

# **Looking to the Future: Conflict Avoidance and Resolution in NAFTA's Agricultural Trade**

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## **Looking to the Future: Conflict Avoidance and Resolution in NAFTA's Agricultural Trade**

### **Introduction**

The increase in agricultural trade between the United States, Canada, and Mexico has been accompanied by tension and conflict over trade in several commodities. This tension is caused by a myriad of factors that spring from the perceptions and concerns of producers. Some of these concerns can be explained in economic terms and others cannot. Without ranking or judging these concerns the list includes: (1) the desire of domestic producers to protect national domestic markets from imports, particularly when trade flows are largely in one direction; (2) differences in policies between countries that sometimes result in a lack of reciprocal access; (3) fears, well founded or not, that imports may carry a pest or disease that would spread and be harmful to the domestic industry; (4) anxiety that imports are due to government subsidization in the exporting country; (5) worry that agriculture is losing its uniqueness in the policy process and will no longer receive government subsidization; (6) tension caused by the rapid pace of globalization and the increasing importance of the WTO; and finally (7) fears that U.S. agriculture is not competitive in world food markets. For some agricultural industries, overlaying the tension caused by imports are generally poor economic conditions within the industry.

This paper discusses the effectiveness of current mechanisms to avoid and resolve agricultural trade disputes between the United States, Canada, and Mexico, members of the North American Free Trade Agreement (NAFTA). It begins with a brief discussion of elements of dispute resolution (CDR 1999; Moore 1996; Deutsch 1973). It then examines current efforts and mechanisms to avoid and resolve disputes and presents an initial and preliminary evaluation of the extent to which these efforts meet certain desirable characteristics of dispute resolution.

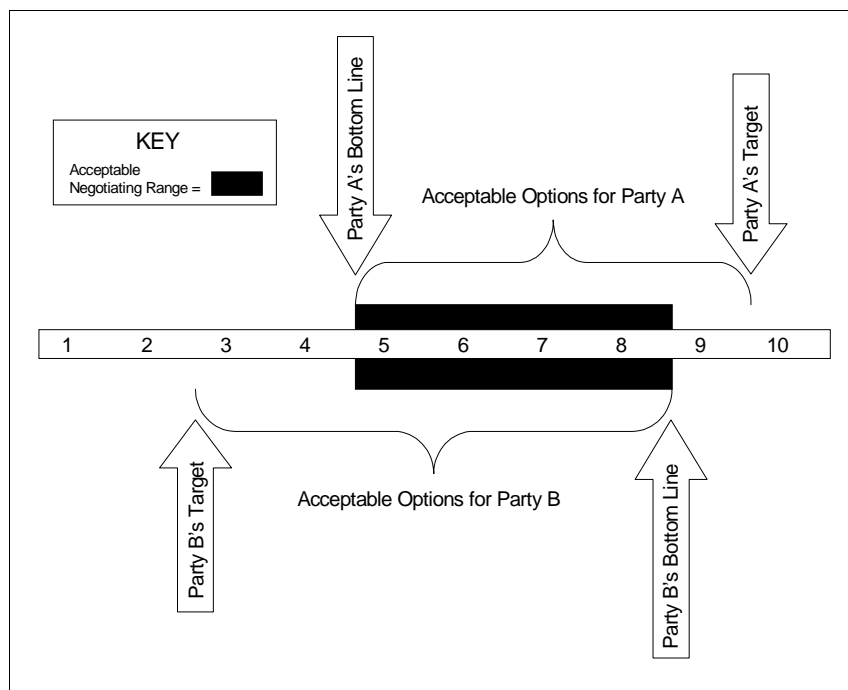
### **Elements of Conflict Resolution**

The literature on conflict resolution presents ideas about different strategies for negotiations over an issue. Positional and interest based bargaining are the basis for contrasting models of dispute resolution and are useful for our purposes, as they provide a baseline with which to evaluate available dispute resolution strategies within NAFTA. In positional bargaining, negotiators begin by selecting and ranking positions to be presented in the negotiation (CDR 1999; Fisher and Ury 1991). Positions are

alternate solutions to an issue that meet the particular interests or needs of one party. Both negotiators present their initial position (with their maximum anticipated gain) and then, through a series of incremental concessions, arrive at a compromise (Figure 1). When positional bargaining is used, the parties usually do not regard their interests (underlying needs and concerns) as interdependent. Usually positional negotiators give current and future relationships relatively low priority. In positional bargaining resources are generally regarded as fixed, leading to the conclusion that if one party gets more, another gets less. Highly adversarial relationships often result. A benefit of positional bargaining is that trust and the full disclosure of information between parties is not required. Another benefit is that positional bargaining may be useful in division of fixed-sum resources (CDR 1999). A disadvantage of positional bargaining is that the rapid presentation of positions may cut off exploration of the underlying needs of the parties and may shortchange investigation of more innovative ways to meet those needs. The adversarial and fixed-sum nature of the negotiation may also damage the parties relationship.

Interest based bargaining approaches to conflict resolution focus on satisfying as many of the needs or interests of the disputants as possible. This is achieved by exploring the interests of the parties

**Figure 1. Positional Bargaining**

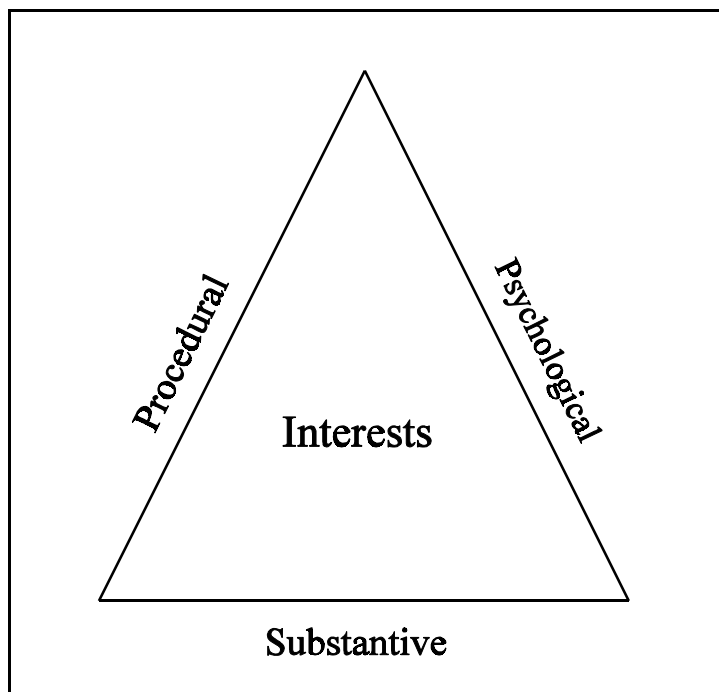


Source: CDR 1999.

and evaluating multiple solutions in an attempt to satisfy the greatest possible number of needs. When possible, resources are not regarded as fixed and negotiators use cooperative problem-solving efforts to investigate solutions. Interest based negotiation requires trust and may uncover divergent values and interests. Due to the process used, interest based negotiations may require more time than positional bargaining. Advantages include solutions that meet specific needs, unanticipated beneficial outcomes, and strengthening of ongoing relationships.

Successful resolution of disputes requires a framework that addresses the substantive, psychological, and procedural aspects of disputes (Figure 2). Lasting solutions to disputes may be hindered by inadequate fulfillment of any of the three aspects. Substantive aspects include the objective needs at hand. For the purpose of this discussion, substantive issues include access to markets, trade rules, import levels, and economic conditions within an industry. Psychological aspects include the need for disputants to be included in the resolution process and for the process to be perceived as fair. Another psychological need is to address issues of bias and stereotypes, which is critical for the creation of long

**Figure 2. The Triangle of Satisfaction**



Source: CDR 1999.

lasting relationships. Finally, procedural aspects address the mechanics of how the dispute is resolved. Questions about mechanics include whether or not the dispute resolution structure is appropriate for the dispute and if parties agree on the process. For the issues considered in this paper, it is also important that the settlement options produced are congruent with existing obligations held by the parties. For example, industry representatives may agree on a regulatory change without being empowered to implement the change.

### **Dispute Avoidance**

Anticipation and early resolution of conflict may bring many of the benefits of settlement without the costs associated with a full blown conflict. The U.S.-Canadian beef industry dispute initiated by the Ranchers-Cattlemen Action Legal Fund (R-CALF ) (Loyns, Young, and Carter 2000; Young 2000) are hypothesized by this author to be partially caused by an inaccurate assessment by U.S. beef producers of their own interests. While this dispute has already occurred, perhaps the underlying argument can usefully be applied to avoid disputes in other industries or further disputes in the cattle industry. Regulatory harmonization is also discussed as a mechanism useful in dispute avoidance.

#### *Identification of Interests*

Progress on substantive issues must begin with the accurate identification of issues. Three categories of interests for NAFTA's agricultural industries are proposed. Competitive interests can be summarized as when one party swims the other party sinks. Cooperative<sup>1</sup> interests exist when goals are linked so that everyone sinks or swims together (Deutsch 1973). Some cooperative interests may be pursued jointly, while others must be pursued separately due to institutional factors. The interests of the Canadian and U.S. beef industries are used as an example (Table 1) (Young 2000).

U.S. and Canadian beef producers have a number of cooperative interests that they can jointly address. The most important may be increasing consumer demand for beef by improving its quality, healthfulness, reputation for safety, and price vis a vis substitutes. This is a cooperative interest, not a competitive one, as given the integrated nature of the market, an increase in the demand for beef within the United States or Canada will be beneficial to producers of both countries. One caveat must be

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<sup>1</sup>The term cooperative is appropriate here due to a long history of use in the dispute resolution and game theory literatures. However, while the interests are cooperative, or alternatively, common to both parties, the parties may not be cooperating in their actions.

**Table 1. Sample Interests of U.S. and Canadian Beef Industries**

Type	Criteria	Examples
Cooperative	Industries have a joint interest in outcome, joint pursuit appropriate.	Increased domestic and export beef demand.
Cooperative but separate	Both industries have an interest in the outcome, but separate pursuit of outcome appropriate.	Federal government regulations for meat inspection—influence reputation for safety.
Competitive	Industries pursue competitive outcomes separately.	Beef demand linked to attributes including location, i.e., made in Montana.

considered, that this applies for beef that is not differentiated by quality attributes linked to location, which at most constitutes a very small portion of the market.

Producers from the two countries also have an interest in a reduction of transactions costs for movement of cattle and beef across the border. To the extent that transactions costs can be reduced, efficiency is achieved in the movement of cattle to processing plants and of boxed beef to market, lowering basis costs and optimizing efficient utilization of plant capacity. Producers in some locations may also gain from access to a packing plant across the border, whose entry into their market increases competition for slaughter cattle.

The cooperative nature of U.S. and Canadian beef interests also holds true of U.S. and Canadian beef export markets. The U.S. and Canadian industries depend on increases in export demand for market growth and share a cooperative interest in reducing trade restrictions through multilateral trade negotiations. It is true that U.S. beef prices would increase if imports were reduced or eliminated while exports continued unfettered. However, this is not the environment that U.S. beef producers operate in and is unlikely to occur in the future.

The U.S. and Canadian beef industries also have cooperative interests that must be independently pursued by each industry. For example, meat inspection and food safety regulations influence beef demand, a cooperative interest of the industries. However, as these policies are determined by national governments, they are influenced by the national industry. Finally, the U.S. and Canadian industries also

have competitive interests. In this category would fall competition for markets where demand is influenced by quality attributes linked to location.

An obstacle to recognition of the interdependence of the U.S. and Canadian beef industries is the deeply rooted historical concept of a market as synonymous with the nationstate. This concept developed due to trade barriers that at one time isolated the U.S. market, as well as the markets of other nations. Some trade barriers were imposed by the government, including taxes, tariffs, quotas, and foreign exchange controls. Natural trade barriers included the cost and adequacy of transportation and communication to assess demand in foreign markets and to make transactions. In addition, reflecting national preferences, federal government regulations and policies influenced the market environment and made it distinct from other national market environments. The nationstate is the basis of international trade law and trade agreements. For the U.S. beef industry, these factors were reinforced by a large domestic market and little historical dependence on the export market. Many of these factors have changed, due to changes in policies and technology, coincident with an increase in globalization. Industries may benefit from consideration of when the market is synonymous with the nationstate and when it is not.

The existence of cooperative interests for many industries within the three NAFTA countries necessitates rethinking current ways of organizing producer groups. One possibility is to form producer groups that correspond with the cooperative interests of the U.S., Canadian, and Mexican industries. National commodity groups would continue to pursue separate cooperative and competitive interests.

The transition from national commodity groups to the creation of strong and viable trinational commodity groups is difficult for several reasons. The existence of a group depends on the perceptions held by members that they are a distinct entity due to their commonalities, an awareness and active pursuit of cooperative interests, and a history of interactions between group members. Commodity groups have existed for a long period of time on the basis of the national market. The movement to a trinational market came quickly and without a corresponding shift in the identity of commodity groups. Another factor impeding the development of trinational commodity groups is the ambiguous commitment of national governments to free trade. While a commitment was made by member

governments to free trade, many mechanisms exist to buffer it, leading to confusion over the size of the market, and the role of government.

### *Regulatory Harmonization*

The avoidance of disputes in agricultural trade is also achieved through the regulatory harmonization. The harmonization of regulations in itself removes a substantive reason for disputes. Equally important, the process of harmonization involves representatives of government and industry from all three countries, and by doing so creates ongoing relationships that are critical in avoiding disputes. Some of efforts to harmonize regulations occur through NAFTA, which provided ongoing processes to harmonize regulations and policies of all three member countries. NAFTA mandated committees to increase the compatibility of a wide range of policies (NAFTA 1993).

The Committee on Standard Related Measures and the Sanitary and Phytosanitary Committee are composed of designees from the appropriate agency of member governments (Lennox 1999; Garvey 1999). Committee power is limited to making recommendations to member governments. Operation of committees on the basis of consensus is key in ensuring the recommendations are taken back to the home country agency and adopted.

The purpose of the Sanitary and Phytosanitary (SPS) Committee is to pursue equivalence of the three countries SPS measures. Under the umbrella of the SPS Committee, the NAFTA Technical Working Group on Pesticides is working to develop a coordinated pesticide regulatory framework among NAFTA partners, to address trade irritants, to build national regulatory/scientific capacity, to initiate joint review of applications, and to coordinate scientific and regulatory decisions on pesticides (Environmental Protection Agency 1999). The Working Group on Pesticides has initiated procedural changes to facilitate joint reviews of pesticide applications and has developed a protocol to prioritize its work on regulatory differences causing trade disputes.

Regulatory changes have also been industry led. The Restricted Feeder Cattle Project, formerly known as the North West Pilot Project, is an example (Young and Marsh 1998). The project resulted in the reduction of sanitary requirements for feeder cattle exports from the United States into Canada, reducing the cost of trade. The Canadian Cattlemen's Association worked with the National Cattlemen's Beef Association, the Montana Stockgrowers Association, and with state and federal agencies from each



country, including the U.S. Animal Plant Health Inspection Service, and the Canadian Food Inspection Agency, to change sanitary regulations for feeder cattle moved into Canada. In addition to Montana and Washington, the pilot project now includes Idaho, North Dakota, Hawaii, and Alaska. This project facilitated the export of 105,374 feeder cattle from the United States to Canada between October 1, 1999 and December 17, 1999. While increased market integration of the northwestern states and provinces in the feeder cattle market did not prevent the R-CALF suits, recognition of the benefits of improved commercial relations with Alberta did moderate producer support of R-CALF within the state of Montana.

An example of an industry led effort involving all three NAFTA countries is provided by the development of the Fruit and Vegetable Dispute Resolution Corporation (FVDRC). Article 707 of NAFTA mandated the creation of a subcommittee to address private commercial disputes for NAFTA partners, with reference to the perishable produce industry. The subcommittee is composed of representatives of industry and government from all three nations and began its work in 1996 (Chancey 2000). The subcommittee decided to address discrepancies in the systems of the three countries for dealing with disputes arising from private commercial transactions in fruits and vegetables, including issues of nonpayment and grading. The committee used a consultative process to develop a trilateral corporation to provide standards and dispute resolution services to the industries of the three countries (Ash and Chancy 1999). Ash and Chancy summarize the lessons learned in the development of the trilateral corporation: (1) that a strong vision of mutual goals and interests is required; and (2) that national identities need to be de-emphasized with a greater focus given to universally acceptable values and objectives.<sup>2</sup>

#### *Evaluation of Current Dispute Avoidance Processes*

The examples given above, including the NAFTA subcommittees, the FVDRC and the Restricted Feeder Cattle project, can be viewed as processes that contribute to dispute avoidance (Table 2), although this goal is more explicit for some cases than for others. In each case, both industry and government are actively involved from a number of countries. The work of these committees follows that model of interest based negotiations as it emphasizes ongoing relationships, provides an opportunity for members

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<sup>2</sup> For further information see the Fruit and Vegetable Dispute Resolution Corporation homepage (<http://www.fvdr.com>).

**Table 2. Elements of Dispute Resolution**

Current Processes	<u>Substantive Aspects</u>			<u>Psychological Aspects</u>			<u>Procedural Aspects</u>		
	Identify Interests	Provide Data	Address Interests	Stakeholder Participation	Address Bias and Stereotypes	Create or Maintain Ongoing Relationships	Structure Appropriate	Parties' Agreement on Process	Congruence with Existing Obligations
<b><u>Dispute Avoidance</u></b>									
NAFTA <sup>1</sup> Committees	Potentially	Potentially	Potentially	Potentially	Some	Some	Potentially	Gov-Yes Ind-Some	Yes
Industry-Led <sup>2</sup>	Potentially	Potentially	Potentially	Potentially	Potentially	Potentially	Yes	Mostly	Yes
<b><u>Dispute Resolution</u></b>									
Government <sup>3</sup> Consultations	Potentially	Limited	Limited	Limited	Limited	Limited	Partially	Gov-Yes	Yes
USITC/USITA <sup>4</sup>	Sometimes	Sometimes	Sometimes	Limited	No	No	Sometimes	No	Yes
NAFTA Dispute Settlement Procedures	Sometimes	Sometimes	Sometimes	Limited	No	No	Sometimes	Gov-Yes Parties-?	Yes

*Notes:*

<sup>1</sup> An example is pesticide harmonization.

<sup>2</sup> An example is the Fruit and Vegetable Dispute Resolution Corporation.

<sup>3</sup> An example is the December 1998 Record of Understanding.

<sup>4</sup> An example is the R-CALF dispute.

of industry to become educated about the other's interests, and to create ongoing ties. The ongoing nature of their work is important in reducing issues of stereotypes and bias that may have existed at the beginning. In some cases, the committees had substantial leeway in designing processes used to complete their mandate. The substantive work accomplished by the committees, namely the development of regulations that fit the needs of all three countries, contributes to changing the identity of the market from a national to a trilateral market. To the extent that their work facilitates trade—as with the Restricted Feeder Cattle Project—increased commercial ties will also work to create a trilateral market. Finally, removing regulatory incompatibilities between countries, which tend to result in unequal access to markets, will also contribute to avoiding conflict over this issue. However, substantive progress may be slow, as while committees may reach consensus on what types of regulatory changes need to be made, representatives of each country must work with their own institutions to implement regulatory changes. The processes discussed in this section address to varying degrees the substantive, procedural, and psychological issues required to avoid conflict.

### **Dispute Resolution**

The primary processes used for resolving disputes within NAFTA are formal dispute processes, including national trade remedy law and NAFTA processes, and consultations between governments. As NAFTA processes are discussed by other authors (Burfisher, Norman, and Schwartz 2000) they will not be discussed further here.

#### *U.S. Trade Remedy Law*

Countervailing duty and antidumping suits result from petitions brought by U.S. industry groups for consideration by the U.S. International Trade Commission (USITC) and the U.S. International Trade Administration (USITA). In this process, evidence is presented to a decision-making panel. Several similarities can be found between positional bargaining and the application of trade remedy law. The structure of the process ensures that one party wins and the other loses, without investigation of the parties' interests and other solutions that might meet their needs. Due to the assumption that resources are fixed, and due to the processes used in presenting evidence, parties are forced into an adversarial relationship.

The processes used by the USITC and USITA in the application of trade remedy law strive to be predictable, rule-based, and fair. In order to achieve fairness between industries and over time, strict and unvarying timetables and economic definitions are used.

However, use of antidumping and countervailing duty suits does not encourage industry groups to undertake a meaningful investigation of the underlying issues or interests. Industry groups do not need to, as these investigations, once initiated, are obligated to use prescribed definitions and criteria in making their determinations. The lack of correspondence between underlying issues and the criteria used in antidumping and countervailing duty investigations may result in misattributed conflict, namely, debate over the wrong issue or between the wrong parties (Deutsch 1973). For example, in the R-CALF case for reducing imports from Canada is the position taken by the U.S. industry, however, one that would not address the multitude of underlying interests held by the U.S. industry (Young 2000).

*Government Consultations—December 1998 “Record of Understanding”*

Government consultations are an important mechanism for the resolution of disputes. There are many examples of government consultation within NAFTA (ERS 1999), the consultations leading to the December 1998 “Record of Understanding Between the Governments of Canada and the United States of America Regarding Areas of Agricultural Trade” is an example.

In response to the blockade against U.S. imports of Canadian agricultural goods implemented by some northern tier state governments in the fall of 1998, the Canadian and U.S. governments began high level consultations to discuss an array of trade concerns. These consultations resulted in the “Record of Understanding” that was signed in December 1998 (Record of Understanding 1998). The “Record of Understanding” contains seventeen action points, addressing a wide range of issues, focused on but not limited to trade in meat and grains. Many of these issues were regulatory in nature, and no large changes in agricultural policy were adopted.

The consultation involved representatives of a wide array of government agencies from both countries. For the United States, the Office of the Trade Representative and the Department of Agriculture, and for Canada, the Department of Foreign Affairs and Agriculture and Agri-food Canada took the lead. Other agencies were involved in many of the discussions due to their role in implementing policy changes, including the Animal and Plant Health Inspection Service and the Environmental

Protection Agency for the United States, and from Canada, the Canadian Food Inspection Agency, Health Canada, and the Canadian Pesticide Management Regulatory Agency.

The agenda for the consultations was set and decisions were made by consensus. The United States has announced formation of an interagency team to monitor implementation of the Record of Understanding (Palmer 1999). The team includes representatives of the USTR, USDA, the National Economic Development Council, the State Department, the Commerce Department, and the Customs Service. High level consultations contrast to the work of the NAFTA committees by their sporadic nature and the lack of an institutionalized process. These processes, due to their flexibility and the possible involvement of a wide range of stakeholders, have the potential to identify interests of the parties and to explore a wide range of integrative solutions (Table 2). However, in the example given, the consultations leading to the "Record of Understanding," the parties who initiated the dispute were not involved in the solution.

#### *Evaluation of Processes for Dispute Resolution*

Informal negotiations and various forms of government consultations are useful in addressing disputes due to their flexible nature, including flexibility about who is included and the process used. Rule based procedures are used once conflict reaches formal dispute processes. These procedures are less likely to address the interests at stake and are more likely to damage the relationship between parties. The provision of other processes to resolve disputes needs to be investigated.

Dispute resolution may be facilitated by the USITC and USITA requiring mediation of some disputes. This would be particularly appropriate when previous investigations did not produce evidence of uncompetitive conditions or the violation of trade laws. Mediation, through the use of interest-based negotiation as described earlier, might be a useful avenue for interest groups to find resolution to the continuing problems in regulatory and policy harmonization. Implementation of these policy changes would require actions on the part of government that might continue to be slow. However, the intense interaction between groups required by the process of mediation might assist in shifting the basis of identity from being based on nations to being based on cooperative interests.

Development of the appropriate procedures for mediation would pose difficult questions. One question is which groups would be involved in the process. Returning again to the R-CALF dispute, who

would be involved in the mediation on the U.S. side? Would the appropriate party be the leadership of R-CALF, the elected leadership of the U.S. Cattlemen's and Beef Association, or some combination of the two? Other questions exist around the scope of issues to be considered and implementation of the settlement options.

## **Conclusions**

Progress in reducing the level of conflict within NAFTA will require working on issues of dispute avoidance, management and resolution simultaneously, as each plays an important role. As the author's research in this field is preliminary, these ideas are offered with the purpose of facilitating discussion, while recognizing that further refinement and research is required.

Dispute avoidance can be facilitated by:

- an accurate identification of the interests held by different parties, and a recognition of the interdependence that exists in many cases;
- promoting industry groups based on their cooperative interests;
- the creation of joint industry and government processes to address substantive issues; and recognizing that
- stakeholders should be involved in the designing of dispute avoidance processes and in negotiations on the actual issues.

Ongoing disputes may exist in cases where strong differing national preferences result in incompatible policy regimes. Dispute management is beyond the scope of the paper, but is an important area for further work. Some preliminary ideas on the management of such disputes include:

- fragmenting the issue into the smallest possible pieces, and addressing individual problems (such as a lack of reciprocity) where possible;
- recognizing areas of agreement;
- acknowledging that not one, but several principles may be involved (for example, the principle of self-determination and the principle of a free market);
- addressing data problems by jointly designing processes for data collection, clarifying areas of disagreement, and identification of criteria for assessment; and
- agreeing to disagree when necessary, while creating spheres of influence to contain the problem.

The resolution of disputes may be improved by:

- having a number of processes for dispute resolution;
- clearly articulating the purpose of each process so that the appropriate process is used in each case;
- using integrative, interest based approaches first, with the goal of involving stakeholders in the crafting of a solution; and finally,
- regular use of mediation or government consultations to attempt to settle a dispute before moving to judicial processes.

A focus of further research might be to develop a more comprehensive conceptual framework of the models of dispute resolution and their advantages and disadvantages for various types of disputes. This research may be further informed by the development of collaborative public processes used to resolve disputes in public policy, particularly natural resource questions (Schellenberg 1996; Dukes 1996; Ross 1993). Progress in better management of disputes between NAFTA partners will require the active involvement and commitment of academics, industry, and government.

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