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NAFTA TRADE DISPUTE RESOLUTION: WHAT ARE THE MECHANISMS?

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Since NAFTA's inception, there have been numerous trade disputes and trade frictions among the three signatory countries—some of which even predate the trade agreement. The sources of these disputes might be classified in four general categories. The first results from ambiguities in the agreement itself, which have led to disputes over the interpretation of the agreement. Other trade disputes have emerged or intensified with the deepening of trade and the increased integration of regional agricultural markets. With open borders, domestic policies that influence production, prices or trade have more direct spillover effects into agricultural markets in other NAFTA countries, and may lead to trade frictions. Third, an increasing number of disputes are related to sanitary and phytosanitary issues; these disputes are particularly complicated due to the presence of three different regulatory frameworks managing disease and pests within the region. A fourth source of trade disputes is the increased competitive pressure under free regional trade that has led some industries to seek protection through trade actions.

The objective of this paper is to review the *formal and informal* mechanisms that have been utilized to resolve trade disputes among NAFTA members. By formal, we refer to the NAFTA and WTO dispute resolution mechanisms, as well as to national antidumping (AD) and countervailing duty (CVD) actions. These formal mechanisms are legalistic in the sense that both the time-

tables and the rules of procedure in each stage of the dispute settlement are strictly specified. These formal mechanisms include both consultative measures and arbitral panels. Consultative measures attempt to find mutually satisfactory outcomes to disputes. When consultations fail, countries can resort to arbitral panels, which are designed to be codified and legalistic. Panels have an outcome that finds for or against the petitioner and the offending country. By informal mechanisms, we mean venues in which transnational disputes are resolved, or even prevented, through negotiation and consensus, using typically ad hoc processes that are defined by the participants. Participants in informal processes are more diverse than in the formal mechanisms. Informal processes can include industry or firm representatives, technical experts, and government agents. While the formal venues help to create an orderly, predictable, rules-based system for international trade, the informal venues can be more cost-effective, and may be used to prevent trade disputes from occurring or escalating.

FORMAL DISPUTE RESOLUTION MECHANISMS IN NAFTA AND WTO

NAFTA and WTO Reference

NAFTA created formal mechanisms for solving trade disputes. The principal dispute mechanisms are provided in Chapters 11, 14, 19, and 20. Chapter 11 covers disputes related to investment, and Chapter 14 covers disputes related to services. So far, agricultural trade disputes have been addressed under Chapters 19 and 20 of the agreement. Chapter 19 concerns the application of anti-dumping and countervailing duty laws. Chapter 20 covers disputes that relate generally to the interpretation or application of NAFTA.

Both Chapters 19 and 20 provide for several stages in the process of dispute resolution, beginning with consultations or mediation among disputing parties (Table 1). Under Chapter 19, the Agreement provides for regular consultations where parties can inform interested parties of domestic antidumping (AD) and countervailing duty (CVD) investigations, and provide them with an opportunity to furnish information. Once national investigations are complete, parties may request panel reviews of other parties' final determinations of dumping, subsidization or injury to domestic industries. Under Chapter 20, consultations occur at the request of a party. When consultations fail to resolve an

Table 1: Formal Dispute Resolution Mechanisms in NAFTA.

<i>Dispute resolution mechanism</i>	<i>Who initiates?</i>	<i>Process</i>	<i>Outcome</i>
NAFTA consultations	Under Chapter 19, countries ("parties") agree to consult annually, or at the request of any country. Under Ch. 20, a party may request bilateral consultations on matters relating to the agreement.	Under Chapter 19, each party designates one official to be responsible for regular consultations. Under Chapter 20, parties provide information and attempt to reach a mutually satisfactory resolution within 30 days, or within 15 days if the case relates to perishable goods.	Under Chapter 19, parties consult annually, notify interested parties of investigations, and provide parties an opportunity to present information. Under Chapter 20, parties attempt to reach a mutually satisfactory outcome during consultations; if they fail, they may request a meeting of the Commission.
NAFTA meeting of Commission (Chapter 20 only)	Under Chapter 20, if consultations are unsuccessful, generally within 30 days, complainant may request a meeting of the Commission.	Within 10 days of the request, the Commission will take action to mediate or resolve the dispute. The Commission may call on advisers or experts; use mediation, conciliation and other measures; and make recommendations.	The Commission makes recommendations that may assist parties in reaching a mutually satisfactory resolution; if this fails, parties can request arbitral panels.
NAFTA arbitral panels	Under Chapter 19, parties may request a panel review within 30 days of the publication of national, final determination of dumping, subsidization or injury. Under Chapter 20, if the Commission has convened but the matter is unresolved within 30 days, the complainant may request an arbitral panel.	Under chapter 19, within 30 days of the request for a panel, each party chooses two expert lawyers; within 55 days, they must agree on a fifth panelist/lawyer. Under Chapter 20, the panel chair is agreed upon within 15 days, and within the next fifteen days, each party chooses two additional panelists from the other party. The panel procedures ensure a right to at least one hearing before the panel, written submissions and rebuttal arguments. Within 90 days, the panel presents to the two parties an initial written declaratory opinion. The initial opinion becomes the final declaratory opinion, unless a Party requests a reconsideration.	Under both chapters, a party found to be in contravention must bring measures into conformity with the panel report, or be subject to compensation or retaliatory suspension of benefits. Under Ch. 19, parties may appeal the initial opinion. Under Ch. 20, parties may request a reconsideration before publication of the final opinion, which cannot be appealed.
WTO arbitral panels	Members must attempt to resolve disputes through bilateral consultations. If unsuccessful within 60 days, complainant may request that the Dispute Settlement Body (DSB) establish a panel.	Within 30 days, parties choose three expert panelists, to act in a neutral personal, rather than governmental, capacity. Panel proceedings are quasi-judicial process of written submissions, counter-submissions, oral hearings, and cross-examination. Panel report is issued to parties, and within 60 days, must be adopted by the DSB. Panel decision may be appealed or by consensus decision, may not be adopted by the DSB.	A party found to be in contravention must submit a plan for implementation of the panel report, compensation, or be subject to retaliation.
National CVD or AD actions (U.S. practice; Canadian practice is quite similar)	Domestic industry or party files a petition with the US Department of Commerce alleging unfair foreign competition.	Commerce investigates merits of allegations. US ITC also investigates whether US industries are likely to be harmed. Results of investigations are published in the Federal Register. Commerce calculates dumping or countervailing margins, publishes an AD or DVD Order	Commerce directs Customs Service to collect cash deposits on imports of the merchandise if there is a positive determination

issue, parties can request a meeting of the Commission. The Commission can call on experts, attempt mediation, and make recommendations for the resolution of the dispute. As a last resort in the dispute settlement process under Chapter 20, parties may request a panel review of the issues in dispute.

While the dispute settlement mechanisms under the two chapters differ in some details, in general they are similar in their development of strict rules of procedure and timetables for panel selection and panel decisions. The rights of each party to choose panelists who are charged with acting in a neutral, expert, and personal rather than national capacity, and the use of arguments, submissions and rebuttals are specified. At the close of the review period, panels issue initial declaratory opinions, along with recommendations for remedial action if the panel's findings are affirmative. Under Chapter 19, parties may object to or appeal the panel decision. In this case, an extraordinary panel will reconsider the panel's findings, and either uphold them or remand them to a newly formed panel. Under Chapter 20, the panel may reexamine the finding before publishing its final opinion, which is not subject to appeal. Under both chapters, the resolution of the dispute should be the removal of the offending practice, but failing that, the offending party must make compensation or the injured party may take comparable action against the offending party.

By the time an issue is referred to the Commission, it is not very likely that it can be resolved without a panel. So far, there have been 4 cases brought into panel reviews under Chapter 19 of the NAFTA, and 2 cases under Chapter 20 (Table 2). Chapter 19 cases involved U.S. malt beverage exports into Canada, U.S. refined sugar exports into Canada, live swine exports from Canada into the United States, and fresh cut flowers exported from Mexico to the United States. Chapter 20 panel reviews covered the interpretation of NAFTA provisions related to Canadian use of tariff rate quotas (TRQ's) on imports of some agricultural products from the United States, and the legality of U.S. safeguard action on broom corn brooms from Mexico.

NAFTA members also have the right to pursue actions within the framework of the WTO. They may pursue any suits relating to matters that are covered by both the NAFTA and the WTO Agreement, but can pursue a specific issue in only one forum, not both. The WTO has a panel system similar to that

Table 2: Examples of Resolving NAFTA Agricultural Trade Disputes Through Formal and Informal Mechanisms.

<i>Dispute resolution mechanism</i>	<i>Selected examples</i>
NAFTA/FTA dispute resolution mechanisms	Chapter 19 panels considered Mexican AD duties on US HFCS exports, US refined sugar exports to Canada, Canadian swine exports to United States and Mexican fresh cut flower exports to the United States. Chapter 20 panels considered Canadian TRQ's on poultry, dairy, barley and margarine, and US safeguards on broom corn brooms from Mexico
WTO/GATT dispute resolution mechanisms	WTO panels considered the Canadian fluid milk TRQ and certain milk pricing practices. Mexican HFCS duties, and Canadian pork exports to the United States.
National CVD or AD actions	Mexico investigated or implemented duties on HFCS, hogs, beef, apples and wheat from the United States, and Canada. United States investigated or implemented duties on tomatoes, cattle and beef from Mexico, and live swine, pork and cattle from Canada. Canada investigated and placed duties on red delicious apples, refined sugar, and certain potatoes from the United States.
Government negotiations	Standing Committees on Agricultural Trade and the NAFTA SPS Committee have addressed issues including regionalization, Mexican SPS import permits for US and Canadian wheat. Ad hoc negotiations established minimum price agreements for US apples and Mexican tomatoes, established one year TRQ for US imports of wheat from Canada, and modified Mexico's dry bean quota auction system, and the application of the US TRQ's for imports of sugar and sugar containing products from Canada. The Canada/US Record of Understanding has put in place a mechanism for managing the bilateral agricultural trading relationship and a framework for resolving many different kinds of trade irritants to prevent them from escalating into disputes.
Industry negotiations	US and Mexican grape industries resolved dispute over Mexican labeling regulations. Mexican and US cattle industry negotiations prevented Mexican AD. The Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods resulted in the establishment of a voluntary industry led trilateral Fruit and Vegetable Dispute Resolution Corporation to begin functioning.
Technical assistance	NAFTA SPS Committee facilitates regional technical cooperation. United States and Mexico established bilateral Plant Health Working Group and Karnal bunt Team. Two standards system for perishable commodities.

of NAFTA. The global mechanism for resolving trade disputes was considerably strengthened in the Uruguay Round. Gifford (1997) and Brosch (1998) describe the new credibility that was given to the WTO process in the Uruguay Round by the decision to prevent parties from blocking panel reports and providing parties with an Appellate Body review process. As in the NAFTA, the offending member must bring its policies into conformity with the finding, provide compensation, or face retaliatory withdrawal of concessions. So far, two cases involving disputes among NAFTA parties have been brought to the WTO. The United States has taken the Canadian fluid milk TRQ and certain milk pricing practices into dispute settlement at the WTO, and has requested a WTO panel review of Mexico's HFCS duties. Although it pre-dates NAFTA, Canada took the issue of assumed pass-through of subsidy from live swine to pork to the GATT. This was after implementation of the Canada-U.S. Free Trade Agreement when there was a choice of forum. In fact, in that instance, Canada

pursued the pass-through issue in the GATT and other aspects of the live swine countervail under the FTA simultaneously. In addition, there are other cases, e.g., live cattle, where WTO consultations were initiated but not carried through to the point of a request for a panel.

National AD and CVD Actions

National anti-dumping (AD) and countervailing duty (CVD) investigations and duty assessments have been a mechanism for NAFTA countries to address trade disputes by taking independent action to address perceived unfair trade practices. AD duties may be imposed if imports are being sold at less than fair value and causing or threatening to cause injury to a domestic industry. CVD duties may be imposed on imported goods to offset subsidies provided to producers or exporters by the government of the exporting country, and must also meet an injury test. Under NAFTA, each member preserved its right to apply its own AD and CVD laws, but agreed to publish notice of national AD or CVD investigations and inform other parties of the mechanisms for providing input. Recent AD and CVD actions include Mexico's investigation of high fructose corn sweeteners (HFCS) imports from the United States, the U.S. investigation of tomato imports from Mexico, the Canadian investigation of refined sugar imports from the United States, and the U.S. investigation of live cattle imports from Canada.

INFORMAL DISPUTE RESOLUTION MECHANISMS

Dispute resolution under the formal NAFTA mechanisms and AD and CVD actions represent only a very small part of the dispute resolution process that has developed and is strengthening under NAFTA. Indeed, the referral of disputes to formal venues is a means of last resort, and might be considered a sign of failure in bilateral relations. One may identify three other trade dispute resolution mechanisms: governmental negotiations, private industry negotiations, and ongoing formal and informal consultations through technical level working groups and assistance (Table 2). Most disputes are being addressed in earlier stages through consultation and negotiation in these informal venues. More importantly, greater informal linkages are likely to be preventing misunderstanding from occurring, and developing into sensitive, high level disputes that must be resolved in formal settings. By fostering greater communication

among parties engaged in trade, these mechanisms may also help to prevent trade disputes from occurring.

Government to Government Negotiations

Government negotiations offer a venue for resolving disputes before they reach the litigation or investigation stage. Ad hoc governmental negotiations have addressed trade disputes as they occur, and some negotiations are conducted in standing committees, in particular the Committee on Agricultural Trade and the Committee on Sanitary and Phytosanitary Measures (SPS Committee).

The Committee on Agricultural Trade is responsible for monitoring and promoting cooperation on the implementation of the agriculture provision of NAFTA and for providing a forum for consultations on agricultural trade issues. For example, clarification and publication of Mexican requirements for the issuance of SPS import permits for wheat imports was achieved following consultations on this issue in the NAFTA Committee on Agricultural Trade.

The NAFTA SPS Committee's role has been to facilitate technical cooperation between NAFTA partners and to enable consultation on SPS measures. This has provided a venue for resolving, and preventing, disputes relating to SPS measures, which have grown significantly in recent years. One achievement has been the implementation within NAFTA of "regionalization," a concept originally contained in the Canada -U.S. Free Trade Agreement and further developed in the WTO SPS Agreement and the NAFTA SPS provisions. This term refers to the process in which certain regions of countries are declared to be free of certain pests or diseases, even though these diseases or pests are present in other parts of the country. Regionalization permits some trade to take place, even though the SPS regulations of the importing country would have otherwise prevented it.

Trade restrictive actions taken or threatened against imports from Canada by several northern tier U.S. states in the fall of 1998 were resolved through bilateral government consultations which eventually led to negotiation of the Canada - U.S. Record of Understanding (ROU) in December of 1998. The ROU put in place a more effective process for managing the bilateral agri-

cultural trading relationship. In addition to establishing a framework for managing the relationship, the ROU also committed both countries to an Action Plan to deal with seventeen specified issues to reduce bilateral trade tensions and facilitate the increased two-way flow of agricultural products. A joint one year progress report was released in December 1999.

Government negotiations have helped to resolve disputes arising from the adjustment of sensitive sectors to increased competition under free trade. The U.S.-Mexican agreement on tomatoes, although partly a response to a U.S. AD action, was ultimately resolved through a bilateral agreement to set temporary minimum prices on Mexican tomato exports to the United States. A second example is the 1994 U.S.-Canadian agreement to implement a temporary U.S. TRQ on wheat imports from Canada.

While the scope of NAFTA does not extend to domestic programs, government negotiations have resolved cases in which domestic programs or policies had significant trade impacts, and helped smooth out differences in incompatible policies or regulations. Examples are the negotiated changes in Mexico's dry bean auction system, to stabilize auction timetables and definitions of qualified bidders; and the U.S. allocation for Canada under the U.S. sugar and sugar containing products TRQs.

Private Industry Negotiations

Private industry has begun to play a larger role in dispute resolution within NAFTA. In two recent disputes over grapes and cattle, producer groups in Mexico and the United States worked jointly to resolve trade disputes resulting from regulatory incompatibilities and allegations of dumping. A combination of private industry and government consultations led to creation of the Northwest Cattle Project to simplify and facilitate the importation of U.S. feeder cattle into western Canadian feedlots.

In an effort to strengthen private dispute resolution capacity, particularly for small and medium sized businesses which need an economical and cost effective way to resolve disputes, the NAFTA governments established the Advisory Committee on Private Commercial Disputes. This trilateral committee has helped to develop model contractual clauses relating to arbitration and

mediation. There are numerous private arbitral institutions available in the three countries, including the American Arbitration Association, the Mexico City National Chamber of Commerce and the International Chamber of Commerce, and the trilateral Commercial Arbitration and Mediation Center for the Americas (CAMCA). An impediment for small business is the difficulty of enforcing arbitral awards on foreign firms, but the existence of NAFTA has helped to make mediation more effective and enforceable.

In addition, NAFTA created a second Advisory Committee on Private Commercial Disputes regarding Agricultural Goods with emphasis on perishable products. This advisory committee has focussed its efforts on establishing an industry led trinational dispute resolution mechanism to facilitate trade in fruits and vegetables among the three countries. This work has resulted in the creation of the newly formed Fruit and Vegetable Dispute Resolution Corporation which is to become operational February 1, 2000. This model may be expanded to other agricultural sectors in the future if it proves itself to be effective for fruits and vegetables.

Technical Assistance

Incompatible national regulatory frameworks are sometimes the result of differing national capacity to set and enforce standards. Technical assistance provides a mechanism for resolving or preventing disputes by building scientific and institutional capacity. It creates a venue for cultivating a relationship that opens communication, creates shared objectives, and develops trust among stakeholders in an issue. The NAFTA SPS Committee has been one avenue for facilitating regional technical cooperation. Other programs have been established to provide for scientific cooperation and assistance relating to specific SPS concerns. Technical assistance and cooperation in developing agricultural statistics and strengthening analytical capacity can also contribute to the reduction of trade tensions by improving information and communication.

CONCLUSIONS

Why are dispute settlement mechanisms of interest? The development of rules-based systems for resolving disputes helps to strengthen trading rela-

tions by providing an orderly, legal framework that defines and protects the interests of all parties. An effective rules based dispute settlement system provides a non-confrontational way of dealing with the inevitable differences of view or interpretation that are bound to occur no matter how carefully an agreement is negotiated. However, it is not reasonable to expect any dispute settlement system to be able to deal effectively with every irritant, in particular, those irritants that arise as a result of the inability to reach agreement on a solution at the time an agreement was negotiated.

In both NAFTA and the WTO, formal mechanisms rely on the voluntary participation of members in both the process and the outcome; there is no coercive force behind implementation other than the interests that participating countries have in preserving a rules-based trading system and the knowledge that a failure to comply may result in counter action by their trading partners. Voluntarism is even more evident in the informal dispute settlement mechanisms than in the formal ones. Here, interested parties seek to achieve shared and mutually beneficial objectives in their trading relationship, through consensus building, communication and negotiation.

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