

The decision on whether to pursue dispute settlement under NAFTA Chapter 20 or under the WTO largely reflects an assessment of the rights and obligations in the respective agreements relevant to the dispute. In instances where there is an obligation under the NAFTA, but no similar or related obligation in the WTO agreements, the dispute could be adjudicated only under the NAFTA. Where both the NAFTA and WTO agreements contain comparable obligations, governments may weigh a number of factors in selecting the forum for the dispute, including the scope of the obligations in the respective agreements, the support provided by the involvement of a broader constituency of trading partners in the WTO system, and relevant case law.

Transparency in international trade agreements and their mechanisms is of top priority to the Government. With respect to NAFTA Chapter 20, the Government pursued this goal in the negotiation of the Model Rules of Procedure. This resulted in a supplement to the dispute settlement rules of procedure; these supplementary procedures provide that at any time during the proceedings, any NAFTA government may make public its written submissions and those of the other parties involved in the dispute following the removal of any confidential information. In addition, the panel hearing transcript may be made public 15 days after the final report of the panel is published. Since 1995, it has been Government policy to make these documents public, subject only to removal of any confidential information. The Government agrees that NAFTA Chapter 20 transparency would be improved by opening the hearing to public observers, provided that adequate procedures are in place with respect to confidential information, and agrees to engage with the US and Mexico on this issue.

The development of Canada's position before dispute settlement panels benefits from a consultation process with interested third parties that often includes industry, provinces, and non-governmental organizations, particularly with those closely involved with the dispute. The Government accepts the Committee's recommendation that Canada advocate an expanded role for interested non-governmental parties and work towards developing a formal NAFTA Chapter 20 procedure to address their role in Chapter 20 dispute settlement. In developing these procedures in the NAFTA, as in the WTO, it is important that any increased rights of intervention for non-governmental interests be balanced against the relevance their submissions might have to the factual and legal issues under consideration and the potential of these submissions to jeopardize the capacity of the panel to deliver prompt settlement of disputes in a manner that satisfies due process requirements.

In the Committee's Report, it has also observed that the NAFTA Chapter 20 dispute settlement mechanisms includes a meeting of the NAFTA Free Trade Commission as an intermediate step between consultations and a request for an arbitral panel. It states that this step is a political one which derails the rules-based focus of the system. Far from

