University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu | (479) 575-7646

An Agricultural Law Research Article

The Dispute Settlement Mechanism of the NAFTA and Agriculture

by

James F. Smith and Marilyn Whitney

Originally published in NORTH DAKOTA LAW REVIEW
68 N. D. L. REV. 567 (1992)

THE DISPUTE SETTLEMENT MECHANISM OF THE NAFTA AND AGRICULTURE

JAMES F. SMITH*
MARILYN WHITNEY**

I. INTRODUCTION

The success of the North American Free Trade Agreement (NAFTA)[1] depends on predictable cross border market access for goods, services and investments. To secure this end, there must be agreement on the basic rules and an effective system for interpreting these rules when their application is disputed. The primary models for the NAFTA's dispute settlement mechanism (DSM) are the Canada-United States Free Trade Agreement (CUSFTA) and the General Agreement on Tariffs and Trade (GATT).[2] This article outlines the procedures of each. The DSM experience of the CUSFTA and the GATT in agricultural and natural resource cases is analyzed. Finally, the paper projects the implications of these DSM models and experience for the NAFTA and agriculture.

Because governments are extensively involved in agriculture and because that economic sector has significant political clout, it is likely that any trade agreement will generate agricultural disputes.[3] Agricultural trade dispute resolution has often been a fail-

---

* Lecturer, School of Law, University of California at Davis. Fulbright Scholar in Mexico in 1986-87 and in Uruguay in 1991.

** Assistant professor, Department of Agrucultural Economics, University of California at Davis Department of Agricultural Economics.

Research assistance by Francois Larrivee, J.D. University of California at Davis, 1991.

Funding for this research was provided by the Giannini Foundation of Agricultural Economics at the University of California.

1. On September 25, 1990, President Bush formally transmitted to congressional leaders his notice of intention to negotiate a bilateral free trade pact with Mexico and endorsed Canadian participation. *Mexico: President Sends Formal Request to Congress to Begin Free Trade Negotiations with Mexico*, 7 Int'l Trade Rep. (BNA) 1499 (Oct. 31, 1990). Congress gave the President such authority in May 1991. *International Agreements: Swing Supporters of NAFTA Talks Urge Agreement on Environmental Protection*, 8 Int'l Trade Rep. (BNA) 1621 (Nov. 6, 1991). Negotiation began in June 1991. *International Agreements: United States Hopes to Have Exchange of NAFTA Texts by Fall, Roh Says*, 8 Int'l Trade Rep. (BNA) 1113 (July 24, 1991).

2. The CUSFTA became effective on January 1, 1989. The GATT is a contract to which its original 22 members adhered in 1947. It was the provisional agreement for the stillborn International Trade Organization, which was rejected by the United States Congress. The GATT is governed by a Council of Representatives. It has hosted seven rounds of Multilateral Trade Negotiations (MTN) which have resulted in considerable tariff reductions and nontariff barrier agreements (Tokyo Round). As of this writing, the GATT Uruguay Round remains deadlocked, primarily over the United States-European Community agricultural subsidies differences.

3. Robert E. Hudec, *Dispute Settlement in Agriculture Trade Matters: The Lesson of the GATT Experience, in* U.S.-CANADIAN AGRICULTURAL TRADE CHALLENGES, 145, 148-149 (Kristen Allen and Katie MacMillian eds., 1987).

ure because of the absence of agreement over substantive rules, particularly with respect to subsidies.[4] The continuing deadlock over agricultural subsidies in the Uruguay Round, the sensitivity of the U.S. fruit and vegetables industry to Mexican imports, the vulnerability of Mexico's small grain producers to U.S. imports and the relatively modest liberalization in agriculture in the CUSFTA suggest that the NAFTA will liberalize agricultural trade over a lengthy transitional period.[5] The NAFTA will evolve over time and require considerable interpretation. The most likely short term agricultural liberalization is tariffication (substitution of tariff for nontariff barriers) and tariff reductions, either of which would cause an increase in the demand for protection through unfair trade practice laws.[6] The success of the NAFTA will largely depend on the efficacy and perceived qualities of its DSM, particularly with respect to agricultural disputes.

Mexican officials have expressed interest in having a DSM that will contain at least the same advantages for Mexico as those obtained by Canada in the CUSFTA.[7] Yet the DSM of the CUSFTA that Canada bargained for, namely binational panels for

4. *Id.* at 152; Thomas Reese Saylor, *Resolving Agricultural Trade Disputes, in* U.S.-CANADIAN AGRICULTURAL TRADE CHALLANGES, 155, 157-58 (Kristen Allen and Katie MacMillian eds., 1987); Debra P. Steiger, *Candian-U.S. Agricultural Trade: A Proposal for Resolving Disputes, in* U.S.-CANADIAN AGRICULTURAL TRADE CHALLENGES 161, 161-166 (Kristen Allen and Katie MacMillian eds., 1987).

5. It is likely that the NAFTA will protect U.S. import-sensitive crops such as tomatoes, citrus products, artichokes, etc., according to House Agricultural Chair Kika de la Garza. *De La Garza to Work on Bill to Help Mexico With Environment*, 8 Int'l Trade Rptr. (BNA) 1572 (Oct. 30, 1991). Protection could include lengthy transition periods of tariff reductions combined with emergency snap-back provisions (short term tariff restoration). Canada-United States Free Trade Agreement, Jan. 2, 1988, art. 702, 27 I.L.M. 383 (1988) (entered into force Jan. 1, 1989) [hereinafter CUSFTA].

6. G. Lermer, *The Dispute Resolution Mechanism in the Free Trade Agreement, in* CANADIAN AGRICULTURAL TRADE 31-32 (1990). The author refers to antidumping (AD) or countervailing duty (CVD) laws as "contingency trade laws." This term, like "administered protection," carries a certain pejorative connotation suggesting the protectionist nature of these measures which, for better or worse, have become an important ingredient of U.S., Canada and Mexican trade law. *See* Robert E. Hudec, *An Approach to Antidumping and Countervailing Duty Laws, Cross Border Trade and Market Access, in* BUILDING A CANADIAN-AMERICAN FREE TRADE AREA 113 (Feb. 3, 1989).

7. Terry Wu and Neil Longley, *A U.S.-Mexico Free Trade Agreement: U.S. Perspective*, J. WORLD TRADE, June 1991, at 5, 10. Mexico's Trade Secretariat's (SECOFI) Sixth Monograph noted that "[c]onsidering that antidumping and anti-subsidy regulations can be used to limit access to these markets, our country has insisted current systems be revised." *Government Study Outlines Mexico's Dumping Rules, Prospects for NAFTA*, 8 Int'l Trade Rptr. (BNA) 1548 (Oct. 23, 1991). Twenty-five U.S. AD/CVD actions were pending against Mexico in 1988. *See* Julio J. Nogués, *Los casos de aranceles compensatorios de Estados Unidos en contra de México* (United States Countervailing Duty Cases against Mexico), ESTUDIOS ECONOMICOS, July-Dec. 1986, vol. 1, no. 2, at 337.; James F. Smith, *Aspectos jurídicos del GATT y del comercio exterior estadounidense*, (Legal Aspects of the GATT and U.S. Foreign Trade) 20 ESTADOS UNIDOS, PERSPECTIVA LATINOAMERICANA, CUADERNOS SEMESTRALES 109 (1986). Well before negotiations began Mexico's ambassador Gustavo Petricioli said that a free trade agreement between Mexico and the U.S. should include provisions for dispute resolution similar to those in the U.S.-Canada Free Trade Agreement.

antidumping (AD) and countervailing duty (CVD) cases (Chapter 19),[8] is merely a temporary provision.[9] The creation of special AD/CVD procedures (binational panels) for Canada was a major concession by the U.S. in that it provided a procedural exception to its trade laws. To date, Canada has prevailed on seven of the eleven panel decisions litigated on the merits under chapter 19.[10] The U.S. may seek to narrow the AD/CVD DSM in the NAFTA. Mexico is probably disposed to expand its use to other controversies. Canadian officials, like their Mexican counterparts, believe that U.S. unfair trade practice laws are "administered protection"[11] with significant adverse economic consequences.[12] The U.S. did not include a similar AD/CVD DSM in its initial NAFTA DSM proposal. Mexico did.[13]

The adoption by the NAFTA of an "institutional" DSM, like the CUSFTA, (essentially an agreement to negotiate) appears certain (Chapter 18).[14] The CUSFTA provision is modeled after the

---

Mexico: Mexico's Ambassador Says FTA Should Include Dispute Resolution Provisions Like Canada FTA, 7 Int'l Trade Rep. (BNA) 1479 (Sept. 26, 1990).

8. ADs offset "dumping," which GATT article VI defines as the practice "by which products of one country are introduced into the commerce of another at less that the normal value of the products." General Agreement on Tariffs and Trade, art. VI:1, 3 B.I.S.D. 12 (Text of agreement in force 1958) [hereinafter GATT]. CVDs offset "subsidies," defined by GATT art. XVI:1 to be "any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory." *Id.* art. XVI, 3 B.I.S.D. 30.

9. The CUSFTA's most remarkable feature, the substitution of a binational panel for judicial review of unfair trade practice decisions, is due to expire no later than January 1, 1996.

10. Free Trade Agreement, U.S.-Can., Status Report (Jan. 1992), Binational Secretariat, U.S. Section.

11. Canadian researchers reported an explosive increase in trade contingency (AD/CVD) actions (three times as many ADs in 1984 as in 1980 and four times as many CVDs). *See* Lermer, *supra* note 6, at 36-37.

12. Keith B. Ferguson, *Dispute Settlement Under the Canada-United States Free Trade Agreement*, 47 U. TORONTO FAC. L. REV. 317, 349 (1989). "In 1986 more than $4 billion of Canadian exports to the U.S. [3.1%] were affected by unfair trade laws," while $384 million of U.S. exports (0.12%) suffered duty impositions under Canadian AD/CVD laws. Alan M. Rugman and Samuel D. Porteous, *Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures*, 15 N.C. J. INT'L L. & COM. REG. 67, 73-74 (1990). The percentage of all U.S. AD/CVD actions which have been filed against Canada and Mexico have been proportionate to their share of imports. The vast majority of such actions were antidumping in the case of Canada and countervailing duty in the case of Mexico. J. Michael Finger and Tracy Murray, *Policing Unfair Imports: The United States Example*, J. WORLD TRADE, Aug. 1990, at 39, 43-45.

13. For a summary of the DSM negotiation positions as of February 21, 1992, see *infra* note 14.

14. On March 23, 1992, *El Financiero*, a Mexican financial newspaper, published a summary of the NAFTA "Dallas Composite" text resulting from the negotiation session between the parties which took place during the week of Feb. 17, 1992 in Dallas, Texas. *TLC: Predominan las Diferencias*, EL FINANCIERO, Mar. 23, 1992, at 1. *See also Serra Puche Tells Mexican Senate NAFTA May Get Extended Tariff Period*, U.S.-MEX. FREE TRADE REP., Apr. 20, 1992, at 1. The text was provided to *El Financiero* by Mexican opponents of the NAFTA. The 500 page heavily bracketed text (Dallas Composite) includes a chapter entitled "Institutional Arrangements and Dispute Settlement Procedures."

DSM of the GATT. It provides a familiar framework for GATT members (consultation, negotiation, consensual referral to arbitration). The circumstances of the negotiation, namely the political pressure to produce a highly complex agreement rapidly,[15] suggest an open-ended DSM to address unresolved and difficult issues.[16] For example, the politically volatile environmental pro-

---

Dallas Composite, Dispute Settlement, Feb. 21, 1992, U.S.-Mex., arts. 2301-2324 [hereinafter Dallas Composite]. The Dallas Composite is neither a complete proposal nor an agreement; rather, it is an effort to set forth in one document the various negotiating positions taken by the parties. If there is to be a NAFTA, it may well ultimately reject all or any part of the Dallas Composite. Its provisions are summarized here to indicate the tentative agreements and differences of the parties as of Feb. 21, 1992.

All parties agreed to establish a Trade Commission which, like the CUSFTA's institutional commission, would be "composed of representative of each Party" wherein the "principal representative shall be the cabinet/level officer or Minister primarily responsible for international trade." *Id.* art. 2301(2). The commission has broad responsibility to "resolve disputes that may arise over its interpretation or application of the NAFTA." *Id.* art. 2301(1), (3). The Commission may "delegate responsibilities to, ad hoc or standing committees . . . [legal, scientific or other] (CDA MEX) expert groups." *Id.* arts. 2301(4), 2318. (The U.S. was not in agreement with the bracketed language). Canada dissented from the proposition that "[All decisions of the Commission shall be taken by consensus.]" *Id.* art. 2301(5).

The Commission is to establish a "Secretariat comprising national Sections," and each party is to "establish a permanent, office of its national section" bearing the "cost of its Section." *Id.* art. 2302(2), (3). "The Secretaries of the disputing Parties shall act jointly to service all meetings of panels established pursuant to this Agreement." *Id.* art. 2302(4).

There was general support for administrative tribunals in each country to review and correct final administrative action "relating to matters covered by this Agreement." *Id.* art. 2306(1). There was agreement to "provide appropriate mechanisms for the enforcement of agreements to arbitrate" "as a means of settling commercial disputes." *Id.* art. XXXX.

Mexico proposed a separate Chapter 11 for "Review of Antidumping and Countervailing Duty Amendments Determinations." *Id.* art. 2308. This Chapter 11 was not included in the Dallas Composite. Like CUSFTA's Chapter 18, the agreement provides for the following DSM: notification, article 2304, consultation, which if unsuccessful would be followed by referral to the Commission, article 2311, whereupon the Commission could opt for input from technical advisors, expert groups, working parties, good offices, conciliation, mediation, etc. article 2312. *Id.* arts. 2304, 2311, 2312. The dispute may then be referred to "a panel of experts," article 2313, or to "binding arbitration," article 2323. *Id.* arts. 2313, 2323. (The parties have not agreed as to what disputes if any would be automatically referred to binding arbitration.) Disputes arising under both the NAFTA and the GATT "may be settled in either forum at the discretion of the complaining Party or Parties, according to the rules of that forum." *Id.* art. 2309.

Each party is to maintain a roster of panelists, and the panels are to consist of five members. But, there was no agreement on panel-member qualifications or panel composition. *Id.* arts. 2314, 2315. Nor was there consensus as to what the panel would address in their initial report beyond findings of fact. *Id.* art. 2320.

"Upon receipt of the final report, the disputing parties shall agree on the resolution of the dispute, which normally shall conform with the recommendation of the panel." *Id.* art. 2322(1). Preferred resolutions are non-implementation or removal of a measure causing nullification or impairment, compensation, or a withdrawal of benefits of equivalent effect. *Id.* arts. 2322(2), (4), (5). "Nullification and impairment" is broadly defined as "any benefit reasonably expected to occur . . . directly or indirectly" under the Agreement. *Id.* art. 2404(1).

15. The pendency of elections in the U.S. in 1992 and in Canada in 1993, the lingering recession in both countries and the political opposition made the NAFTA more urgent (to boost investment and trade growth) but also delayed the NAFTA in order to avoid the high political cost of the perceived downside of the NAFTA for some sectors in an election/recession year.

16. "It is well known in diplomacy that those who draft agreements often postpone the most insoluble problems for those who must administer the agreements in the future."

tection and labor issues may be defined as "unfair trade practices" and thereby included in a DSM.[17]

In order to analyze the possible modifications of the CUSFTA's DSM for the NAFTA, it is first necessary to describe its two distinct procedures. These procedures are: (1) dispute resolutions of any question of interpretation or application of the agreement except financial services or AD/CVD cases (Chapter 18); and (2) AD/CVD matters disputes (Chapter 19).

II. INSTITUTIONAL PROVISIONS: CANADA-UNITED STATES TRADE COMMISSION (CHAPTER 18)

1. Chapter 18 applies to all disputes relating to the application or interpretation of the CUSFTA, including actual or proposed modifications of either party's trade laws, except the financial services (Chapter 17) and unfair trade practice (Chapter 19) provisions.[18]

2. The Canada-United States Trade Commission (Commission) is established to supervise implementation of the agreement, resolve disputes and to oversee the CUSFTA's further elaboration.[19] The Commission is to be composed of representatives of both parties by a cabinet level officer or Minister responsible for international trade or his or her designee.[20] Decisions are to be by consensus.[21] The dispute panel process may be initiated only by the federal governments.[22]

3. The parties recognize their obligations under the GATT. The complaining party must elect either forum for dispute

---

Ingrid Nordgren, *The GATT Panels During the Uruguay Round: A Joker in the Negotiating Game*, 8 J. INT'L ARB. 87, 87 & n.I (1991) (quoting GILBERT R. WINHAM, INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATION (1986)).

17. In a letter to Congress dated May 1, 1991, President Bush insisted that labor and environmental protection not be part of the NAFTA but pledged to address these concerns in parallel agreements (May action plan). In October, 74 House Democrats, two-thirds of whom voted for fast-track authority, sent a letter to President Bush, stating that there is a "general consensus" that the U.S.-Mexico Border Plan is wholly inadequate. *International Agreements: Swing Supporters of NAFTA Talks Urge Agreement on Environmental Protection*, 8 Int'l Trade Rptr. (BNA) 1621 (Nov. 6, 1991). Fast track authority passed by a margin of 231 to 192 in the House and 59 to 36 in the Senate. Keith Bradsher, *Senate Vote Backs Bush on Trade*, N.Y. TIMES, May 25, 1991, § 1, at 35. The U.S. Council for International Business has endorsed an environmental DSM for the NAFTA, parallel to the trade related DSM. *International Agreements: U.S. Business Group Endorses Provision for FTA Environmental Dispute Settlement*, 8 Int'l Trade Rptr. (BNA) 1823 (Dec. 11, 1991).

18. CUSFTA art. 1801(1).

19. *Id.* art. 1802(1).

20. *Id.* art. 1802(2).

21. *Id.* art. 1802(5).

22. *Id.* art. 1805 (neither provincial nor state governments have input).

resolution.[23]

4. Each party is to provide notice of any proposed or actual measure that may materially affect the operation of the CUSFTA along with any requested pertinent information.[24]

5. A party may request consultations with the other party on any matter affecting the CUSFTA.[25] If bilateral consultations fail to resolve the matter within thirty days, the complaining party may have it referred to the Commission.[26]

6. The Commission must refer safeguard (emergency) disputes to binding arbitration.[27] Otherwise it may (by consensus) decide the matter itself or refer it to third-party mediation or binding arbitration.[28] If it retains the matter, either party may request that an advisory binational panel of experts be established to make nonbinding recommendations.[29]

7. Binational panelists are to be selected from rosters maintained by the Commission and submitted by each party. Each party selects two panelists and those four select the fifth.[30]

8. The parties have the right to at least one hearing before the panel, with the right to submit written arguments.[31] There is a limit of 241 days for resolution of the dispute.[32]

9. If the losing party fails to implement the findings of a binding arbitration panel and the parties are not otherwise agreed on a remedy, the prevailing party may suspend application of equivalent benefits under the agreement until compliance is achieved.[33]

10. Expert panels may make nonbinding recommendations after the parties have had an opportunity to comment on its preliminary findings. If the Commission is unable to reach an agree-

23. *Id.* art. 1801(2). The NAFTA, Dallas Composite, includes a similar provision. *See* Dallas Composite, *supra* note 14, art. 2309.

24. CUSFTA art. 1803(1), (3).

25. *Id.* art. 1804(1).

26. *Id.* art. 1805(1).

27. *Id.* art. 1806(1)(a). CUSFTA's Chapter 11, the emergency action (safeguard) provision, permits temporary duty increases in response to surges in imports that are a "substantial cause of serious injury" to domestic producers. *Id.* art. 1101(1)(b). Although Canada is rarely a source of "surging" imports, its imports have been "sideswiped" by emergency actions aimed at others. Gary N. Horlick et al., *Dispute Resolution Mechanisms*, *in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT: THE GLOBAL IMPACT, 65, 72-73 (Jeffrey J. Schott and Murray G. Smith, eds., 1988); Lermer, *supra* note 6, at 38.

28. CUSFTA arts. 1805(2), 1806.1(b).

29. *Id.* art. 1807(2).

30. *Id.* art. 1807(3).

31. *Id.* art. 1807(4).

32. JUDITH H. BELLO & ALAN F. HOMER, GUIDE TO THE U.S.—CANADA FREE TRADE AGREEMENT 762 (1990 & Supp. 1991).

33. CUSFTA art. 1806(3).

ment within thirty days of the panel's report, the prevailing party may suspend equivalent benefits until an agreement is reached.[34]

A. CUSFTA'S CHAPTER 18 AND THE GATT DSM

The Dallas Composite of the NAFTA retains very similar features to those found in CUSFTA Chapter 18.[35] While Chapter 18 is modeled on the DSM of the GATT, it contains the important innovations of a roster of panelists agreed upon in advance,[36] time limits and the provisions for binding arbitration. Despite its auspicious title, the Commission[37] has no permanent institutional presence.[38] It is a political body committed to mediation and nonbinding arbitration (except in safeguard disputes).

The Commission has had few cases to resolve in its short existence. But the GATT DSM, upon which it is modeled, has unsteadily evolved from a negotiation process to an adjudicatory one since its inception in 1947. The GATT DSM[39] may be invoked for failure to carry out the obligations of the agreement or other circumstances which nullify or impair its benefits.[40] If the GATT Council (operating by consensus) finds the nullification or impairment "serious enough to justify such action," it may allow appropriate withdrawal of concessions. But this is rarely done.[41] An

---

34. *Id.* art. 1807(6)-(9).

35. *See* Dallas Composite, *supra* note 14.

36. Panel selection has often caused considerable delay in the GATT DSM in that disputants may bicker for years over its composition.

37. *See supra* notes 19-22 and accompanying text.

38. The U.S. has traditionally shied away from ceding any jurisdiction on international trade disputes to a truly independent DSM. Robert H. Hudec, *Dispute Resolution Mechanisms, Comments, in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT, *supra* note 27, at 91, 96. The proposed Charter for the International Trade Organization (ITO) contained an adjudicatory DSM with provision for a permanent Executive Board, arbitration and referral to the International Court of Justice. These permanent DSM features did not survive in the GATT following the U.S. Congress' rejection of the ITO. Robert P. Parker, *Dispute Settlement in the GATT and the Canada-U.S. Free Trade Agreement*, J. WORLD TRADE, June 1989, at 83, 84-86; ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 52 (2d ed., 1990).

39. While the GATT itself contains some 30 DSMs and the Tokyo Round elaborated an additional eleven, the primary DSM appears in articles XXII and XXIII. The DSM is first invoked by the complaining party asking for consultations. If consultations fail to resolve the matter, the complaining party may have the matter referred to the GATT Council. The Council must then appoint a panel to make recommendations, first to the disputants and then to the Council.

40. A prima facie case of nullification or impairment is presented by a showing of violation of the GATT, quantitative restriction or when a domestic subsidy is introduced or increased on a product in which a tariff concession has been negotiated. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 167, 331-32 (1979). The procedural rules of the GATT DSM have been codified in the "Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance" (the 1979 Understanding), and its Annex. GATT, 26th Supp., B.I.S.D. 210 (1980).

41. Only one dispute, the 1953 complaint of the Netherlands against the U.S. quotas on the importation of dairy products, has resulted in the authorization of suspension of

emphasis on consultation, numerous opportunities for procedural delays, a requirement of consensus and an absence of effective implementation remedies of the GATT DSM have traditionally encouraged negotiated or political solutions rather than rule adjudication[42] (the application of substantive rules to the facts of the dispute).

The creation of the European Community (EC) was in violation of the GATT.[43] By the 1960s, the EC's resistance to rule-adjudication forced the GATT Council to take the pragmatic approach of diplomacy over legalisms.[44] The U.S. and many developing countries have since pressed for a more legalistic approach by presenting numerous cases and arguing for reforming the procedures.[45] Since the Uruguay Round began in 1986, the GATT's DSM has been unusually active.[46] Important procedural reforms were adopted in the 1988 Midterm Review of the Uruguay Round

---

concessions. The Netherlands was permitted to limit its imports of wheat from the U.S. JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 352 (2d ed. 1986). In the "Chicken Wars" case, a GATT "arbitration" panel was formed in 1960 to evaluate the loss caused by a violatory import levy by the Germans. The withdrawal of equivalent concessions was authorized. The U.S. did so by raising duties on brandy and trucks. In the meantime, Volkswagon had began production in the U.S. and benefited by these duties that raised the prices on Japanese trucks. The losers were the Japanese truck exporters and the American consumers, not the German chicken industry. *See* Herman Walker, *Dispute Settlement: The Chicken War*, 58 AM. J. INT'L L. 671 (1964); Andreas F. Lowenfeld, *The Chicken War: A Postscript*, 5 J. MAR. L. & COM. 317-18 (1974).

42. Such "negotiation" has been characterized as "power-oriented," as opposed to "rule-oriented" diplomacy, which favors the larger, wealthier and more powerful economy. John H. Jackson, *Perspective on the Jurisprudence of International Trade: Costs and Benefits of Legal Protection in the United States*, 82 MICH. L. REV. 1570, 1571-72 (1984). Or as Professor Robert E. Hudec has written, "it is usually the smaller and weaker partner in any deal that wants and needs the protection of effective legal remedies against violations by the other." Robert H. Hudec, *Dispute Resolution Mechanisms, Comments, in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT, *supra* note 27, at 87.

43. *See* HUDEC, *supra* note 38, at 212. The European Community (EC) or Common Market, resulted from the merger of the European Coal and Steel Community (ECSC) (1951), the European Economic Community (EEC) (1957) and the European Atomic Energy Commission (Euratom) (1957). The EC includes Belgium, France, Italy, Luxembourg, the Netherlands, West Germany, Denmark, Ireland, the United Kingdom, Greece, Portugal, and Spain. JACKSON & DAVEY, *supra* note 41, at 199. The term the "EC" is used herein to refer to the 12-country trading block created by these treaties and the merger of these treaty systems.

44. *See* HUDEC, *supra* note 38, at 212. Japan, like the EC, has been inclined to view the GATT as a framework for negotiations. Parker, *supra* note 38, at 89. But in 1984, the EC adopted a regulation authorizing the EEC Commission, at times on the basis of individual or firm petition, to launch a GATT DSM and to follow it through to its conclusion before contemplated counter actions could be utilized. While somewhat parallel to the U.S. Section 301 procedures, it is distinct. For a discussion of the U.S. Section 301 procedures, see JOHN H. JACKSON, RESTRUCTURING THE GATT SYSTEM 69-74 (1990).

45. HUDEC, *supra* note 38, at 251-53. The U.S. has pressed for a more rule-oriented approach, proposing quicker decisions, elimination of the consensus requirement, binding arbitration, etc. *See generally Ferguson*, *supra* note 12, at 340-49. *See also* Review of the Effectiveness of Trade Dispute Settlement Under the GATT and the Tokyo Round Agreements, USITC Pub. 1793, Inv. No. 332-212, at 23-27 (Dec. 1985).

46. *See* Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 16: Settling Disputes in the GATT: The Past, Present and Future*, 24 INT'L LAWYER 519, 519

at Montreal.[47] The round has also generated the 1990 draft (Brussels) and the 1991 "Dunkel Text," which call for automatic panel establishment, panel and appellate report adoption, and authorization of retaliatory implementation by the Council, unless there is a negative consensus against such establishment, adoption or implementation. Optional referral to binding arbitration and the establishment of a permanent appellate review body were also proposed. Also, time limits for implementation of panel reports are to be set.[48] If these reforms are adopted, the GATT DSM will become a more effective rule-adjudication mechanism.[49] The U.S., the EC and Japan have agreed in principle to these reforms.

The CUSFTA Commission, which is modeled on the GATT, may experience a similar metamorphosis. It is somewhat of a hybrid (negotiation/adjudication). Several of its features suggest a pure negotiation model. *Binding* arbitration is required only in safeguard cases.[50] Like the GATT's dispute settlement procedure, the CUSFTA's DSM is vague and includes nonviolational "nullification and impairment" of benefits,[51] which suggests political negotiation. However, the CUSFTA's DSM is not as well equipped as the GATT's for rule-adjudication. It lacks the institutional pres-

---

(1990). Nineteen panels were established and presented their reports from October 1986 to November 1990. Nordgren, *supra* note 16, at 87.

47. These reforms tighten time limits, expedite panel selection, standardize terms of reference and improve surveillance of implementation of panel reports. *GATT Adopts New Dispute Settlement Procedures, Country—Review System*, GATT FOCUS, June 1989, at 1.

48. *Understanding on the Interpretation and Application of Articles XXII and XXIII of the General Agreements on Tariffs and Trade, in* DRAFT FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, at 287-306, MTN.TNC/W/35 Rev. 1 (Dec. 3, 1990). *See generally Understanding on Rules and Procedures Governing the Settlement of Disputes Under Articles XXII and XXIII of the General Agreement on Tariffs and Trade, in* DRAFT FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, at S.1-S.23, MTN.TNC/W/FA (Dec. 20, 1991) (Dunkel Text).

49. In the first 40 years of GATT, 170 legal complaints were filed—93 progressed to litigation, 72 led to rulings and 20 were settled. All but nine of the 72 were resolved by final ruling or settlement. Richard Bilder, *The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, 1989 AM. SOC'Y INT'L L. PROC. 251, 262. During the Uruguay Round (1986-90) as well as the Tokyo Round (1970-75), the U.S. Administration initiated numerous GATT panel actions in order to convince a skeptical Congress that the system could produce effective decisions. The recent effort was more successful in that 16 of 19 panel reports were adopted during the Uruguay Round, all but three within two to three months after presentation to the council. Nordgren, *supra* note 16, at 97. Only 3 of 13 reached a "panel decision of sorts" during the period 1970-75. HUDEC, *supra*, note 38, at 251-52.

50. *See* CUSFTA, art. 1807(8) (providing that the Commission shall agree to resolution of disputes following nonbinding arbitration).

51. A CUSFTA concept borrowed directly from GATT art. XXIII.1. *See* CUSFTA art. 1801(1). The CUSFTA DSM also addresses benefits anticipated under this agreement and provides that the Commission's decisions "normally shall conform to the recommendations of the panel." *Id.* art. 1807(8)-(9). The Dallas Composite NAFTA draft has borrowed identical language. *See* Dallas Composite, *supra* note 14, art. 2404.1.

ence and external force of the GATT Council.[52] In addition, it lacks the invaluable support of a permanent professional staff like the independent GATT Secretariat.[53]

The provision of binding arbitration in the CUSFTA is backed by the right to suspend the application of "equivalent benefits." Such implementation compares favorably to any existing trade agreement of the U.S., including the GATT and the Israel-United States Free Trade Agreement.[54] However, the CUSFTA's binding arbitration awards are not binding on the national courts as in the case of the judgments of the EC's Court of Justice.[55] Neither party to the CUSFTA has contemplated the kind of political and institutional integration reflected in the EC's parliament and the jurisdiction of its Court of Justice.[56] Professor Hudec has contrasted the U.S. rule-oriented GATT reform position with the rather conservative implementation features of the CUSFTA DSM as follows: "It's fine to make GATT adjudication work better at producing legal decisions, but let's not get too carried away with enforcing them, OK?"[57]

B. AGRICULTURAL DISPUTES IN THE GATT

Agriculture has been the subject of more trade disputes than any other sector within the GATT.[58] The resolution of these dis-

---

52. The GATT Council is composed of representatives of the Contracting Parties "willing to accept the responsibility of membership." KENNETH W. DAM, THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 338 (1970). "Membership of the Council is open to all countries who wish to be represented." GERARD CUVZON, MULTILATERAL COMMERCIAL DIPLOMACY, THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES 40 (1965).

53. Bilder has described the Secretariat as follows:

> Typically, the Secretariat provides a staff of two officials, a legal officer, and a specialist in the subject area of the complaint. The Secretariat staff guides parties and panelists through the hearing procedures, does the panel's research, drafts the statement of facts and arguments, is present when the panel discusses the merits *in camera*, and usually drafts the panel's findings and conclusions. It has been said that GATT dispute settlement could work without expert panelists, but not without Secretariat staff.

Bilder, *supra* note 49, at 259. The Dallas Composite NAFTA draft appears to offer little hope for a significant Secretariat in that it is composed of national sections, each of which is to be separately funded by its sponsoring government. Moreover, each party contemplates separate administrative tribunals to review and correct final administrative actions relating to the Agreement. *See* Dallas Composite, *supra* note 14, arts. 2302, 2306(1).

54. Israel-United States Free Trade Agreement, April 22, 1985, art. 19.1 nonbinding DSM, 24 I.L.M. 654.

55. JACKSON & DAVEY, *supra* note 41, at 199-219.

56. The EC is a common market which explicitly requires a common external tariff. *See generally* GATT art. XXIV. The NAFTA, like the CUSFTA, is a trade agreement.

57. Robert E. Hudec, *Dispute Resolution Mechanisms, Comments, in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT, *supra* note 27, at 91, 93-94.

58. Approximately 45% involved agricultural products. JACKSON & DAVEY, *supra* note 41, at 345.

putes has been problematic because agriculture is significantly exempt from the trade discipline of the GATT.[59] During the Uruguay Round it seemed that the U.S. was purposely testing the efficacy of the DSM, and mostly in agricultural cases.[60] Thirteen of the nineteen panels, during the latest Uruguay Round, dealt with agriculture. The U.S. won a series of cases against quantitative restrictions[61] including the Canadian restrictions on yogurt and ice cream.[62] The U.S. was able to defend its own quota provisions for sugar and sugar products in a case brought by the EC, but was unsuccessful against a similar Australian complaint.[63]

The U.S. challenge of EC production subsidies to soybeans and oilseeds as discriminatory and violative of the national treatment and as measures which nullified and impaired earlier EC tariff concessions resulted in a favorable panel recommendation.[64]

---

59. The "national treatment" clause itself specifically exempts domestic subsidies. GATT art. III:8(b), 3 B.I.S.D. 9. The quota prohibition permits marketing orders and import quotas, if necessary, to enforce domestic production or surplus removal programs. *Id.* art. XI:2(b), 3 B.I.S.D. 19-20. International commodity agreements establishing quotas are permitted. *Id.* art. XX(h), (i), 3 B.I.S.D. 43-44. The restriction on export subsidies to primary products is unenforceable because it is ambiguously conditioned on the receipt of "more than an equitable share of world export trade." *Id.* art. XVI:3, 3 B.I.S.D. 31. Domestic subsidies are restricted only if they cause "serious prejudice to the interests" of a GATT party in which case consultations are required. *Id.* art. XVI:1, 3 B.I.S.D. 30. In 1955, the U.S. obtained an agricultural products waiver from the national treatment and quota restriction, thereby allowing import quotas which other parties may not impose. JACKSON & DAVEY, *supra* note 41, at 956-59. This waiver alone seriously undermines the GATT's significance in agriculture. Tariff concessions in agriculture have not been as numerous, nor as meaningful as for other products. *Id.*

60. Descriptions of these cases can be found in Nordgren, *supra* note 16, at 87-102; Bello & Holmer, *supra* note 46, at 532; Operation of the Trade Agreements Program, 41st Report, USITC Pub. 2317 (Sept. 1989); Operation of the Trade Agreements Program, 42nd Report, USITC Pub. 2403 (July 1991).

61. Japanese quantitative restrictions against U.S. dairy products, processed vegetables and fruit, preserved bovine meat and starch were found violative of GATT article XI:2 (c)(i) and not subject to the exception of an existing government program to restrict domestic production. Nordgren, *supra* note 16, at 88. The U.S. then successfully invoked panels against the quantitative restrictions of the Nordic countries (apples and pears), the EC (apples), Korea (beef) and Thailand (cigarettes). *Id.* at 89-90. Korea's effort to justify the restrictions as necessary for balance of payment as provided by GATT article XVIII:B was rejected, as the proper steps had not been taken. *Id.* Thailand's argument that cigarettes were "like products" to tobacco and therefore subject to its domestic production controls pursuant to GATT article XI:2 (c)(i) was rejected. *Id.* at 90-91.

62. Canada's effort to justify such restrictions as part of their domestic production controls on raw milk was rejected on the grounds that such products were not "like product" directly competitive with raw milk, etc., within the meaning of GATT article XI:2(c). *Id.* at 90.

63. In the U.S., restrictions on the importation of sugar and sugar-containing products applied under the 1955 Waiver and under the headnote to the schedule of tariff concessions. Complaint by Australia on the Sugar Import Regime, Operation of the Trade Agreements Programs 41st Report, USITC Pub. 2317, at 46 & n.248 (Sept. 1989); *U.S. Accepts Ruling on Sugar Quotas*, GATT FOCUS, July 1989, at 2.

64. Although the panel was set up in June 1988, the Report was not presented until January 1989. *GATT Council Resolves US-EC Soyabean Dispute*, GATT FOCUS, Feb. 1990, at 3. The EC has yet to comply. The latest deadline for implementation expired on October 31, 1991. *GATT: U.S. Warns EC on Failure to Implement Oilseeds Ruling*, 8 Int'l

Japanese import levies on wine and alcoholic beverages were found violative of article III.[65] The GATT Council's adoption of sixteen of nineteen cases during the Uruguay Round demonstrated the effectiveness of the GATT's Midterm Review DSM reforms, which included automatic establishment of a panel, standard terms of reference and settled procedures for selection of panels.

C. ENVIRONMENTAL AND NATURAL RESOURCE CASES UNDER CUSFTA CHAPTER 18 AND THE GATT.

To date, two disputes have been settled under the Chapter 18 provisions of the CUSFTA, *Canada's Landing Requirement for Salmon and Herring*[66] and *Lobsters from Canada*.[67] While both cases concern fishery regulations rather than agricultural trade, they have ramifications for agriculture, as do other environmental and natural resource cases investigated under the GATT DSM. Linkages between agriculture and the environment are an issue in the NAFTA negotiations. For instance, the U.S. Congress has expressed concern over differences between U.S. and Mexican pesticide and pollution control regulations and enforcement.[68] A brief overview of several environmental and natural resource cases under the GATT and CUSFTA DSMs highlights issues relevant to the NAFTA negotiations.

Prior to 1989, Canadian regulations prohibited the exportation of unprocessed herring and sockeye and pink salmon from its West Coast fisheries.[69] Following a U.S. complaint, a GATT dispute settlement panel ruled in November 1987 that these regulations constituted quantitative restrictions on exports inconsistent with Article XI:1 of the GATT.[70] Canada had argued that by allowing an accurate monitoring of the harvest, the export prohibi-

---

Trade Rep. (BNA) 1656 (Nov. 13, 1991). But the U.S. has not been innocent of such delays. In the superfund oil import levy case, the GATT Council adopted the panel report in June 1987 but the U.S. failed to implement it until November, 1989. *See* Nordgren, *supra* note 16, at 92.

65. Nordgren, *supra* note 16, at 91-92.

66. *In re* Canada's Landing Requirements for Salmon and Herring, 12 ITRD 1026 (U.S.-Canada Binational Panel Final Report No. COA-89-1807-01, Oct. 16, 1989).

67. Lobsters from Canada, 12 ITRD 1653 (U.S.-Canada Binational Panel No. USA 89-1807-01, May 25, 1990).

68. *International Agreements: Swing Supporters of NAFTA Talks Urge Agreement on Environmental Protection*, 8 Int'l Trade Rptr. (BNA) 1621 (Nov. 6, 1991).

69. Section 6 of the Pacific Commercial Salmon Fishery Regulations, C.R.C., ch. 823, § 24(1) of the Pacific Herring Fishery Regulations, SOR/84-324; pursuant to Canadian Fisheries Act, R.S.C., ch. F-14 (1985) (Can.) *as amended*.

70. For a more detailed discussion of U.S.-Canadian disputes over salmon and herring fisheries, see Ted L. McDorman, *Using the Dispute Settlement Regime of the Free Trade Agreement: The West Coast Salmon and Herring Problem*, 4 CAN.-U.S. BUS. L. REV. 177, 177-89 (1990).

tions served a valid conservation purpose and thus were a permitted exception to XI:1 under XX(g).[71]

Responding to the negative GATT decision, Canada revoked its ban on unprocessed exports in late 1989 and instituted new regulations requiring one hundred percent domestic landing of West Coast salmon and herring caught in Canadian waters.[72] The landing requirements applied not only to herring and sockeye and pink salmon, but were extended to include chinook, coho and chum salmon. Under these regulations, direct shipment of unprocessed salmon and herring to U.S. processors was prohibited. However, fish could be shipped unprocessed to the U.S. after first being off-loaded in Canada for counting and collection of biological samples.

In challenging the landing requirements, the U.S. became the first to utilize the Chapter 18 nonbinding arbitration provisions of the CUSFTA.[73] A panel of two trade and two fisheries experts was convened, with the Chair being qualified in both areas. The U.S. viewpoint was that by necessitating extra handling of fish for export but not of the domestic catch, the regulations had the clear effect of restricting trade in violation of GATT XI:1 and thus of Article 407 of the CUSFTA, which incorporates said article. Canada's position was that the landing restrictions applied equally to domestic and exported product and that Article XI:1 was therefore inapplicable. Further, even if found to be inconsistent with Article XI:1, the measures were an essential component of Canada's resource conservation regime and thus a permitted exception under Article XX(g). The panel agreed with the U.S. position, finding that the one-hundred percent landing requirements were a restraint on exports and were not intended primarily as a conservation measure, since alternative measures could have allowed adequate data collection. The panel further suggested that a more limited landing restriction could be acceptable under the

71. GATT art. XX(g) (permitting, under certain conditions, the adoption or enforcement of measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"). As an exception to GATT article XI:1, the burden of proof is on the country adopting the measure to show that its primary purpose is conservation and that there are no measures less disruptive of trade that might satisfy the same goal.

72. *In re* Canada's Landing Requirements for Salmon and Herring, 12 ITRD 1026, 1028 & n.6 (Oct. 16, 1989) (citing *Pacific Herring Fishery Regulations, amendment*, SOR/89-217, Canada Gazette Part II, Vol. 123, No. 10, 2384-84; *Pacific Commercial Salmon Fishery Regulations, amendment*, SOR/89-219, Canada Gazette Part II, Vol. 123, No. 10, 2390-91).

73. A perceived weakness of the GATT panel process is that a complainant cannot force another state to form a panel. In contrast, the U.S. or Canada can require the establishment of a panel under the CUSFTA. McDorman, *supra* note 70, at 181 n.14.

CUSFTA. After four months of negotiation, the Commission reached a consensus. Canada was allowed to maintain its landing requirement in return for exempting twenty percent of the salmon and herring catch and making these available to the U.S., with the exempt amount to increase to twenty-five percent in 1991-93.

In *Lobsters from Canada*, a CUSFTA Binational Panel considered whether a December 1989 amendment to the "Magnuson Act"[74] constituted a restraint of trade as alleged by Canada. This amendment made it unlawful to transport or sell in the U.S. any lobsters that were below a minimum possession size, egg-bearing, or visibly stripped of eggs. The U.S. presented evidence that certain regions of the Atlantic lobster fishery were under extreme fishing pressure and that, as a result, only one to six percent of lobsters were reaching reproductive maturity in these areas. Scientists expressed fear of a population collapse. Prior to enactment of the disputed amendment, possession of undersized lobsters harvested in U.S. waters had been prohibited, although small Canadian lobsters could be imported if accompanied by documentation of their Canadian origin. The U.S. argued that a total ban on undersized lobsters was necessary in order to prevent mingling of small lobsters taken illegally from U.S. waters with those imported from Canada. In a split 3-2 decision, the panel found that the U.S. minimum size requirements on live lobsters sold in the U.S. were not in conflict with Article 407.[75] The majority of panelists agreed that Article III, rather than Article XI:1, applied in this case, since the size limitations on U.S. and Canadian lobsters were identical. Two panelists dissented, stating that under this interpretation, imports of virtually any product could be restricted simply by imposing like restrictions on domestic goods. They acknowledged, however, that even under Article XI:1, the measure might qualify as a legitimate conservation measure under Article XX(g).

Perhaps the most controversial North American case involving environmental protection or natural resource conservation has been the ongoing Mexican-U.S. dispute over yellowfin tuna harvesting methods. This species of tuna congregates beneath schools of dolphin. Tuna fishing vessels encircle dolphin schools with purse seine nets in order to harvest the associated tuna, killing and

74. Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(J) (1988).

75. *See* Lobsters from Canada,12 ITRD 1653 (U.S.-Canada Binational Panel No. USA 89-1807-01, May 25, 1990).

injuring dolphins in the process. As a signatory to the Marine Mammal Protection Act of 1972 (MMPA), the U.S. requires its fishing vessels to use special precautions to reduce dolphin mortality and limits total dolphin deaths for the U.S. fleet to 20,500 per year.[76] The MMPA also requires that the U.S. prohibit importation of yellowfin tuna products from nations whose "average kill per set" of dolphins exceeds 1.25 the average U.S. kill per set during the same period.

Beginning in September 1990, the U.S. banned the importation of yellowfish tuna and products thereof, after finding that Mexico had exceeded the incidental kill standards of the MMPA. Additionally, an "intermediary nations" embargo prohibited the importation of tuna products originating from the Mexican fleet, even if shipped through or processed in an intermediary nation. In response, Mexico filed a complaint against the U.S. under the GATT DSM with respect to the primary embargo, the intermediary nations embargo, the potential imposition of import prohibitions under the "Pelly Amendment," and the tuna product labeling provisions of the Dolphin Protection Consumer Information Act (DPCIA).[77]

As in *Lobsters from Canada*, the U.S. position was that the restrictions on incidental taking of dolphin applied equally to domestic and Mexican vessels and thus were subject to Article III rather than Article XI of the GATT. However the GATT sided with Mexico in condemning both the primary and intermediary embargoes. The panel found that because the embargoed species (tuna) is not the subject of the conservation policies (dolphin), the embargo did not fall under article III.[78] Since the area in which

76. *GATT: Implications on Environmental Laws: Hearing Before the Subcomm. on Health and the Environment of the House of Representatives Committee on Energy and Commerce*, 102d Cong., 1st Sess. 7 (1991) (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative), [hereinafter GATT Hearing].

77. *Id.* at 20-22 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative). The "Pelly Amendment" can be found at Section 8(a) of the Fishermen's Protective Act of 1967, 22 U.S.C. § 1978 (1988). Mr. Charat, Vice-President of the Mexican Fisheries Association, notes that the actual dolphin kill rate for the Mexican Fleet may have been proportionately less than the U.S. fleet but, nonetheless, triggered the law. The GATT Panel found the measure discriminatory. Felipe Charat, *Mexico: No Threat to Dolphins*, J. COM., Nov. 5, 1991, at 34.

78. *See* Scott Otteman, *Findings of GATT Dispute Panel on U.S. Tuna Ban*, INSIDE U.S. TRADE SPECIAL REPORT, Sept. 6, 1991, at S2-S8; GATT Hearings, *supra* note 76, at 17-18 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative). A previous attempt by the U.S. to ban tuna from Canada pursuant to the Magnuson Fishery and Conservation and Management Act (FCMA), Pub. L. No. 94-265 (1975), 16 U.S.C. § 1801-1882 (1988) (prohibiting fish imports from foreign states that claim jurisdiction of tuna within 200 miles of their shores), was likewise condemned by a GATT panel. *United States—Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT, 29th Supp., B.I.S.D. 91, 105-09 (1983). The federal courts enjoined the U.S. from importing tuna

the disputed fishing practices are employed lies outside U.S. territorial waters, Articles XX(b) and XX(g), excepting from Article XI those measures necessary for protection of animal life or natural resource conservation, were not applicable. Furthermore, even if Articles XX(b) and (g) could be applied extrajurisdictionally they would not be available in this case, since the "maximum kill per set" standard was capricious. Mexican vessels could not determine until after the tuna harvest whether a violation of the standard had occurred.[79] Nor had the U.S. exhausted other GATT-compatible avenues for dolphin protection, such as negotiation of international agreements.[80]

The GATT dolphin decision raises many substantive questions.[81] It appears, in light of this case, that a number of major U.S. environmental laws and international conventions to which the U.S. is party could also be found GATT-inconsistent.[82] Others fear

---

and tuna products from Mexico as well as from countries that have processed such tuna for export to the United States. Earth Island Institute v. Mosbacher, 746 F. Supp. 964 (N.D. Cal. 1990), *aff'd*, 929 F.2d 449 (9th Cir. 1991).

79. While denouncing the GATT panel's decision on Mexican tuna, Greenpeace, in a recent position paper, noted that the comparability provision of the MMPA imposes "a double standard that not only does not discourage dolphin encirclement, but may actually encourage the practice." GREENPEACE, DOLPHINS, TUNA AND FREE TRADE: A GREENPEACE PERSPECTIVE 4-5 (1992). Greenpeace advocates amending the MMPA by "banning encirclement and prohibiting any tuna caught by boats that set on dolphins from entering the U.S. market," while striving for an international ban on encirclement. *Id.* at 6.

80. Under provisions of the DPCIA, tuna harvested under certain criteria may be labeled "dolphin safe." The Panel found that these labeling provisions did not discriminate between countries and were GATT-consistent. Also, although the "Pelly Amendment" could be imposed in a GATT-inconsistent manner, it was not in effect in this case, and it does not mandate GATT-inconsistent measures. *See* GATT Hearings, *supra* note 76, at 21 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative). The Panel suggested a GATT-consistent approach would be to impose an excise tax on all tuna sold in the U.S. that was not caught in a dolphin-safe way. David Palmeter, *Supporting Dolphins and GATT*, J. COM., Oct. 1, 1991, at 39.

81. Among the GATT's shortcomings, as cited by environmental and consumer interests, are its failure to address externalities such as pollution; its placing of the burden of proof on consumer and environmental groups under articles XX(b) and XX(g); and the possibility of over-representation of business relative to consumer interests.

To some extent, these criticisms reflect the GATT's origin at a time when environmental concerns were not widely held. Steven Shrybman, from the Canadian Environmental Law Association, testified before the House Subcommittee and noted that the word "environment" does not appear in the GATT. GATT Hearings, *supra* note 76, at 94 n.48 (testimony of Steven Shrybman, Canadian Environmental Law Ass'n). *See also Proposed Negotiation of A Free Trade Agreement with Mexico: Hearings Before the Subcomm. on Trade of the Comm. on Ways and Means*, 102d Cong., 1st Sess. 226, 227 (1991) (statement of Steven Shrybman, Canadian Environmental Law Ass'n). In its concluding remarks, the GATT dolphin Panel suggested that adoption of its report would not affect the rights of nations to act jointly in enacting measures in conflict with current GATT rules. GATT Hearings, *supra* note 76, at 19 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative). The Panel also recommended that the matter of extrajurisdictional efforts to conserve resources would better be addressed by amending or supplementing the GATT rather than by reinterpreting existing articles XX(b) and (g). *Id.* at 21-22 (testimony of Joshua B. Bolten, General Counsel, Office of the U.S. Trade Representative).

82. In addition to the Pelly Amendment, Magnuson Act, and the MMPA, a partial

that the GATT and other trade agreements may undermine legitimate health and safety regulations by labelling them as "non-tariff barriers to trade,"[83] or might require nations to import goods manufactured using prison or child labor. Because of the enormous political impact of such concerns, the U.S. and Mexico have agreed that Mexico would not ask the GATT Council to adopt the panel's recommendations. Rather, this controversy is to be resolved within the NAFTA negotiations. Until there is greater international agreement on the relationship between environmental measures and trade restrictions, it is likely that such controversies will continue to be negotiated, as opposed to adjudicated, on a bilateral basis.

In contrast to the ongoing controversy involving the relationship between trade and environmental laws, the choice of a DSM (GATT versus CUSFTA) in Chapter 18 cases appears (from the limited evidence at hand) to have had little impact on the decisions rendered. Chapter 18 Panels have relied extensively on GATT precedent in interpreting GATT articles. Thus, a DSM similar to the Chapter 18 DSM of the CUSFTA may be acceptable to all parties to the NAFTA, all of whom are members of the GATT.

III. BINATIONAL PANEL DISPUTE SETTLEMENT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES (CHAPTER 19)

Chapter 19 of the CUSFTA includes three important innovative DSM features for AD/CVD disputes:

1. *Elaboration of new laws.* The parties have pledged to develop a new system of AD and CVDs within five to seven years. If this does not occur, either party may terminate the agree-

---

listing of other U.S. environmental laws which environmental groups fear may be found GATT-incompatible include the Endangered Species Act, 22 U.S.C. § 2151q (1988); African Elephant Conservation Act, 16 U.S.C. § 4212 (1988); Federal Insecticide Fungicide and Rodenticide Act (FIFRA) (foreign notification provisions), 7 U.S.C. § 136 (1988); Resource Conservation and Recovery Act (RCRA) (foreign notification provisions), 42 U.S.C. § 6901 (1988); Lacey Act, 16 U.S.C § 701 (1988); and the Forest Resources Conservation and Shortage Relief Act, 16 U.S.C. § 620 (1988).

International environmental treaties and conventions to which U.S. is a party and which might be GATT-inconsistent include the Convention on International Trade in Endangered Species; Montreal Protocol on the Ozone Layer; International Convention for the Regulation of Whaling; Migratory Bird Treaty; and the Cartagena Caribbean Convention. GATT Hearings, *supra* note 76, at 49 (statement of David Phillips, Earth Island Institute, on behalf of a coalition of the Environment Organizations; Ralph Nader, Consumer Advocate; and Steven Shrybman, Canadian Environmental Law Assoc.).

83. GATT Hearings, *supra* note 76, at 2 (opening statement of the Honorable Henry A. Waxman).

ment.[84] In the meantime, the parties may apply their own laws.[85]

2. *Replacement of Judicial Review by Binational Panels.* Either country, or the party otherwise entitled to judicial review of final AD and CVD determinations, may obtain review by a binational panel.[86] Panels are to use the substantive law[87] and standard of judicial review which would otherwise apply in the importing country.[88] Panel decisions are binding on both parties and the relevant agencies in each country.[89] If the importing party's law has been improperly applied, the panel is to remand the final determination to the administrative agency for action not inconsistent with its decision.[90] The panels are ad hoc, with a new one struck for each case.

Panels are to be composed of five members, a majority of whom are lawyers, chosen by the parties from a roster developed by them.[91] Chapter 19 panels are independent of the institutional panels (Chapter 18), and a permanent secretariat is established to facilitate their operation.[92] Panel decisions may be subject to "extraordinary challenge" by either party which will be heard by a committee of three judges or former judges. Such challenges are limited to a member's gross misconduct, bias or serious conflict of interest, to cases in which the "panel seriously departed from a fundamental rule of procedure," or to cases in which the panel has exceeded its jurisdiction.[93]

3. *Modification of AD or CVD laws.* Although the parties may effect changes in their existing AD or CVD laws,[94] such modifications will only apply to the other country if it is named in the legislation,[95] has received prior written notification,[96] and, if con-

84. CUSFTA art. 1906.
85. *Id.* art. 1902(1).
86. *Id.* art. 1904(5). The U.S. implementing legislation provides that a timely request for judicial review may be made by a person not having standing. 19 U.S.C. § 1516a(g)(8)(A) (1988).
87. CUSFTA art. 1904(2).
88. *Id.* art. 1904(3).
89. *Id.* art. 1904(9).
90. *Id.* art. 1904(8).
91. *Id.* annex 1901.2(1), (2), (3). A party need not select its own nationals and may exercise four peremptory challenges of the other party's selections. If panelists are not selected within allotted times, they must by chosen by lot. *Id.*
92. *See id.* art. 1909.
93. *Id.* art. 1904(13). This extraordinary challenge provision has been used one time. *See* Fresh, Chilled and Frozen Pork From Canada, 13 ITRD 1859, 1860 (Extraordinary Challenge Committee No. USA 89-1904-06, June 14, 1991) (summarily rejecting the challenge because the "allegations do not meet the threshold for an extraordinary challenge that is set forth in article 1904.13").
94. CUSFTA art. 1902(2).
95. *Id.* art. 1902(2)(a).
96. *Id.* art. 1902(2)(b).

sultations have been extended, where requested.[97] Changes must be consistent with the GATT, the Antidumping Code[98] and the Subsidies Code[99] of the GATT; the object and purpose of the CUSFTA; and must not overturn panel decisions.[100] If consultations do not resolve disputes, the affected party may request a binding binational panel review.[101] If the panel recommends changes in the legislation which are not effected and the parties do not otherwise agree, the complainant may enact similar legislation or terminate the agreement.[102]

Chapter 19 establishes important improvements over existing DSMs for AD/CVD procedures in each country. It provides impartial, binding and rapid rule-adjudication.[103] Some Canadian administrative decisions that were not previously subject to judicial review, such as final determinations of dumping or subsidies by the Department of National Revenue, Customs and Excise (DNR), are now subject to binational panel review.[104] In the U.S., binational panels of five experts will replace the individual judge of the Court of International Trade. These judges from the Court of International Trade have sometimes issued conflicting opinions. However, losing parties may now rely on their governments to initiate and plead its case before a binational panel, thereby substantially reducing their costs.[105]

The U.S. Congress has been asked to amend trade legislation in response to administrative rulings unfavorable to U.S. industry

---

97. *Id.* art. 1902(2)(c).

98. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code), pt. I, Jan. 1, 1980, 26 GATT B.I.S.D. 171.

99. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code), Jan. 1, 1980, 26 GATT B.I.S.D. 56 (1980).

100. CUSFTA arts. 1902.2(d)(i), 1903(1)(b).

101. *Id.* arts. 1903(1), 1903(3)(b).

102. *Id.* art. 1903(3)(b).

103. *Id.* arts. 1904, 1908. The panel is mandated to decide the appeal within 300 to 315 days from the date of the final determination. *Id.* art. 1904(14). Neither GATT article XXIII nor the GATT Antidumping Code establishes deadlines for establishing a panel and obtaining a final ruling. GATT art. XXIII; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, article 15, GATT, 26th Supp. B.I.S.D. 171 (1980). The GATT Subsidies Code does attempt to do so. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, art. 18, GATT, 26th Supp. B.I.S.D. 36, 76-77 (1980). Appeals to the United States Court of International Trade have taken at least a year, and at times two to three years, and this is after the administrative process. An exporter may have to pay provisional duties during this entire period. Delays in Canada were comparable. Ferguson, *supra* note 12, at 328.

104. CUSFTA art. 1904(15). For a definition of "final determination," see CUSFTA art. 1911.

105. Canadian litigants in U.S. proceedings have paid $4 million in legal fees in 1983 in the softwood dispute, $1 millon each in the swine and fish, actions, and millions more in the softwood dispute in 1986. Ferguson, *supra* note 12, at 329.

and, on occasion, has done so.[106] The CUSFTA requires notice and consultation prior to any future legislative changes. It further establishes binational panels to analyze the effect of proposed legislation with respect to unfair trade practices (AD/CVD). If the modification of the legislation recommended by the binational panel is not complied with, the complaining party may respond in kind or terminate the agreement. Retaliation is limited to comparable legislative or executive action, unlike the GATT, where retaliation may widen the dispute into other areas.[107]

A. CUSFTA CHAPTER 19 CASES

Two Chapter 19 Binational Panel decisions involving agricultural products have been completed to date: *Red Raspberries* and *Fresh, Chilled or Frozen Pork*. These cases allow a preliminary assessment of the CUSFTA DSM's impact on settlement of AD and CVD disputes and suggest the potential of a similar DSM under the NAFTA.

The Trade Agreements Act of 1979[108] shifted the administration of U.S. trade laws from the Treasury Department to the Department of Commerce and created a bifurcated system for resolving trade disputes. Under this system, the International Trade Administration (ITA) determines whether "less than fair pricing" (in AD cases) or subsidization (in CVD cases) has occurred, while the International Trade Commission (ITC) tests for material injury or threat of material injury. ITA and ITC decisions were formerly reviewed by the Court of International Trade (CIT), but they may now be heard by a CUSFTA binational panel.

Canada's Antidumping Act of 1970[109] was superseded by the Special Import Measures Act of 1984.[110] Under the latter, charges of dumping are initially investigated by the Canadian DNR. The

106. Following a negative determination in the softwood lumber case, several bills were introduced to expressly include natural resource pricing practices as countervailable subsidies. Ferguson, *supra* note 12, at 333. In the *Chilled Pork* case, the U.S. industry persuaded Congress to add the concept of "upstream subsidy" to U.S. trade law after an International Trade Administration ruling that swine subsidies were not attributable to pork products. *See* Fresh Chilled and Frozen Pork, 12 ITRD 2299, 2306-07 (Binational Panel No. USA 89-1904-06, Sept. 28, 1990). Later, a GATT Panel found the upstream subsidy provision to be violative of the GATT. *See Canadian Complaint on U.S. Countervailing Duties on Imports of Pork Products*, Operations of the Trade Agreements Program, 42nd Report, USITC Pub. 2403, at 48 (July 1991); Canada/United States: U.S. Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, GATT FOCUS, Oct. 1990, at 4.

107. Horlick et al., *supra* note 27, at 75.

108. Pub. L. 96-39, 93 Stat. 144 (approved July 26, 1979).

109. Antidumping Act, R.S.C., ch. A-15 (1970) (Can.).

110. Special Import Measures Act, R.S.C., ch. S-15 (1985) (Can.).

DNR Deputy Minister determines whether dumping has occurred and if there is evidence of material injury. If allegations of dumping are confirmed, the Canadian International Trade Tribunal (CITT) determines whether injury has occurred, or will occur, and whether such injury is caused by the dumped imports. Unlike the U.S. ITC, the Tribunal may also consider consumer welfare after making the initial determination, thereby choosing to forego or reduce any duty not deemed to be in the public interest.[111]

Prior to the CUSFTA, a number of AD and CVD cases between the U.S. and Canada had involved agriculture; affected products included Canadian and U.S. potatoes,[112] Canadian cut flowers,[113] Canadian live swine and pork,[114] and U.S. corn.[115] A perception existed that the escalation in AD and CVD actions constituted "administered protection"[116] and that the ITA, ITC and CIT and their Canadian counterparts had, in some cases, exhibited a protectionistic bias, applying incorrect economic reasoning in arriving at their decisions. When examining the record for evidence of such bias, it is important to note that trade laws containing elements inconsistent with basic economic principles are by no means uncommon.[117] Clearly, any DSM cannot be expected to

---

111. *See Canadian Beef: Grading Changes Seen Affecting Trade*, MONTHLY IMPORT/BUS. REV., Oct. 1991, at 15. *See generally Public Interest, Grain Corn, Report of the Canadian Import Tribunal under Section 45 of the Special Import Measures Tax*, CANADIAN IMPORT TRIBUNAL, Oct. 20, 1987, at 3; Fred Lazar, *Antidumping Rules following the Canada-United States Free Trade Agreement*, J. WORLD TRADE, Oct. 1989, at 45, 58-59.

112. *Fall-Harvested Round White Potatoes from Canada*, USITC Pub. 1463 (Dec. 1983).

For a discussion of the "Potato War," see Colin Carter et. al., *The Potato War and U.S.-Canada Agricultural Trade, in* CANADIAN AGRICULTURAL TRADE, 125-141 (1990).

113. Fresh-Cut Flowers from Canada, Chile, Colombia, Costa Rica, Ecuador, Israel, Kenya, Mexico, Netherlands, and Peru, 11 ITRD 1493 (USITC Inv. Nos. 303-TA-18, 701-TA-275—278, 731-TA-327—333, Pub. 2119, Aug. 1988).

114. Live Swine and Pork from Canada, 11 ITRD 1231 (USITC Inv. No. 701-TA-224, Pub. 2108, Aug. 1988).

115. Subsidized Grain Corn Originating in or Exported from the United States of America, Inquiry No. CIT-7-86 (March 1987) (finding of the Canadian Import Tribunal); *Canada: Trade Tribunal to Consider Extension of Countervail on Subsidized U.S. Corn*, 8 Int'l Trade Rptr. (BNA) 1110 (July 24, 1991).

116. Alan M. Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 ME. L. REV. 305, 311 (1988).

117. For instance, consumers have virtually no standing under U.S. trade law, although economic theory suggests that they are primary beneficiaries of free trade. Although Canadian consumers recently gained a voice in trade disputes under Section 45 of the Special Import Measures Act, Rugman and Anderson suggest that the measure is insufficient to ensure adequate representation of consumers' interests. Alan M. Rugman & Andrew Anderson, *The Dispute Settlement Mechanisms' Cases in the Canada-United States Free Trade Agreement: An Economic Evaluation*, 24 GEO. WASH. J. INT'L L. AND ECON. 1, 41 (1990). Other inconsistencies with economic principles include: a lack of emphasis on causality in CVD cases (*see* Erna van Duren, *Is There a Legal Opportunity for an Economic Analysis of Causality Under U.S. Countervailing Duty Laws?*, 25 WORLD COMPETITION 87-96 (1991); Lazar, *supra* note 111, at 54 (vagueness in both U.S. and Canadian definitions of

correct deficiencies inherent in the laws on which it must base its decisions. However, the CUSFTA has the potential to alleviate protectionistic biases in several ways. First, a bilateral or multilateral panel of experts may tend to interpret the law more objectively than would a national court or tribunal. Second, by mandating a strict timeline for dispute settlement, the CUSFTA may make the appeals process faster and less costly and thus more accessible. And importantly, under Chapter 19 the U.S. and Canada have agreed to develop new AD and CVD laws to replace existing national laws.

Red Raspberries from Canada[118] was the first case to be heard by a binational panel under Chapter 19 of the CUSFTA. The dispute originated in 1984 when U.S. raspberry producers charged Canadian producers with dumping bulk frozen raspberries in the U.S. market. The ITA found positive dumping margins for several producers. In its preliminary determination, the ITC cited declining U.S. capacity and increasing Canadian exports as evidence that a threat of injury existed. Antidumping duties were imposed in 1985.

As required by the Tariff Act, an administrative review was conducted in each year following imposition of duties to determine whether such duties should be modified or discontinued. In conducting its second administrative review, the ITA departed from its earlier procedure for calculating dumping margins. Because home country and third market sales were few in number, the ITA used constructed value rather than home market sales to measure Foreign Market Value (FMV), and dumping margins were found to have increased. Canadian raspberry producers appealed under Chapter 19 of the CUSFTA, noting that the ITA

---

material injury)); the use of accounting rather than economic costs; lack of consideration of market structure in the importing and exporting countries (Susan Hutton and Michael Trebilcock, *An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales*, J. WORLD TRADE, June 1990, at 123-46); unsupported assumptions regarding subsidy pass-through (*see* Selected Issues In Trade Agreements Activities in 1990, Operation of the Trade Agreements Program, 42nd Report, USITC 2403, at 7 (July 7, 1991) (discussing the *Fresh, Chilled or Frozen Pork from Canada* decisions)); and contradictory guidelines to be used in testing for dumping (Andrew Schmitz et al., *Agricultural Export Dumping: The Case of Mexican Winter Vegetables in the U.S. Market*, 63 AM. J. AGRIC. ECON. 545-54 (Nov. 1981)).

Although a law may itself be free of protectionistic bias, it can be invoked to harass foreign competitors even when the ultimate outcome is likely to be negative. J.M. Finger, *The Industry Country Incidence of "Less than Fair Value" Cases in US Import Trade*, 21 Q. REV. ECON. & BUS. 260, 264-65 (1981). The threat of possible trade disruptions and legal costs may suffice to discourage foreign firms from competing.

118. *In re* Red Raspberries from Canada, 12 ITRD 1259 (Binational Panel No. USA-89-1904-01, Dec. 15, 1989), *following remand*, 12 ITRD 1652 (Binational Panel No. USA-89-1904-01, April 2, 1990).

did not dispute that the existing home market sales were bona fide and above the cost of production.

In relying on constructed value, the ITA had apparently violated its own Antidumping Duty Regulations for determining FMV in such cases. Sales to the home market exceeded five percent of third country sales in terms of value and number (for two firms) and exceeded five percent of total sales in number although not in volume. The Panel remanded the case to the ITA, citing the ITA's failure to explain why Canadian producers' home country sales had been disregarded.[119] The ITA responded that home country sales failed to exceed five percent U.S. sales by volume; however the Panel rejected this argument as "legally deficient."[120] On second remand, the ITA used home market sales as the basis for computing dumping margins, resulting in removal of duties on two firms.[121]

The case of *Fresh, Chilled or Frozen Pork from Canada*[122] was reviewed under Chapter 19 of the CUSFTA beginning in 1990, at the request of two Canadian meat packers, the Canadian Pork and Meat Councils and the governments of Alberta and Quebec. In 1989 the U.S. ITA had found that a number of Canadian agricultural programs provided countervailable subsidies to pork producers,[123] while the ITC had determined that the U.S. pork industry was materially injured or threatened with material injury.[124] Binational Panels were formed to review each decision.

Major issues raised by the complainants regarding the ITA decision included: (1) Whether subsidies received by hog producers are direct or upstream subsidies to pork producers; (2) whether it is reasonable to assign the entire value of subsidies to swine producers to fresh, chilled and frozen pork processors when a significant quantity of other commercial products (ham, bacon, sausage) are derived from the hog carcass; and (3) whether seven of the subsidy programs deemed countervailable are, in fact, generally available and thus not countervailable.

---

119. *Red Raspberries*, 12 ITRD at 1266.

120. *Red Raspberries*, 12 ITRD at 1652-53.

121. *See In re* Red Raspberries from Canada, 1990 WL 299942 (Binational Panel No. USA-90-1904-01, May 2, 1990).

122. Fresh, Chilled or Frozen Pork from Canada, 12 ITRD 1380 (USITC Inv. No. 701-TA-298, Sept. 1989), *following remand to ITC*, 12 ITRD 2119 (Binational Panel No. USA-89-1904-11, Aug. 24, 1990), *following remand*, 13 ITRD 1024 (USITC Inv. No. 701-TA-298, Oct. 23, 1990), *following remand*, 13 ITRD 1291 (Binational Panel No. USA-89-1904-11, Jan. 22, 1991).

123. Fresh, Chilled or Frozen Pork From Canada, 12 ITRD 2299, 2302 (Binational Panel No. USA-89-1904-06, Sept. 28, 1990).

124. *Id.*

In regard to the first point, the Panel affirmed that subsidies to hog growers may be considered direct subsidies to pork producers under the "upstream subsidies" provision of the Tariff Act,[125] noting, however, that this measure was GATT-inconsistent.[126] On the second point, the Panel agreed with complainants that hog subsidies should be allocated by weight over all of the commercial products resulting from hogs. And on the third point, the Panel affirmed the countervailability of two subsidy programs and requested a remand on the remaining five on the grounds that substantial evidence of the "general availability" of such programs was lacking.[127]

The Panel's review of the ITC decision investigated the extent to which the finding of threat of injury had resulted from (1) misleading data on pork production and consumption, (2) unsubstantiated conclusions regarding Canada's likely future market penetration in Japan, and (3) unsubstantiated assumptions about hog supply response to Canadian subsidy programs. In the ITC's decision, a majority of the Commissioners had predicted that Canada's share of the U.S. market would rise to an injurious level, even though it had recently been declining. This prediction was based in part on data indicating a thirty-one percent increase in Canadian fresh pork production, declining U.S. pork consumption, evidence that Canada's shipments to Japan were declining, and the notion that Canadian subsidy programs would induce a large supply response from hog growers. The Panel found that the data indicating thirty-one percent Canadian production growth had

125. 19 U.S.C. § 1677-1 (1988).

126. Fresh, Chilled or Frozen Pork from Canada, 12 I.T.R.D. 2299, 2304-11, Binational Panel No. USA-89-1904-06 (Sept. 28, 1990). On remand the ITA affirmed the countervailability of three of these five subsidy programs, finding substantial evidence in the record to support its decision, while finding a lack of substantial evidence to support its countervailable subsidy determination against the other two. Fresh, Chilled and Frozen Pork from Canada, Binational Panel No. USA-89-1904-06, 1990 WL 299940, at *1-8 (Dec. 7, 1990). In a second remand decision, the Panel affirmed the countervailability of one of the three programs, but again remanded the other two for lack of, and inconsistency with the substantial evidence in the record. *In re* Fresh, Chilled and Frozen Pork from Canada, Binational Panel No. USA-89-1904-06, 1991 WL 112791, at *1-2 (Mar. 8, 1991). In its final redetermination, the ITA re-affirmed the countervailability of one of the programs, but at a lower subsidy level; the ITA did not reaffirm the countervailability in the other program for lack of substantial evidence. Fresh, Chilled and Frozen Pork from Canada, Binational Panel No. USA-89-1904-06, 1991 WL 143863 (Apr. 11, 1991). The outcome is moot in light of the ITC's negative determination of threat of material injury discussed below.

127. On remand, the ITA affirmed the countervailability of these five subsidy programs and provided additional information to substantiate their findings. The Panel then affirmed two programs and again remanded the remaining four. Fresh, Chilled or Frozen Pork from Canada, 12 ITRD 2299, 2319-25 (Binational Panel No. USA-89-1904-06, Sept. 28, 1990). The outcome is moot in light of the ITC's negative determination of threat of material injury, discussed below.

arisen from a statistical error[128] and that actual Canadian production had increased only 8.4 % during the period in question. Panelists noted that this misinformation may have colored the ITC's assessment of other issues. Likewise, evidence of a slight decline in U.S. pork consumption had been based on per capita data and thus failed to account for U.S. population growth. The Panel also pointed that Canadian pork sales to Japan had been increasing "by rather striking proportions," with the exception of April 1989, the month considered by ITC counsel.[129] Lastly, the assumption that hog production would rise sharply in response to subsidy programs was also unsubstantiated. Thus, the case was remanded to the ITC.

On second remand the ITC affirmed its previous finding of threat of injury, arguing that Canadian subsidy programs tend to shift negative effects of hog cycles to the U.S. market.[130] The Binational Panel again remanded the case, stating that the ITC had made a legal error in reopening the record to new information and issues without affording notice to interested parties.[131] Upon its third consideration, the ITC reached a negative determination of threat of injury.[132]

An examination of the outcomes of the *Red Raspberries* and *Chilled Pork* cases suggests that the Chapter 19 provisions of the CUSFTA represent a significant improvement in resolving trade disputes. While abiding by existing national laws, the Binational Panel mechanism appears to have reduced protectionism by offering a more balanced interpretation of law and more careful economic reasoning and data evaluation.[133] The timeliness of Panel

128. The error arose due to a change in the method of reporting pork production by Agriculture Canada and Statistics Canada between 1987 and 1988. The error was identified by the U.S. Department of Agriculture. Fresh, Chilled or Frozen Pork from Canada, 12 ITRD 2119, 2125 (Binational Panel No. USA-89-1904-11, Aug. 24, 1990).

129. *Id.* at 2128. "In the Panel's view, such data appears to be so contrary to the Record as a whole that it amounts to reliance on 'isolated tidbits' which does not meet the 'substantial evidence' standard of review." *Id.*

130. Fresh, Chilled or Frozen Pork from Canada, 13 ITRD 1024, 1042-43 (USITC Inv. No. 701-TA-298, Oct. 1990).

131. Fresh, Chilled or Frozen Pork from Canada, 13 ITRD 1291, 1297, 1303 (Binational Panel No. USA-89-1904-11, Jan. 22, 1991).

132. Fresh, Chilled or Frozen Pork of Canada, 13 ITRD 1453, 1465 (USITC Inv. No. 701-TA-298, Feb. 1991).

133. Other authors commenting favorably on the CUSFTA DSM include: Parker, *supra* note 38, at 92-93; Rugman, *supra* note 116, at 334; Rugman & Anderson, *supra* note 117, at 42. The Panel decision remanding the ITC decision in the *Chilled Pork* case was affirmed by an Extraordinary (CUSFTA) Panel review which was invoked by the U.S. Fresh, Chilled or Frozen Pork from Canada, 13 ITRD 1859, 1866 (Extraordinary Challenge Committee, June 14, 1991).

decisions is also an important step toward freer trade, since legal costs and shipping delays are themselves trade impediments.

B. THE COMING DEMISE OF CHAPTER 19?

Given the positive features of Chapter 19 as an impartial DSM, it is unfortunate that the U.S. is now retreating from its support for such a forum. It appears that the U.S. is returning to its traditional preference for a power-oriented negotiation model. The Dallas Composite reveals that Mexico argued for a continuation of the CUSFTA concept of a separate Chapter (eleven) for AD/CVD disputes.[134] The U.S. rejected this position and moreover insisted that all disputes arising under the CUSFTA and the NAFTA be settled under the NAFTA "unless both Parties agree otherwise."[135] Canada proposed that disputes arising under either agreement "may be settled in either forum at the discretion of the complaining party."[136]

Clearly, the U.S. Administration regards Chapter 19 as a bad idea. They are seeking to avoid its application in the CUSFTA (through the NAFTA) while opposing the inclusion of a similar provision in the NAFTA. Given these positions, it is predictable that the U.S. will not agree to extend Chapter 19 beyond its January 1, 1996 expiration date. The DSM of the NAFTA seems destined to be little more than an agreement to negotiate disputes as they arise, rather than a mechanism to resolve controversies through submission to a neutral forum (unless the parties explicitly agree, on an ad hoc basis, to submit the matter to binding arbitration).[137]

C. IMPLICATIONS OF NAFTA FOR US-MEXICO CVD AND AD DISPUTES IN AGRICULTURE

While there have been many U.S.-Mexican disputes over dumping and subsidization in recent years, relatively few have involved agricultural products.[138] This is in marked contrast to the

134. Dallas Composite, *supra* note 14, art. 2308. On February 28, 1992, Mr. Jaime Serra Puche, The Mexican Secretary of Commerce and Industrial Development, informed the Commerce Committee of the Mexican Senate as follows: "Also, is being considered the establishment of an expert panel, with participation from the three countries that would determine in case of controversies if AD/CVD procedures were appropriately applied." *Avances en la Negociación del Tratado de Libre Comercio entre México, Canadá y Estados Unidos* [Progress in the Negotiation of the NAFTA], III MONOGRAPH OF SECOFI [Secretary of Commerce and Industrial Development].

135. *Id.* art. 2310.

136. *Id.*

137. *Id.* art 2313.

138. Of 23 CVD cases brought by the U.S. against Mexico from 1979-87 under the 1979

U.S.-Canadian experience, where agriculture has been a major subject of AD and CVD disputes. The scarcity of unfair trade cases between U.S. and Mexican agricultural interests likely reflects the existence of significant duties and quantitative restrictions that have tended to reduce or eliminate cross-border cost advantages in production. Thus, there is the possibility that a NAFTA agreement may result in increased CVD and AD cases due to tariff and quota reductions. The absence of an effective DSM for these predictable disputes does not augur well for the future of the NAFTA.

IV. MEXICO AND THE NAFTA'S DSM

The DSM of the GATT and of the CUSFTA are the most relevant models for the NAFTA negotiators. It is probable that some combination of binding and nonbinding trinational or binational arbitration panels will be used. Whether membership in the ad hoc panels contemplated by the NAFTA Dallas Composite would be limited to the disputants was not resolved.[139] A discussion of some of the more salient matters to be resolved in the NAFTA negotiation follows.

A. POWER-ORIENTED OR RULE-ORIENTED DISPUTE RESOLUTION

CUSFTA's Chapters 18 and 19 present striking contrasts. The

Trade Agreements Act, only two involved agricultural goods. *See* Fresh Asparagus from Mexico, 5 ITRD 1373 (Department of Commerce International Trade Administration, May 13, 1983); Certain Fresh Cut Flowers from Mexico, 6 ITRD 1757 (Department of Commerce International Trade Administration, April 16, 1984). Both determinations were negative, as subsidies received by growers were found to be generally available domestic subsidies and thus not countervailable. *See* Smith, *supra* note 7. Of 15 AD cases against Mexico reported by Powell, Giesse and Jackson, again only two involved agricultural products. *See* Certain Fresh Winter Vegetables—Mexico, 11 ITRD 5339 (Department of Commerce, International Trade Administration, March 28, 1990); Certain Fresh Cut Flowers from Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, Kenya, Mexico, Netherlands and Peru, 6 ITRD 1757 (USITC Inv. No. 303-TA-18, 701-TA-275 to 278, and 731-TA-327 to 333, Aug. 1988). Of these, *Winter Vegetables* was decided in favor of Mexico, while dumping was affirmed in the case of *Fresh Flowers*. Certain Fresh Winter Vegetables—Mexico, 11 ITRD 5339 (Department of Commerce, International Trade Administration, March 28, 1990); Certain Fresh Cut Flowers from Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, Kenya, Mexico, Netherlands and Peru, 6 ITRD 1757 (USITC Inv. No. 303-TA-18, 701-TA-275 to 278, and 731-TA-327 to 333, Aug. 1988). *See* Stephen J. Powell et al., *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & B. 177, 179 n.10 (1990).

In an empirical study of the country incidence of total U.S. AD and CVD cases from 1975 through 1979, Finger reported that cases brought against Canada included goods with a total value of $421.7 million, with affirmative cases equalling 4.7% by value. Cases brought against Mexico included imports valued at $202.3 million, with 0.6% by value being affirmed. Finger, *supra* note 117, at 268.

139. Dallas Composite, *supra* note 14, arts. 2314-2315.

institutional provisions (18) are broad and vague, leaving government officials considerable flexibility to negotiate a consensual resolution. The AD/CVD provisions (19), however, are designed for formal litigation with detailed procedural rules for panel adjudication and implementation of their decisions. The U.S., which can rely on economic and political power, would be more inclined toward negotiated solutions.[140] Mexico, which needs stronger procedural protection, may be expected to argue for expanded jurisdiction of binding adjudication panels.[141] These positions could merge in the creation of a more institutionalized DSM, with binding and nonbinding arbitration and an expanded secretariat.[142] If trinational panels are used, they would probably be formed to avoid a situation where only a minority of the panel would represent the countries whose laws are being interpreted.[143] A power-oriented or negotiation model would suggest having only the two parties involved participate in the DSM. An adjudicatory model would not view the DSM as another form of negotiation but as application of the rule to the facts.[144]

---

140. The U.S. preference for a negotiated solution to its trade disputes is well illustrated by its reliance on threats (and occasional use) of unilateral trade reprisals for unfair and unreasonable trade practices by its trading partners as authorized by "Section 301." *See generally* Robert E. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 69 MINN. L. REV. 461 (1975). The "super" and "special" section 301 provisions of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (codified at 19 U.S.C. § 1303 (1988)), demonstrate the current popularity of section 301, which has been widely condemned by U.S. trading partners as violative of the multilateral DSM goals of the Uruguay Round. The USTR has characterized its section 301 actions as in furtherance of GATT goals. See Judith H. Bello and Alan F. Holmer, *"Special 301": Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259 273 (1989-90).

141. Binding arbitration by expert ad hoc panels has traditionally been favored as a DSM in international transactions. The International Chamber of Commerce and International Centre for Settlement of Investment Disputes provide conciliation and arbitration services. Kevin C. Kennedy, *International Commercial Arbitration Legislation in the State of Michigan: A Proposal*, DET. C. L. REV., Winter 1990, at 9. *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (UNCITRAL) (adopted by the United Nations Commission on International Trade Law, June 21, 1985) *in* 24 INT'L LEGAL MATERIALS 1302 (1985). The U.S. and Israel have successfully completed their first binding arbitration under their FTA. *Middle East: Arbitration Panel Says U.S. Violated Israel FTA in Attempt to Block Taiwan Machine Tools*, 8 Int'l Trade Rptr. (BNA) 1069 (July 17, 1991). Mexico and Chile recently signed an FTA in which a binding arbitration DSM similar to the CUSFTA Chapter 19 was adopted.

142. Referrals or specific disputes to binding or nonbinding arbitration could be accomplished according to subject matter or on a selected basis. *See, e.g.*, CUSFTA annex 705.4 (16), (17) (wheat subsidy level).

143. Each party could choose two panelists, and the fifth might be chosen from the third country's roster. Victor Carlos Garcia Moreno & Cesar E. Hernandez, Neoprotectionism and the Panels as a Defense Mechanism against Unfair Practices (El Neoproteccionismo y los paneles como mecanismo de defensa contra las prácticas desleales) (Dec. 11, 1991) (unpublished manuscript, delivered at the School of Law, Mexico's National University, Mexico City).

144. Whether membership in the ad hoc panels contemplated by the NAFTA Dallas

B. PRIVATE RIGHT OF ACTION

Private individuals are not authorized to directly invoke either the DSM of the GATT or the CUSFTA. But AD/CVD reviews may be invoked by an individual through his government in the CUSFTA. Mexico may press for a direct private right of action, authorizing individuals to challenge government sanctions. Such privatization of the DSM would be likely to expand the use and transparency of the DSM. Purely private sector disputes could be handled under the auspices of a NAFTA DSM as well.[145]

C. DOES THE UNITED STATES CONTEMPLATE A "HUB AND SPOKE" OR "DOCKING" ARRANGEMENT WITH FUTURE LATIN AMERICAN FREE TRADE PARTNERS?

On June 27, 1990 President Bush called for an "Enterprise for the Americas Initiative" (EAI), with a "free trade zone stretching from the port of Anchorage to the Tierra del Fuego."[146] He stated that the U.S. was ready to sign "framework agreements" with Latin American and Caribbean countries for the purpose of identifying impediments to free trade and the means of removing them.[147] The threat that Mexico and Canada would enjoy exclusive trade concessions with the U.S. has spurred an enthusiastic response to the President's initiative.[148]

Although agreements were quickly signed in 1990 by the U.S. and several Latin American countries (Bolivia,[149] Colombia,[150] Chile,[151] Ecuador,[152] Honduras,[153] and Costa Rica[154]), it appears

---

Composite would be limited to the disputants was not resolved. *See* Dallas Composite, *supra* note 14, arts. 2314, 2315.

145. Chairman E. (Kika) de la Garza, Press Release, Committee on Agriculture, U.S. House of Representatives (Oct. 31, 1991) (proposals for settling U.S.-Mexico Trade Disputes).

146. President Bush, Enterprise for the Americas Initiative, Remarks before administrative officials and members of the business community (June 27, 1990), *in* OFF. OF PUB. COMM., U.S. DEP'T OF STATE, Current Policy No. 1288, June 1990, at 1-2.

147. *Id.*

148. Sidney Weintraub, *The New US Economic Initiative Toward Latin America*, J. INTERAMERICAN STUDIES & WORLD AFFAIRS 1, 1-3 (1991).

149. The agreements have typically established a "Joint Commission on Trade and Investment Agreements" in which the U.S. and the country in question form a joint commission to identify impediments and issues for subsequent negotiations. *Latin America: Bush Announces New Intiatives on Trade, Aid, and Debt Reduction for Latin America*, 7 Int'l Trade Rep. 983 (BNA) (July 4, 1990); *Latin America: Western Hemisphere Free Trade Zone Possible Within This Decade, Bolivian Official Says*, 7 Int'l Trade Rep. (BNA) 1485 (Sept. 26, 1990).

150. Signed July 17, 1990. *Latin America: Delegates to U.S.-Colombia Joint Commission Pledge to Work Toward Liberalizing Trade*, 7 Int'l Trade Rep. (BNA) 1550 (Oct. 10, 1990).

151. Signed on Oct. 2, 1990. *Latin America: U.S. and Chile Sign Framework*

that the U.S. prefers to negotiate free trade agreements (FTAs) with groups of nations who have achieved their own economic integration. Regional trade pacts are being formed among the Andean countries (Colombia, Venezuela, Ecuador, Peru and Bolivia),[155] Mercosur (Argentina, Brazil, Paraguay and Uruguay),[156] and the Central American countries (Costa Rica, Guatemala, Honduras, El Salvador and Nicaragua).[157]

The Bush administration has not determined if its model for extending free trade will be a "hub and spoke" system which envisions the U.S. having separate bilateral FTAs with various regional FTAs, or a "docking arrangement" whereby countries would sign on to a NAFTA (through an accession clause) potentially applicable to all.[158] Congress will undoubtedly insist that each FTA be separately negotiated. One trade expert has termed the complexities and political difficulties of a "hub and spoke" arrangement as "nightmarish."[159] Canadians have argued that such agreements would serve to perpetuate "bilateralism" or discriminatory trade preference to the detriment of free trade objectives; namely, the development of economies of scale and comparative advantage without trade distortion.[160]

Apart from these concerns, the use of a "hub and spoke" DSM raises other problems. The U.S. is likely to push the case for bilat-

---

Agreement Establishing Trade and Investment Council, 7 Int'l Trade Rep. (BNA) 1513 (Oct. 3, 1990).

152. Signed July 23, 1990. *Latin America: Administration Officials Urge Quick Passage of Proposal For Latin America Initiative*, 7 Int'l Trade Rep. (BNA) 1513 (Oct. 3, 1990).

153. Signed Nov. 1, 1990. *Latin America: Honduras and U.S. sign Framework Agreement on Investment, Trade Relations*, 7 Int'l Trade Rep. (BNA) 1707 (Nov. 7, 1990).

154. Signed Nov. 29, 1990. *Latin America: U.S., Costa Rica Sign Framework Agreement Establishing Trade and Investment Council*, 7 Int'l Trade Rep. (BNA) 1837 (Dec. 5, 1990).

155. The Andean Group Summit Unification Agreement took effect Jan. 1, 1991. *Latin America: Hopes for a Hemispheric Common Market Dominate Meetings of Latin American Heads*, 8 Int'l Trade Rep. (BNA) 1859 (Dec. 18, 1991).

156. Mercosur was signed on March 26, 1991. *Latin America: Argentina, Brazil, Paraguay, Uruguay Sign Agreement to Create Common Market by 1995*, 8 Int'l Trade Rep. (BNA) 482 (March 27, 1991). Mercosur signed a framework agreement with the U.S. on June 19, 1991. *Latin America: Bush and Brazilian President Collor Discuss Joint Framework Agreement*, 8 Int'l Trade Rep. (BNA) 929 (June 19, 1991).

157. A series of pacts among these countries were signed beginning August, 1991. *Latin America: Central American Countries Sign Accords in Preparation for Trade Pact with U.S.*, 8 Int'l Trade Rep. (BNA) 1621 (Nov. 6, 1991).

158. *Latin America: How to Integrate Western Hemisphere FTAS Still Undecided, U.S. Trade Official Says*, 8 Int'l Trade Rep. (BNA) 512 (April 3, 1991). Former USTR, Bill Brock, has endorsed the idea of having an accession clause in the NAFTA. *International Agreements: Former USTR Brock Endorses Idea of Accession Clause in NAFTA*, 8 Int'l Trade Rep. (BNA) 1012 (July 3, 1991).

159. Wientraub, *supra* note 148, at 3 & n.4.

160. RONALD J. WONNACOTT, THE ECONOMICS OF OVERLAPPING FREE TRADE AREAS AND THE MEXICAN CHALLENGE xiv (1991).

eral negotiation DSMs, thereby giving it the advantage of its superior economic power. Such an arrangement seems likely to lead to a patchwork DSM that would produce inconsistent (discriminatory) results and engender resentment and mistrust between the regional miniblocks, while undermining the principal goal of establishing a perception of fairness in the process.[161] This suggests the wisdom of having a multinational tribunal charged with the responsibility of interpreting a single instrument.[162]

D. PERMANENT INSTITUTION OR AD HOC PANELS?

The "hub and spoke" issue implicitly raises the question of the pros and cons of having a permanent, prestigious and multilateral DSM, rather than arbitration through binding or nonbinding ad hoc panels. Ad hoc panels lack the advantage of the expertise that would come with a permanent tribunal. The most compelling model for such a tribunal is the EC's Court of Justice. While the NAFTA is not a common market, nor a customs union (common tariffs), nor an effort to achieve political integration, it is an effort to establish a framework for economic integration. The role of the Court of Justice in the evolution of the EC's common market is well worth considering. The EC Court of Justice has thirteen judges, assisted by six "Advocates General," one of whom recommends a decision to the court in each case. The judges are appointed by agreement of the members for renewable six-year terms. "Although there is no requirement that there should be at least one judge from each member state, this is and has always been the practice."[163] The Court of Justice has the power to annul national acts that conflict with community law, along the lines of the United States Supreme Court,[164] although such authority does not exist in the judiciary in many of the member states. Moreover,

161. While the parties have agreed that the copies of requests for consultation shall be provided to "third" or "other" parties the U.S. objected to joint consultations unless "all the parties" agree. Dallas composite, *supra* note 14, art. 2311(1),(3).

162. A permanent tribunal would solve the practical difficulties of providing a sufficient supply of panelists.

Professor Hudec has observed that it is difficult to find expert panelists who do not fall into one of two categories—lawyers who have had previous relationship with the litigants or persons without apparent conflicts, but whose expertise is questionable. Hudec, *Dispute Resolution Mechanisms, Comments*, *in* THE CANADA-UNITED STATES FREE TRADE AGREEMENT, supra note 27, at 87-89.

163. FRANCIS G. JACOBS AND ANDREW DURAND, REFERENCES TO THE EUROPEAN COURT: PRACTICE AND PROCEDURE 173 (1975).

164. The Court of Justice has defined the scope of community power over EC commerce while restraining national power to affect such commerce in a manner very parallel to the United States Supreme Court with respect to the Commerce Clause, the Congress and the states. *See* 1 COURTS AND FREE MARKETS 11 (Terrance Sandalow & Eric Stein eds., 1982).

the Court of Justice's case law has precedental value, again more akin to a common law system than the civil law tradition of all EC members except the United Kingdom. The Court of Justice has played an enormous role in the EC's success in achieving economic integration.[165] This is particularly true with respect to agriculture, where the Court has enforced the EC's Common Agricultural Plan and agricultural organization by invalidating inconsistent member states' legislation.[166]

A more familiar model for a NAFTA permanent DSM institution would be the Canada-United States International Joint Commission[167] or the Mexico-United States International Boundary and Water Commission,[168] which deal with boundary and water problems. These commissions have some authority to resolve disputes. They also have a permanent staff that appoints necessary experts who are authorized to issue nonbinding recommendations and prepare reports, regarding disputes, for the two governments.

The DSM of the NAFTA that is contemplated in the Dallas Composite has little institutional substance. The "Commission" is simply a name given to a consultation process involving cabinet level trade ministers or their delegates.[169] The "Secretariat" comtemplates a national staff, not a multilateral professional group.[170]

E. DIFFERENT LEGAL SYSTEMS

It is often stated that a DSM between Mexico (with a civil law system) and the U.S. and Canada (with a common law system)

165. *See* JACKSON & DAVEY, *supra* note 41, at 201-02.

166. The Court of Justice has held that the common organization of the EC's agriculture policy may be regarded as forming a complete system precluding the resort to national law. J.A. USHER, LEGAL ASPECTS OF AGRICULTURE IN THE EUROPEAN COMMUNITY 125 (1988) (citing *Koenecke*, 1984 E.C.R. 3291). The Court of Justice has scrutinized member state legislation for its conformity with the common organization's express provisions and the compatibility of such legislation with the aims and objectives of the EC's common organization. *Id.* at 130 (citing Apple and Pear Development Council, 1983 E.C.R. 4083). The Court of Justice has approved legislation, adopted by a majority vote, prohibiting the use of substances causing certain hormonal reactions in livestock. *Id.* at 21 (citing United Kingdom v. Commission, 2 C.M.L.R. 98 (1988)). It has also struck a German prohibition of liqueurs with an alcohol strength of less than 25%. *Id.* at 28 (citing Rewe-Zentral AG v. Bundesmonopolverwaltung, 1979 E.C.R. 649, 3 CMLR 494 (1979)).

167. Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising between th United States and Canada, Jan. 11, 1909, 36 Stat. 2448, TS 551, 12 Bevans 319, (reprinted in L.M. BLOOMFIELD AND GERALD F. FITZGERALD, BOUNDARY WATER PROBLEMS OF CANADA AND THE UNITED STATES 206 (1958).

168. Treaty Relating to the Utilization of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, U.S.-Mexico, 59 Stat. 1219 (1947).

169. Dallas Composite, *supra* note 14, art. 2301.

170. *Id.* art. 2302. However, no GATT instrument has explicitly established anything approaching its Secretariat; rather, the experience of the GATT process and tradition has created it.

poses particularly difficult problems. The relative lack of independence of the Mexican judiciary is also cited.[171] These concerns should be analyzed in the context of what the NAFTA purports to be, namely a trade agreement. The parties have adopted common international trade instruments. All three countries have signed the GATT Antidumping Code and have implemented it through their own internal legislation.[172] The U.S. and Canada have signed the GATT Subsidies Code, while Mexico has signed an equivalent agreement with the U.S..[173] All three countries have legislation implementing GATT provisions authorizing imposition of CVDs to offset "subsidies."[174] Although there are other significant differences in the internal trade law of the three countries, similar discrepancies have not proven to be a problem for the CUSFTA panels.[175]

However, differences between the countries in the scope and rigor of judicial review may prove more difficult.[176] For example it has been observed that binational panel review is more valuable to Canadian than to American exporters, because the standard of U.S. judicial review is more rigorous in the U.S. than in Canada.[177]

---

171. *International Agreements: U.S.-Canada Dispute Settlement Mechanism Must Be Broader for NAFTA, Expert Says*, 8 Int'l Trade Rptr. (BNA) 1544 (Oct. 23, 1991).

172. Canada did so through the Special Import Measures Act (SIMA), R.S.C., ch. S-15 (1985)(Can.); the United States through the Trade Agreement Act of 1979 (TAA), 19 U.S.C. §§ 1673-73i, 1675, 1677-77h (1988); Mexico through the MEX. CONST. art. 131 (*Ley de Comercio Exterior* or L.C.E., published in the *Diario Oficial* of the Federation, January 13, 1986)). *See generally* Sistema Mexicano de Defensa Contra Practicas Desleales de comercio International (SECOFI) [Mexican System of Defense Against Unfair Trade Practices (Secretary of Commerce and Industrial Development)].

173. Mexico has not signed the Subsidies Code but has signed an equivalent *Understanding regarding subsidies and countervailing duties*, April 23, 1985, U.S.-Mexico, DEP'T ST. BULL., Apr. 1986, at 94.

174. The U.S. CVD statutes are codified at 19 U.S.C. §§ 1671-71f, 1675, 1677, 1677c-77h (1988).

175. In the U.S., is there a private right of action in that the complainant may seek judicial review of the administrative authority's refusal to proceed with their petition. Lermer, *supra* note 6, at 34; *see also* 19 U.S.C. § 1516a(a) (1988). Conversely, private petitioners must represent a majority of producers of like goods in the importing country to have standing in Canada and the U.S. Rugman & Porteous, *supra* note 12, at 71. But, only 25% of such producers are required to petition to proceed with the investigation in Mexico. Sistema Mexicano de Defensa Contra Practicas Desleales de Comercio Internacional, art. 10 L.C.E. regulation arts. 13, 14 (Mex.).

Both Canada and Mexico have provisions in the law which authorize the administrative authority to take the public interest into consideration in the imposition of ADs or CVDs. Special Imports Measures Act, R.S.C., ch. S-15, § 45 (1985) (Can.); Sistema Mexicano de Defensa Contra Practicas Desleales de Comercio Internacional, L.C.E., regulation arts. 1, 4.6, 13 (Mex.). In Canada, such a review process in the *Grain Corn* case resulted in an immediate reduction in the CVD on U.S. corn imports. Rugman & Porteous, *supra* note 12, at 78. *See also* Rugman & Anderson, *supra* note 117, at 7-12.

176. This was a particularly contentious issue between the ITC and the Panel in Fresh, Chilled or Frozen Pork from Canada, 13 ITRD 1291 (USA-89-1904-11, Jan. 22, 1991).

177. Ferguson, *supra* note 12, at 349; Lermer, *supra* note 6, at 40. Canadian exporters have successfully utilized Chapter 19 more often than U.S. exporters to date. *See supra* note 10.

Mexico's tradition of judicial review is perceived as even less favorable to exporters.[178]

In the U.S., exporters or the petitioners who are dissatisfied with administrative rulings in AD/CVD cases may seek judicial review in the federal courts. The standard of review is one of " 'arbitrary, capricious, [or] an abuse of discretion,' 'unsupported by substantial evidence on the record,' or 'otherwise not in accordance with law.' "[179] In Canada, the standard of review under the Federal Court Act is either a failure to "observe a principle of natural justice or otherwise acted beyond, or refused to exercise, its jurisdiction," "error in law," or as basing a decision on "erroneous finding of fact . . . in a perverse or capricious manner . . . ."[180] It appears that a greater percentage of administrative trade decisions have been reversed in the U.S. than in Canada.[181]

In Mexico administrative review of AD/CVD appears is limited to Mexican importers.[182] But the Mexican importer, as well as the local petitioner, may seek judicial review of a final AD/CVD administrative ruling from the Federal Tax Tribunal in the federal district court via indirect *amparo.*[183] The petitioner could chal-

178. *International Agreements: U.S.-Canada Dispute Settlement Mechanism Must Be Broader for NAFTA, Expert Says*, 8 Int'l Trade Rptr. (BNA) 1544 (Oct. 23, 1991).

179. Horlick et al., *supra* note 27, at 68 (citing 19 U.S.C. § 1516a(b)(1)); Donald P. Cluchey, *Dispute Resolution Provisions of the Canada-United States Free Trade Agreement*, 40 ME. L. REV. 335, 347 n.97 (1988). Nonetheless, U.S. courts accord considerable deference to administrative agencies because of their administrative expertise. The United States Supreme Court has held that "substantial evidence" is "more than a mere scintilla of evidence" but less than 51% of the evidence. Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938). It may be assumed that a binational panel of experts would not be as deferential to an administrative agency, given their comparable technical competence. Roberto E. Berry, Normas de Revision en Materia de Antidumping y tarifas Compensatorias en el Acuerdo de Libre Comercio entre Estados Unidos, Mexico y Canada [Standards of Review in AD/CVD in the NAFTA] (Nov. 7-9, 1991) (unpublished manuscript, presented at the Private International Law Academy of Mexico, Hermosillo, Sonora, Mexico). The *Chilled Pork* case illustrates the unwillingness of the Panel to accord such deference to an agency whose error is apparent. Fresh, Chilled and Frozen Pork, 12 ITRD 2299, 2304 (Binational Panel No. USA-89-1904-06, Sept. 28, 1990).

180. Horlick et al., *supra* note 27, at 68-69, 78-79 & n.21 (citing certain case law for these propositions, noting that "where a tribunal properly admits evidence, it cannot be reversed for giving the wrong weight to particular evidence.").

181. *Id.* at 72. *See also* John Kazanjian, *Dispute Settlement Procedures in Canadian Antidumping and Countervailing Duty Cases, in* TRADE-OFFS ON FREE TRADE: THE CANADA-U.S. FREE TRADE AGREEMENT 197, 198, 201 (Marc Gold & David Leyton-Brown eds., 1988). The author, a Canadian trade lawyer, argues that the Canadian "Federal Court will generally defer" to administrative trade authorities. *Id.* at 198. He also argues that it is likely that "both the U.S. and Canadian panel members would take their own expertise into account and could be less deferential than the Federal Court to the expertise of the trade regulators." *Id.* at 201.

182. One of the coauthors was informed by SECOFI officials that exporters had unsuccessfully attempted to challenge AD orders by a writ of amparo (judicial review) which was rejected by the circuit courts on two separate occasions.

183. Articles 14 and 16 of the Mexican Constitution prescribe the requirements of procedural due process, or conformity with previous existing law, and constitutional "competence" (jurisdiction and authority of the official). RICHARD D. BAKER, JUDICIAL

lenge the constitutionality of the ruling on the grounds of conformity with previously existing law, its legal justification or the "legal competency" (authority and jurisdiction) of the public official in question.[184] Mexican courts may also examine whether the responsible authority's discretional power was properly employed.[185] Researchers have found Mexican judicial review of administrative decisions to be comparably rigorous to U.S. judicial review.[186] However the *substitution* of a binational panel's review for judicial review may raise constitutional problems in Mexico.[187]

F. IMPORTANCE OF LEGAL DIFFERENCES

The problems of integrating a common and civil law legal system have been managed in the EC by the creation of a common charter (Treaty of Rome) and a single tribunal to interpret it.[188] The CUSFTA attempts to have it both ways in that a common FTA governs the Commission's negotiations, but each importing party's internal laws are to be applied in AD/CVD cases.[189] While the intrinsic fairness of judicial review in each country may be comparable, the importance of the differences in legal culture cannot be

---

REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT 121-123 (1971); *see generally* Hector Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CAL. WEST. INT'L L.R. 306 (1979).

There is also a right of appeal to the Mexican Collegiate Circuit Court or Supreme Court. KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 131 (1975).

184. Articles 103 and 107 of the Mexican Constitution and the Law of Amparo (*Ley de Amparo*) set forth the substantive and procedural requirements for the "*amparo*," a unique constitutional writ of mandate and prohibition in Mexican law.

185. Baker, *supra* note 183, at 240.

186. Mexican Writ of Amparo is widely used in Mexico. Researchers have reported that its effectiveness is comparable with the U.S. in terms of reversal of administrative rulings and that judicial review in Mexico compares favorably with other Latin American countries. JOHN HENRY MERRYMAN AND DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS 339-340, 778-784 (1978).

187. Articles 103, 104 and 107 of Mexico's Constitution establish judicial review of violations of "individual guarantees" in the federal courts. Dr. Jose Luis Siqueiros, *Toward a Free Trade Agreement* (Hacia el Tratado de Libre Comercio) BOLETÍN JURÍDICO DE ANÁLISIS LEGISLATIVO DEL CONSEJO COORDINADOR EMPRESARIAL, Aug. 1991, at 39, 53-54 (Aug., 1991).

188. *See* JACKSON & DAVEY, *supra* note 41, at 199-202.

189. However, CUSFTA panels have been willing to directly apply GATT and CUSFTA law in AD/CVD cases. In Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, 12 ITRD 1461 (U.S.A. 90-1904-1, March 7, 1990), the Panel noted that, "whenever possible, the Tariff Act [U.S. Trade Law] should be construed in a manner consistent with the GATT." *Id.* at 1467. In the *Chilled Pork* case, the Binational Panel found a violation of CUSFTA principles of fairness with respect to a partial reopening of the record on remand despite objections by the U.S. petitioners that the due process clause of the U.S. Constitution, supported their position. Fresh Chilled and Frozen Pork from Canada, 13 ITRD 1291, 1298 (Binational Panel No. USA-89-1904-11, Jan. 22, 1991).

denied.[190] For example, the nature of the relationship between national law and international law may vary significantly. The U.S. Congress may approve legislation contrary to binding international agreements,[191] and if the measure becomes law, it would be binding on the U.S. courts, although they would seek to construe the two so as to avoid conflict.[192] The same analysis would apply in Canada.[193]

Article 133 of the Mexican Constitution, like the Supremacy Clause of the United States Constitution, equates treaties with federal statutes, so long as they conform to the Constitution.[194] While U.S. and Canadian jurists would appear to agree that their countries *could*, if they chose, enact legislation contrary to the NAFTA which would be binding on their national courts, Mexican jurists have a different perspective.[195] Mexico's legal tradition and polit-

190. *See* William J. Bridge, Lionel Pereznieto Castro, and James F. Smith, *A Different Legal System*, *in* 1 DOING BUSINESS IN MEXICO, ch. 3, 8-14 (Michael W. Gordon ed., 1992).

191. Because the Congress has never explicitly implemented the GATT itself, questions have been raised about its status under U.S. law. It does appear that the President's authority to obligate the U.S. to the GATT was authorized by the 1945 renewal of the Trade Agreements Act of 1945. JACKSON & DAVEY, *supra* note 41, at 145, 306-07. More importantly, Congress has implicitly approved the GATT through decades of acquiescence to it without any rejection of its provisions. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (adopting an expansive acquiescence doctrine in approving the executive's suspension of U.S. litigation against Iran during the hostage crisis). However, this analysis does not hold for Part IV of the GATT, which was not authorized and for which the record of acquiescence is questionable.

192. The Trade Agreements Act of 1979, which implements the Tokyo Round Antidumping Code Subsidies Code, explicitly states that no such agreement "which is in conflict with any statute of the U.S. shall be given effect . . . ." Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, sec. 3(a). Similarly, the CUSTA Implementation Act of 1988 specifically provides that no provision in the agreement "which is in conflict with any law of the United States shall have effect." JACKSON & DAVEY, *supra* note 41, at 545 (Supp. 1989) (citing United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988). Congressional executive agreements, which are first authorized by Congress and then subsequently implemented by legislation by Congress, stand on equal footing to treaties. Cotzhausen v. Nazro, 107 U.S. 215 (1882); B. Altman & Co. v. United States, 224 U.S. 583, 587 (1912). When a treaty or congressional executive agreement and a federal law "relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control." Whitney v. Robertson, 124 U.S. 190, 194 (1888). The Latin maxim *leyes posteriores priores contraries abrogant* ("the last expression of the sovereign will must control") aptly states the principle. The Congress may amend its trade laws as it chooses, as a matter of internal law, despite whatever international law violations may be implied. Moser v. United States, 341 U.S. 41 (1951); Foster & Elam v. Neilson, 2 Pet. 253 (1829). *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 163, 221-222, 407 (1972).

193. JACOMY-MILLETTE, TREATY LAW IN CANADA 282-290 (1975).

194. Article 133 of the Mexican Constitution is very similar to the Supremacy Clause of the United States Constitution.

195. Mexican jurists consider treaties as "special enactments" which prevail over "general legislative laws." While the Congress can modify law, it may not abrogate treaties. Treaties and statutes are seen as two distinct sources of normativity. Accordingly, the U.S.-Canadian doctrine that a treaty and federal law are of equivalent hierarchy, and that the latest in time ("ley posterior") governs, does not apply. Fernando Alejandro Vazquez Pando, *Jerarquia del tratado de libre comercio entre Mexico, Estados Unidos de America y*

ical philosophy are more deferential to international law.[196] The matter is of some political significance in that Mexicans may see themselves at a distinct disadvantage in this regard.[197]

Case law is of far more importance in the U.S. and Canada than in Mexico. Such fundamental differences in legal tradition as methodology in legal research and analysis would undoubtedly prove problematic for a U.S. or Canadian panelist required to determine and apply Mexican law, or vice-versa. Again this suggests the need for a permanent tribunal or secretariat, so that such trinational expertise could be institutionalized, whether ad hoc panels are used or not.

V. CONCLUSION

Fundamental agricultural trade issues, such as subsidies, will not be resolved by the NAFTA, at least as long as the Uruguay

---

Canada en el sistema juridico Mexicano ("Hierarchy of the NAFTA in the Mexican legal system") PANORAMA JURIDICO DEL TRATADO DE LIBRE COMERCIO, UNIVERSIDAD IBERO AMERICANA DEPARTAMENTO DE DERECHO, MEXICO 35, 41 (1992); Mexican law is not well settled on this point because the Mexican Supreme Court has not published binding precedent (*jurisprudencia definida*) on this issue. Such binding precedent may be elaborated by the Supreme Court *en banc*, the Supreme Court chambers or collegiate circuit courts, when such a court makes the same ruling on a certain point of law in five consecutive decisions (without contrary ruling in between the first and the fifth decision). Lower federal courts and administrative courts would be bound by *jurisprudencia* from higher courts. *See* Art. 107 of the Constitution, articles 94, 192, 193, and 197 of the Amparo Law, and article 95 of the Organic Law of the Judicial Power of the Federation should be viewed for reference.

196. Article 89, Section X of the Constitution of the United Mexican States reflects the Mexican philosophy in stating that, in conducting foreign policy, the "[e]xecutive [p]ower shall observe the normative principle . . . [of] the legal equality of states." MEX. CONST. art. 89, § X. Dr. Cesar Sepulveda, a celebrated Mexican jurist in the field of public international law, has written:

> The examination of the Mexican practice reveals that no norm has existed that attempts to limit compliance with an international treaty, nor have the courts established binding precedent, in any case, to place the Constitution over treaties. Also, it is certain that the Mexican nation has complied in good faith with all of its obligations derived from the international legal order, despite its effect on its internal interests. The logical consequence is that in general international law is superior to the norms of the Mexican state.

Cesar Sepulveda, *Derecho Internacional* 79 (1986) (translated from Spanish to English by author).

197. Mexico and Canada have both signed and ratified the Vienna Convention on the Law of Treaties, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, *done at* Vienna on May 23, 1969, art. 26, U.N. Doc. A/Conf. 39/27, 63 A.J.I.L. 875 (1969) (entered into force on Jan. 27, 1980). It further provides that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty," unless "that violation was manifest and concerned a rule of . . . fundamental importance." *Id.* arts. 27, 46.1. The U.S. has signed but not ratified the Convention. Vienna Convention on the Law of Treaties, *done at* Vienna on May 23, 1969, S. TREATY DOC. NO. 92-1, 92d Cong., 1st Sess. (1971). While the U.S. has not ratified the Vienna Convention, it accepts the same doctrine (*Pacta sunt servanda*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 (1987). But this international law principle does not necessarily determine how a national court would construe a domestic law provision that conflicts with a prior treaty.

Round has failed to settle them. Other more technical issues which may be addressed such as phytosanitary regulations, tariffication, tariff reduction (together with the snapback provision) and modest subsidy reduction, will probably be addressed by the NAFTA and will be subject to interpretation and dispute resolution. A DSM mechanism that combines the binding and nonbinding arbitration features of CUSFTA Chapter 18 will most likely function as well as it has in the CUSFTA. The presence of a permanent secretariat with professional staff, like the GATT Secretariat, would provide institutional continuity to the panel decision and significantly enhance the efficacy of such a DSM.

The more contentious and important AD/CVD issues could be adequately addressed, as it was in CUSFTA's Chapter 19, by trinational or binational panels whose decisions are binding on the national administrative agencies and courts. If the U.S. refuses to agree to a Chapter 19-type DSM for AD/CVD disputes, such differences may pose a significant threat to the NAFTA's viability. The addition of such politically volatile areas as environmental and labor protection in a trade DSM would be problematic in that clear substantive rules are not likely to be in place. Given the positions that the U.S. has advanced in the Dallas Composite, it appears that the NAFTA DSM will remain in the political/negotiation realm of dispute resolution.[198] The more fundamental issue of whether the NAFTA DSM can be designed to give a permanent tribunal the jurisdiction to truly accelerate the process of hemispheric integration seems beyond the range of political possibility at this time.

The U.S. position on an international trade DSM is not limited to a power-oriented negotiation model. The U.S. is likely to agree to the GATT DSM reforms set forth in the Dunkel Text[199] which, if adopted, would dramatically move the GATT DSM toward a rule adjudication model. Yet, the U.S. appears to be insisting on a DSM negotiation model for the NAFTA. The rationale would appear to be the relative power position of the U.S. in each instance. The U.S. does not enjoy the same dominant relationship with the EC and Japan that it does with Mexico and Canada. The submission of controversies to rule application is more appropriate with the former trading partners but tactically disadvantageous with the latter. While the downside of this purely political equation suggests a stunted beginning for the NAFTA's DSM, any other

198. *See supra* part III(b).
199. *See supra* note 48 and accompanying text.

result is unlikely, given the relatively intense politicization of the NAFTA debate in the U.S. These developments underscore the importance of the Uruguay Round in general and the DSM of the GATT in particular.