 35S B.I.S.D. 245 (Feb. 2, 1988) (see *infra* note 15), the dispute was initiated by Canada and the EC, but submissions by the following third parties were analyzed by the panel and discussed in its report: Australia, Hong Kong, India, Japan, New Zealand, Peru, and Singapore.

In certain circumstances, exceptions to this practice have arisen. For example, the United States was permitted to participate in all panel meetings in the recent GATT panel proceeding involving the EC complaint against Japan's implementation of the 1986 U.S.—Japan semiconductor arrangement. *Japan—Trade in Semi-Conductors*, 35S B.I.S.D. 116 (May 4, 1988). "Given the special nature of the matter" involving an agreement to which the United States was a party, the panel agreed to provide "adequate opportunity to the United States to participate in the work of the Panel as necessary and appropriate." *Id.* Furthermore, the EC had initially requested consultations with the United States, as well as Japan. *Id.*

party does not impose obligations on other contracting parties even if they practice the same offending measure.¹⁵

Panel reports that are not officially adopted nonetheless have practical significance, particularly when they involve sensitive political issues of broad interest. For example, a 1991 GATT panel ruled in the "Tuna case" that the U.S. Marine Mammal Protection Act (MMPA), which banned imports of tuna caught with purse-seine nets to prevent inadvertent dolphin deaths, violated GATT article XI's prohibition against quantitative import restrictions. The United States argued that the law was permitted by a GATT exception allowing trade restrictive measures that are "necessary to protect human, animal or plant life or health,"¹⁶ or "relating to the conservation of exhaustible natural resources"¹⁷ provided that such measures are applied on a nondiscriminatory basis and do not constitute a disguised restriction on trade. The GATT panel rejected this argument, however, ruling that the MMPA was not necessary since the United States had not demonstrated that the measure was the least trade restrictive means to achieve this goal and that the measure was not "primarily aimed at such conservation" because it was based on "unpredictable conditions."¹⁸

The environmental community criticized the GATT panel report on several grounds. First, the report caused concern because it highlighted that national conservation and environmental standards may be affected (and possibly weakened) by dispute resolution between contracting parties under trade agreements. Second, the environmental community criticized the confidentiality of the dispute

15. For example, a GATT panel ruled in 1988 that U.S. customs user and merchandise processing fees, which were based on the value of the imported merchandise, violated GATT articles II:2(c) and VIII:1(a) because the fees were not commensurate with the actual processing expense—as required by these articles. *United States—Customs User Fee*, 35S B.I.S.D. 245, 272-76 (Feb. 2, 1988). The United States complied with the report and subsequently changed the import fee structure. Customs and Trade Act of 1990, 104 Stat. 629, § III. Although U.S. exporters also face such fees based on value (or other measures similarly unrelated to actual costs) when their merchandise is imported into other countries, the panel ruling against the United States does not require these countries to change their procedures; the United States must initiate dispute resolution procedures against other countries to achieve this result. In practice, such a challenge would likely receive expedited review.

Another consequence of limiting the ruling's legal effect to the disputing parties is that a non-disputant may not seek to enforce a panel ruling through countermeasures. In 1987, after a panel upheld a U.S. complaint against Japan regarding import restrictions on a broad range of agricultural products, *Japan—Restrictions on Imports of Certain Agricultural Products*, 35S B.I.S.D. 163 (Mar. 22, 1988), the parties reached a settlement concerning many but not all of the products covered by the report. Australia, which exported to Japan products not covered by the U.S.-Japan settlement, repeatedly requested that Japan fully comply with the panel report. *Id.* Australia was not, however, authorized to take compensatory action. *Id.*

16. GATT, *supra* note 2, art. XX, para I., cl. b.

17. *Id.* cl. g.

18. *United States Restrictions on Imports of Tuna*, reprinted in 30 I.L.M. 1598, 1620-21, paras. 5.28, 5.33 (1991). The "unpredictable conditions" resulted from the Act's linking (a) the maximum incidental dolphin-taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States, to (b) the taking rate actually recorded for U.S. fishermen during the same period.

resolution process and the lack of opportunity for interested private parties to be heard.¹⁹ The "Tuna case" thus demonstrates the growing importance of dispute resolution under international trade agreements as the applicability of such procedures expands to significant and politically sensitive issues.

4. *Procedural Problems and Attempted Solutions*

In practice, dispute resolution under the GATT has a number of apparent deficiencies that the GATT negotiators are attempting to correct in the Uruguay Round. First, the lack of firm deadlines has generated uncertainty in the past, although an improvement is reflected in the practice of recent panel reviews, which typically have been completed in six months. In the Uruguay Round the negotiators have sought to codify the existing panel practice and establish clear guidelines on their operation, including deadlines for various stages of the proceeding.

Deadlines for panel action serve not only to instill confidence in the system generally, but also to assure that resolution on the international level may be completed before the United States takes unilateral action. Under section 301 of the Trade Act of 1974, the U.S. Trade Representative (USTR) may investigate, inter alia, alleged violations of trade agreements to which the United States is a party.²⁰ Although the provision requires consultations under the trade agreement allegedly violated, it also requires the USTR to decide on compensatory action within prescribed deadlines, which could result in unilateral U.S. action before GATT panel proceedings have run their course.²¹ According to a U.S. negotiator, the current version of the draft text provides for completion of GATT panel review within thirteen-and-a-half months (or fifteen-and-a-half months in extended cases), before the section 301 eighteen-month outer limit for a determination for most cases (other than subsidies cases).²² The fact that section 301 deadlines are outer limits,²³ however, means that the statute technically does not require the USTR to wait for a GATT panel to complete its review before retaliating. Nonetheless, the new deadlines undoubtedly will put tremendous political pressure on the United States to do so.

Second, as noted above, the important steps in the dispute resolution process—the decision to create a panel, to accept panel reports, and to authorize countermeasures—must be agreed upon by consensus, which allows a disputant contracting

19. See, e.g., Jessica Mathews, *Dolphins, Tuna and Free Trade; No Country Can Protect Its Own Smidgen of Air or Ocean*, WASH. POST, Oct. 18, 1991, at A21.

20. 19 U.S.C. § 2411. USTR may undertake such investigations on its own initiative or upon petition by interested persons. *Id.*

21. *Id.* §§ 2413–2414.

22. USTR must make its determination in most cases by the earlier of (a) 30 days after institutional dispute resolution is completed or (b) 18 months after the investigation is initiated. *Id.* § 2414(a)(2)(A). These deadlines do not account for cases concerning GATT rules on subsidies; USTR must make a determination within 12 months of initiation. *Id.* § 2414(a)(2)(B).

23. The determinations must be made "on or before" the specified dates. *Id.* § 2414(a).

party to effectively block these actions by the Council. The Uruguay Round draft text issued by GATT Director General Dunkel in December 1991 (the so-called Dunkel text), which, reportedly, is the draft text as of this writing, attempts to resolve the blocking problem. The Dunkel text *requires* both the formation of panels upon request of a complaining party (after consultations) and the adoption of panel reports, *unless* Council members decide unanimously not to take such steps.²⁴ Thus, while the Dunkel text does not make these steps automatic, it certainly improves on the existing process and creates a strong presumption that the dispute resolution will not often be blocked.²⁵

Similarly, the ability of a contracting party to block the authorization of countermeasures under the GATT has created incentives for injured parties to retaliate without waiting for GATT authorization. To address this issue the Dunkel text, applying the same rule for Council actions (after a period of negotiations) authorizing countermeasures,²⁶ requires a unanimous vote to prevent initiation of the countermeasures. The draft also sets guidelines for permissible compensatory measures and provides for arbitration of disagreements on the extent of such measures.²⁷ The establishment of this countermeasure regime thus appears to create a more effective system of GATT-authorized retaliation, which is likely to foster adherence to the rule of law in the resolution of trade disputes and help to dissuade parties from resorting to unilateral actions.

B. THE U.S.-CANADA FREE TRADE AGREEMENT

The general dispute resolution mechanism of the CFTA, a bilateral agreement, codifies and enhances a number of the procedures followed under the GATT.²⁸ Specifically, chapter 18 of the CFTA establishes a Binational Trade Commission (the Commission) to oversee CFTA implementation and to resolve certain interpretative disputes.²⁹ Under the CFTA, the signatory countries (the Parties) may request consultations "regarding any actual or proposed measure or any other

24. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 20, 1991, in "THE DUNKEL DRAFT" FROM THE GATT SECRETARIAT, section S, paras. 4.1, 14.4, 20.3.

25. A "trade-off" for this step towards automaticity is the institution of an appeal process. The new dispute resolution procedures would provide for a standing appellate body composed of seven members, three of whom would serve on any particular case on a rotating basis, which would review panel decisions subject to prescribed deadlines. *See, e.g., id.* para. 15.

26. *Id.* para. 20.3.

27. The guidelines provide that "[t]he level of suspension of concessions or other [authorized compensatory measures] . . . shall be equivalent to the level of nullification or impairment." *Id.* para. 20.4. The measures must be temporary and applied only until such time as the measure found to be inconsistent with the GATT is removed or some other mutually satisfactory agreement is reached. *Id.* para. 20.6.

28. As with most of the CFTA, chapter 18 continues to apply between the United States and Canada until the NAFTA becomes effective, at which time disputes between these two countries will be governed by the latter agreement. CFTA, *supra* note 3, ch. 18.

29. *Id.* art. 1802.

matter that it considers affects the operation of this Agreement.’’³⁰ If the Parties fail to resolve the matter through consultations, either Party may request a meeting of the Commission, which may in turn employ various means of dispute resolution, including mediation, binational reviews, and binding arbitration.³¹ While the Parties may use the CFTA’s dispute resolution procedures for disputes also covered by various GATT agreements to which both countries are signatories, a Party must select either the CFTA or the GATT as the exclusive forum.³²

The CFTA offers a significant improvement to the existing GATT procedures by requiring the Commission to form a panel upon the request of *either* Party and providing deadlines for various stages of the resolution of the dispute.³³ As compared to the GATT and the Dunkel text, this rule injects a certain amount of automatism into the panel process. At the same time, however, panel rulings serve only as recommendations to the Commission; each Party retains its ultimate ability to object.³⁴ Nonetheless, the CFTA’s requirement—that the Commission “shall agree on the resolution of the dispute, which normally shall conform with the recommendation of the panel”³⁵—provides a strong admonition to the Parties to reach an acceptable solution.

1. *Implementation and Retaliation*

In contrast to the GATT, the CFTA authorizes the complaining Party to retaliate where a panel ruled in its favor even if the Commission has not agreed on the resolution.³⁶ This significant provision eliminates the offending party’s ability, under the GATT, to block authorization to retaliate. It also reflects a closer relationship between the CFTA Parties, which share similar heritages, political institutions, legal structures, and the like.³⁷

Thus far, panels formed under chapter 18 of the CFTA have issued three rulings. The most recent decision concerned the method for determining whether

30. *Id.* art. 1805.

31. The provisions of chapter 18 do not apply to matters covered by the dispute resolution provisions on financial services (chapter 17) and binational panel dispute settlement in antidumping and countervailing duty cases (chapter 19). *Id.* art. 1801.

32. *Id.*

33. *Id.* art. 1807.

34. *Id.* art. 1807(2). *But see id.* art. 1806 (a dispute can be sent to binding arbitration only by action of the Commission). In other words, *both* Parties must agree to submit the dispute to binding arbitration as the results are mandatory.

35. *Id.* art. 1807(8).

36. *Id.* art. 1807(9).

If the Commission has not reached agreement on a mutually satisfactory resolution . . . within 30 days of receiving the final report of the panel (or such other date as the Commission may decide), and a Party considers that its fundamental rights (under this Agreement) or benefits (anticipated under this Agreement) are or would be impaired by the implementation or maintenance of the measure at issue, the Party shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute.

Id.

37. As the CFTA is a bilateral agreement, questions of third Party participation in dispute resolution procedures, or the impact of a ruling on other Parties to the agreement, do not arise.

certain merchandise was entitled to preferential tariff treatment under the CFTA.³⁸ The question turned on which specific costs of production were intended to be included in valuation for rules of origin purposes under the agreement. The panel's analysis was legal in nature and focused on the text of the CFTA's origin provisions, taking guidance from the Vienna Convention's admonition to interpret a treaty "in accordance with [its] ordinary meaning."³⁹ The panel ruled in favor of Canada, concluding that interest expenses on unsecured loans could be included when determining "value added" for rules of origin purposes. U.S. Customs Service rules have since been amended to comply with the ruling.⁴⁰

Another panel upheld the U.S. complaint against Canada's requirements that 100 percent of salmon and herring catches in Canadian waters be landed in Canadian ports before exporting the catches to the United States.⁴¹ The CFTA articles applicable to this landing requirement incorporated by reference GATT obligations concerning trade-restricting measures and GATT exceptions from these obligations, thereby requiring the CFTA panel to analyze GATT cases interpreting these provisions.⁴² The panel ruled that a 100 percent landing requirement was inconsistent with the GATT's article XX(g) exception.⁴³ Specifically, the panel determined that the measure was not necessary to achieve the stated data collection goals, was not " 'primarily aimed at' conservation and thus cannot be considered a measure 'relating to the conservation of an exhaustible natural resource' within the meaning of GATT Article XX(g)," which allows exceptions to GATT obligations.⁴⁴ At the same time, however, the panel concluded that Canada would be authorized to impose landing requirements that were less restrictive than the ones under review and that were designed to meet specific data-collection needs.⁴⁵ This ruling thus set the stage for the parties to resolve the dispute through a negotiated settlement.⁴⁶

38. In the Matter of Article 304 and the Definition of Direct Cost of Processing or Direct Cost of Assembling, USA-92-1807-01, 1992 WL 174413 (U.S.-Can. F.T.A. Binational Panel June 8, 1992). Canada initiated the case, reportedly at the request of G.M. and Toyota, which were planning a joint venture in Canada for the production of vehicles for export to the United States.

39. *Id.* at 13 (citing Vienna Convention on the Law of Treaties, art. 31). In so noting, the panel declined to rely on allegedly analogous provisions, such as GAAP, FASB regulations, prior Customs rulings and, even another chapter of the CFTA. Nonetheless the Panel did not entirely eschew consulting extrinsic sources and considered certain accounting treatises.

40. 57 Fed. Reg. 46,502 (1992) (amending 19 C.F.R. § 10.305(a)(3)(iv)).

41. In the Matter of Canada's Landing Requirement for Pacific Salmon and Herring, CDA 89-1807-01, 1989 WL 250302 (U.S.-Can. F.T.A. Binational Panel Oct. 16, 1989).

42. The panel also was required to determine, as a factual matter, whether the measures operated to achieve their goals in order to determine if they were justified under the incorporated GATT standards. *Id.* at 34-35.

43. *Id.* at 26-49.

44. *Id.* at 51-52.

45. *Id.*

46. Under the four-year agreement beginning in 1990, U.S. producers were afforded direct access to a certain percentage of salmon and herring harvested in British Columbian waters (i.e., no landing requirement) and Canadian inspectors were permitted access to certain vessels transporting fish from British Columbia fishing grounds to the United States.

Finally, a split panel ruling resulted from a Canadian challenge to U.S. restrictions on the sale or transport of lobsters under a specified size.⁴⁷ The panel members disagreed on whether the restriction should be analyzed under GATT article XI on border measures (as incorporated by CFTA article 407) or GATT article III (as incorporated by the CFTA's national treatment provisions). Neither Party endorsed the split decision and instead referred the matter to a Joint Trade Commission. Canada then rejected the Commission's proposal, and no resolution has been reached.⁴⁸

In sum, the use of the CFTA panel mechanism to date suggests that it can be a useful means of resolving trade disputes between the Parties or, at least, of clarifying issues and paving the way for negotiated solutions. Where panel decisions are not unanimous (and especially if panel members were to vote along national lines), the approach may perhaps be less effective; it leaves a disputing party with the ability to argue that the panel ruling should be disregarded.

II. The Dispute Resolution Under the NAFTA: Refinements on an Evolving Theme

The general dispute resolution provisions of the NAFTA,⁴⁹ which build on the CFTA approach, cover a broader range of disputes and contain additional mechanisms necessitated by the NAFTA's trilateral (or potentially multilateral) nature.⁵⁰ The expansion of dispute resolution to nontraditional subjects raises issues concerning the integrity of the process itself, including the prospects of public participation, the treatment of expert evidence on technical subjects, and transparency.

A. NEW HORIZONS

Like other prior trade agreements, the NAFTA, by its terms, covers "all disputes between the Parties regarding the interpretation or application" of the agreement or situations where "a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of [the] agreement or cause nullification or impairment" of the agreement.⁵¹ The NAFTA,

47. Lobsters from Canada, USA 89-1807-01, 1990 WL 299945 (U.S.-Can. F.T.A. Binational Panel May 21, 1990). The United States justified the restriction, inter alia, as a conservation measure.

48. JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE TRADE AGREEMENT 770.1 (1990).

49. NAFTA, *supra* note 1, arts. 2003-19. Chapter 20's dispute resolution procedures do not apply to reviews of national antidumping and countervailing duty determinations subject to chapter 19 or to investment disputes between a Party and an investor of another Party under chapter 11. *Id.* art. 1138. See also *id.* art. 1017 on special rules regarding bid challenges to government procurement and *id.* arts. 1714-18 containing special rules on matters relating to intellectual property.

50. The NAFTA eventually could include more than the original three signatories if other countries join pursuant to the agreement's accession provision. *Id.* art. 2204.

51. *Id.* art. 2004.

therefore, covers not only situations where the agreement has actually been violated (that is, measures "inconsistent with the obligations of this Agreement"), but, in certain situations, measures that nullify or impair a Party's benefit under the agreement.⁵²

The standard promulgated by the NAFTA is not new and follows from both the GATT and the CFTA; however, the broad range of subjects covered by the NAFTA is new. Because of chapter 20's standard, the NAFTA's dispute resolution mechanism will now apply to disputes between the Parties covering the wide-ranging rules on such nontraditional and complex subjects as the environment, health, sanitary and phytosanitary standards,⁵³ intellectual property, and financial services.⁵⁴ While these subjects have been covered to some degree in prior agreements,⁵⁵ the NAFTA has established the most comprehensive rules in these areas. Hence, in contrast to prior agreements, the NAFTA will likely expand the application of the dispute resolution to a myriad of new contentious areas as the Parties seek to adjudicate whether these new rules have been followed.

The idea of dispute resolution in these areas has provoked controversy in the United States, especially in Congress, and has raised fears that an international tribunal could nullify or revoke U.S. state or local environmental, safety, and health laws and regulations.⁵⁶ Environmentalists were concerned that this would result in a loss of U.S. sovereignty over its environment. While the sovereignty issues indeed are sensitive, and vigilance in this area is essential, these concerns are for the most part misplaced. The NAFTA expressly recognizes the right of each Party to maintain its own environmental, sanitary, and phytosanitary standards,⁵⁷ and limits challenges to the particular standards set forth in the agreement.

1. *Environmental Disputes Under the NAFTA*

The resolution of disputes between the NAFTA Parties on environmental, phytosanitary, and sanitary standards illustrates that the NAFTA dispute resolution mechanism can potentially be used to seek changes in the laws or other measures of a Party that do not meet the NAFTA's rules. Specifically, a Party

52. Under annex 2004, subject to certain exceptions, a Party can seek dispute resolution on the grounds of nullification or impairment of benefits provided by NAFTA with respect to Part Two (Trade in Goods) except for those provisions of annex 300-A (Automotive Sector) or chapter 6 (Energy) relating to investment, Part Three (Technical Barriers to Trade), Part Six (Intellectual Property), and Part Twelve (Cross-Border Trade in Services). *Id.* annex 2004(1), (2). *See id.* art. 2101 (noting exceptions).

53. Sanitary and phytosanitary measures are those applied to protect human or plant life or health from risks associated with pests and diseases, additives, contaminants, and toxins in food and beverages.

54. NAFTA, *supra* note 1, art. 104.

55. *See, e.g.*, Agreement on Technical Barriers to Trade, the GATT Standards Code, 1979.

56. *See, e.g.*, Letter to the Honorable Max Baucus from Natural Resources Defense Council (June 26, 1992), reprinted in *INSIDE U.S. TRADE* (July 17, 1992).

57. NAFTA, *supra* note 1, art. 904.

may seek redress through the NAFTA's dispute settlement regime with respect to any environmental or other standards established by another Party that: (1) affects trade between the Parties⁵⁸ and (2) does not conform to the NAFTA's substantive rules.⁵⁹ Under the NAFTA, sanitary and phytosanitary standards established by a Party must be "scientifically justifiable," while other standards (for example, environmental standards) need only serve a "legitimate objective," which may include protection of the environment.⁶⁰ Thus, under NAFTA's scientific standard, sanitary and phytosanitary measures must be:

- (a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;
- (b) not maintained where there is no longer a scientific basis for it; and
- (c) based on a risk assessment, as appropriate to the circumstances.⁶¹

Under rules derived from the GATT, environmental and other standards also must not create an "unnecessary obstacle" to trade⁶² or discriminate against goods from other Parties.⁶³

By establishing such new rules in the environmental and other areas, the NAFTA will expand the range of issues to which its dispute resolution can be applied. Moreover, the NAFTA standards themselves in these areas are subject to a variety of uncertainties that may provide fertile ground for litigation before a dispute panel. For example, the agreement neither expressly states what are acceptable "scientific principles" nor defines the "relevant factors" that must be taken into account in reaching a "scientific justification" for a particular

58. Article 709 of the NAFTA (sanitary and phytosanitary measures) speaks in terms of measures that "affect trade between the Parties," while article 901 (standards-related measures) refers to measures that "affect trade in goods or services between the Parties." No substantive difference between these articles appears to exist.

59. In contrast, with respect to standards that affect investment (rather than trade in goods or services), the NAFTA only states disapproval of relaxed enforcement, or waiver, of environmental protections and provides only for consultations with a Party that engages in such trade-offs. NAFTA, *supra* note 1, art. 1114(2). No rules are established that can be subjected to dispute resolution.

60. The NAFTA provides only an illustrative list of "legitimate objective[s]" but states that "protection of domestic production" is not a permissible objective. *Id.* art. 915.

61. *Id.* art. 712(3).

62. For environmental standards an "unnecessary obstacle" will *not* be found where: (a) it can be shown that the purpose of the standard is to achieve a legitimate objective (i.e., protecting the environment); and (b) the standard does not work to exclude goods that meet that objective. *Id.* art. 904(4). Sanitary or phytosanitary standards must be adopted and applied "only to the extent necessary to achieve its appropriate level of protection . . ." *Id.* art. 712(5). A Party is also prohibited from taking sanitary and phytosanitary measures that create a disguised restriction on international trade. *Id.* art. 712(6).

63. *Id.* arts. 712(4), 904(3). Specifically, sanitary and phytosanitary measures governed by chapter 7 must not arbitrarily or unjustifiably discriminate between its goods and "like goods" of another Party. *Id.* art. 712(4). For other standards covered by chapter 9, the Parties must accord goods and services of the other Parties' treatment no less favorable than "like" goods and services produced domestically. *Id.* art. 904(3)(b). This phraseology appears to impose a broader obligation not to discriminate in applying environmental standards as compared to sanitary and phytosanitary standards because the term "similar" envisions a class of goods larger than the class of "like" goods.

phytosanitary standard. Additionally, the agreement does not clearly delineate what will *not* constitute an unnecessary obstacle to trade. Moreover, the nature of “risk assessment”⁶⁴ that the NAFTA requires before adopting a standard is unclear and will necessarily be a case-by-case determination.

The NAFTA’s vague language on these important criteria may thus invite cases requiring interpretation by arbitral panels and may give such panels considerable latitude in shaping the level of acceptable standards and the means used in adopting them. In analyzing these questions, panels will no doubt reach for analogous jurisprudence such as that under the GATT.

The use of chapter 20’s procedures in these complex areas also means that the NAFTA dispute resolution process is likely to evolve in practice. Among important matters to be considered, as discussed below, are how to handle expert testimony and advice in these complex areas and how to accommodate the role of non-Party constituencies that seek a voice in decisions on such sensitive issues as the environment.

B. RULES AND PROCEDURES

The NAFTA establishes a three-step dispute resolution mechanism: (1) consultations between the disputing Parties; (2) a meeting with the Commission if consultations fail; and (3) as a last resort, the convening of an arbitral panel. The NAFTA also creates a series of detailed rules governing dispute resolution, which build on prior agreements. The NAFTA requires the Parties to establish Model Rules of Procedure, which undoubtedly will be shaped to accommodate the wide array of disputes subject to chapter 20. The Model Rules are likely to be the vehicle for ensuring the integrity of dispute resolution as it evolves to accommodate disputes with respect to the complex subjects that the NAFTA covers.

1. Consultations

Like the GATT and the CFTA, the NAFTA contains the usual provisions encouraging the Parties to cooperate and consult on implementation and interpretative issues.⁶⁵ The NAFTA requirement that a Party requesting consultations do so in writing to all the other Parties not only provides notice to the other Parties, but also affords the Parties the opportunity to consider third-Party participation in the dispute resolution process.⁶⁶ As discussed below, the NAFTA allows a third Party with a “significant” interest to participate in the consultations upon proper notice.⁶⁷ Expanding on the CFTA, which provides for consultations and encourages the Parties to “make every attempt to arrive at a mutually satisfactory

64. *Id.* arts. 715, 907.

65. *Id.* art. 2003.

66. *Id.* art. 2006(1)–(3).

67. *Id.* art. 2006(3).

resolution,’’⁶⁸ the NAFTA also requires the Parties to provide sufficient information for analyzing the dispute and to seek to avoid any resolution that adversely affects another Party.⁶⁹

2. *Commission Meetings*

Should the Parties fail to resolve the matter through consultations in thirty days (or forty-five days if a third Party joins the consultations),⁷⁰ any Party may call a meeting of the Free Trade Commission (Commission),⁷¹ which comprises cabinet-level representatives of the Parties or their delegates.⁷² The NAFTA, like the CFTA, avoids creating private rights of action for citizens of the NAFTA signatories; any individual claiming that another Party has violated the agreement must have its government raise the claim before the Commission and request establishment of a panel, except with respect to investment disputes subject to chapter 11.⁷³

The Commission, in endeavoring to “resolve the dispute promptly,” may: call upon technical advisers or create working groups as expert groups; use good offices, mediation, conciliation or other means of alternative dispute resolution procedures; or make recommendations.⁷⁴

3. *Arbitral Panels*

If the Commission does not resolve the dispute within thirty days after it is convened, any consulting Party may require that a panel be established.⁷⁵ As under the CFTA, the NAFTA charges the panel with making findings of fact that determine whether the action taken by the defending country is inconsistent with its obligations under the NAFTA and making recommendations for resolutions.⁷⁶

68. CFTA, *supra* note 3, art. 1804.

69. NAFTA, *supra* note 1, art. 2006(5).

70. *Id.* art. 2007(1)(a)–(b). The NAFTA establishes shorter time periods for disputes involving perishable agricultural goods. *Id.* art. 2007(1)(c).

71. *Id.* art. 2007(1). The Commission also may be convened if the Parties have consulted under the GATT in matters concerning environmental, sanitary and phytosanitary measures, or standards-related measures, or the following subject-specific consultation procedures in other chapters of NAFTA: article 513 (Cooperation-Working Group and Customs Subgroup), article 723 (Sanitary and Phytosanitary Measures—Technical Consultations) and article 914 (Standards-Related Measures—Technical Consultations). *Id.* art. 2007(2).

72. *Id.* art. 2001.

73. *Id.* art. 2021. Significantly, the NAFTA permits investors to submit certain investment disputes against a Party to binding international arbitration. *Id.* ch. 11, sec. B.

74. *Id.* art. 2007(4)–(5). The NAFTA omits the CFTA provision establishing specific procedures on binding arbitration, which was deemed to limit the flexibility of the Parties to reach a negotiated settlement. However, binding arbitration could be undertaken if the Parties so decided and would be governed by the procedures that they might agree to at that time.

75. NAFTA, *supra* note 1, art. 2008(1). Panels may not be established for disputes regarding any proposed emergency action under chapter 8.

76. *Id.* art. 2016(2)(a)–(c).

a. Panel Composition

The NAFTA negotiators designed the rules on panel selection to ensure the integrity of the dispute resolution process, accommodate participation by multiple parties, and limit a Party's ability to block resolution of the dispute. Much like the CFTA, the NAFTA panels will be composed of five members, who will normally be chosen from a trilaterally agreed upon roster of trade, legal, and other experts, including nationals from non-Parties.⁷⁷ In order to foster the integrity of the process, the rules require that the roster members: (1) must be independent of and not affiliated with any Party; and (2) must comply with a code of conduct established by the Commission.⁷⁸ A special roster will be established for experts in disputes involving financial services.⁷⁹

Codifying the practice under the CFTA, the rules require the disputing Parties to select the chairman before selecting the other panelists. In the event of disagreement, a Party (or Parties on the same side of a dispute) will be selected by lot to choose a chairman who is not a citizen of the selecting country (or countries).⁸⁰ If a dispute involves two Parties, each disputing Party shall then select two members who are citizens of the other Party within fifteen days of selecting the chair.⁸¹ In a dispute involving more than two disputing Parties, Parties will select panelists on each side of the dispute, within fifteen days, from citizens of the Parties on the other side of the dispute.⁸² Again, if any disputing party fails to select a panelist, the panelist shall be selected by lot.⁸³

b. Submissions and Argument

The Model Rules of Procedure will provide for written submissions, rebuttals, and at least one oral hearing.⁸⁴

c. Timing

The NAFTA establishes time limits to ensure prompt resolution. Unless the disputing Parties agree otherwise, a panel must, within ninety days of its selection or such other time period established by the Model Rules of Procedure, issue a confidential initial report to the disputing Parties. Disputing Parties will then have fourteen days in which to provide comments to the panel. The panel must issue its final report to the disputing Parties within thirty days of the presentation of its initial report. The panel may not, in its initial or final report, disclose which panelists are associated with majority or minority opinions (thereby helping to ensure the

77. *Id.* art. 2010.

78. *Id.* art. 2009.

79. *Id.* art. 1414(2).

80. *Id.* art. 2011(1)(b)-(2)(b). The time limits for selection vary depending on whether the dispute involves two or more Parties.

81. *Id.* art. 2011(1)(c).

82. *Id.* art. 2011(1)(d), (2)(c), (2)(d).

83. *Id.* art. 2011(2).

84. *Id.* art. 2012.

integrity of the deliberations and avoid claims of national bias). The report will then be transmitted to the Commission, which will normally publish it.⁸⁵

d. Forum Selection

If a dispute could be brought under both the GATT and the NAFTA, the complaining Party may choose either forum.⁸⁶ If a complaining Party intends to initiate GATT dispute resolution on grounds that are substantially equivalent to those available under the NAFTA, however, that Party must so notify other Parties. If a third Party wants to bring the same case under the NAFTA, the two complaining countries will consult with a view to agreement on a single forum. In light of the enhanced standing of a third Party in a NAFTA dispute (as compared to GATT dispute resolution), if those countries cannot agree, the dispute settlement proceeding “normally” will be heard by a NAFTA panel.⁸⁷

In contrast, if a dispute arising under both the NAFTA and GATT is subject to certain environmental and conservation agreements⁸⁸ the complaining Party (that is, a NAFTA signatory) has the right to proceed exclusively under the NAFTA. This procedure is also the rule for any disputes that arise under the chapters on sanitary and phytosanitary measures (chapter 7) or standards-related measures (chapter 9).⁸⁹ These requirements thus prevent a Party from avoiding the substantive rules in these areas under the NAFTA by seeking dispute resolution under an agreement that does not impose the standards required by the NAFTA.

C. THIRD-PARTY PARTICIPATION AND EFFECT OF PANEL RULINGS

Under the NAFTA any third Party that believes it has a “substantial interest” in a matter under dispute may, as of right, participate in the consultations upon providing proper notice.⁹⁰ Further, a third Party that considers itself to have a “substantial interest” in a matter under dispute may, upon the provision of proper notice, participate in the panel proceedings—either “as a complaining Party,”⁹¹ or as a noncomplaining participant allowed to attend hearings, make oral and written submissions to the panel, and receive the written submissions of other Parties.⁹² As discussed below, the real difference in these forms of third-Party participation concerns the effect of panel rulings on the third Party (that is, the

85. *Id.* arts. 2012, 2016, 2017.

86. *Id.* art. 2005(1).

87. *Id.* art. 2005(2), (7).

88. *Id.* art. 104.

89. *Id.* art. 2005(3).

90. *Id.* art. 2006(3). At the same time, this rule is subject to the right of the Commission to provide otherwise in its rules and procedures. Thus while it remains to be seen exactly how this provision will be applied, the NAFTA at least establishes the principle of third-Party standing.

91. *Id.* art. 2008(3). The provision requires written notification to the other Parties within seven days after a panel has been requested.

92. *Id.* art. 2013.

ability of the third Party to seek countermeasures or the establishment of a separate panel at a later time).

1. *Effects of Panel Rulings: Compensation*

As under the CFTA, the NAFTA contains an admonition that the disputing Parties “shall agree” on the resolution of the dispute on receipt of the final report of a panel.⁹³ The NAFTA also follows the CFTA provision that authorizes a Party to impose compensatory measures if the disputing Parties do not reach agreement within thirty days of receiving the final report. This authority extends only to the Party that initiated the dispute or joined in it as a “complaining Party” under article 2008(3).⁹⁴ Thus, third Parties that choose to participate as a non-complaining Party in panel decisions have no authorization to impose such measures.

Significantly, if another Party did not join the proceeding as a complaining Party, that Party is also precluded from initiating or continuing a separate dispute settlement proceeding under the NAFTA or the GATT regarding the same matter without a “significant change in economic or commercial circumstances.”⁹⁵ This rule of arbitral economy thus forces Parties to participate in a dispute or be silent as to that issue.

Regarding the nature of relief, the NAFTA provides that, “wherever possible,” the resolution shall entail the elimination of the offending measure that was the subject of the dispute or, failing such a resolution, compensation.⁹⁶ The agreement also provides guidelines on the nature and duration of compensatory measures.⁹⁷ A disputing party, but not a noncomplaining third Party, may also request, and the Commission shall establish, a panel to determine if the level of compensatory measures taken is “excessive.”⁹⁸

D. TRANSPARENCY AND NON-PARTY PARTICIPATION

1. *Confidentiality*

At the consultation stage, the NAFTA requires the Parties “to treat any confidential or proprietary information exchanged . . . on the same basis as the Party

93. *Id.* art. 2018(1). *But see* CFTA, *supra* note 3, art. 1807(8), which provides that the Commission shall agree on a resolution. Because the Commission comprises representatives of all Parties, the NAFTA provides instead that the disputing Parties shall reach agreement so that nondisputants may not block any agreement.

94. NAFTA, *supra* note 1, art. 2019(1).

95. *Id.* art. 2008(4).

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

97. *Id.* arts. 2019(1)–(2). Unless the dispute is resolved, a “complaining Party may suspend the application to the Party complained against of benefits of equivalent effect.” Under the NAFTA’s guidelines, any benefits suspended should be in the same sector as the offending measure unless the complaining Party considers it impractical or ineffective to limit countermeasures to that sector. *Id.* art. 2019(2).

98. *Id.* art. 2019(3).

providing the information.⁹⁹ The NAFTA also provides that the panel's hearings, deliberations, initial report, and all written submissions to and communications with the panel shall be confidential.¹⁰⁰ Unless the Commission decides otherwise, the final report shall be published fifteen days after it is submitted to the Commission.¹⁰¹

These provisions do not vary significantly from the GATT or the CFTA¹⁰² (except that a GATT panel report, even if final, is not published until the Council adopts it). The NAFTA provisions may be affected, however, by a recent district court decision holding that U.S. submissions to GATT panels and unadopted GATT panel reports must be released to the public upon a request under the Freedom of Information Act.¹⁰³ The United States Government initially appealed, but ultimately withdrew the appeal. Thus, the ruling stands as precedent and must be dealt with. Potentially, a similar case concerning the NAFTA panel proceedings could yield a similar result. Accordingly, the ruling suggests that U.S. law may need to be changed if panel confidentiality is to be maintained under the NAFTA.

On the other hand, the ruling has opened the door for the potential modification of the NAFTA's confidentiality rules. Specifically, many non-Party observers favor the enhanced openness of panel proceedings and may support a rule requiring the release of panel submissions. These transparency considerations are likely to arise often in the context of particular cases and may very well be addressed when the Parties draft the Model Rules of Procedure. The Parties need to consider whether and to what extent each Party has to allow the public release of Party submissions.

2. Participation of the Public

Significantly, the NAFTA does not provide any mechanism for the participation of non-Parties in dispute resolution, including interested members of the public, affected companies, and the like. Interpretative disputes between the Parties under previous trade agreements typically excluded such nongovernmental parties, which traditionally have no standing under international law. This contrasts sharply, however, to the practice in the U.S. environmental field (and other regulatory areas) where interested parties have long had standing under various applicable laws and rights to participate in rulemaking and adjudicatory proceedings. Indeed, affording the public notice and the right to participate have been hallmarks of the U.S. regulation of health, safety, and the environment. Thus the prospect of nonparticipation in disputes under chapter 20 concerning the NAFTA

99. *Id.* art. 2006(5)(b).

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

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

102. *See, e.g.*, CFTA, *supra* note 3, art. 1807(8).

103. *Public Citizen v. Office of the U.S. Trade Representative*, 804 F. Supp. 385 (D.D.C. 1992).

legality of U.S. environmental, safety, and health measures has raised some concerns in the United States.

While the NAFTA has not directly provided for such non-Party participation, it does not appear to preclude it. Hence, some form of public participation could be provided for in the Model Rules of Procedure or in a particular case if the Parties agree to this mechanism.¹⁰⁴ Additionally, a mechanism could be established where each disputing Party could provide its interested nationals with the opportunity to be heard on the dispute, and each Party then could provide such public input to the panel.¹⁰⁵

3. *Expert Testimony*

The NAFTA has drawn attention for its provisions permitting, but not requiring, panels to use technical experts in environmental, health, safety, or other scientific matters. On request of a disputing Party or on its own initiative, unless the disputing Parties disapprove, and subject to any terms and conditions upon which the Parties might agree, the panel may request expert testimony¹⁰⁶ or “may request a written report of a scientific review board on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing Party in a proceeding.”¹⁰⁷ The complexity of technical, environmental, and other subjects is likely to lead panels increasingly to seek expert advice, and such expert advice may very well help to encourage broader acceptance of panel reports in these areas.

The provisions on experts raise several issues. First, some have argued that the use of experts be made mandatory in environmental and other regulatory disputes, much as it would be in certain U.S. environmental proceedings. By making this provision permissive, the NAFTA allows the Parties the flexibility to use experts as needed. The practice over time will enable the Parties to decide in what types of cases expert participation is most useful and, hence, whether it should be made mandatory.

A second issue concerns the objectivity of experts. Maintaining objectivity will be critical to the integrity of the panel process and undoubtedly will involve in-depth review of an expert’s prior work and affiliations. On this issue, the NAFTA plainly seeks objectivity. Specifically, where any NAFTA panel establishes a scientific board, the board members are required to be selected by the panel from among highly qualified, independent experts in scientific matters, after consultations with the disputing Parties and the scientific bodies mentioned in

104. NAFTA, *supra* note 1, art. 2012.

105. The NAFTA also appears to leave the door open to these proposals in article 2014, although the “[r]ole of [e]xperts” provides that, subject to the agreement of the Parties, a “panel may seek information and technical advice from *any person or body* that it deems appropriate” *Id.* art. 2014 (emphasis added).

106. *Id.* art. 2014.

107. *Id.* art. 2015.

the Model Rules of Procedure. The Model Rules can be a vehicle for establishing additional safeguards to ensure expert independence.

A final issue concerns the ability of Parties to examine the expert's credibility, factual assumptions, hypotheses, and findings. The NAFTA provides participating Parties an opportunity to comment on the issues to be referred to a scientific board and on the board's report to the panel.¹⁰⁸ However, there is currently no opportunity for cross-examination of the experts on their background, assumptions, factual bases, and findings. Here too, the Model Rules, when drafted, may serve as a vehicle for allowing Parties to challenge and probe the expert testimony or advice.¹⁰⁹

III. Conclusion

In sum, the NAFTA's coverage of nontraditional areas and its strengthened procedures reflect another step in the ongoing evolution of dispute resolution under international trade agreements. The NAFTA's improved procedures help to ensure the integrity and effectiveness of the dispute resolution and, hence, encourage Parties to utilize this consensual mechanism as a means of resolving contentious trade disputes. The dispute resolution process thus may reinforce the resolution of trade issues under the rules of international law rather than the "go it alone" rules of the international trading jungle.

As the range of matters subject to dispute resolution under trade agreements expands, we can anticipate that, in practice, the dispute resolution process itself is likely to be further adjusted to accommodate these new types of disputes. Issues of transparency, public participation, and the role of experts will likely be addressed in the NAFTA Model Rules of Procedure and on a case-by-case basis. The willingness of the NAFTA Parties to refine the agreement's dispute resolution mechanisms as the body of experience grows will help to ensure that chapter 20 is perceived as a fair and effective vehicle for resolving a broad range of trade disputes in North America.

108. *Id.* art. 2015(3).

109. Standards set forth in Federal Rules of Evidence, *see, e.g.*, rules 701 to 706, could serve as an appropriate analogy in preparing these rules. For example, rule 705 states that "[t]he expert may . . . be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705.