AGRICULTURAL POLICIES, TRADE AGREEMENTS AND DISPUTE SETTLEMENT

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INTRODUCTION

The purpose of this paper is to examine how dispute settlement mechanisms in trade agreements have evolved and to discuss the implications of differences in domestic agricultural policies for dispute settlement in multilateral as well as regional trade agreements.

Agricultural Trade Disputes

The Multilateral Experience There is no question that fundamental differences in agricultural policy goals and instruments were at the heart of the agricultural trade disputes which permeated the General Agreement on Tariffs and Trade (GATT) throughout its existence.

The propensity of governments to treat agriculture as a "special" sector because of its political sensitivities resulted in agriculture-specific rules (Article XI:2(c)I), special treatment (grand-fathered measures, country waivers, refusing to ban agricultural export subsidies when industrial export subsidies were banned) and, ultimately, lack of credibility when it became apparent that the rules were not effective and did not apply equally to all.

The lack of credibility became most apparent when GATT members began in the 1980s to block the adoption of findings of the Subsidies and Countervailing Code which had been negotiated in the Tokyo Round.

With the benefit of hindsight, the Tokyo Round Code provisions that applied to agricultural export subsidies illustrate the danger of negotiators trying to draft around a problem. The rule of law cannot be built on a foundation of "creative ambiguity". Consequently, because the parties did not share a common understanding of what the provisions were designed to accomplish, GATT members started to block the adoption of Panel reports they did not like.

The general provisions of the GATT fared much better than the Subsidies and Countervailing Code. By and large, the dispute settlement system worked when basic issues of non-discrimination and nullification and impairment were at stake. Probably the best example of the GATT overcoming its inherent shortcomings regarding agricultural trade was the Panel finding which required the European Community (EC) to modify its support system for oilseeds which had been found to nullify duty-free bindings on oilseed imports. However, it is no coincidence that Europe accepted and implemented the Panel finding on oilseeds only after it had come to the conclusion that its relationship with the United States and the rest of the world could not continue to stand the strain of perpetual anarchy in agricultural trade.

The recognition that multilateral trade in agricultural products must be based on a system of effective rules equally applicable to all was a necessary condition for bringing the Uruguay Round negotiations on agriculture to a successful conclusion.

Also contributing to the Uruguay Round breakthrough on agriculture was the explicit recognition (missing from earlier GATT Rounds) that agricultural trade problems stem largely from differences in domestic agricultural policies, particularly in the level and type of support. The acceptance of the importance of these concepts had been greatly facilitated by the Producer Subsidy Equivalent (PSE) work of the Organization for Economic Cooperation and Development (OECD) which had provided governments for the first time with an objective means to make country and commodity comparisons in agricultural support.

Probably the best example of a GATT member consciously deciding to narrow the policy differences with its most important trading partners was the 1992 decision of the EC to reduce its internal market grain prices to levels much closer to world levels and to compensate producers through direct income supports tied to a system of acreage set asides. It should come as no surprise that the practical effect of these reforms was to make the European support system for grains more compatible with that of the United States.

Complementing a set of agricultural trade rules and commitments which were perceived as fair and effective was an improved system of dispute settlement. Many trade policy observers regard the new dispute settlement system of the World Trade Organization (WTO) as the glue which is necessary to keep the organization credible.

The decision to prevent parties to a dispute from blocking a Panel report; the decision to make the dispute settlement more credible by establishing an Appellate Body review; and, the decision to regard the Uruguay Round results as a single undertaking, subject to common membership and a common dispute settlement system, have given the WTO the credibility the GATT was sadly lacking in its last years.

Before turning to an examination of dispute settlement in a North American Free Trade Agreement (NAFTA) context, it is worthwhile to recall that the WTO system of dispute settlement evolved out of almost fifty years of GATT experience. In the beginning, the major emphasis in the GATT was to secure a positive solution to a dispute through consultation and negotiation. Thus, a solution mutually acceptable to the parties to a dispute was always preferred to litigation. However, if bilateral or plurilateral discussions did not

resolve the dispute then the objective of the dispute settlement system was to secure the withdrawal of the measures concerned if the panel or Working Party found them to be inconsistent with the GATT. If the offending member did not bring its measures into conformity with the finding, the last resort of the GATT (and the WTO) was to provide for compensation or the suspension of equivalent concessions (retaliation) on a discriminatory basis, subject to the authorization of the GATT members. In short, a major goal of the GATT was to ensure that a balance of interests, once established, be maintained.

In the earlier days of the GATT, Working Parties comprised of government representatives were often called upon to assist in dispute resolution. With the benefit of hindsight this was not a very satisfactory process as witnessed by the fact that a GATT Working Party concluded in the mid-1970s that Canada could apply import quotas in support of its supply management system for eggs. That Working Party "win" certainly gave Canadian policy makers the false security that its system of Article XI import quotas was fully consistent with its GATT obligations. Fifteen years later a GATT panel addressing certain Japanese import quotas interpreted Article XI in a much more restrictive and legalistic way than the Egg Working Party.

Gradually, over the years, even the larger economic powers, such as the United States and the EC, began to share the views of the smaller members that a more neutral, more codified, more legalistic approach was required to manage disputes and avoid conflicts. Quiet diplomacy and the old boy networks were simply not sufficient, nor were Working Parties. However, it took nearly five decades before the GATT dispute settlement system acquired the features which characterize today's WTO and NAFTA dispute settlement procedures: the right to the establishment of a panel; rosters of experts to serve on panels in their personal capacity and not as government representatives; the quasi-judicial panel process of written submissions, counter-submissions, oral hearings and cross-examination within the context of a legal framework of rights and obligations; the establishment of firm time-lines governing the establishment and operation of the panel; and the acceptance that a party to a dispute could not block the adoption of a report.

The NAFTA Experience One of the major differences between the European Union (a customs union) and NAFTA (a free trade area) is that the former is predicated on the progressive adoption of common commercial policies. Europe now has common policies governing virtually all economic activity including: competition, technical regulations, trade, transport and agriculture. However, even a customs union with common policies requires an effective dispute settlement mechanism. Thus, the Treaty of Rome provides that the European Court of Justice "shall ensure observance of law and justice in the interpretation of this Treaty" and that the judgements of the Court "shall" be executed by the offending member.

In contrast, WTO and NAFTA panel decisions are not self-enforcing. However, once a Panel decision is rendered the offending party must bring its measure into conformity with the treaty provisions or face compensation/retaliation. This provides a healthy incentive to respect the Panel finding.

NAFTA is not predicated on common policies. Instead specific commitments are undertaken and it is presumed that members will make the domestic policy changes necessary to bring them into conformity with the trade agreement provisions.

Clearly, the domestic policy adjustments required tend to be fairly modest for areas where the level of support and the marketing systems are similar and the terms of market access are reciprocal. This is the case for most Canada/U.S. agricultural trade. There are notable exceptions, however, and they, not surprisingly, are the areas where friction is currently being experienced. Dairy, poultry, grains, sugar and peanuts are all sectors which are experiencing difficulties because of real or perceived differences in the level of support and/or marketing systems and/or asymmetrical terms of access.

Other speakers will deal with the specifics of these commodity sectors in more detail. Suffice to say that the dispute settlement provisions of the NAFTA will continue to be tested wherever there is a perception that the trade playing-field is somehow tilted in favour of one party at the expense of another. However, there are different categories of irritants. Some (like dairy, poultry, sugar) are examples of irritation that the NAFTA has not gone far enough in reducing barriers to trade. Others (like potatoes, grain, cattle) are concerns relating to the perception that NAFTA has gone too far and that "unfair" imports are triggering political pain thresholds.

The solutions to these two categories of irritants are obviously not the same. However, both types can put pressure on the dispute settlement system. The recent NAFTA panel on Canadian dairy, poultry, egg, barley and margarine tariff equivalents found that Canada (and by extension the United States) can maintain tariff equivalents on items which were identified in our respective WTO schedules. In effect, the Panel confirmed that the original balance of interests in agriculture in the Canada/U.S. Free Trade Agreement included an agreement to maintain certain non-tariff barriers, recognizing that the Uruguay Round was underway which could have implications for their future. Put another way, the Panel concluded that a deal is a deal, and if the parties wished to change the deal it would require a renegotiation.

It is interesting to note that the Panel on tariff equivalents was comprised of two U.S. law professors chosen by Canada, two Canadian law professors chosen by the United States, and a mutually agreed British law professor acting as Chairman. The professional composition of this Panel is indicative of how legalistic dispute settlement panels have become. Political economy is out, law is in!

This Panel is instructive in a number of ways. It reflected a basic difference of views as to how WTO tariff equivalents should be interpreted in the context of the NAFTA. It was preceded by extensive bilateral negotiations which lasted for nearly a year before it was concluded that a negotiated solution was not possible and that referral to a neutral panel of experts was needed in order to determine authoritatively the <u>legal</u> rights and obligations of the parties. The legal issue was not whether one party could maintain a certain support and marketing system, the issue was what import measure could be applied, given the original Canada/U.S. deal on agriculture and the later WTO Agreements.

A somewhat similar issue is looming on sugar. Here the question is whether or not the United States is obligated to terminate its re-export program on sugar containing products. Unless there is a bilateral solution, this case will eventually be placed before a panel to determine the legal rights and obligations with respect to this measure.

More disturbing, however, are the irritants which do not reflect differences in the interpretation of the NAFTA, but rather reflect the politicization of an import issue and the perception that "something" should be done to limit imports because a political pain threshold has been reached. The classic example of this was the limit placed on imports of wheat from Canada for a year in the fall of 1994. To be blunt, the only reason Canada agreed to this was under the threat of a more punitive Section 22 import quota. However, today the United States no longer has the right to apply Section 22 import quotas because it, like all WTO members, agreed to convert all existing non-tariff barriers into tariff equivalents and not to reintroduce them. This provision took effect on the entry into force of the WTO on January 1, 1995.

Since Canada and United States cannot apply import quotas against one another and since "normal" tariffs are to be eliminated on all goods (agricultural and industrial) effective January 1, 1998, the only ongoing import measures which can be applied on bilateral trade under NAFTA are the "tariff equivalents" resulting from the WTO conversion of non-tariff barriers.

Of course, neither NAFTA nor the WTO prevent the application of anti-dumping, countervail or safeguard measures. However, a party wishing to invoke a special import measure must follow the international rules governing their application.

I mentioned earlier that there are two categories of irritants. I could add two more by drawing a distinction between problems which are being handled on their technical merits in accordance with the letter of the law and those which have become so politicized that facts have become almost irrelevant and perceptions have become reality. If an irritant reaches this politicized stage, it risks undermining the acceptance that bilateral trade relations are based on the rule of law. The agricultural experience of the GATT clearly illustrates that if the political economy of agriculture is allowed to overwhelm the law, the end result is anarchy.

SUMMARY AND CONCLUSIONS

An effective, rules based, dispute settlement system is an essential part of multilateral and regional trade agreements. The panel system which evolved in the GATT and which is now incorporated in the WTO and NAFTA provides an objective way of resolving disputes where bilateral discussions have failed to reach a mutually agreed resolution of differences.

Even in the best written trade agreements there is always a potential for differences in interpretation to emerge, particularly as time passes. Parties to a trade agreement are

constantly having to assess their international rights and obligations when making changes to domestic laws and regulations.

Formal litigation through the dispute settlement process should be, however, treated as a means of last resort if the system is not to become overloaded and its quasi-judicial character de-based.

In most cases, it is much preferable for the parties to a dispute to reach a bilateral agreement and it is even more preferable that the parties and their constituencies take the action necessary to minimize the need to involve the dispute settlement machinery.

Lack of knowledge and understanding of each party's agricultural support and marketing systems, lack of formal and informal consultations on an ongoing basis can lead to an environment where small, localized irritants can erupt into a major trade relation confrontation, with unpredictable results.

While recourse to effective, and impartial dispute settlement procedures may, in some cases, be the only way of resolving particularly contentious issues, many potential disputes can be settled without recourse to litigation, provided the governments and the industries concerned work hard at cultivating a genuine understanding and dialogue so that myths are addressed early before political rhetoric turns perceptions into reality.

The GATT experience clearly showed that most trade problems stem from differences in the level and types of support governments provide to their rural sectors. The challenge for a free trade area which does not have a common agricultural policy is to identify, control and reduce the pressures which result from differences in domestic agricultural policies. This can be done within the framework of a rules based trade agreement provided all stakeholders, government and industry, work hard to address legitimate concerns and grievances. These concerns once identified should be promptly dealt with. It is unrealistic and counter-productive to expect the dispute settlement system to handle every irritant, in particular, those that result from an inability to negotiate a solution at the time an agreement was negotiated. The parties must do their part to resolve as many of their differences as possible, thus leaving litigation as the last resort.

This conclusion may appear to go somewhat against the grain to the extent it gives the appearance of harking back to the earlier days of the GATT and older bilateral trade agreements which were characterized by an emphasis on consultative mechanisms and negotiations in order to manage disputes and avoid conflicts. This is not what is intended. Instead, what is being suggested is that a modern trade agreement needs a rules based dispute settlement system and it must also have mechanisms to ensure ongoing government-to-government and industry-to-industry dialogues. In short, fostering an harmonious agricultural trade relationship requires more than an effective litigation mechanism. It also requires a willingness by governments and private sector interests in all member countries to devote sustained efforts into making trade agreements work effectively by managing problems and resolving potential conflicts before they become too entrenched.