GATT AND NAFTA: MARRYING EFFECTIVE DISPUTE SETTLEMENT AND THE SOVEREIGNTY OF THE FIFTY STATES

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> [T]he sovereignty issue is a red herring. . . . [I]f our rights are being trampled we are going to be able to fix it.[1]

INTRODUCTION

In 1776, Adam Smith admonished the world that "[t]he most effectual expedient . . . for raising the value of . . . surplus pro[]duce, for encouraging its increase . . . would be to allow the most perfect freedom to the trade of all such mercantile nations."[2] Since that time, international trade has reached immense proportions as nations increasingly depend on formal and reliable free trade regimes.[3] By virtue of its huge import market and strong export industries, the United States remains at the center of global trade.[4] With the ever increasing complexity and prevalence of international trade, binding trade agreements such as the General Agreement on Tariffs and Trade (GATT)[5] and the North American Free Trade Agreement (NAFTA)[6] will play a vital role in the

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1. 140 CONG. REC. S15,342 (daily ed. Dec. 1, 1994) (statement of Sen. Dole).

2. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 670 (R. H. Campbell et al. eds., 1976) (1776) (describing the advantages of free trade for landed nations).

3. There are 97 preferential trade agreements between various nations established under Article XXIV of GATT, including the European Economic Community, the African Common Market, the Latin America Free Trade Association, and the Israel-United States Free Trade Agreement. GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 797–808 (6th ed. 1994) [hereinafter GATT Index].

4. *See* PATRICK LOW, TRADING FREE: THE GATT AND US TRADE POLICY 10–11 (1993) ("In the twenty-eight years from 1960 to 1988, for example, the share of imports in U.S. gross domestic product (GDP) rose from 4.7 percent to 9.7 percent (in constant dollars). Over the same period, the export share in U.S. GDP rose from 5.2 percent to 11.4 percent.") (citation omitted).

5. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5–6, at A5, 55 U.N.T.S. 187 (1952) [hereinafter GATT 1947]. The current amended version of the GATT appears at 4 GATT BISD 1 (1969).

6. The North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32

legal relationships between the United States and its trading partners.

While scholars of jurisprudence may debate the necessity of efficacious application of law in any legal system,[7] critics of the international legal system regularly cite its lack of effective dispute settlement and enforcement mechanisms as a major shortcoming.[8] In the area of international trade, nations have recognized the importance of maintaining a stable economic system and have had varying degrees of success in adopting legal structures to ensure trade stability.[9] GATT and NAFTA represent significant progress toward enhancing international economic welfare through binding legal obligations. However, a tension persists between international legal obligations like GATT and NAFTA and domestic jurisdiction because nations fear losing their sovereignty to supranational forces.[10] The United States has historically feared loss of sovereignty to world government, and the individual states have often pushed hardest for protection of their interests in the face of international economic agreements.

GATT and NAFTA inevitably curtail state sovereignty to a certain degree. However, the Constitution and caselaw grant significant powers to the federal government in the international economic arena, and thus the states have traditionally exercised a lesser degree of sovereignty in this field. Compelling arguments dictate a unified international trade policy that only the federal government can effectuate. Moreover, the agreements do not limit sovereignty impermissibly because they provide safeguards to pro-

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I.L.M. 296–456 & 605–800 [hereinafter NAFTA].

7. *See* GEORGE C. CHRISTIE, LAW, NORMS AND AUTHORITY 12–15 (1982) (describing the debate over the relationship between the validity of legal norms and their "efficaciousness," i.e., their effective application when situations demand application).

8. *See, e.g.*, BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 14–15 (1991).

9. *See* LOW, *supra* note 4, at 9–33.

10. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 292 (1990):

> [R]eserved domain [of domestic jurisdiction] is mysterious only because many have failed to see that it really stands for a tautology. However, if a matter is *prima facie* within the reserved domain because of its nature and the issue presented in the normal case, then certain presumptions against any restriction on that domain may be created.

See also Tycho H.E. Stahl, *Liberalizing International Trade in Services: The Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 429–33 (1994) (describing sovereignty and national autonomy concerns that arise in response to international trade in services) (citation omitted).

tect individual state laws, maintaining a proper balance between state sovereignty and the advantages of international trade. Arguments that surfaced during debates over ratification of NAFTA and the Uruguay Round Agreements of GATT illustrate the tension between effective international trade regimes and state sovereignty concerns. By comparing the dispute resolution mechanisms of GATT and NAFTA in light of this international-domestic dichotomy, this Note focuses on sovereignty issues that arise when the laws of one of the fifty states conflict with obligations arising from international trade agreements and international trade dispute settlement bodies.

In order to understand the perceived risk to state sovereignty posed by GATT and NAFTA, Part I compares and contrasts dispute settlement under the Uruguay Round Agreements and NAFTA, with an emphasis on the binding nature of dispute settlement under both agreements. This Part investigates the structure of the World Trade Organization (WTO) and its Dispute Settlement Body (DSB) as well as two of NAFTA's dispute resolution mechanisms—one dealing with general disputes and the other with specific disputes over dumping and subsidies. The function and process of dispute resolution panels, including provisions for appellate review and enforcement, make the new mechanisms both more effective and potentially more threatening to state sovereignty.

Part II then discusses how these trade agreements may affect state sovereignty. This Part discusses dispute settlement under GATT and NAFTA to show that both treaties include safeguards sufficient to protect state sovereignty interests while preserving the primary goal of trade liberalization. Opponents have characterized the WTO in GATT as a wholesale surrender of national and state sovereignty to an international bureaucracy headquartered in Geneva.[11] Similarly, NAFTA dispute resolution mechanisms have received considerable criticism because they allegedly sacrifice sovereignty and domestic judicial review to international arbitral panels.[12] However, practically and constitutionally, the federal government is and should be the primary actor in international trade policy. Although leaders cannot neglect state sovereignty

11. *See infra* notes 161–67 and accompanying text.
12. *See infra* notes 208–12 and accompanying text.

issues, the structure of GATT and NAFTA does not damage state sovereignty.

I. A COMPARISON OF GATT AND NAFTA DISPUTE RESOLUTION MECHANISMS

A. *Binding International Agreements*

One element shared by GATT and NAFTA is a greater commitment by member nations to accept these multilateral treaty obligations as binding agreements. This acceptance should enhance the effectiveness of the trade regimes embodied in the treaties, but also raises concerns for state sovereignty. 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.[13] Subsequently, the 103rd U.S. Congress adopted implementing legislation for the new GATT.[14] One of the most significant developments for the United States and all GATT members is the establishment of the WTO to administer dispute settlement procedures for GATT.[15] Because of its recent inception, practical effects of this new dispute settlement process remain to be seen.

Nevertheless, the Uruguay Round Agreements seek to enhance the binding legal effect of GATT.[16] The WTO Agreement

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13. *The Marrakesh Declaration*, FOCUS: GATT NEWSL. (Information and Media Relations Division of GATT, Geneva, Switz.), May 1994, at 7.

14. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) [hereinafter Uruguay Act]. The House enacted GATT legislation by a vote of 288-146 on November 29, 1994. David E. Sanger, *House Approves Trade Agreement by a Wide Margin*, N.Y. TIMES, Nov. 30, 1994, at A1. The Senate approved the pact by a surprisingly wide margin of 76-24 on December 1, 1994. David E. Sanger, *Senate Approves Pact to Ease Trade Curbs; A Victory for Clinton*, N.Y. TIMES, Dec. 1, 1994, at A1.

15. 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 [hereinafter WTO Agreement].

In addition to its dispute settlement function, the WTO will also facilitate the implementation of GATT and the Multilateral Trade Agreements, provide a forum for negotiations among GATT members, administer the Trade Policy Review Mechanism, and cooperate, where appropriate, with the International Monetary Fund and the International Bank for Reconstruction and Development. *Id.* art. III.

16. The Marrakesh Declaration welcomed "the stronger and clearer legal framework [the Members] have adopted for the conduct of international trade, including a more effective and reliable dispute settlement mechanism." Marrakesh Declaration of 15 April 1994, para. 1, *reprinted in* GATT SECRETARIAT, THE RESULTS OF THE URUGUAY

specifically provides that the agreements in the General Agreement on Tariffs and Trade 1994 (GATT 1994) are binding on all members.[17] This provision reflects a shift from past rounds where parties to GATT could selectively choose which agreements to accept without jeopardizing their status under the Agreement.[18] Thus, the Uruguay Round contains more binding international legal obligations than past GATT agreements. It also provides structures to enhance enforcement of the binding legal norms.[19]

While GATT works on a global level, NAFTA seeks to enhance the binding nature of its obligations on a regional level. NAFTA was signed by Canada, Mexico, and the United States on December 17, 1992.[20] Nearly a year later, the U.S. Congress adopted its implementing legislation after a difficult congressional battle.[21] NAFTA is a free trade area[22] whose primary objectives are the promotion of free trade and investment through the elimination of trade barriers and the facilitation of cross-border movement of goods and services.[23] NAFTA adopted and expanded a dispute resolution mechanism from the United States-Canada Free Trade Agreement (CFTA).[24]

ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS iii (1994).

For example, import restricting safeguards are limited through time limits, investigations, and nondiscrimination among suppliers. Rules for the use of antidumping and countervailing duties are also clarified and subjected to tighter discipline. *The Uruguay Round: Results and Implications*, WORLD ECON. OUTLOOK (International Monetary Fund, Wash., D.C.), May 1994, at 82, 83.

17. WTO Agreement, *supra* note 15, art. II. The General Agreement on Tariffs and Trade 1994 (GATT 1994) is described in GATT SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 21 Annex 1A (1994).

18. Andreas F. Lowenfeld, *Remedies Along With Rights: Institutional Reform in the New GATT*, 88 AM. J. INT'L L. 477, 478 (1994) (explaining *Agreement Establishing the World Trade Organization, pt. II of Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, GATT Doc. MTN/FA (Dec. 15, 1993), 33 I.L.M. 1, 13 (1994)).

19. *See infra* notes 86–89 and accompanying text.

20. *Significant Events in the History of NAFTA*, 10 Int'l Trade Rep. (BNA) 2089 (Dec. 15, 1993).

21. The measure 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.

22. GATT Article XXIV § 5 permits the formation of free trade areas among GATT parties. A free trade area (FTA) is a group of two or more nations that have agreed to eliminate substantially all trade barriers between their constituent territories. However, each country may maintain separate trade policies with countries outside the FTA. GATT 1947, *supra* note 5, 61 Stat. pts. 5–6, at A66–68, 55 U.N.T.S. at 268–72.

23. NAFTA, *supra* note 6, art. 101, 102(1), 32 I.L.M. at 297.

24. *See* David S. Huntington, *Settling Disputes Under the North American Free Trade*

Like the Uruguay Round of GATT, NAFTA includes enhanced obligations for its members. Article 105 specifically provides that "[t]he Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement by state and provincial governments."[25] In addition to this commitment to ensure state compliance with NAFTA provisions, NAFTA embodies enhanced dispute resolution mechanisms that differ depending on the nature of the dispute. Disputes concerning dumping/antidumping duties[26] and subsidies/countervailing duties are dealt with in Chapter 19,[27] whereas Chapter 20 provides a general framework for the settlement of other disputes. However, both chapters focus on the use of dispute settlement panels[28] similar to those in GATT as mechanisms for resolution of difficult disputes. It is the nature and power of these panels coupled with the federal government's commitment to enforce NAFTA obligations that create fears of lost state sovereignty.

B. *Dispute Settlement Bodies and Panels*

GATT and NAFTA dispute settlement bodies both seek to centralize control over dispute settlement in an effort to facilitate its use and effectiveness. The Uruguay Round Final Act establish-

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Agreement, 34 HARV. INT'L L.J. 407, 408–09 (1993) ("The bifurcated structure of NAFTA dispute settlement is inherited directly from the Canada-U.S. FTA, and the general dispute settlement provisions of both treaties are in many respects similar to the GATT system."). The provisions of the CFTA are set forth at Free Trade Agreement, Dec. 22, 1988, U.S.-Canada, 27 I.L.M. 281.

25. NAFTA, *supra* note 6, art. 105, 32 I.L.M. at 298.

26. Put simply, dumping occurs when an exporting industry sells its exported goods in foreign markets at less than their fair value. Antidumping duties are designed to offset the effects of price discrimination by individual producers. *See* PAUL B. STEPHAN III ET AL., INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY 724–25 (1993). For a history of United States antidumping law, see PIETRO S. NIVOLA, REGULATING UNFAIR TRADE 30–35 (1993).

27. Generally, countries may subsidize their products in two primary ways: They may provide economic advantages to exporting industries as an incentive to increase exports; or they may provide other subsidies, such as provision of inexpensive capital, to give domestic producers a competitive advantage over foreign producers. Foreign countries that oppose such subsidies claim their domestic industries are harmed by them and often impose countervailing duties to restore competitive equality. This explanation greatly oversimplifies a complex and highly technical body of U.S. and foreign law that addresses countervailing duties. *See* STEPHAN ET AL., *supra* note 26, at 687, 699 . For a discussion of recent subsidies issues, see NIVOLA, *supra* note 26, at 35–41.

28. *See infra* notes 63–75 and accompanying text.

es a Dispute Settlement Body (DSB) to administer rules and procedures for dispute settlement, including establishment of panels, adoption of panel reports, supervision of rulings and recommendations, and authorization for suspension of GATT obligations in retaliation for harmful activity.[29] The DSB has its own chairman[30] and establishes its own rules of procedure, but the General Council of the WTO has ultimate authority to "discharge the responsibilities of the Dispute Settlement Body."[31]

In the past, trade controversies under GATT were settled through a system based primarily on Articles XXII[32] and XXIII[33] and subsequent understandings between the Contracting Parties.[34] This system promoted consultations between disputing parties and provided panels of three or five experts to adjudicate trade controversies unresolved by consultation.[35] In the Uruguay

29. The Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 2: Understauding on Rules and Procedures Governing the Settlement of Disputes (Apr. 15, 1994), art. 2(1) (33 I.L.M. 112, 114), *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 404, 405 (1994) [hereinafter Understanding on Dispute Settlement].

30. Australian Ambassador Donald Kenyon was elected to chair the DSB on January 31, 1995. *The General Council of the World Trade Organization*, MULTINATIONAL SERVICE, Feb. 2, 1995, *available in* WESTLAW, News Library, AllNews File, 1995 W.L. 8360028, at *3.

31. WTO Agreement, *supra* note 15, art. IV, para. 3, at 9, *reprinted in* 33 I.L.M. at 1145.

32. Article XXII requires consultation between parties when one party claims a violation of GATT standards. This article further provides that a disputing party may call upon the GATT Contracting Parties to consult with the disputing parties about the unresolved issue. GATT 1947, *supra* note 5, 61 Stat. pt. 5 at A64, 55 U.N.T.S. at 266.

33. Article XXIII provides that when a party finds that the benefits from GATT are impaired or nullified by actions of another contracting party or any other situation, the injured party may make written complaints to the offending country. If the injured party receives no relief, the matter may be referred to the Contracting Parties of GATT who will investigate the matter and make recommendations to the disputing parties, or rule on the dispute. *Id.* at 61 Stat. pt. 5, at A64–65, 55 U.N.T.S. at 266–67.

34. *See, e.g.*, Understanding on Notification, Consultation, Dispute Settlement and Surveillance of 28 November 1979 (26S/210), *reprinted in* GATT Index, *supra* note 3, at 586 (setting forth agreed description of customary dispute settlement practice).

Prior to the Uruguay Round Agreements, GATT referred to its participants as parties, and the entity composed of all parties as the Contracting Parties. These designations reflected GATT's status as an agreement and not as an organization. David Palmeter & Gregory J. Spak, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 LAW & POL'Y INT'L BUS. 1145, 1146 n.6 (1993). However, under the Uruguay Round, GATT participants are members of the World Trade Organization and this Note will refer to them as such. *See* WTO Agreement, *supra* note 15, 33 I.L.M. at 1144–52.

35. Pierre Pescatore, *The GATT Dispute Settlement Mechanism—Its Present Situation*

Round Final Act, the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the Understanding") adopts goals from Articles XXII and XXIII, and provides a codified and coherent structure for resolution of disputes.[36] The Understanding also states that a complaining Member may—but is not required to—request consultations with the offending Member to resolve a dispute. The Understanding further provides that if consultations do not produce an acceptable result within sixty days, the complaining Member may request a panel.[37] Moreover, the Understanding allows Members voluntarily to request good offices,[38] conciliation, and mediation at any time, including during the course of a panel proceeding, and by any party to a dispute.[39] By centralizing and strengthening dispute settlement, the Uruguay Round agreements will enhance free trade by enhancing compliance with GATT principles. However, the DSB also provides nations greater opportunity to challenge laws of other nations that allegedly violate GATT principles. Thus, GATT 1994 heightens the tension between effective international obligations and state sovereignty concerns.

NAFTA dispute settlement reflects a similar desire for centralization and efficiency. Chapter 20 of NAFTA provides the basic structure of its dispute settlement system. Article 2001 establishes a Free Trade Commission (FTC) to supervise implementation, elaboration, and dispute resolution under the Agreement.[40] Cabinet-level representatives from each nation make up the Commission, and all Commission decisions are made by consensus.[41] This structure parallels GATT 1994 in which the WTO supervises the activities of a DSB. Under NAFTA, the Free Trade Commission

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and Its Prospects, 27 J. WORLD TRADE 5, 5–7 (1993).

36. Understanding on Dispute Settlement, *supra* note 29, art. 3(1), 33 I.L.M. at 115 ("[M]embers . . . affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of the GATT 1947 . . . ."); *see also* Pescatore, *supra* note 35, at 16.

37. Understanding on Dispute Settlement, *supra* note 29, art. 4(2), (7), 33 I.L.M. at 116–17.

38. Good Offices refers to the practice of the Director-General of GATT (or a group appointed by the Director) acting as an informal counsellor to assist the resolution of a particular dispute. For examples, see GATT Index, *supra* note 3, at 714–15.

39. Understanding on Dispute Settlement, *supra* note 29, art. 5(1), (3), (5), 33 I.L.M. at 117–18.

40. NAFTA, *supra* note 6, art. 2001(1), (2), 32 I.L.M. at 693.

41. *Id.* art. 2001(1), (4), 32 I.L.M. at 693.

will supervise the activities of a Secretariat charged with dispute resolution. The Secretariat will include one section each for Canada, Mexico, and the United States. Each party is responsible for operation and costs of its section as well as payment of panelists.[42] The Agreement requires that the Secretariat provide assistance to the Commission, to panels under both Chapters 19 and 20, and as directed by the Commission.[43]

Unlike GATT in which consultations are optional, parties must use consultations and arbitration prior to a request for NAFTA panel proceedings.[44] If the parties fail to resolve their disputes through consultations among themselves, either party may request that the Commission convene to provide good offices, conciliation, and mediation.[45] If the Commission has convened and the matter has not been resolved within thirty days, either party may request an arbitral panel.[46] Like those in GATT, NAFTA's binding obligations inevitably face the tension between effective international trade agreements and the sovereignty of the fifty states.

Panels of experts have become and continue to be the preferred method of dispute settlement in both GATT and NAFTA. Analyzing these mechanisms in both agreements illustrates the panels' goal of effective dispute resolution as well as the potential danger for intrusion of state sovereignty. Panels will persist as the main dispute resolution mechanism under GATT 1994. The DSB establishes dispute settlement panels to make objective assessments of disputes before them and to provide the DSB with sufficient information to make recommendations or rulings about disputes.[47] The terms of reference for panels, unless otherwise agreed by the parties, 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

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42. *Id.* art. 2002(2), 32 I.L.M. at 693.

43. *Id.* art. 2002(3), 32 I.L.M. at 693.

44. *See* Huntington, *supra* note 24, at 419 (arguing that NAFTA, unlike GATT, limits consultations to the early stages of a dispute, thereby protecting the integrity of a rule-oriented NAFTA panel process).

45. NAFTA, *supra* note 6, art. 2007, 32 I.L.M. at 695. For a more detailed description of the consultation and alternative dispute resolution process, see Huntington, *supra* note 24, at 417–19.

46. NAFTA, *supra* note 6, art. 2008(1), 32 I.L.M. at 695.

47. Understanding on Dispute Settlement, *supra* note 29, art. 11, 33 I.L.M. at 120.

> 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/s.[48]

A panel is expected to issue its final report within six months of its establishment.[49] The panel may make a written request for more time, but only for an additional three months.[50] These guidelines provide clear duties for panelists that should facilitate their work, and the time limits will ensure prompt resolution of disputed issues.

Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes 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."[51] This provision alters previous GATT practice: Prior Agreements did not include clear language that a panel must be formed unless a consensus existed against establishment. Instead, consensus was required to decide whether a panel should consider the matter at all.[52] Two prominent commentators consider this change to be a positive step: "The new system will wisely eliminate the consensus requirement, though it will retain a useful safety valve of allowing an appeal of a panel's report to a special review group."[53]

Article 8 provides that panels will include individuals well-qualified in international trade issues from governments and/or nongovernmental bodies.[54] The Understanding excludes citizens of members whose governments are parties to the disputes, but the disputing parties may waive this exclusion by agreement.[55] The Secretariat will propose nominations for specific panels,[56] and the

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48. *Id.* art. 7(1), 33 I.L.M. at 118.

49. *Id.* art. 12(8), 33 I.L.M. at 121. A case of urgency (e.g., a dispute involving perishable goods) requires that the panel attempt to issue its final report within three months. *Id.*

50. *Id.* art. 12(9), 33 I.L.M. at 121.

51. *Id.* art. 6(1), 33 I.L.M. at 118.

52. John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535, 549–50 (1993).

53. *Id.*

54. Understanding on Dispute Settlement, *supra* note 29, art. 8(1), 33 I.L.M. at 118.

55. *Id.* art. 8(3), 33 I.L.M. at 119.

56. *Id.* art. 8(6), 33 I.L.M. at 119. Panels will generally consist of three panelists, but

parties to the dispute may block these nominations only for compelling reasons.[57] The Secretariat will maintain a list of well-qualified individuals who may serve as panelists, and members may suggest individuals to be added to the list.[58] Persons can be placed on the list without government nominations. Professor Andreas Lowenfeld distinguishes this feature from that of NAFTA where only individuals nominated by governments may appear on these rosters.[59] These provisions of the Understanding provide a diverse and qualified group of adjudicators to sit on the panels. In addition, by limiting the reasons for which persons may be excluded from panels, the Understanding facilitates prompt resolution of trade disputes.

Adoption of panel decisions will occur more easily under the Uruguay Round Agreements. Previous GATT practice had allowed a Contracting Party (usually the party who lost the dispute) to block adoption of a panel report because panel decisions did not take effect until the GATT Council voted unanimously to accept them.[60] Under the DSB system, the report will be adopted at a meeting of the DSB within sixty days after the report has been circulated to the Members.[61] There are only two ways to prevent adoption of a report. Both are fairly difficult: Either "one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."[62] Thus, the new system streamlines the process with specific time limits for adoption of panel decisions and facilitates the effectiveness of panel decisions by providing limited avenues to block them.

Similar to GATT's requirement that the DSB establish panels upon request, NAFTA requires the Free Trade Commission to establish an arbitral panel upon receipt of a request from a party.[63] This provision creates a right to an arbitral panel.[64] With a few differences, the panels will operate similarly to those under

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the parties may agree on a panel of five. *Id.* art. 8(5), 33 I.L.M. at 119.

57. *Id.* art. 8(6), 33 I.L.M. at 119.

58. *Id.* art. 8(4), 33 I.L.M. at 119.

59. Lowenfeld, *supra* note 18, at 483.

60. *Id.* at 479–80.

61. Understanding on Dispute Settlement, *supra* note 29, art. 16(4), 33 I.L.M. at 123.

62. *Id.*

63. NAFTA, *supra* note 6, art. 2008(2), 32 I.L.M. at 695.

64. Huntington, *supra* note 24, at 419.

GATT. As described above, NAFTA panelists must be nominated by their governments, which may possibly limit the number of qualified people who will serve as panelists.[65] Unlike GATT panels, which generally have three members,[66] NAFTA panels will have five members. The selection procedures differ depending upon the number of parties in dispute. Generally, the disputing parties must first agree on a chair for the panel and then each party chooses two citizens from the opposing party or parties to serve as panelists.[67] Finally, while GATT procedures require that parties have peremptory challenges against panelists for compelling reasons, the NAFTA selection process only provides the use of peremptory challenges against panelists who are not selected from the roster.[68] Thus, NAFTA makes it more difficult to remove panelists by using peremptory challenges. However, because parties choose panelists from opponents' countries, parties will have greater control over the selection process and both countries will be equally represented, which will decrease the need for peremptory challenges.

Article 2012 provides the rules of procedure for panels. The Commission establishes model rules of procedure based on two principles: "[T]he procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions; and the panel's hearings, deliberations and initial report, and all written submissions to and communications with the panel shall be confidential."[69] Like GATT panels, NAFTA panels will have specific terms of reference for dispute settlement:

> To examine, in the light of the relevant provisions of the Agreement, the matter referred to the Commission (as set out iu the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2).[70]

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65. *See supra* note 59 and accompanying text.

66. *See supra* note 56.

67. NAFTA, *supra* note 6, art. 2011(1), (2), 32 I.L.M. at 696. This procedure alters the CFTA procedure that allowed countries to choose their own citizens as panelists. Huntington, *supra* note 24, at 421.

68. NAFTA, *supra* note 6, art. 2011(3), 32 I.L.M. at 696. Article 2011(4) provides that if disputing Parties agree that a panelist has violated the code of conduct, that panelist shall be replaced.

69. *Id.* art. 2012(1)(a), (b), 32 I.L.M. at 696.

70. *Id.* art. 2012(3), 32 I.L.M. at 696.

These clear terms of reference, guarantees of confidentiality, and right to at least one hearing give NAFTA greater credibility as an effective legal means of dispute resolution.

After the panel has completed its work, it issues initial and final reports. The initial report allows disputing parties to review the panel's findings of fact, determination of the dispute, and recommendations for resolving the dispute. Disputing parties have fourteen days to make comments on this initial report.[71] This phase provides parties with another opportunity to voice their views, and therefore may increase compliance with panel reports because parties are more likely to feel they had significant input into the panel decision.[72] Moreover, this phase may decrease parties' concerns about sovereignty because they will have more active participation in the panel process. Subsequently, the panel may revise or reconsider its findings, but the panel must issue a final report within thirty days of the initial report.[73] Unless the Commission decides otherwise, the report will be published fifteen days after it is sent to the Commission.[74] Notably, panels cannot reveal which members sided with the minority or majority view in their reports.[75] This secrecy could provide greater compliance with panel reports as parties have no basis to complain that decisions were made according to the national interests of the panelists. However, secrecy may cause countries to reject panel decisions based on a *belief* that decisions are secretly partisan.

C. *Appellate Review and Enforcement*

One of the main differences between GATT and NAFTA is that NAFTA Chapter 20,[76] unlike the GATT DSB, does not provide for an appeals process to panel decisions. However, Chapter 19 of NAFTA[77] does provide for appeals in a narrow field of

71. *Id.* art. 2016(2), (4), 32 I.L.M. at 696.

72. Huntington, *supra* note 24, at 422. Huntington also notes that this review phase may allow parties to exert undue influence on the panelists, which could damage the panel's ultimate decision.

73. NAFTA, *supra* note 6, arts. 2016(5), 2017(1), 32 I.L.M. at 697. Article 2017 also allows extension of the 30-day period with the consent of the disputing parties.

74. *Id.* art. 2017(4), 32 I.L.M. at 697.

75. *Id.* art. 2017(2), 32 I.L.M. at 697.

76. *Id.*, 32 I.L.M. at 693.

77. *Id.*, 32 I.L.M. at 682.

trade disputes. This difference mainly reflects the two agreements' approaches to enforcement. Whereas GATT enhances specific provisions for enforcement, NAFTA relies more on the parties and their willingness to implement and respect trade obligations. This difference is defensible, however, because NAFTA treats a more limited number of countries whose interests are more easily reconciled. In contrast, GATT must provide more binding measures because it operates at a global level.

While the GATT DSB will facilitate dispute settlement, a new appellate review system will help protect members from the adoption of erroneous decisions. The DSB established a standing appellate body of seven persons, three of whom will hear an individual case.[78] Unlike panels of initial review, the appellate body will not include representatives from any government.[79] Professor Andreas Lowenfeld has indicated two major areas of concern with this new appellate body.[80] First, Article 17(6) limits the scope of review to issues of law and legal interpretations.[81] However, legal and factual issues usually are interrelated, and the appellate body may spend too much of its limited time attempting to separate law from fact.[82] Second, for members to accept the new system, the appellate body must retain actual and perceived independence from nationalistic or political influences. To achieve this goal, the Secretariat should provide support for the panel process, but should not involve itself in the substance of the appeals process.[83] If the appellate body can maintain its independence and provide reasoned, unbiased opinions, it has great potential to strengthen and expand the effectiveness of dispute resolution.

The issue of standing to request a GATT panel is also important. According to Article 3(7), only members of the WTO can bring a complaint against another member.[84] Thus, private parties that claim injury from foreign trade practices must ask their governments to bring a complaint on their behalf. Allowing private parties to bring complaints as well as governments could depoliti-

78. Understanding on Dispute Settlement, *supra* note 29, art. 17(1), 33 I.L.M. at 123.
79. *Id.* art. 17(3), 33 I.L.M. at 123.
80. Lowenfeld, *supra* note 18, at 484.
81. Understanding on Dispute Settlement, *supra* note 29, art. 17(6), 33 I.L.M. at 123.
82. Lowenfeld, *supra* note 18, at 484.
83. *Id.* at 485.
84. Understanding on Dispute Settlement, *supra* note 29, art. 3(7), 33 I.L.M. at 115.

cize the review process and enhance its legitimacy.[85] However, for now, industries and other private parties claiming that foreign countries are violating GATT norms must rely on their home governments to bring complaints before the DSB.

In addition to the appeals process, another critical element of the DSB is an enhanced ability to implement, supervise, and enforce its rulings and recommendations. The DSB commits Members to prompt compliance with recommendations and rulings.[86] Moreover, the DSB provides specific enforcement requirements, including limited time periods for compliance[87] and surveillance of implementation of adopted rulings or recommendations.[88] As a last resort, an injured Member may receive compensation and suspend GATT advantages from a Member that fails to comply.[89] These specific enforcement mechanisms both should enhance the credibility of the DSB and increase compliance with GATT obligations as determined by panels.

A final aspect of the new Agreement is its limitation on the use of retaliatory trade measures. Article 23 of the Understanding specifically limits Members' use of retaliatory measures, such as suspension of GATT concessions or obligations, by requiring determination of harmful activity only through the DSB system and suspension of concessions only upon DSB approval.[90] Professor Lowenfeld argues that industries will primarily use measures like Section 301 of the Trade Act of 1974[91] to pressure their governments to bring complaints to the DSB, rather than use such measures to retaliate unilaterally.[92] Members of Congress viewed this limitation with concern: "[T]he Agreement would have considerable limiting effect on our ability to use 301."[93]

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85. *See* Barton & Carter, *supra* note 52, at 550.

86. Understanding on Dispute Settlement, *supra* note 29, art. 21(1), 33 I.L.M. at 125.

87. *Id.* art. 21(3), 33 I.L.M. at 125 (requiring compliance immediately unless impracticable; if impracticable, a reasonable period of time for compliance will be determined).

88. *Id.* art. 21(6), 33 I.L.M. at 126 (placing implementation issues on the DSB agenda until resolved).

89. *Id.* art. 22, 33 I.L.M. at 126.

90. *Id.* art. 23(2), 33 I.L.M. at 128–29.

91. 19 U.S.C. § 2411 (1988). Section 301, commonly called Super 301, provides the authority for the Executive to investigate unfair trade practices and take retaliatory steps when necessary. For a detailed description of Super 301, see LOW, *supra* note 4, at 87–96.

92. Lowenfeld, *supra* note 18, at 481.

93. David S. Cloud, *Super 301: An Ever-Popular Weapon*, 52 CONG. Q. WKLY. REP. 778, 793 (1994) (statement of Rep. Sander M. Levin, D-Mich., House Ways and Means

Notably absent from Chapter 20 of NAFTA is a provision for appellate review. While GATT and Chapter 19 of NAFTA both include some type of appeals process, Chapter 20 envisions enforcement primarily by the disputing parties and does not provide for appeals of panel reports. Furthermore, recall that Chapter 19 focuses on the narrow area of international dumping and countervailing duty trade disputes, whereas Chapter 20 addresses dispute settlement in a broader range of areas.[94] The enforcement provisions of Chapter 20 are straightforward:

> On receipt of the final report of a panel, the disputing Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel, and shall notify their Sections of the Secretariat of any agreed resolution of any dispute.[95]

Ideally, an offending party will agree not to implement the nonconforming measure or to remove the protectionist measure altogether. When parties cannot agree to do so, the nonconforming party may pay compensation.[96] Finally, if no mutually satisfactory agreement has been reached within thirty days of the final report, the complaining party may suspend benefits of "equivalent effect" until the parties reach agreement.[97] In a comparison of GATT and NAFTA, GATT focuses more on the enforcement of the panel decision through surveillance and reporting at the DSB level, whereas NAFTA emphasizes bilateral resolution of disputes and provides suspension of benefits for failure to comply.[98]

Because of its significance in U.S. trade law, it is also important to consider briefly Chapter 19 of NAFTA. First, unlike Chapter 20, Chapter 19 provides review and dispute settlement in antidumping and countervailing duty cases. While many of the dispute resolution mechanisms are identical to those in Chapter 20, there are some fundamental differences. Chapter 19 does not alter domestic law; in fact, Article 1902 explicitly provides that the parties may retain and continue to apply their existing counter-

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Subcommittee on Trade). Full discussion of this issue is beyond the scope of this Note.

94. *See supra* notes 26–28 and accompanying text.

95. NAFTA, *supra* note 6, art. 2018(1), 32 I.L.M. at 697.

96. *Id.* art. 2018(2), 32 I.L.M. at 697.

97. *Id.* art. 2019(1), 32 I.L.M. at 697.

98. *See supra* notes 86–89 and accompanying text; *see also* Huntington, *supra* note 24, at 423–24.

vailing duty and antidumping laws. Article 1902 is an important provision for the United States, which has consistently used these retaliatory measures to protect U.S. industry from foreign industrial policies and attempts to gain U.S. market share through dumping.[99] Moreover, binational panels will review the final antidumping or countervailing duty determinations of a party when requested by another party.[100] Thus, for the United States, panels will review the final determinations of both the U.S. Department of Commerce and the International Trade Commission, the agencies where most international trade litigation commences.[101] Finally, Chapter 19 will likely have greater importance than Chapter 20 because past history has shown that parties will generally use the former more frequently.[102]

Chapter 19 also allows parties to challenge amendments to other parties' countervailing and antidumping duty laws.[103] A party may challenge another party's proposed amendment on grounds that it violates GATT standards, is contrary to the purpose of NAFTA, or violates any prior NAFTA panel rulings. Thus, parties can protest protectionist laws before they develop into trade disputes. This provision and standard of review should help reduce nationalistic pressures in panels by referring to an outside agreement (GATT), by appealing to the fairness principle in NAFTA, and by protecting prior panel rulings.[104]

A major difference between Chapters 19 and 20 involves the issue of standing. When disputes arise concerning the application of one party's law under Chapter 19, private parties are guaranteed the same right that they possess under domestic law to challenge agency determinations.[105] This provision is important for

99. Kristin Moody-O'Grady, *Dispute Settlement Provisions in the NAFTA and the CAFTA: Progress or Protectionism?*, FLETCHER F. OF WORLD AFF., Winter/Spring 1994, at 121, 122–23.

100. NAFTA, *supra* note 6, art. 1904(2), 32 I.L.M. at 683.

101. Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707, 708 (1993).

102. Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution under NAFTA—Building on the U.S.-Canada FTA, GATT and ICSID*, 27 J. WORLD TRADE 21, 27 (1993) (arguing that under a similar provision in the U.S.-Canada FTA, parties used Chapter 19 panels much more than other types of panels).

103. NAFTA, *supra* note 6, art. 1903(1), 32 I.L.M. at 682.

104. Moody-O'Grady, *supra* note 99, at 127.

105. NAFTA, *supra* note 6, art. 1904(5), 32 I.L.M. at 683 ("An involved Party . . . shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determi-

industries affected by unfair trade practices as they retain the right to contest those practices within the NAFTA framework. Moreover, it allows more direct pressure from industry rather than requiring all complaints to be filtered through the government first.

When Chapter 19 is used to review final agency determinations of dumping or an existence of subsidies, the binational panel will replace domestic judicial review,[106] but apply the same standard of review that the challenged country's courts would apply.[107] Moreover, unlike Chapter 20 panel rulings, which allow parties to accept the panel decision or agree to their own solution, Chapter 19 panel decisions are explicitly binding on the parties.[108] While Chapter 20 panels offer recommendations and rulings, Chapter 19 panels are required either to affirm or to remand decisions of the national agencies.[109] Finally, contrary to Chapter 20 panels that lack an appellate review mechanism, Chapter 19 establishes an extraordinary challenge procedure whereby parties may challenge panel findings on grounds of misconduct.[110] These provisions provide parties with strong tools to challenge subsidies and dumping expediently. However, both Chapter 19 and Chapter 20 dispute settlement provisions also form the basis of some com-

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nation, request such review.").

106. *Id.* art. 1904(1), 32 I.L.M. at 683.

107. *Id.* art. 1904(3), 32 I.L.M. at 683. For a description of these standards of review, see Horlick & DeBusk, *supra* note 102, at 28.

108. NAFTA, *supra* note 6, art. 1904(9), 32 I.L.M. at 683 ("The decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.").

109. *Id.* art. 1904(8), 32 I.L.M. at 683.

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> Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:
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> (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
>
> (ii) the panel seriously departed from a fundamental rule of procedure, or
>
> (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and
>
> (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process, that party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

Id. art. 1904(13), 32 I.L.M. at 683.

plaints that NAFTA steals sovereignty from the states.[111] With the key provisions of these agreements in mind, consider the compelling reasons why GATT and NAFTA do not violate state sovereignty in light of some arguments made against GATT and NAFTA.

II. THE EFFECTS OF GATT AND NAFTA PANEL DECISIONS ON STATE SOVEREIGNTY

The federal government holds a preeminent position over the states in the area of international trade policy and agreements. The Commerce Clause of the Constitution grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[112] The Supreme Court has long "recognized that [the Commerce Clause] also limits the power of the States to erect barriers against interstate trade."[113] Furthermore, the Supreme Court has deferred to federal law, particularly in matters involving international commerce.[114] The Court has emphasized the importance that the United States "speak[] with one voice when regulating commercial relations with foreign governments."[115] Speaking with one voice prevents the states from imposing burdens on international trade that conflict with national policy goals, decrease trade flows, and thus harm national economic vitality. Finally, federal law has always constrained the exercise of state power.[116] In the context of GATT and NAFTA, the federal government persists as the principal decisionmaker. Therefore, any arguments claiming that these agreements overly infringe upon state sovereignty must first defeat

111. *See infra* notes 201–12 and accompanying text.

112. U.S. CONST. art. I, § 8, cl. 3.

113. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980).

114. *See, e.g.*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453–54 (1979) (invalidating a California *ad valorem* property tax imposed on foreign-owned cargo containers used in international commerce); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972) (upholding a forum selection clause that selected a British court to be binding on the parties); *see also* Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265, 300–01 (1984) (arguing that although the Court will not likely strike down the convention as an intrusion on state law, serious concerns exist concerning implementation of the convention).

115. *Japan Line*, 441 U.S. at 451.

116. John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions Is Changing the Character of "International" Law*, 42 KAN. L. REV. 605, 662 (1994).

the strong presumption that the federal government has primary responsibility for international commerce. These arguments have failed to overcome this presumption.

A. *GATT and the States*

By enhancing the dispute settlement provisions of GATT through the WTO and the DSB, Members have agreed to subject their domestic systems to a greater degree of supranational legal control. Under GATT 1994, nations are bound to a greater number of agreements, and dispute panels have enhanced ability to enforce dispute settlements.[117] Thus, individual states will be required to comply with the rulings of international panels, which limits state sovereignty to a certain degree. In exchange for decreased legal control, the Uruguay Round Agreements promise significant advantages. An improved GATT promises enormous increases in global prosperity through the reduction of trade barriers.[118] Moreover, the new dispute resolution mechanism offers more efficient and reliable settlement of trade controversies.

1. *GATT: Congressional-Executive Agreement or Treaty?* This section will show that despite arguments to the contrary, passage of the Uruguay Round Agreements as a congressional-executive agreement rather than a treaty did not jeopardize state sovereignty interests. The debate concerning the form of GATT highlights the sovereignty concerns that persisted throughout the process to adopt the agreements into U.S. law. The Uruguay Round Agreements Act[119] passed the U.S. Congress as a congressional-executive agreement under a procedural device known as "fast track."[120] Presidents prefer to negotiate trade agreements under

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117. *See supra* notes 16–19, 86–89 and accompanying text.

118. Analysts estimate that the Uruguay Round agreements will increase world exports by $755 billion and raise world incomes by $235 billion annually. *The WTO is Born,* FOCUS: GATT NEWSL. (Information and Media Relations Division of GATT, Geneva, Switz.), May 1994, at 1. The Council of Economic Advisers estimates national income will increase by $100 to $200 billion by the tenth year of the new agreement. Bob Benenson, *With Health Care Receding, GATT Pact Gains Urgency,* 52 CONG. Q. 2661, 2664 (1994). However, "Estimates of how much [GATT] would benefit the American economy . . . vary so widely that they are almost useless." David E. Sanger, *Clinton Pledges to Push for Vote on Trade Accord,* N.Y. TIMES, Nov. 17, 1994, at A1.

119. 15 U.S.C. § 3511 (1994).

120. Fast track authority began under the Trade Act of 1974. 19 U.S.C. §§ 2101, 2111–12, 2191–93 (1988). Since the 1974 Act, fast track authority has expired periodically

fast track because it imposes time limits for both houses of Congress to vote yes or no on implementing legislation without amendment.[121] Fast track serves two important ends. First, it provides the President with flexibility and credibility when negotiating trade agreements because trading partners have greater confidence that Congress will not unravel hard-won trade agreements. Second, it ensures presidential accountability to the legislative branch because Congress still participates in drafting and adoption of the implementing legislation.[122]

Representatives of the executive branch and other commentators made compelling arguments supporting passage of the Uruguay Round Agreements as a congressional-executive agreement. Assistant Attorney General Walter Dellinger sent a memorandum to Trade Representative Michael Kantor that had a significant effect on the congressional debate about GATT's status.[123] Responding to arguments from Professor Laurence Tribe[124] that the Uruguay Round Agreements so violated state sovereignty that

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and has been renewed for various trade agreements. *See, e.g.*, 19 U.S.C. § 2902(e) (1994) (extending fast track authority for GATT through April 16, 1994).

121. Fast Track has five main elements. First, the President must notify the House Ways and Means and the Senate Finance Committees of his intent to enter a trade agreement 120 days before actually signing such an agreement. 19 U.S.C. § 2112(e)(1) (1988). Second, once the agreement is signed, the President must submit the agreement, implementing legislation, and supporting information to the House and Senate. *Id.* § 2112(e)(2) (1988). Members of Congress cannot amend the implementing legislation. *Id.* § 2191(d). Third, both houses of Congress must vote ou the implementing legislation within 60 days, or, if the bill contains reveuue provisions, 90 days. *Id.* § 2191(e). Fourth, if a committee fails to report the implementing legislation to the floor of either house within 45 days, the bill is automatically discharged to the floor. *Id.* Fifth, floor debate in both houses is limited to 20 hours, after which the House and Senate must vote. *Id.* § 2191(f).

122. *See* Harold H. Koh, *Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 148 (1992).

123. *See* Memorandum from Walter Dellinger, Assistant Attorney General, Office of Legal Connsel to Ambassador Michael Kantor, U.S. Trade Representative, (Nov. 22, 1994) (on file with author) [hereinafter OLC GATT Memo]. While this Note focuses on the state sovereignty issue, Mr. Dellinger also argued that because the Treaty Clause and subsequent caselaw do not provide clear-cut tests for determining when agreements are treaties, this determination should be made by examining precedents of the executive and legislative branches acting together under their respective foreign Commerce Clause and foreign affairs powers. *Id.* at 2–4. Furthermore, the political branches can and have concluded significant treaties like the Urugnay Round Agreements. *Id.* at 5 (citing United States v. Munoz-Flores, 495 U.S. 385, 393 (1990) (finding Senate had incentive and mechanism to stop such agreements but did not do so)).

124. *See infra* notes 131–33 and accompanying text.

they required Treaty Clause[125] consideration, Mr. Dellinger wrote: "[I]f the Uruguay Round Agreements unduly invade State sovereignty, ratification as a treaty will not save them from unconstitutionality; if they are not an undue invasion, they can be given effect by Act of Congress."[126]

Moreover, Professor Bruce Ackerman, joined by a distinguished group of professors of international and constitutional law, rejected Professor Tribe's assertion that because the Agreements implicated state sovereignty, the Senate would best represent state interests.[127] They argued that the House, not the Senate, better represents state interests because many Senators are national figures detached from local issues. They further asserted that the joint action of the House and Senate on congressional-executive agreements better represents federalist values, and prevents the Senate from blocking important international agreements by a minority of one-third plus one under the Treaty Clause. Finally, they maintained that because the WTO will have significant impact on world trade and because the House retains revenue-raising responsibility, both houses of Congress should pass the Agreement.[128] Taken together, these arguments illustrate the fallacy behind the argument favoring Treaty Clause consideration as a protection for state sovereignty by showing that the congressional-executive agreement provides a valid means for adopting laws that are supreme to state laws and that the full Congress, not the Senate alone, provides the greatest protection for states' rights.

Members of Congress also rejected the argument that state sovereignty concerns necessitated Treaty Clause consideration for the Uruguay Round. As one senator stated,

> Another important concern some have in our country, and in my State, is that this agreement appears to be a treaty . . . . It is important to point out this is not a treaty. It was not negotiated as such. It has always been considered an executive agreement by all parties involved. . . . [U]nder Article I of the Constitution, the Congress has the power to regulate commerce with foreign

125. U.S. CONST. art. VI, cl. 2.

126. OLC GATT Memo, *supra* note 123, at 11.

127. *GATT Implementing Legislation: Hearings on S.2467 Before the Senate Comm. on Commerce, Science, and Transportation*, 103rd Cong., 2nd Sess. 529 (Oct. 18, 1994) (prepared statement of Prof. Bruce A. Ackerman et al.).

128. *Id.* at 9–10.

> nations. Hence, only a majority vote in both Chambers of Congress is required.[129]

Senator Daniel Patrick Moynihan further argued that "the WTO is an [A]rticle I issue. Commerce and revenue are its principal features . . . . Treating this matter as a treaty would keep the House out of this and confine it to the Senate, contrary to the practice since 1934."[130]

During the debates concerning GATT's implementing legislation, Professor Laurence Tribe argued before Congress that the Uruguay Round Agreements should be considered as a formal treaty requiring advice and consent of the Senate, not as a congressional-executive agreement under fast track.[131] Tribe explained that through a series of political compromises following World War II, Presidents negotiated and submitted many international agreements as congressional-executive agreements, thereby circumventing and weakening the Treaty Clause. Moreover, he claimed that certain agreements had such broad scope and effect that they required Treaty Clause scrutiny; otherwise, "[i]f the Treaty Clause may be disregarded for the CFTA, for NAFTA, and for the Uruguay Round of GATT, it may come to be disregarded altogether and for all time."[132] Finally, he argued that because the new WTO posed such significant threats to individual state sovereignty, the Agreement had to be considered under the Treaty Clause so that the Senate could best protect state interests.[133]

During debates over the Uruguay Round Implementation Act, members of Congress reiterated arguments that GATT should receive consideration under the Treaty Clause. For example, Senator Ted Stevens of Alaska argued, "I believe that the GATT Agreement should be submitted to the Senate as a treaty because the World Trade Organization Council and the dispute resolution

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129. 140 CONG. REC. S15,275 (daily ed. Dec. 1, 1994) (statement of Sen. Domenici).

130. 140 CONG. REC. S15,079 (daily ed. Nov. 30, 1994) (statement of Sen. Moynihan). The Senator also argued that sovereignty concerns had been effectively refuted, especially because "[w]e yet govern ourselves, with the authority to regulate commerce with foreign nations given to the Congress." *Id.* at S15,081.

131. *GATT Implementing Legislation: Hearings on S.2467 Before the Senate Comm. on Commerce, Science, and Transportation,* 103rd Cong., 2nd Sess. 296 (Oct. 18, 1994) (prepared statement of Professor Laurence H. Tribe) [hereinafter Tribe GATT Statement]. There are many facets to the argument, but this Note focuses on how failure to consider GATT as a treaty affects state sovereiguty.

132. *Id.* at 14.

133. *Id.* at 1, 18–19.

mechanism diminish the sovereignty of the individual states."[134] Even in the House, where consideration of GATT as a treaty meant House members would not participate in passing the legislation, Congressman Eliot Engel from New York also argued that "this agreement ought to be considered as a treaty."[135] Thus, members of Congress shared unfounded concerns that GATT 1994 would overwhelm state sovereignty.

Based in part on concerns that the Uruguay Round Agreements would threaten state sovereignty, many argued that GATT should be considered as a formal treaty. These arguments reflect the natural tendency toward protectionism when nations contemplate enhancing supranational legal control. However, arguments that GATT should receive treaty consideration were not convincing largely because they overstated the threat posed by GATT and the Treaty Clause's ability to defend state interests. In fact, Professor Tribe retracted his opposition to GATT in direct response to the memorandum from the Office of Legal Counsel. While retaining his belief that the Senate's constitutional role in treaty ratification generally deserved more serious consideration, Professor Tribe wrote:

> I regard it as my responsibility, in light of Assistant Attorney General Dellinger's recent forceful analysis, to say that I believe the Clinton Administration has based its position on the Uruguay Round Agreements on constitutional arguments that are both powerful and plausible. It would therefore be incorrect to quote or to rely upon my earlier contrary views without adding this important qualification.[136]

Thus, Professor Tribe had some lingering concerns about the Uruguay Round Agreements, but not enough to oppose passage of the implementing legislation.[137]

Therefore, although questions may remain about the effect of the Uruguay Round Agreements on state sovereignty, treating

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134. 140 CONG. REC. S15,151 (daily ed. Nov. 30, 1994) (statement of Sen. Stevens).

135. 140 CONG. REC. H11,495 (daily ed. Nov. 29, 1994) (statement of Rep. Engel).

136. Letter from Professor Laurence H. Tribe to Senator George J. Mitchell (Nov. 28, 1994), *reprinted in* 140 CONG. REC. S15,078 (daily ed. Nov. 30, 1994).

137. For a more cynical view, see 140 CONG. REC. S15,151 (daily ed. Nov. 30, 1994) (statement of Sen. Stevens) ("I regret to say [Professor Tribe] has recanted his position at the last minute, as he started to count votes because of the circumstance that he does support GATT, but he opposes the process.").

GATT or other trade agreements under the Treaty Clause will not resolve state sovereignty concerns. In fact, the requirement of Treaty Clause procedures would vitiate many prior valid trade agreements, weaken Presidential ability to enter trade agreements, and harm state sovereignty interests by excluding the House from participating in ratification.

2. *GATT in U.S. Law.* To understand why state sovereignty issues raised such concern, it is important to consider how GATT panel decisions could affect state laws. While GATT is not considered a treaty under the Treaty Clause, it is a congressional-executive agreement enacted by a federal statute, which gives it the same effect as a treaty for purposes of domestic U.S. law.[138] It is therefore supreme over prior conflicting local, state,[139] and federal law.[140] In fact, for most of the WTO's dissenters, the issue was not whether the Uruguay Round Agreements would affect state law, but rather *to what extent* they would affect state law.[141] Before the Uruguay Round Agreements, Professor Robert Hudec argued that "the weight of the evidence still favours the view that Article XXIV:12 obligates the United States to compel state adherence to GATT, and that GATT is thus superior to state law."[142]

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138. Thomas W. France, Note, *The Domestic Legal Status of the GATT: The Need for Clarification*, 51 WASH. & LEE L. REV. 1481, 1495–99 (1994).

139. *See* OLC GATT Memo, *supra* note 123, at 11 n.30; *United States—Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R at 86 (Mar. 16, 1992) (citing Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, *in* THE EUROPEAN COMMUNITY AND GATT 187 (Meinhard Hilf et al. eds., 1986)); Jeffry C. Clark, *The United States Proposal for a General Agreement on Trade in Services and Its Preemption of Inconsistent State Law*, 15 B.C. INT'L & COMP. L. REV. 75, 97 (1992); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 297–98 (1967); *see also* Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 501–09 (1993) (discussing responsibility of federal government to implement GATT).

140. For more detailed descriptions of the relationship between GATT and federal law, see Robert E. Hudec, *The Legal Status of GATT in the Domestic Law of the United States, in* THE EUROPEAN COMMUNITY AND GATT, 199–218 (Meinhard Hilf et al. eds, 1986) (discussing generally GATT's status in U.S. federal law); Don Mayer & David Hoch, *International Environmental Protection and the GATT: The Tuna/Dolphin Controversy*, 31 AM. BUS. L.J. 187, 215–24 (1993) (discussing a GATT panel ruling that invalidated a U.S. embargo of tuna from Mexico under the Marine Mammal Protection Act for violating GATT Article XI).

141. *See infra* notes 161–67 and accompanying text.

142. Hudec, *supra* note 140, at 221.

The Supreme Court has never directly considered the application of GATT to state law.[143] However, other courts have held that GATT preempts state law.[144] For example, the California Court of Appeals in *Baldwin-Lima-Hamilton Corp. v. Superior Court of San Francisco* found GATT controlling over state law.[145] In *Baldwin-Lima*, construction companies had made bids for a project that required all materials and equipment, except one, to be manufactured in the United States in accordance with a California "buy-American" law. The construction company that won the bid had disregarded the buy-American provision and submitted the lowest bid by using foreign materials. The winning construction company based its decision to use foreign material on advice from the San Francisco City Attorney that the buy-American provision was invalid.[146] The Court of Appeals described the relationship between the Treaty and Supremacy Clauses, and held that "[w]hen a state statute conflicts with any such treaty, the latter will control. Compacts and similar international agreements, such as GATT, which are negotiated and proclaimed by the President are 'treaties' within the above [S]upremacy [C]lause of the Constitution."[147]

Similarly, the New Jersey Supreme Court discussed the relationship of GATT to a state statute requiring purchase of American-made materials for construction of water diversion and treatment facilities.[148] The court recognized that "GATT is, by virtue of the federal constitution, 'the supreme Law of the Land.' A state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty."[149] However, the court found the statute in question exempt from GATT because it required use of Ameri-

143. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 439 n.4 (1979) (rejecting argument that California *ad valorem* tax violated Art. III, §§ 1–2 of GATT because no evidence that California treated Japanese carriers differently from domestic carriers); Zenith Radio Corp. v. United States, 437 U.S. 443, 457 (1978) ("[T]he Secretary's [of the Treasury] position has been incorporated into the General Agreement on Tariffs and Trade (GATT), which is followed by every major trading nation in the world . . . .").

144. *See* Hudec, *supra* note 140, at 221–25.

145. 25 Cal. Rptr. 798, 808 (1962).

146. *Id.*

147. *Id.* at 809 (citations omitted).

148. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 381 A.2d 774, 777–78 (N.J. 1977).

149. *Id.* at 778 (citations omitted).

can goods for governmental purposes (i.e., dam building), not for production of goods for sale.[150] Overall, it is well accepted that obligations in the Uruguay Round Agreements are superior to conflicting state law. Thus, determining how GATT obligations will translate into state law requires further analysis.

To understand the effect of GATT panel decisions on inconsistent state law, consider a 1992 panel decision against the United States known as *Beer II*.[151] Canada challenged federal and state tax laws as well as other laws that allegedly favored U.S. beer and wine producers over foreign producers in violation of GATT Articles III(1), (2), and (4).[152] In a carefully reasoned opinion relying on GATT provisions, U.S. caselaw, and opinions of noted authors, the panel upheld certain state laws, but found that others violated GATT; it recommended that the United States bring the inconsistent laws into conformity.[153]

This case illustrates two important points. First, GATT panels have carefully considered both the laws of the disputing parties as well as GATT norms. In *Beer II*, the panel did not summarily invalidate scores of state laws; rather, it carefully balanced competing policy and legal concerns to arrive at an acceptable conclusion. There is no reason to believe that future panels under the DSB will not perform with similar success. Second, the state laws found to be inconsistent with GATT were not immediately reversed, nor

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150. *Id.* at 780–82.

151. *United States—Measures Affecting Alcoholic and Malt Beverages, Report of the Panel*, GATT Doc. DS23/R (Mar. 16, 1992) [hereinafter *Beer II*]; *see also* David S. Cloud, *Critics Fear GATT May Declare Open Season on U.S. Law*, 52 CONG. Q. WKLY. REP. 2005, 2009 (1994); Tribe GATT Statement, *supra* note 131, at 26–27.

152. *See Beer II*, *supra* note 151, para. 6.1 (citing Article III(1), which prohibits protectionist use of tariffs; Article III(2), which prohibits charging imports higher internal taxes than domestic goods; and Article III(4), which provides that products imported from contracting parties must receive no less favorable treatment than domestic products).

153. *Id.* para. 6.1(r). For example, the panel ruled that GATT did not prohibit laws in nine states that restrict sale, distribution, and labelling of beer that is above a specified alcohol content. The panel found that high and low alcohol content beers are not treated as products, so they may be regulated differently; policy goals of protecting human life motivated these regulations; and the regulations were not applied to afford protection to domestic producers. *Id.* para. 5.74–77.

However, the panel ruled that laws in 30 states violated GATT Art. III(4) by requiring imported beer and wine to be sold through in-state wholesalers, despite the fact that out-of-state beer was treated as an import. *Id.* para. 5.32–33. Moreover, the court rejected the argument that these inconsistent state laws were mandatory existing legislation, necessary under the Twenty-First Amendment, and thus exempt from GATT through the Protocol of Provisional Application. *Id.* para. 5.46–48.

did the U.S. government sue the states to force compliance. On the contrary, state and federal government officials are working in an ongoing process to bring the laws into compliance with the panel decision.[154]

While the United States is working to implement the decisions of this panel, one must recall that the new DSB will have enhanced powers to make and enforce its decisions.[155] Moreover, members of the WTO, including the United States, have signed an agreement that urges "[p]rompt compliance with recommendations or rulings of the DSB [as] essential in order to ensure effective resolution of disputes."[156] Members that fail to comply with covered agreements or recommendations and rulings within a reasonable time face payment of compensation or retaliation.[157] Opponents of the Uruguay Round seized upon these enhanced legal powers as a serious threat to state sovereignty.

3. *DSB Panels: A New Threat to States?* This section will show why opponents to the Uruguay Round could not sustain arguments that the WTO will impermissibly violate state sovereignty. As described above, the federal government traditionally holds a preeminent position in international commerce, and GATT clearly relates directly to international commerce. Moreover, under the Uruguay Round implementing legislation, several provisions protect states' limited but legitimate interests. First, the Uruguay Round Agreements Act provides that the President and the U.S. Trade Representative must consult with the states about provisions of the Agreement that affect the states.[158] Therefore, the states will have input into measures that affect their laws and can begin to limit any effects on state sovereignty at an early stage. More importantly, the Act provides that the USTR and state government representatives will work together to bring conflicting state laws into compliance with adverse panel

154. *United States—Measures Affecting Alcoholic and Malt Beverages, Follow-up on Panel Report, Communication from the United States*, GATT Doc. DS23/13 (Dec. 13, 1993) (explaining that states are continuing to adopt legislation in conformance with the panel report).

155. *See supra* notes 60–62, 86–89 and accompanying text.

156. Understanding on Dispute Settlement, *supra* note 29, art. 21(1), 33 I.L.M. at 125.

157. *Id.* art. 22(1)-(3), 33 I.L.M. at 126–27.

158. Uruguay Act, *supra* note 14, § 102(b), 108 Stat. at 4815–16.

decisions.[159] Like the process followed in the *Beer II* case discussed above, the federal government will not simply overturn state law after an adverse panel decision, but will work with the states to reach solutions that satisfy both GATT norms and state sovereignty needs. Finally, the Act provides that adverse panel decisions cannot automatically invalidate state law, but that the United States must bring an action under congressional scrutiny against a nonconforming state forcing it to comply.[160] This provision ensures that any state law that violates GATT principles will have judicial protection against arbitrary invalidation. Thus, enhanced dispute settlement is coupled with federal responsibility for bringing state law into compliance with adverse DSB panel rulings to safeguard state sovereignty.

A principal argument against the Urugnay Round Agreements claimed that binding decisions from the DSB would alter state laws[161] with little regard for the state's policy goals and sovereignty. During the congressional debates, Professor Tribe explained,

> [w]hereas Congress may choose between a GATT-illegal federal law and WTO-imposed sanctions, a state whose law has been found in violation of GATT provisions will know that if it does not change its law, one of the following will occur: Congress may preempt the offending state law; the Executive Branch may bring an action against the state and persuade a court to strike the law down under GATT; or the nation as a whole will be subject to retaliatory sanctions. If the state does not wish to change its law, the consequences are left to federal officials and to other nations.[162]

Thus, Professor Tribe argned that states will relinquish sovereign legislative and executive powers to either the federal government or simply to GATT panels.

Consumer groups argued that GATT would weaken state consumer protection laws. Testifying before the Senate Commerce Committee, consumer advocate Ralph Nader argued that foreign countries would challenge state and local laws as illegal trade

159. *Id.* § 102(b)(C)(iv), 108 Stat. at 4817.

160. *Id.* § 102(b)(2), 108 Stat. at 4817–18.

161. Arguments also were made concerning the effect of the WTO on federal law. However, this Note is limited to the issue of state sovereignty.

162. Tribe GATT Statement, *supra* note 131, at 303.

barriers through the DSB, thus overturning important labor, environmental, and consumer standards, and chilling further legislation that potentially violated GATT norms.[163] This result, he argued, would subordinate domestic policies and domestic democratic bodies to international mercantile interests and to "a dispute resolution body located in Geneva, Switzerland that would operate in secret and without the guarantees of due process and citizen participation found in domestic legislative bodies and courts."[164]

State attorneys general also raised the sovereignty issue during the Uruguay Round Agreement debates.[165] In a letter to the President, forty-two state attorneys general expressed many concerns, including whether the USTR will consult with the states about state laws that are illegal under GATT; whether states will have a formalized process and guaranteed right to defend their laws from adverse DSB panel decisions; and whether the implementing legislation would guarantee that the federal government will genuinely consider trade sanctions rather than forcing states to change their laws in response to an adverse panel decision.[166] Maine Attorney General Michael D. Carpenter summarized concerns that the USTR would not protect state interests, stating that "[the] USTR might view state laws as bargaining chips when negotiating with trading partners, particularly because state laws in the areas of health, safety and environmental protection often are tougher than those at the federal level."[167]

Furthermore, Uruguay Round dissenters focused on a portion of the *Beer II* decision that held a Minnesota tax incentive for in-state microbreweries to be inconsistent with GATT.[168] Critics saw

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163. *See GATT Implementing Legislation: Hearings on S.2467 Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 357, 357–59 (Oct. 18, 1994) (prepared statement of Ralph Nader).

164. *Id.* at 359.

165. *See* Letter from Michael E. Carpenter, Maine Attorney General, et al. to President Clinton (July 13, 1994), *reprinted in* 140 CONG. REC. S8847, S8853 (daily ed. July 13, 1994).

166. *Id.*

167. Cloud, *supra* note 151, at 2010.

168. *See* Beer II, *supra* note 151, para. 5.19.

> [E]ven if Minnesota were to grant the tax credits on a non-discriminatory basis to small breweries inside and outside the United States, imported beer from large breweries would be "subject . . . to internal taxes . . . in excess of those applied . . . to like domestic products" from small breweries and there would still be an inconsistency with Article III:2, first sentence.

Id.

the decision as the future of things to come under the WTO. Professor Tribe argued that "an extreme version of the concept of non-discrimination" found in the opinion "would limit states' abilities to favor certain classes of producers, irrespective of nationality . . . [and] would have much greater force if applied under the WTO."[169] Members of Congress raised similar concerns, fearing that valid state laws would suffer immediate attack under the new dispute settlement body.[170] Senator Kempthorne provided a specific example of how panel determinations might affect his state's laws: "[T]he Idaho legislature has enacted an investment tax credit which allows companies to deduct plant investments. It is not hard to imagine a WTO panel determining that this investment tax credit favors Idaho industries over foreign competition."[171]

Dissenters, however, could not sustain these arguments because the nature of the Agreements and provisions in the implementing legislation belied any real threat to state sovereignty. Most importantly, substantive and procedural guarantees in the implementing legislation will protect state sovereignty.[172] Neither the Agreements nor the implementing legislation allow immediate invalidation of state laws in the face of adverse panel decisions. On the contrary, as the *Beer II* decision illustrates, a process of federal-state consultation will occur in order to find satisfactory means to implement panel decisions. Moreover, foreign nations will have strong incentives not to challenge state laws because such attacks will open their laws up to attack from the United States, and will foster animosity in trade relations between trading partners.

As an ultimate guarantee of state sovereignty, the United States may leave the WTO after six-months notice if it decides that sovereignty has been compromised.[173] Moreover, Senator Robert Dole expressed concerns about risks to U.S. sovereignty in the WTO, but agreed to support the bill in exchange for legislation to be introduced in 1995 establishing a WTO Dispute Settlement Review Commission.[174] This Commission, which will be

169. Tribe GATT Statement, *supra* note 131, at 306.

170. *See* Cloud, *supra* note 151, at 2009.

171. 140 CONG. REC. S15,271, S15,302 (daily ed. Dec. 1, 1994) (statement of Sen. Kempthorne).

172. *See supra* notes 158–60 and accompanying text.

173. WTO Agreement, *supra* note 15, art. 15(1), 33 I.L.M. at 1152.

174. *See* 140 CONG. REC. S15,271, S15,341 (daily ed. Dec. 1, 1994) (statement of Sen.

comprised of five sitting U.S. appellate court judges, will review each DSB panel decision for fairness.[175] If the Commission finds inequity in three or more decisions, Congress can take action to remove the United States from the WTO.[176] While this enhanced dispute settlement system will require greater compliance from Members, procedural and substantive provisions in the WTO Agreement and the Uruguay Round Agreements Act will effectively safeguard state sovereignty.

B. *NAFTA and the States*

Canada, Mexico, and the United States established NAFTA to increase productivity in its three Member nations by reducing trade barriers. To achieve this goal, all parties recognized the need for clear, reliable, and enforceable dispute settlement provisions. However, as with GATT, enhanced powers to supranational bodies may always affect state laws and the states' ability to promulgate laws. This section will consider arguments that NAFTA impermissibly violates state sovereignty. This section will also show how NAFTA's structure overcomes these concerns.

1. *NAFTA in U.S. Law.* Like GATT, NAFTA was negotiated and approved as a congressional-executive agreement under fast track procedures,[177] and as a valid congressional-executive

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Dole) (citing Letter from Michael Kantor, United States Trade Representative to Bob Dole, Senate Minority Leader (Nov. 23, 1994)). As agreed, Senator Dole introduced S. Res. 16, 104th Cong., 1st Sess. (1995) (WTO Dispute Settlement Review Commission Act), 141 CONG. REC. S173, S176 (daily ed. Jan. 5, 1995).

175. The Commission will review adopted DSB panel decisions adverse to the United States. The Commission will determine whether the panel or Appellate Body:

> 1. Demonstrably exceeded its authority or terms of reference or . . . [for dumping cases] failed to apply Article 17.6 concerning standard of review;
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> 2. Added to the obligations or diminished the rights the United States assumed under the pertinent Uruguay Round agreement;
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> 3. Acted arbitrarily or capriciously, engaged in misconduct, or demonstrably departed from the procedures specified for panels or the Appellate Body in the agreements; and whether
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> 4. The action in 1, 2, or 3 materially affects the outcome of the report.

140 CONG. REC. at S15,341.

176. *Id.*; *see also* David E. Sanger, *Dole and Clinton Strike Deal on World Trade Pact*, N.Y. TIMES, Nov. 24, 1994, at A1.

177. For a history of NAFTA fast track procedures, see Koh, *supra* note 122, at 153–56.

agreement, it is also considered the supreme law of the land.[178] Because of its recent inception, few courts have considered NAFTA directly, and the Supreme Court has never ruled on its status as supreme law. In dicta, the Fifth Circuit explained: "In sum then, the NAFTA Act is not meant to affect United States law other than as 'specifically provided.'"[179] The court further ruled that NAFTA did specifically amend § 17(d) of the Poultry Products Inspection Act.[180] Of course, this decision did not address state law nor the application of an adverse panel decision. However, the opinion does show that NAFTA supersedes specific inconsistent federal law. By extension, inconsistent state law, which can be preempted by federal law, must also yield to certain NAFTA obligations.[181]

Trojan Technologies, Inc. v. Pennsylvania,[182] a case that arose under NAFTA's predecessor, the U.S.-Canada Free Trade Agreement (CFTA),[183] provides some indication of how courts may treat NAFTA because NAFTA borrows many of its provisions directly from the CFTA. In this case, the court considered whether the Pennsylvania Steel Products Procurement Act[184] conflicted with and was therefore preempted by the CFTA.[185] The court considered section 102 of the CFTA Implementation Act, which provides that CFTA provisions "prevail over . . . any conflicting State law . . . [and] any conflicting application of any State law to any person or circumstance."[186] However, because the CFTA did not expressly mention "buy-American statutes," the court held that the CFTA did not explicitly preempt these statutes, but tacitly permitted them.[187] The court also considered the legislative history, opinions of Canadian commentators, and congressional concerns about fair trade to decide that Congress could

178. *See supra* notes 138–42 and accompanying text.

179. Mississippi Poultry Ass'n, Inc. v. Madigan, 31 F.3d 293, 303 (5th Cir. 1994).

180. *Id.* The PPIA is codified at 21 U.S.C. §§ 451–70 (1988).

181. *See* Hudec, *supra* note 140, at 219.

182. 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991).

183. 27 I.L.M. 281. For indications of NAFTA's effect on the U.S.-Canada Free Trade Agreement, see United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, § 501(c)(3), 102 Stat. 1851, 1898 (1988), *reprinted in* note following 19 U.S.C.A. § 2112 (West Supp. 1994) ("suspension resulting from NAFTA").

184. Pub. L. 6, No. 3, PA. STAT. ANN. tit. 73, §§ 1881–87 (1978).

185. *Trojan Technologies*, 916 F.2d at 904–06.

186. *Id.* at 906. The North American Free Trade Agreement Act does not contain similar language about preemption. *See infra* notes 216–17 and accompanying text.

187. *Trojan Technologies*, 916 F.2d at 907.

not unilaterally eliminate these U.S. state laws while Canada maintained similar provincial barriers.[188]

Because the caselaw is unclear concerning NAFTA's effect on state laws, it is critical to consider the language of the North American Free Trade Agreement Implementation Act[189] and its legislative history.[190] Recall that NAFTA Article 105 requires parties to ensure observance of its obligations by state and provincial governments.[191] Like the Uruguay Round Agreements Act, legislators took great care to protect state sovereignty from undue intrusion by NAFTA panel decisions.[192] First, the Act specifically states that state law cannot be declared invalid because it is inconsistent with NAFTA, except in an action brought by the United States to declare the state law invalid.[193] At the same time, the legislative history provides that "NAFTA obligations generally apply to State and local, as well as Federal, laws and regulations, with significant exceptions, particularly with respect to standards, government procurement, investment, and trade in services."[194] These provisions leave some doubt about how and when NAFTA will supersede specific state laws. However, the legislative history also describes how NAFTA should function:

> While section 102 makes clear that the Federal Government retains the right to challenge, including through court action, any State law or its application on the grounds that it is inconsistent with the NAFTA, this authority is intended to be used only as a last resort in the unlikely event that consistency is not achieved through the consultative process.[195]

So, great emphasis is placed on federal-state consultation to bring state laws into conformity with NAFTA and to avoid federal government challenges to inconsistent state laws. The consultative

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188. *Id.* at 907 & n.4.

189. 19 U.S.C. §§ 3312–3473 (1995).

190. H.R. REP. NO. 361, 103d Cong., 1st Sess. (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552.

191. NAFTA, *supra* note 6, art. 105, 32 I.L.M. at 298; *see also supra* note 25 and accompanying text.

192. *See, e.g.*, Letter from Michael Kantor, U.S. Trade Representative, to Rep. Henry A. Waxman, Chairman, Subcomm. on Health and the Environment (Sept. 7, 1993), *reprinted in* 93 U.S.C.C.A.N. 2858, 2862 (responding to concerns that section 105 of NAFTA would require preemption of state laws).

193. 19 U.S.C. § 3312(b)(2).

194. H.R. REP. NO. 361, 103d Cong., 1st Sess., pt. 1, at 2568 (1993).

195. *Id.*

process contains two elements. First, the President consults with the states to ensure conformity of state laws through already established policy advisory committees.[196] Second, the United States Trade Representative also consults with the states about "issues relating to the Agreement that directly relate to, or will potentially have a direct impact on, the States."[197] Legislators included this expanded consultation process "to address concerns expressed by State representatives about the potential impact of NAFTA obligations on State laws and the need for their involvement in any disputes concerning those laws."[198] Finally, the implementing legislation disallows private rights of action to challenge federal, state, or local laws.[199] This provision ensures states that only the federal government may challenge, in court, a state or local law for being inconsistent with NAFTA. Thus, these provisions attempt to strike a balance between effective compliance with United States international obligations and protection of important state sovereignty interests.

2. *Does NAFTA Violate State Sovereignty?* Similar arguments to those made against GATT[200] arose against NAFTA during congressional debates and hearings.[201] Representative Joelen Unsoeld raised the question of environmental enforcement on the House floor.[202] She included a memorandum of law from Professor Robert W. Benson of Loyola Law School that argued that Article 105 of NAFTA would create implied and unavoidable preemption of state and local laws.[203] Similarly, during questions before the Senate Commerce Committee, Senator Stevens asked United States Trade Representative Michael Kantor whether Article 105 would require NAFTA's side agreements to preempt

196. 19 U.S.C. § 3312(b)(1)(A). These committees are established under 19 U.S.C. § 2114c(2)(A)(ii) (1994).

197. 19 U.S.C. § 3312(b)(1)(B).

198. H.R. REP. NO. 361, 103d Cong., 1st Sess., pt. 1, at 2568.

199. 19 U.S.C. § 3312(c).

200. *See supra* notes 161–71 and accompanying text.

201. *See, e.g.*, Bob Herbert, *In America; NAFTA and the Elite*, N.Y. TIMES, Nov. 10, 1993, at A27.

202. 139 CONG. REC. H9816, 9819 (daily ed. Nov. 16, 1993) (statement of Rep. Unsoeld).

203. *Id.* at 9820. Professor Benson also cited the *Beer II* case as evidence of challenges to state laws that would require the federal government to force states to change conflicting laws. *Id.*

U.S. law.[204] Ambassador Kantor responded, "No, they do not. What they do is they induce and force each of the participants to enforce their existing laws."[205] Senator Stevens then raised his chief concern: "Under the Supremacy Clause, it means suddenly we have amended State laws whether the States like it or not."[206] Thus, as described above, members of Congress[207] were concerned that because NAFTA had the status of federal law it would automatically preempt state laws.

A second major concern dealt with panel decisions. Professor Benson also argued:

> [C]onflicts between NAFTA and state and local laws will not usually be resolved by American courts or agencies working under open government requirements. They will usually be resolved by NAFTA arbitral panels of 5 trade specialists whose proceedings and documents are secret. State and local officials, represented only by U.S. federal officials, have no right to participate to defend their laws. These panels may well declare state and local laws in violation of NAFTA despite the presence of the savings clause.[208]

Professor Benson and others predicted that state pollution, labor, food, consumer, and safety laws all faced challenges under NAFTA as restrictions on trade.[209] Senator Kempthorne again raised issues about Idaho's sovereignty under NAFTA's environmental side agreement.[210] He feared that the states would not have adequate representation before arbitral panels, and that the federal government would disregard legitimate differences in interpretation of state laws by the states, passing panel penalties on

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204. *Hearings on the NAFTA Implementation Act Before the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong., 2d Sess. 35 (Oct. 21, 1993) (Senator Ted Stevens questioned Michael Kantor, U.S. Trade Representative: "[W]hat effect then do these side agreements have as far as Federal law is concerned? Do they modify any Federal law?").

205. *Id.*

206. *Id.*

207. *See also* Letter from Michael Kantor to Rep. Waxman, *supra* note 192, at 2862 ("Does [Article 105] require the U.S. to preempt any state and local laws, and does the Administration intend to include any preemption provisions in its implementing legislation?").

208. 139 CONG. REC. at H9820.

209. *Id.* at H9820–21.

210. 139 CONG. REC. S16,678, 16,696–97 (daily ed. Nov. 20, 1993) (statement of Sen. Kempthorne).

to the offending state.[211] In the House, Representative Bentley also argued that citizens had no standing under "secret" Article 20 panel proceedings which further threatened sovereignty.[212]

Despite these concerns, the legislative history, expert opinions, and final passage of NAFTA show that NAFTA will not impermissibly infringe upon state sovereignty. First, the USTR explained that NAFTA Article 105 did not require federal preemption of inconsistent state laws. Rather, Article 105, like section 102(b)(2) of the Uruguay Round Implementation Act,[213] will hold the federal government responsible when states fail to comply with NAFTA norms.[214] Ambassador Kantor further explained that "the precise legal relationship" between federal and state law was left to each nation, and promised that the Administration would work with Congress and the states to adopt an acceptable standard.[215] The compromise "acceptable standard" described above[216] does not include a provision that specifically requires preemption.[217] Similar to the GATT legislation, the NAFTA implementing legislation also includes provisions guaranteeing federal-state consultation to bring inconsistent state laws into conformity, which reserves recourse to preemptive legislation or legal action as a last resort available only to the federal government.[218] Thus,

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211. *Id.*

212. 139 CONG. REC. H9800, H9800 (daily ed. Nov. 9, 1993) (statement of Rep. Bentley).

213. *See supra* note 158 and accompanying text.

214. Letter from Michael Kantor to Rep. Waxman, *supra* note 192, at 2862.

215. *Id.* at 2862–63.

216. *See supra* notes 193–95 and accompanying text.

217. Unlike NAFTA, Title I, section 102 of the United States-Canada Free-Trade Agreement Implementation Act of 1988 required that to the extent there is any conflict with state law, the provisions of the agreement "prevail over—(A) any conflicting State law; and (B) any conflicting application of State law to any person or circumstance." Pub. L. No. 100-449, tit. I, § 102(b), 102 Stat. 1851, 1853 (1988), *reprinted in* note following 19 U.S.C.A. § 2112 (West Supp. 1994).

218. Ambassador Kantor also wrote:

> In the one instance where state measures were successfully challenged before a GATT panel, we have not had recourse to preemption or lawsuits. Rather, we have worked with the state involved to see what, if any, solutions to the question can be found that would fully protect state interests in the matter. We expect our practice of consultations and cooperation to continue under the NAFTA.

Letter from Michael Kantor to Rep. Waxman, *supra* note 192, at 2863. This letter further illustrates the federal commitment to work with states to ensure compliance of state laws with international trade obligations, dispelling fears that the federal government will simply invalidate state laws in response to adverse NAFTA or GATT panel decisions.

the federal government will not run roughshod over state sovereignty, but will work with the states to ensure compliance with national obligations.

Adverse panel decisions also pose no impermissible threat to state sovereignty. The history of CFTA panel decisions shows that the overwhelming majority have been quality decisions with "no significant problems with compliance."[219] Thus, the likelihood of numerous adverse panel decisions threatening state sovereignty seems remote. In addition, there are numerous safeguards in both the Chapter 19 and Chapter 20 panel processes, and in the implementing legislation that protect state sovereignty. Speaking about Chapter 19 panel decisions, one House Member described some of the key safeguards: "All three signatories . . . have the option to refuse to alter laws that are found to be inconsistent . . . . If any of the three sovereign countries refuse to change such a law . . . the other countries can impose penalties or tariffs. . . . [A]ny of the signatories can withdraw from the Agreement on 6 months notice."[220]

Similarly, Chapter 20 panel decisions require federal government action for implementation, and the government is bound by a consultation process to ensure state participation in doing so. Moreover, for Chapter 19 panels, section 403 of the Act implements safeguards from NAFTA Article 1904 (extraordinary challenge committees),[221] including an explicit guarantee that panels will follow the domestic standard of review for the country whose law is being challenged.[222] Thus, if a state law is challenged as a subsidy by Canada or Mexico, it will be guaranteed the same standard of review that it would have under U.S. law. Finally, these provisions, taken together, refute arguments that NAFTA panel decisions will impermissibly violate state sovereignty by compelling states to change laws inconsistent with NAFTA.

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219. Huntington, *supra* note 24, at 415 (citing Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution Panels of the U.S.-Canada Free Trade Agreement: The First Two and One-half Years*, 37 MCGILL L.J. 575, 585–87 (1992)).

220. 139 CONG. REC. H9875, H10,019 (daily ed. Nov. 17, 1993) (statement of Rep. Fish).

221. *See supra* note 110 and accompanying text.

222. H.R. REP. NO. 361(I), *supra* note 190, at 74, *reprinted in* 1993 U.S.C.C.A.N., at 2624.

CONCLUSION

The Uruguay Round Agreements of GATT and the North American Free Trade Agreement are important international obligations that will provide economic benefit to the United States and the world. Enhanced dispute settlement procedures and firm commitments to abide by the obligations in these agreements will strengthen their credibility and effectiveness. In exchange for these benefits, parties to the agreements have sacrificed a degree of control over their domestic legal systems. While it is a constant challenge to maintain an appropriate balance between the exigencies of international trade obligations and the sovereignty of the fifty states, GATT and NAFTA have safeguard provisions to help ensure a proper balance. Moreover, both agreements have specific provisions that allow the United States to end its participation if state sovereignty is undermined. While states and the federal government must be vigilant to protect states' rights under the agreements, fears that the two agreements would necessarily usurp state power are exaggerated and unpersuasive. NAFTA and the Uruguay Round Agreements of GATT effectively join the goals of protecting state sovereignty and enhancing international trade.