

International Agricultural Trade Disputes: Case Studies in North America
Chapter 4:
WTO and NAFTA Dispute Settlement for North American Agricultural Trade
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Objectives of the Paper

Dispute settlement under trade agreements has gained such reach that consideration needs to be given to invoking its machinery in a wide variety of international commercial disputes. This paper aims to provide an understanding of how these recent additions to the field of alternative dispute resolution systems would operate with respect to agricultural border disputes and why a litigant might choose one over the other when both are available or either over national courts. The paper opens with a background on negotiations in the World Trade Organization (WTO) and the North American Free Trade Agreement (NAFTA) to ensure the reader's basic knowledge of the dispute settlement systems at issue in the discussion to follow.

The template for comparison of the systems will be an actual case that has been addressed both by the WTO and NAFTA Dispute Settlement systems. The case involves the imposition of anti-dumping duties by Mexico on U.S. imports of High Fructose Corn Syrup, a multi-million dollar U.S. industry whose product is used primarily to sweeten soft drinks. We will not dwell on the substantive findings of the various dispute settlement panels, but instead use the case to illustrate important differences between the two systems that a litigant might consider, such as how the process is invoked, how

a panel is formed, the panel's jurisdiction, what standard of review it will use, how it will treat precedent, what role private counsel will play in the process, the nature of an appeal of a panel decision, and how the decision will be implemented.

There are a number of types of dispute settlement contemplated in the NAFTA.

Although some of the complex details will be omitted, the paper primarily will look to the Chapter 19 procedures for resolving disputes involving the trade remedy laws of the three countries and will point out important differences from the various other dispute procedures created by the NAFTA.

Dispute Settlement in the World Trade Organization

The WTO is repository of the basic international trade rules among its 144 nation-state Members. The NAFTA is a regional economic integration agreement that builds on the WTO's basic rules to open trade more completely among the three countries of North America (called "Parties" in this chapter). The two treaties entered into force in the mid-1990s with powerful systems to resolve trade disputes.

To understand present dispute settlement in the WTO, one needs to picture the winding path taken by its predecessor for the previous 50 years, the General Agreement on Tariffs and Trade (GATT) to reach the stage from which WTO negotiators were able to take a quantum leap. In sum, what began as a diplomacy-driven process of negotiation to resolve disputes has been transformed into nothing

short of a rule of law. At their inception, GATT dispute settlement procedures were straightforward. If a party considered that benefits to which it was entitled under the Agreement were being nullified or impaired, the Agreement entitled the party to the "sympathetic consideration" of the party alleged to have violated its GATT obligations or otherwise caused the nullification or impairment.¹ If these consultations failed to resolve the dispute, the matter could be referred to the contracting parties² for investigation, to be followed by a recommendation or ruling.³

Over time, these investigations progressed from being handled by a working party to a panel of experts to a separate panel for each case, none of which is identified by the Agreement, and each of which is an inexorable step toward greater objectivity in the dispute resolution process.⁴ After receiving the panel's report, the contracting parties could, if they considered the situation "serious enough," authorize the complaining party to impose countermeasures in the form of suspension of GATT concessions,⁵ although they have done so only once, in a complaint by the Netherlands involving U.S. quotas on the importation of dairy products.⁶ Modest procedures for the handling of Article XXIII complaints. were adopted in 1966.⁷

GATT 1947's very sketchy provisions were fleshed out minimally by a framework understanding on dispute settlement rules⁸ and by the particular provisions of the six new 1979 Tokyo Round codes addressing non-tariff measures (standards, government procurement, subsidies, antidumping, customs valuation, and import licensing). These

provisions continued the emphasis on stimulating settlement by Parties through an informal, policy-oriented reasoning together approach, although they made an initial stab at a disciplined process with the setting of loose time limits for panel reports and for compliance with panel recommendations. In hindsight, it is clear that the sixty-day targets in the codes for completion of panel proceedings and the "reasonable period" suggested for bringing the offending laws into compliance, harkened back to the clubby 1950s when GATT was made up of twenty-three like-minded countries whose representatives had negotiated the Agreement together.⁹

As became obvious by the failure of these improvements to ensure successful resolution of a deluge of disputes, both broader and deeper than in earlier times, which characterized the 1980s,¹⁰ the new GATT had become an altogether different creature.¹¹ The basic remedy of GATT dispute settlement continued to be bringing the offending measure into compliance with GATT or its agreements. The losing party could continue to block adoption of a panel report because adoption required the consensus of the contracting parties. The codes and the understanding confirmed that countermeasures, in the case of failure of a party to bring its laws into compliance, could include the withdrawal of GATT concessions, that is, increased tariffs on products that were not the subject of the dispute. Under this prescription, countermeasures always, of course, had the effect of harming or helping industries that had not been injured by the activity that was the subject of complaint.

Taken together with the fact that the losing party also had the power to block countermeasures, very few trade disputes were resolved under this political process, which set the stage for an early harvest in this field during the Uruguay Round. At the April 1989 mid-term meeting of ministers, the parties agreed to apply on a trial basis a bold new set of initiatives until the end of the Round.¹² Binding arbitration was added for the first time, as a mutually agreed upon option (albeit an opportunity that no party chose to take). Standard terms of reference were adopted when the parties to the dispute could not agree; failure of the party complained against to agree to the issues to be decided by the panel had become a standard tactic for delaying the substantive work of the panel.

Together with this automatic establishment of panels, more realistic deadlines were established, in *recognition* of the intense fact-gathering nature of dispute settlement, as well as the need for considerable legal analysis - a nine-month deadline was set for the panel's report, with a target of six months. The GATT Council was to monitor implementation of an adopted report, and the subject would, until resolved, remain on the council agenda beginning six months after adoption. No actual deadline was established for compliance with a panel's recommendations, although peer pressure had become decidedly stronger than in earlier days as parties, particularly developing countries, came to the view that hard-won GATT benefits were worth substantially less to them if they could not be enforced. The essence of the mid-term improvements was that while they clearly were aimed more toward a judicial rather than a legislative

process, any party still could block adoption of a panel report, and any party still could prevent countermeasures from being approved even if it permitted the report to be adopted.

As might have been predicted from the early harvest, the dispute settlement procedures that emerged from the Uruguay Round easily were the most significant advance since GATT was born.¹³ Parties subjected their disagreements to truly binding arbitration by the panel process. A panel report must be adopted unless there is consensus to reject the panel report.¹⁴ Because this consensus must include the winner of the dispute, this reverse consensus would be exercised only when all agreed to reject an "outlaw" panel decision, one whose adverse impact on other programs would be worse than its favorable effects on the activity under dispute.

Tighter time frames, including for compliance, are provided. "Urgent" cases (including, for example, those involving perishables - relevant of course to some agricultural products), are to be completed in only three months, while other disputes retain the mid-term target of six months and deadline of nine.¹⁵ In a change most resembling court proceedings, there is an appeal of right to a standing body.¹⁶ In the event of noncompliance, the winning party has the right to retaliate, unless there is consensus to reject the countermeasures.¹⁷ Significantly, the basic remedy is bringing the offending measure into compliance;¹⁸ also unchanged from the original GATT, countermeasures constitute the withdrawal of GATT concessions.¹⁹ In essence,

although the vestiges of a political process remain, the new dispute settlement in the WTO is mostly a rule-driven, judicially oriented system.

NAFTA Binational Panel Review of Antidumping and Countervailing Duty Determinations

Effective at the start of 1995, the United States agreed with its northern and southern neighbors to a unique and still controversial cession of judicial sovereignty. Chapter 19 of the U.S.-Canada Free Trade Agreement, overtaken in 1994 by Chapter 19 of NAFTA when Mexico joined the pact, provides an innovative solution to a complex issue, that is, how to satisfy our free-trade agreement colleagues that U.S. unfair trade laws will be applied fairly to their imports, while preserving the right of U.S. producers to be protected fully from unfairly traded imports from two of our most important trading partners.

Chapter 19 provides for the review of antidumping and countervailing duty determinations involving goods of another NAFTA party by independent binational panels composed of private trade law experts chosen by the two countries involved in the dispute, instead of the traditional review by national courts. Article 1904 of NAFTA provides that final determinations (as defined in Article 1911) of the investigating authorities in each country²⁰ that involve goods of the other country²¹ will be subject to review by binational panels selected by the two governments.²² Panelists cannot be government employees or otherwise affiliated with the governments (judges are not considered affiliated with governments for this purpose) and a majority of the panelists

on a given panel (including the chair) must be lawyers in good standing. All panelists are to be selected on the basis of their "objectivity, reliability, sound judgment, and general familiarity with international trade law."²³

The emphasis on legal knowledge, even for the non-lawyer panelists, is well-placed because the panel's function is to determine whether the investigating authority has properly applied its antidumping or countervailing duty law, based solely on the record created during the administrative process and on the standard of review and the general legal principles that would apply in that country's courts.²⁴ A final determination may be challenged under normal judicial review procedures only if neither government requests a panel within thirty days after receiving notice of the determination.²⁵ The government request may be either on its own initiative or at the insistence of a private party that would otherwise have standing under domestic law to bring an action in the courts.²⁶

If the panel finds that the investigating authority has incorrectly applied its antidumping duty law, the panel will remand the determination for action not inconsistent with the panel's decision and must establish a time limit for compliance with the remand.²⁷

Under very limited circumstances, the decision of a panel may be brought before an "extraordinary challenge committee" composed of judges or former judges for an expedited decision.²⁸ Decisions of the panel are binding on the parties insofar as the particular matter before the panel is concerned, and the Agreement provides that the

governments may not legislate an appeal of a panel decision to the domestic courts.²⁹

Improvements Made by NAFTA to the U.S. -Canada Model

After five years of experience under the U.S.-Canada agreement, the parties were able to identify modifications to the binational panel system that would better reflect the intent of the crafters of the system. First, it should be noted that despite the addition of a third party, the system did not become one of trinational panels. Only two parties participate in any given review, precisely the same situation that would prevail in the judicial systems of the countries involved. Perhaps a faithful description of the current process is that it is triangular.

One improvement introduced by NAFTA is a preference for judges, either sitting or retired, from the federal courts of the three countries. This change emphasizes that a panel's task is to apply existing law as a court would, not to create a new body of law. This change also will have the effect of reducing the potential for a conflict of interest by trade practitioners who also represent clients in other trade matters pending before the administering authorities of the countries involved.

In addition, the procedures for challenging a panel decision through an extraordinary challenge committee have been improved by expressly requiring these committees to examine the legal and factual conclusions of the panel, and by tripling the length of time available to the committees to undertake that examination.

The third change, the corrective mechanism added by Article 1905, is quite substantial. The parties recognized that some risk attended the melding of Mexico's civil law system, together with its recently enacted antidumping and countervailing duty law, with the common law system, and the more mature antidumping and countervailing duty laws of the other two NAFTA parties. The principal protection against an adverse clash of systems was to ensure sufficient change to Mexico's laws that the exporters of all three countries would be in a roughly equivalent position. Essentially, this combination of changes³⁰ shifts Mexico several steps closer to a common law system for antidumping and countervailing duty.

Article 1905 then provides that if a party's laws prevent a panel from being established, or have the effect of rendering its decisions non-binding, or if these laws fail to provide a meaningful opportunity for judicial review, and a special committee agrees that one of these situations exists, the complaining party may suspend operation of the binational panel system, or suspend equivalent benefits to the other party. This is, of course, a remedy reminiscent of GATT. Article 1905 goes on to provide that when and if the problem is eliminated, any suspension of operation of the binational panel system would be terminated. This snapback provision, while potentially draconian in its impact, is an effective and fair method for ensuring that Chapter 19 continues to operate as the Parties anticipated it would.

The five-member panels are composed of two members chosen by each of the involved parties, with the fifth to be chosen by agreement (which has never happened) or "by lot," that is, by tossing a coin to decide which party will make the choice, and thus have a majority of its appointees on the panel.³¹ After all panelists have passed their conflict-of-interest examinations, they elect a chair, who must be a lawyer.³² Once established, the panels move swiftly, in recognition of the deadline of 315 days imposed by NAFTA.³³ Because panels do not have equity powers,³⁴ the panel's jurisdiction over the imports at issue is preserved not through a panel injunction, but by an equivalent order by Commerce to the U.S. Customs Service.³⁵

As required by the NAFTA, panel decisions will be implemented by the agencies based directly on the panel's direction, without need for an intervening governmental decision, as befits a forum that substitutes for a court. If the United States believes the panel has seriously exceeded its powers, it may request reconsideration by an extraordinary challenge committee, an avenue pursued three times in the eight years of binational panel review, never successfully.³⁶ The decision to seek such review is made by the U.S. Trade Representative upon the advice of several interested federal agencies.³⁷ In the view of some trade practitioners, past extraordinary challenge committees have so limited the availability of this remedy that such a committee can be expected to act only if a panel overtly refuses to apply the clearly relevant standard of review, or if it contains a truly corrupt panelist whose vote mattered.³⁸

Impact of New Alternatives for Resolving Commercial Disputes

The U.S. General Accounting Office conservatively estimates that U.S. exports have increased by over \$1 billion per year as a direct result of successful U.S. challenges in the WTO. Many millions more have been implicated by disputes won but, to put it delicately, not fully implemented by the losing WTO country. For example, \$530 million in lost sales will eventually be recovered by the United States as the result of the October 2001 settlement of the 30-year Bananas War with Europe. \$117 million in lost sales is still pending from Europe's Beef Hormones ban, which was found in 1998 to be inconsistent with the WTO Agreement on Application of Sanitary and Phytosanitary Measures by the Appellate Body.

Nearly 300 cases have been filed since the WTO came into effect in January 1995. The United States filed fully one-third of these cases to vindicate its commercial interests, mostly against Europe. As expected, given the huge trading volumes between the United States and Europe, most of Europe's WTO challenges have challenged U.S. border measures. These disputes have reached broadly across commercial practice areas, from patent protection issues in the *India Mailbox* case or the copyright law interpretation in the *U.S. Music Licensing Act* case, to the novel anti-trust arguments advanced in the U.S. case against *Japan's Photographic Film* distribution system, to environmental issues implicated by the *Shrimp-Turtle* challenge against the United States, to systemic global tax policies represented by the Value-Added Tax versus the Income Tax highlighted by the \$4 Billion per year challenge to the *U.S. Foreign Sales*

Corporation law, to the health and safety issues treated by panels on Europe=s ban of *Asbestos* insulation and Australia's ban of Fresh *Salmon*.

Despite its open market, the United States often is a respondent in WTO dispute settlement. The United States aggressively interprets the limited discretion that remains under WTO Agreements to protect domestic industries from the adverse impacts of free trade. Many of these cases have involved agricultural products. In fact, although agricultural commodities constitute about 10 percent of world trade, easily twice that percentage of WTO disputes involve such products and fully 30 percent of the disputes entertained at the highest level of the WTO dispute process B its Appellate Body B address agricultural trade disputes.

The picture is equally impressive in the NAFTA dispute settlement system. From cross-border trucking to groundbreaking investment challenges against NAFTA Governments to border conflicts involving wheat, pork, tomatoes, cement, lumber, and corn syrup, the various dispute settlement mechanisms of this powerful North American trade treaty have determined millions of dollars in business outcomes.

Background on the Fructose Case

While in retrospect the telling one-two punch that occurred in the case of a WTO challenge followed immediately by a NAFTA complaint seems a brilliant tactical move by the United States, the reality is perhaps slightly less dazzling. In January 1998,

Mexico's Commerce Department found, following a year-long investigation under its Anti-Dumping Law, that Fructose exports from the United States were being sold for export below their domestic U.S. price, and that this international price discrimination (dumping) threatened material injury to Mexico's sugar industry.

Consideration will be given to some of the factors the exporters—Archer Daniels Midland and Cargill—would have considered in choosing a forum, other than an *amparo* citizen's suit or a wrongful taxation suit in Mexico's federal courts, to challenge this decision, which had the effect of shutting down a lucrative multi-million dollar market for the U.S. corn industry.

Invoking the Dispute Settlement Process

A WTO challenge can be brought only by a Government, consistent with the traditional notion of international dispute resolution as a government-to-government process. This translates in our example into convincing the U.S. agencies responsible for the area of law in question, the U.S. Department of Commerce and the U.S. International Trade Commission, of both the merit of the legal concerns with Mexico's anti-dumping investigation and that the errors raise important issues worth engaging the WTO dispute settlement process.

The U.S. Trade Representative's (USTR) lawyers also need to be convinced, because they are the official triggers of a dispute resolution challenge for the United States. This

is not as complex as it may sound, because these agencies closely monitor on their own investigations of U.S. industries being undertaken in other countries, so someone already familiar with the case is likely available to meet with industry representatives to get the process rolling. Once the decision to go forward is made, USTR will send to Mexico, through the respective Geneva WTO representatives, a request for consultations, which opens a period of possible negotiated settlement, of assessing the merits of each other's positions, and generally a cooling off period.

Many cases never go beyond this stage, but if the Government chooses to pursue the challenge, the United States would send its request for the formal establishment of a dispute settlement Panel to the WTO Dispute Settlement Body, that is to say, all the WTO Members assembled in Dispute Settlement mode. Under WTO rules, such a request must be honored. Dispute Resolution under Chapter 19 of the NAFTA—which covers the trade remedy laws, that is, Anti-Dumping or Anti-Subsidies or Countervailing Duty cases—actually replaces national court review of the agency's action if either side of the dispute chooses NAFTA's Chapter 19 dispute resolution process.

This is an unusual—in fact, unique—ceding of judicial sovereignty to an international forum, and continues to cause enormous controversy in this country. For this reason, the industry itself B the same private parties who could have triggered a suit in Mexico's courts C can invoke NAFTA Chapter 19 dispute resolution by filing a request for a panel with the Secretariat of the NAFTA. This does not mean counsel for the corn

industry would not consult with the U.S. agencies C certainly that happened here to map out a strategy B but it does mean that not only whether a challenge is filed, but also, importantly, whether particular issues are raised in that challenge, will be made by the domestic industry affected and not by the Government, which will of course be looking at the national interest C for example, the effect on future U.S. agency practice if a particular issue is resolved against the United States C when deciding what issues should be submitted for decision.

The principal other NAFTA dispute resolution process C under Chapter 20 C used to resolve disputes not involving the trade remedy laws, follows the more traditional process of convincing the Government itself to trigger formation of a dispute panel. There is a third type of NAFTA dispute resolution which will be mentioned only in passing because it is complex enough to require its own paper, the Investor-State Dispute Settlement process of NAFTA Chapter 11, which allows businesses whose investment has been financially affected by governmental regulation amounting to expropriation to trigger binding arbitration against the government. Some say Chapter 11 resurrects the notion of "regulatory takings," but only for foreign investors, not U.S. citizens.

In the Fructose case, the government and industry representatives agreed that a WTO case was warranted because of the importance of the issues involved. The U.S. Government, however, was unwilling to raise certain issues the industry thought

important, so it was agreed that the industry would pursue a separate challenge in the NAFTA at the same time.

Formation of the Dispute Panel

Once the process is invoked, how is a dispute panel actually formed? There is both a formal and an informal process under both systems. In the WTO, the Secretariat supposedly picks three panelists from a so-called "Indicative List" of names advanced by the Members, usually current government officials, most often those involved in implementing the WTO for their countries. Panelists normally may not be nationals of the disputing parties, and at least in theory they serve in their individual capacities—they may not take instruction from their governments.

In fact, the disputing parties may informally exchange names, including of trade experts not on any list who are hoped by the submitter to be from a country whose practice suggests they may be amenable to the position the government intends to present. There is no formal process of preemption, although names are eliminated without explanation in a wrenching process that often results in the parties submitting their preferred panelists to the Secretariat to break the logjam. As noted, most often panels are composed of trade officials of neutral governments and of academics whose reputation rises above national politics.

Five panelists will be selected for a NAFTA panel instead of the three under the WTO,

and usually they are selected from a Roster of Panelists created by the three NAFTA governments. Unlike the WTO situation, they will be nationals of one of the three NAFTA countries, normally, although not always, three chosen by the government of one disputing party and two by the other. Note that although the private industry invokes the process, national governments choose the judges, usually in consultation with industry counsel. In practice, the all-important tie-breaker comes from the country that wins a coin toss.

Also unlike the WTO, panelists cannot be present government employees—unless they are sitting Judges. The prospect of Judges serving on panels that replace the jurisdiction of an Article III Court, like much of Chapter 19, raises its own Constitutional issues. With only three countries to pick from, finding a neutral government employee who also was an expert in the subject truly would be difficult. One of the most difficult issues is picking panelists who do not have an issue conflict. Most potential panelists are practicing trade lawyers, and they may not of course serve if they have other cases pending before the agencies with the same or similar issues. Finding qualified panelists has often delayed panel formation long past treaty deadlines, with the result that NAFTA dispute resolution rarely is the expeditious resolution the Agreement promises. Once chosen, the five choose their own Chair.

It may be noted in passing that WTO panelists receive substantially greater support from the Secretariat B each panel has its own skilled WTO lawyer and economist to

assist its work B whereas NAFTA panelists must with meager funds individually hire their own law clerks. Until recently, WTO panelists also were compensated at a higher rate—although neither system even approaches private legal compensation rates. NAFTA panelists had their salaries doubled to in 2001 to \$800 Canadian per day, which now compares favorably with 600 Swiss Francs for WTO panelists.

In the Fructose Case, the industry's request for a panel made a month after Mexico acted C in February 1998 C was delayed for a variety of unusual trade reasons, with the result that the NAFTA panel was not even formed until August 2000, several months after the first WTO panel to address the issue had already issued its report finding against Mexico. As it happened, this result was quite fortuitous for the United States, as will be described below. Further delays saw the NAFTA panel's report not issued until August 2001.

Legal and Subject Matter Jurisdiction of the Panels

WTO panels have the more traditional function of interpreting compliance with the International Agreements at issue. That is, they are applying international law to the facts. The scope of review—the panel's subject matter jurisdiction—in a particular challenge is determined through so-called "terms of reference," the nature of the concern set out by the complaining country in its request for establishment of a panel. Generally, these requests cite chapter and verse of the Agreements allegedly violated, but rarely go much beyond that.

NAFTA chapter 19 panels, on the other hand, consistent with their role of replacing national judicial review, are actually applying the domestic law of the importing country to the facts. They are in fact charged with using the same law, and the same general legal principles, that would be applied in the courts of the importing nation B the U.S. Court of International Trade in the United States or the counterpart judicial bodies in the other NAFTA countries, depending on what agency=s determination is being reviewed. Requests for Chapter 19 Review tend for this reason to look very much like a complaint that would be filed in federal court.

In the Fructose case, the jurisdictional reality of the WTO and the NAFTA panels was much closer than the treaty provisions would have predicted, in large part because Mexico—as a “monist” country—had incorporated the Anti-Dumping Agreement into its federal law, which meant that the NAFTA panel necessarily tread exactly the same ground as its WTO counterparts, although the NAFTA panel’s job did not end there, because it also had to rule on compliance by the Mexican agency with the legislative and regulatory gloss put onto the treaty provisions by Mexico=s legislative and administrative bodies.

Standard of Review and Precedent

WTO panels reviewing Anti-Dumping cases apply a special standard of review. For fact-finding, it probably comes closest to the “substantial evidence” test, although with

a twist that requires the panel to assess whether the agencies were “unbiased” in their findings. For legal interpretation, the standard closely resembles Chevron: a fair degree of deference to the investigating national authority.

Although scholars question whether panels have paid more than lip service to the special standard, WTO panels reviewing other types of challenges have been supplied no written standard for their review other than they must make an “objective assessment” of the national agency action. Appellate Body reports have effectively grafted a “reasonableness” test onto the treaty’s brief requirement—not total deference to the agency, but neither should a panel substitute its judgment for that of the national authorities.

As to the sources of law issue of the role of precedent, formally panel decisions—and even appellate decisions—bind no one but the parties before them, and often panels diverge in their interpretations. At the appellate level, given the permanent nature of the Appellate Body, successive appellate decisions tend to track closely prior appellate decisions and, as you would expect, first-level panel decisions rarely stray from a four-square prior appellate report interpreting a treaty provision.

Because Chapter 19 panels replace national judicial review, the standard of review is the same one that applies in the national courts, which has the sometimes perverse effect of according national agencies three levels of deference, almost complete

deference for Canadian cases on the one hand, very little deference for Mexican authorities, with the United States somewhere in between with its substantial evidence standard for factual findings and its “in accordance with law” test for legal conclusions of the agency.

The question of precedent took some time for panels to resolve, but ultimately resulted in NAFTA panels finding that, when they are reviewing U.S. agency determinations, they operate at the same level as the U.S. Court of International Trade, with the result that they are not bound by prior rulings of that Court—a substantial body of Anti-Dumping law—but that they are bound by decisions of the U.S. Court of Appeals for the Federal Circuit to which Court of International Trade decisions are appealed. While the differing standards of review here inspired many pages of discussion, virtually of treatise-like length in the NAFTA panel’s case in discussing the Mexican standard, it would be difficult to pinpoint any difference either in the analysis or, as we shall see, in the ultimate result.

The NAFTA panel here, because of the substantial delay in its formation, had the benefit not only of the original WTO panel decision finding fault with Mexico’s implementation of the Anti-Dumping Agreement, but also of the so-called Implementation Panel formed when the U.S. complained that Mexico had failed adequately to bring its measure into compliance with the Agreement, despite Mexico’s revision of its Anti-dumping determination following its first WTO panel loss.

Applying what it termed the “Principle of International Law Comity,” the NAFTA panel deferred to the WTO panel’s findings and conclusions on virtually all of the pure Anti-Dumping Agreement issues, failing to do so only when it announced that the WTO panel had not considered a particular issue in sufficient detail to justify the NAFTA panel’s acceptance of its findings in whole cloth. That left the NAFTA panel with a substantially smaller task of analysis, while simultaneously illustrating an unusual instance of partial merger of the jurisdiction of the two panels.

Role of Private Counsel

As noted, a significant legal task is plotting strategy with the government, which means putting together briefs arguing the legal points under both the WTO and the NAFTA, as well as coordinating industry’s efforts to convince trade officials of the importance of initiating a WTO case if that forum seems appropriate. But what is private counsel’s role after the process is invoked and arguments are being mounted before the panel?

In the WTO, the U.S. Government has zealously guarded its prerogative to be the only U.S. lawyers in the room, and only recently failed in its effort to apply that same standard to every other country. Many countries cannot afford to employ legal staff sufficient to mount or defend WTO challenges, with the result that they turn often to private legal experts, usually from the U.S. trade bar, for assistance. The WTO Appellate Body in 2000 ruled definitively that these consultants may actually argue the

case before a panel, on the theory that a WTO Member has the right to choose who will represent it in its delegation.

As to U.S. cases, the affected industry, or consumer, environmental, or other groups interested, play their role behind the scenes, but it is a meaningful role nonetheless, from ensuring that Government counsel is well-prepared before panel hearings to being fully de-briefed following such arguments and assisting in drafting written responses to the Panel=s questions.

In NAFTA Chapter 19 proceedings, as may have been anticipated, private counsel play the same part they would in court—full and visible representation of their clients. For general NAFTA dispute settlement in Chapter 20, the more traditional behind-the-scenes approach is taken. Labor union lawyers, for example, were significant hidden players in U.S. legal deliberations when Mexico challenged the U.S. refusal to let their trucks ply their trade on U.S. roadways. In Chapter 11 investor-state cases, private counsel provide full representation to their clients before the arbitral panels and the national courts to which arbitral awards may be taken for limited procedural review.

Right of Appeal

The Appellate process points out a major difference in the two systems. Every WTO panel decision may as of right be sent for review by the standing Appellate Body, often called the Supreme Court of World Trade, one of the founding members and the

current chair of which is a prominent Florida lawyer, James Bacchus of Greenberg Traurig in Orlando. Well over half of all panel decisions are appealed, although we may expect that number to decrease as the Appellate Body's reports resolve more and more of the basic issues under WTO Agreements.

Because Chapter 19 was a political compromise that permitted Canada to have some role in the review of U.S. trade remedy decisions, it was inconsistent with that goal to allow full appellate review of panel decisions. The drafters created instead an "Extraordinary Challenge Committee" that could be formed to review panel decisions, but only under the most unusual—as the very name makes clear—conditions, including primarily corruption of a panelist or an "outlaw" panel decision so outrageous that its very existence threatens the integrity of the binational panel process.

No cases yet have met that test, and none ever is likely to do so. This is one of the most frequent criticisms of the process. Certainly it results in original panels having enormous power, because they cannot be second guessed.

Implementation of Panel Decisions and Retaliation for Non-Implementation

There exist important differences in implementation of panel decisions under the two systems. It is often said that the "centerpiece" of the WTO is its binding dispute settlement system. Unlike the previous system, panel reports cannot be blocked by the losing country—panel reports automatically are adopted after any appeal is exhausted

under the “rule of reverse consensus,” that is, unless every voting Member—including the country that won the dispute—agrees that the panel report should not be accepted by the WTO.

But the question whether they truly are “binding” international obligations is significantly more complex, because the losing Member retains its sovereign right to ignore the panel decision, in which case ultimately it will face retaliation in the form of withdrawal by the winning country of tariff or other trade benefits under the WTO Agreements that are comparable to the “nullification or impairment” of benefits worked by the WTO-inconsistent measure.

On the other hand, a formal system of implementation is built into the WTO process. As in our Fructose Case, if the winning party is dissatisfied with the efforts taken by the losing party, here in Mexico’s revised determination of anti-dumping duties, the original panel is reconvened to sit as an arbitral panel to decide the level of compensation the United States would be authorized to exact. Thus the panel decision has only indirect impact, but the process will follow through to ensure that some way or another the panel’s decision has consequences. This does not of course guarantee favorable results for the complaining country. U.S. cattle farmers still cannot ship to Europe beef from cattle raised on growth hormones. Europe has not seen a repeal of our Foreign Sales Corporation law.

In the NAFTA Chapter 19 situation, the panel's Fructose decision had direct and binding impact on the Mexican agency that issued the determination, in the same way a national judicial decision would apply to the agency. On one level, then, the NAFTA panel decision clearly is more binding as an international legal obligation. On another level, a recalcitrant agency can play havoc with the theory by delay and obfuscation.

The very existence of the post-report arbitration option in the WTO illustrates a significant concern for compliance missing from the NAFTA Chapter 19 process. While the issuance by an arbitral panel in the WTO of authorization for the prevailing Member to retaliate at a certain level still does not guarantee that the responding country will revise its border measure found to have been in violation, it does guarantee at least that non-compliance cannot be pursued without consequences. In fact, not only does the WTO system permit retaliation, it does not let the matter end even there; compliance by the losing Member remains on the agenda of the Dispute Settlement Body until the panel report is implemented, even if the winning Member has already exacted retaliation at the full level of the harm done to its export interests.

Under the NAFTA Chapter 19 process, the only recourse to a Party's recalcitrance or even refusal to implement a panel decision is a new request for a panel decision B and even this step cannot be taken unless the losing agency issues a new determination that can be challenged B or what trade lawyers call the "atom bomb" of Article 1905 of the NAFTA. That provision authorizes the dissatisfied Government to invoke a separate

dispute process to determine whether a Party has failed to implement a panel decision.

If the complaining Party succeeds in convincing a “special committee” that this is the case, its recourse is to suspend operation of the Chapter 19 process with respect to the non-complying Party.

In this respect, the difference between a NAFTA panel and a national court becomes clearer, because panels do not have equitable powers and thus no way to enforce their own decisions. Of course, the prevailing industry can file a new complaint, and thereby obtain a new panel decision, but the regular and orderly implementation process of the WTO is missing from the NAFTA arsenal.

In the Fructose Case, Mexico promptly revised its determination that had been found wanting by the original WTO panel, but its compliance was seen by the NAFTA panel as a transparent exercise in tracking the WTO panel=s findings of violations, without marginally changing the result, even though the factual and legal premises for the earlier determination had been undermined. This is not to suggest that an adverse panel report necessarily should result in a different outcome in every instance B that is certainly not the law in regard to “reversal” by national courts and NAFTA Chapter 19 panels are modeled after national judicial processes in the three countries.

Conclusion

This Case Study has attempted to trace the historical premises of the two most

significant advances in trade dispute settlement—the WTO and NAFTA Chapter 19 systems—and to demonstrate differences between them that might be important in agricultural border disputes. Successful international litigation strategy requires an understanding both by agricultural lawyers and business officials of these powerful new alternative dispute resolution systems.

1. GATT 1947, *supra* note 8, art. XXII(1).

2. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT*, at xxxix (1969).

3. GATT 1947, *supra* note 8, art. XXIII(2).

4. *Compare* Chile's complaint against Australia's fertilizer subsidies, GATT, B.I.S.D. at 193 (1952) (working party), *with* the poultry war between Europe and the United States, GATT, B.I.S.D. (12th Supp.) at 65 (1964) (expert panel), *and* European Communities: Refunds on Exports - Complaint by Brazil, GATT, B.I.S.D. (27th Supp.) at 69 (1981) (individual panel).

5. GATT 1947, *supra* note 8, art. XXIII(2). If the party whose concessions were withdrawn disapproved of the remedy, its only recourse was to withdraw from the Agreement within a shorter time period than otherwise provided under Article XXI.

6. Netherlands Measures of Suspension of Obligations to the United States, GATT, B.I.S.D. (1st Supp.) at 32 (1953).

7. Procedures Under Article XXIII, GATT B.I.S.D. (14th Supp.) at 18 (1966).

8. Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT B.I.S.D. (26th Supp.) 1980, *reprinted in* THE TEXTS OF THE TOKYO ROUND AGREEMENTS 200 (GATT 1986). Article 7 of the Understanding explicitly reaffirms that the customary practice of GATT in the field of dispute settlement includes the 1966 procedures for the settlement of disputes between developed and less-developed countries.

9. ROBERT E. HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 29 (1993). Professor Hudec notes that the cohesiveness of this group was so strong that the first disputes were resolved by a ruling from the chair, usually accepted by consensus without debate. *Id.*

10. Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*, 8 LEIDEN J. INT'L L. 115, 117 (1995).

11. *See generally* HUDEC, *supra* note 253, ch. 7.

12. Improvement to the GATT Dispute Settlement Rules and Documents, GATT B.I.S.D. (36th Supp.) at 61 (1989).

13. HUDEC, *supra* note 253, at 194.

14. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 16(4), WTO Agreement, *supra* note 13, Annex 2, 33 I.L.M. 1235 (1994) [hereinafter Dispute Settlement Understanding].

15. *Id.* art. 12(8).

16. *Id.* arts. 16(4), 17.

17. *Id.* art. 22(6).

18. *Id.* art. 22(1).

19. *Id.* art. 22(3).

20. The U.S. Department of Commerce's International Trade Administration and the U.S. ITC (to decide injury) in the United States; the Deputy Minister of National Revenue for Customs and Excise and the Canadian International Trade Tribunal (which decides injury) in Canada; and the International Trade Practices Division of the Department of Commerce and Industry (SECOFI), which decides both dumping or subsidization and injury in Mexico.

21. Whether an investigation involved Mexican goods, for example, would be decided by the International Trade Administration, applying U.S. antidumping law to the facts of the specific investigation. North American Free Trade Agreement, U.S.-Canada-Mexico, Jan. 1, 1994, art. 1901(1), 32 I.L.M. 289, *reprinted in* H.R. Doc. No. 103-159, at 1231-32 (1993) [hereinafter NAFTA]. This is an exception to the rules of origin provided in Chapter 4 for other trade matters regulated by NAFTA.

22. A clear distinction should be drawn between the binational panels that will review antidumping and countervailing duty determinations under Article 1904 and panels that review statutory amendments to the antidumping and countervailing duty laws to advise on the consistency of such amendments with GATT or NAFTA. Findings of panels that review statutory amendments are not binding, although the failure of the governments to resolve the problem after a panel's finding on inconsistency authorizes the other government to take equivalent legislative or executive action. *Id.* art. 1903.

23. *Id.* annex 1901.2.

24. *Id.* art. 1904(2)-(3). *See id. art.* 1911 for definitions of "administrative record," "general legal principles," and "standard of review."

25. *Id.* art. 1904(10)-(12).

26. *Id.* art. 1904(5), (7).

27. *Id.* art. 1904(8).

28. *Id.* art. 1904(13). The basis for the extraordinary challenge procedure is that a panel member has a serious conflict of interest, that the panel seriously departed from a fundamental procedural rule, or that the panel manifestly exceeded its powers, and that such action materially affected the panel's decision and threatens the integrity of the panel process. For procedures, *see id.* annex 1904.13.

29. *Id.* art. 1904(9), (11).

30. *Id.* annex 1904.15 (Schedule of Mexico). Through such provisions as disclosure meetings, notices of intended action by SECOFI, access to proprietary business information by counsel under a protective order, detailed reasons for SECOFI decisions, and elimination of the need to seek an administrative appeal before challenging a SECOFI determination before a binational panel, Mexico's law was assured a solid foundation in transparency and due process. One can argue that Mexico's system is more advanced in this respect than Canada's.

31. *Id.* annex 1901.2.2 - .2.3.

32. *Id.* annexes 1901.2, 1901.6. The principal potential conflicts of the practicing trade attorneys often chosen are pending cases involving the same companies or issues, or representation of one of the governments on other legal matters.

33. *Id.* art. 1904(14). This period does not include the time needed for the agencies to respond to panel remands. Time also can be added when a panelist realizes midway through the proceeding that a conflict of interest exists because of one of the issues, and resigns. In any event, the deadline is unenforceable.

34. United States-Canada Free-Trade Agreement, Statement of Administrative Action 104, *reprinted in H.R. DOC. No. 100-216*, at 266 (1988).

35. 19 U.S.C. § 1516a(g)(5)(C). In a limitation that became controversial in the *Lumber Products from Canada* case (as did virtually everything else in that proceeding), this injunction equivalent is not available during review of the original antidumping or countervailing duty investigation, because actual assessment of duties occurs only during later proceedings by Commerce under § 751(a) of the Tariff Act of 1930. *Id.* § 1675(a) (1996); see Statement of Administrative Action, *supra* note 240, at 104, *reprinted in H.R. Doc. No. 100-216*, *supra* note 240, at 266..

36. See United States - Canada Free Trade Agreement Binational Panel Review, In the Matter of: Fresh, Chilled, or Frozen Pork from Canada; ECC-91-1904-01 USA (June 14, 1991); United States - Canada Free Trade Agreement Binational Panel Review, In the Matter of: Live Swine from Canada, ECC-93-1904-OIUSA (Apr. 8, 1993); *Lumber ECC*, *supra* note 188.

37. North American Free Trade Agreement Implementation Act of 1988, 19 U.S.C. § 3432(c)(2)(B)(iv) (1994).

38. Conversations by author with members of trade bar.