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Antidumping and Countervailing Duty Disputes:

Comparisons Between the NAFTA and the WTO Agreement

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Michael A. Meyer¹

As the number of antidumping (AD) and countervailing duty (CVD) investigations has proliferated, the use of non-judicial dispute resolution as a means to contest the outcome of these cases also has increased. From a U.S. perspective, the most important of the non-judicial dispute resolution mechanisms are those provided in the North American Free Trade Agreement (NAFTA)² and the World Trade Organization (WTO) Agreement.³ This article discusses and compares those mechanisms.⁴

The AD/CVD caseload under NAFTA and the WTO Agreement is likely to be heavy. The U.S.-Canada Free Trade Agreement (FTA)⁵ dispute resolution mechanism was used frequently, and the same can be expected of the NAFTA.⁶ In anticipation of more cases

1. The authors, attorneys with O'Melveny & Myers, Washington, D.C., were active in the NAFTA and Uruguay Round negotiations and have served as counsel in numerous U.S.-Canada FTA and GATT dispute settlement proceedings. They would like to thank Wendy L. Judd and Thomas B. Stahl for their assistance in preparing this article. The views in this article are those of the authors and do not necessarily reflect the views of their clients.
 2. The North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., 32 I.L.M. 605 (1993) (entered into force January 1, 1994) [*hereinafter* NAFTA].
 3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (April 15, 1994) [*hereinafter* Final Act], reprinted in Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements, Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 316, 103d Cong., 2d Sess. (1994) [*hereinafter* House Document].
 4. There are many dispute resolution mechanisms found in the NAFTA and WTO Agreement in addition to those discussed in this article, including NAFTA Chapter 20, 32 I.L.M. at 693 (disputes of the parties to the NAFTA); NAFTA Chapter 11, 32 I.L.M. at 639 (investor disputes); WTO Agreement on Subsidies and Countervailing Measures [*hereinafter* Subsidies Agreement], Final Act at 229, House Document at 1533; WTO Agreement on Preshipment Inspection, Final Act at 199, House Document at 1506.
 5. The U.S.-Canada Free Trade Agreement, Dec. 12, 1987, U.S.-Can., 27 I.L.M. 281 (1988) [*hereinafter* U.S.-Can. FTA].
 6. Since 1989, forty-nine AD and CVD cases have been challenged under Chapter 19 of the U.S.-Canada FTA. Thirty of these panel reviews challenged U.S. determinations, while 19 challenged Canadian decisions. As of January 6, 1995, 6 cases remained active, the United States won 7 cases, Canada won 7 cases, 12 cases were affirmed in part and remanded in part (generally con-
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under NAFTA, the United States recently expanded the number of roster candidates eligible to serve as panelists to hear cases.⁷

The number of unfair trade investigations initiated under the General Agreement on Tariffs and Trade (GATT) has grown, and the trend is likely to continue under the WTO Agreement, which went into effect on January 1, 1995. During the 1980's, the number of AD cases initiated by GATT members averaged 140-150 per year.⁸ From 1990-1993, the number of AD cases increased to an average of 227 per year.⁹

The increase in unfair trade investigations over the past several years has led some to complain that unfair trade remedies have become trade barriers themselves.¹⁰ As a result, the trading nations of the world have paid closer attention to the negotiation of dispute settlement mechanisms in international and regional trade agreements. The dispute resolution mechanisms of the NAFTA and the WTO Agreement have built upon and refined the existing dispute settlement procedures found in Chapter 19 of the U.S.-Canada FTA,¹¹ and the GATT, respectively.¹²

This article compares the NAFTA and WTO dispute resolution mechanisms for AD/CVD disputes, focusing on standards of review, procedures for the resolution of

Note 6, continued

sidered a victory for the complainant), 14 cases were terminated and 3 cases were stayed indefinitely. See NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report of FTA and NAFTA Active Dispute Settlement Matters* (January 1995); NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report: Completed NAFTA and FTA Dispute Settlement Panel Reviews* (January 1995).

7. "U.S. NAFTA Secretariat Expands Roster of Eligible Panelists," *Inside U.S. Trade*, Nov. 25, 1994, at 15.

8. General Accounting Office, Pub. No. GAO/NSIAD-90-238FS, *Use of the GATT Antidumping Code* at 4 (1990). Between 1980 and 1989, GATT member states initiated 1456 AD cases. *Id.* Of those cases, the United States initiated 395, Canada brought 294 and Mexico filed 30. *Id.*

9. Semi-Annual Reports Under Article 14:4 of the Agreement, GATT ADP/48/Add. 2-8, ADP/53/Add. 2-11, ADP/62/Add. 2-10, ADP/70/Add. 2-10, ADP/81/Add. 2-10, ADP/88/Add. 2-12 and ADP/102/Add. 2-11. During the four-year period from 1990 to 1993, GATT member states brought 909 AD cases. Of those cases, the United States initiated 216, Canada initiated 92, and Mexico brought 68. *Id.* The large number of unfair trade complaints filed against steel products was a contributing factor to the surge in cases from 1990-1993.

10. See, e.g., Report to the President of the Council of Economic Advisors at 239 (February 1994) ("In the United States and elsewhere, antidumping laws go beyond preventing anticompetitive practices, which should be their rationale, and often have the effect of protecting domestic industries from foreign competition."); N. David Palmeter, "The Antidumping Law: A Legal and Administrative Nontariff Barrier," in *Down in the Dumps: Administration of the Unfair Trade Laws* 64, 66 (Boltuck and Litan eds., 1991) ("The standards of the law, the procedure it uses, and the implementation of these standards and procedures ... increasingly ensure that ... an exporter determined to have been selling in the United States below fair value has probably been doing no such thing in any meaningful sense of the word 'fair.' On the contrary, rather than being a price discriminator, a dumper is more likely the victim of an antidumping process that has become a legal and an administrative nontariff barrier"); see also J. Michael Finger, "The Origins and Evolution of Antidumping Regulation," in *Antidumping: How It Works and Who Gets Hurt* 13 (J. Michael Finger ed., 1993).

11. Cf. NAFTA, Ch. 19, 32 I.L.M. at 682, with U.S.-Can. FTA, Ch. 19, 27 I.L.M. at 386.

12. Ministerial Declaration on the Uruguay Round, GATT BISD 33S/19 (Sept. 20, 1986).

AD/CVD disputes, and remedies. The NAFTA contains no substantive AD/CVD provisions and replaces domestic judicial review of AD/CVD disputes. In contrast, the WTO mechanism contains substantive AD/CVD provisions and provides for a determination of whether AD/CVD decisions are consistent with those substantive provisions.

The NAFTA and WTO Agreement have many similar AD/CVD dispute settlement procedures, including the process for panel selection, tight deadlines and a means for challenging panel decisions. However, these mechanisms differ significantly in that NAFTA Chapter 19 provides a legal, adjudicative process that allows for full participation by non-governmental parties and open proceedings while the WTO Agreement emphasizes government-to-government conciliation, with a very limited role for non-government parties in generally closed proceedings, although the United States is pushing for greater transparency.

AD/CVD remedies available under the NAFTA and WTO Agreement can vary. Under NAFTA, a winning exporter can obtain automatic revocation of the order and a refund of all duties.¹³ Under the WTO Agreement, the remedy is to bring a country's AD/CVD law into compliance with the relevant WTO provision, and failing that, compensation or suspension of WTO benefits.

I. Standards of Review Under the NAFTA and the WTO Agreement

The first question facing a party seeking the review of an AD or CVD determination is the proper forum for review. The NAFTA and the WTO Agreement provide dispute settlement for different issues. While Chapter 19 of the NAFTA essentially replaces domestic judicial review,¹⁴ the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes provides for the determination of whether an AD or CVD determination complies with the standards for such determinations set forth in the WTO Agreement.¹⁵ In certain cases, a particular decision may be challenged under both mechanisms.¹⁶

13. See, e.g., Certain Softwood Lumber Products From Canada, 59 Fed. Reg. 42029 (Dep't Comm. 1994) (notice of panel decision); "U.S., Canada Announce New Talks After Repayment of Duties," *Inside U.S. Trade*, Dec. 16, 1994, at 1.

14. NAFTA, Art. 1904.1, 32 I.L.M. at 683.

15. The WTO Agreement dispute settlement procedures are designed to provide the "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member." Understanding on Rules and Procedures Governing the Settlement of Disputes [*hereinafter* Annex 2], Art. 3.3, Final Act at 354, House Document at 1655.

16. To date, two cases have been appealed under both the U.S.-Canada Free Trade Agreement and the GATT. See *In the Matter of Fresh, Chilled and Frozen Pork from Canada*, USA-89-1904-06 (U.S.-Canada Free Trade Agreement Binational Panel Review September 28, 1990); *Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, GATT BISD 38S/30 (July 11, 1991); *In the Matter of Certain Softwood Lumber Products from Canada*, USA-92-1901-01 (U.S.-Canada Free Trade Agreement Binational Panel Review May 6, 1993); *United States - Measures Affecting Imports of Softwood Lumber from Canada*, GATT Doc. SCM/162 (February 19, 1993).

A. NAFTA REPLACES DOMESTIC JUDICIAL REVIEW

Article 1904 of the NAFTA creates a dispute settlement mechanism that replaces the domestic judicial review proceedings of each member country.¹⁷ Like the U.S.-Canada FTA, NAFTA does not contain substantive provisions governing AD and CVD determinations.¹⁸ As a result, NAFTA Chapter 19 panels may only determine whether a final AD or CVD decision is "in accordance with the antidumping or countervailing duty law of the importing Party."¹⁹ For purposes of Chapter 19 panel review,

the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.²⁰

AD and CVD appeals normally challenge evidentiary matters and interpretations of law, so NAFTA dispute settlement would be an appropriate forum when, for example, the complainant questions whether there is sufficient evidence on the record to support a finding that a petitioner has standing.²¹

NAFTA requires that panelists apply the standard of judicial review of the country that issued the final determination.²² In the United States, the standard of review for AD

17. NAFTA, Art. 1904.1, 32 I.L.M. at 683.

18. *Id.* During both the U.S.-Canada FTA and NAFTA negotiations, the United States refused to include substantive provisions that would amend U.S. AD and CVD determinations. See "Mexican Proposal to Debate Reforms of Trade Laws Hits U.S. Brick Wall," *Inside U.S. Trade*, July 12, 1991, at 1.

19. NAFTA, Art. 1904.2, 32 I.L.M. at 683.

20. *Id.* Since the United States and Canada have predominantly common law systems and Mexico has a civil law system, panelists may be called upon to judge a decision based on a system with which they are unfamiliar.

21. A WTO panel also could rule on evidentiary matters. In a GATT panel ruling on plastic from the United States, a lack of evidence in the administrative opinion was construed as a lack of positive evidence as required by Article 3:3 of the Antidumping Code. *Korea - Antidumping Duties on Imports of Polyacetal Resins from the U.S.*, at para. 287, GATT Doc. ADP/72 (Apr. 2, 1993) ("the determination did not include an examination, let alone evidence, of the future evolution of the volume of imports and price effects of these imports"). See also *U.S. - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom*, at para. 429, GATT Doc. DRS/1a (1994) (finding of a pass through of subsidies not a sufficient basis to support a finding that a subsidy was bestowed on the production of merchandise); *id.* at para. 476 (agency failed to adequately explain unequityworthiness finding); *id.* at para. 550 (agency failed to provide adequate explanation for finding that a company was not creditworthy); *id.* at para. 580 (agency failed to provide sufficient explanation for relying on "the facts available" for calculation of the discount rate).

22. NAFTA, Art. 1904.3, 32 I.L.M. at 683. See also *id.* at Article 1911, 32 I.L.M. at 687; *id.* at Annex 1911, 32 I.L.M. at 691-93.

and CVD final determinations²³ is whether the determination is "unsupported by substantial evidence on the record, or otherwise [is] not in accordance with law."²⁴ For decisions not to initiate an investigation, not to review a determination based upon changed circumstances, or a negative preliminary determination by the U.S. International Trade Commission, the standard is whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁵

The applicable standard of review in Canada²⁶ is whether the agency

- (a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;
- (b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;
- (c) erred in law in making a decision or order, whether or not the error appears on the face of the record;
- (d) based its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard to the material before it;
- (e) acted or failed to act, by reason of fraud or perjured evidence; or acted in any other way that was contrary to law.²⁷

The Mexican standard of review²⁸ provides that an AD or CVD determination will be declared illegal if one of the following causes is shown:

- (a) lack of competence of the administrator who issued the decision or conducted the proceedings;
- (b) omission of formal legal requirements, including the absence of a foundation or causation;
- (c) procedural defects in the proceeding;
- (d) incorrect or misunderstood facts, or improper issuance or enforcement of the decisions;
- (e) an exercise of discretionary authority inconsistent with the objectives of the law granting the authority.²⁹

23. NAFTA, Annex 1911, 32 I.L.M. at 693 (definition of standard of review for the United States).

24. Tariff Act of 1930 § 516A(b)(1)(B), *as amended*, 19 U.S.C. § 1516a(b)(1)(B)(1988).

25. Tariff Act of 1930 § 516A(b)(1)(A), *as amended*, 19 U.S.C. § 1516a(b)(1)(A)(1988).

26. NAFTA, Annex 1911, 32 I.L.M. at 693 (definition of standard of review in Canada).

27. Federal Court Act, R.S.C., ch. F-7, § 18.1(4) (1985) (Can.).

28. NAFTA, Annex 1911, 32 I.L.M. at 693 (definition of Mexican standard of review).

29. *Código Fiscal de la Federación*, Article 238, December 31, 1981.

The U.S., Canadian and Mexican standards of review are deferential to the administering authorities' determinations in varying degrees,³⁰ and panels are expected to provide the same degree of deference as the local court.³¹

B. WTO PANELS DETERMINE WHETHER AD/CVD DECISIONS ARE CONSISTENT WITH THE WTO AGREEMENT

The dispute settlement provisions of the WTO Agreement are found primarily in the Understanding on Rules and Procedures Governing the Settlement of Disputes.³² These provisions build upon and strengthen the dispute settlement provisions found in Chapters XXII and XXIII of the General Agreement on Tariffs and Trade and the Understanding Regarding Notification, Consultations, Dispute Settlement and Surveillance.³³ In addition, for AD, there is an overlay of special rules as indicated in Appendix 2 of Annex 2 of the WTO Agreement.³⁴

30. See, e.g., *Calabrian Corp. v. U.S. Int'l Trade Comm.*, 794 F. Supp. 377, 381 (Ct. Int'l Trade) ("As to the burden of proof, the statute provides that 'the decision of ... the [agency] is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.'" (quoting 28 U.S.C. §-2639(a)(1) (1988)));

In American Farm Bureau Federation v. Canadian Import Tribunal, 2 S.C.R. 1324 (1990) (Can.), the Canadian Supreme Court upheld a decision of the Canadian Import Tribunal, stating that it would not interfere if there was "any evidence" on which the Tribunal's judgment could be based. A GATT panel rejected this standard of extreme deference to the Canadian Import Tribunal. See *Canadian Countervailing Duties on Grain Corn from the United States*, at para. 6.1, GATT Doc. SCM/140 (Feb. 21, 1992) ("The Panel concludes that the determination of injury by the CIT ... is not consistent with the requirements of Article 6 ... because the CIT did not determine [injury] on the basis of positive evidence").

31. Whether an FTA panel applied the appropriate standard of review was hotly contested in the matter of *Fresh, Chilled and Frozen Pork From Canada*, ECC-91-1904-01USA (U.S.-Canada FTA Extraordinary Challenge Committee Proceeding June 14, 1991). In that case, the United States filed an extraordinary challenge on the grounds, *inter alia*, that the panel "manifestly exceeded its powers, authority or jurisdiction" by applying an inappropriate standard of review. *Id.* at 14. The extraordinary challenge committee rejected the United States' argument. Because of the controversy surrounding this case, the United States insisted on adding language to the NAFTA explicitly clarifying that failure to apply the appropriate standard of review is an example of how a panel can manifestly exceed its powers, authority or jurisdiction. Cf. NAFTA, Art. 1904.13(a)(iii), 32 I.L.M. at 683 with U.S.-Can. FTA, Art. 1904.13(a)(iii), 27 I.L.M. at 388-89.

32. Annex 2, Final Act at 353, House Document at 1654.

33. Cf. *id.* with GATT Chapters XXII and XXIII, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. (pt. 5) A3, A64-65, 55 U.N.T.S. 188, 266-68, and with Understanding Regarding Notification, Consultations, Dispute Settlement and Surveillance, GATT BISD 26S/210 (November 28, 1979). The Ministerial Declaration launching the Uruguay Round confirms the Parties' desire to strengthen GATT dispute settlement. See Ministerial Declaration on the Uruguay Round, GATT BISD 33S at 25 ("negotiations shall aim to improve and strengthen the rules and the procedures of the dispute settlement process").

34. Annex 2, Appendix 2, Final Act at 374, House Document at 1675. See also Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 [*hereinafter* AD Agreement], Arts. 17.4-17.7, Final Act at 374, House Document at 1675; Subsidies Agree-

Unlike the NAFTA, the WTO Agreement provides detailed substantive provisions governing the imposition of antidumping and countervailing duties.³⁵ Accordingly, dispute resolution under the WTO Agreement will involve a determination of whether the underlying AD or CVD decision was issued in compliance with the appropriate substantive and procedural requirements.

Because the Subsidies Agreement contains no special or additional rules governing the settlement of disputes involving CVD determinations, the standards of review found in Annex 2 of the WTO Agreement apply.³⁶ The standards of review set forth in Annex 2 are fairly broad. All dispute resolution mechanisms found in Annex 2 are governed by the general principle that WTO dispute settlement "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."³⁷ In addition, a panel convened under the WTO Agreement's general dispute settlement provisions is charged with "mak[ing] an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...".³⁸ Because the WTO Agreement's standard of review is less deferential than the standard for NAFTA panels, WTO dispute resolution may be more appealing than NAFTA to a party seeking to overturn a CVD order. However, the WTO Agreement's vague standard of review also may create uncertainty as to the outcome of the proceedings.

By contrast, the Antidumping Agreement does contain special rules governing the

Note 34, continued

ment, Arts. 4.2-4.12, Final Act at 231-32, House Document at 1535-36, Art. 6.6, Final Act at 234-35, House Document at 1538-39, Arts. 7.2-7.10, Final Act at 235-37, House Document at 1539-41, Art. 8.5, Final Act at 239-40, House Document at 1543-44, n.35, Final Act at 241, House Document at 1545, Art. 24.4, Final Act at 255, House Document at 1559, Art. 27.7, Final Act at 258, House Document at 1562, and Annex V, Final Act at 269-70, House Document at 1573-74.

None of the additional provisions found in the Subsidies Agreement applies to disputes involving CVD determinations. The WTO Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures recognizes "the need for consistent resolution of disputes arising from antidumping and countervailing duty measures," but does not require the application of identical rules. See Final Act at 403, House Document at 1696.

35. See AD Agreement, Final Act at 145, House Document at 1453; Subsidies Agreement, Final Act at 229, House Document at 1533.

36. See Subsidies Agreement, Art. 30, Final Act at 260, House Document at 1564 ("The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement, except as otherwise specifically provided herein"); Annex 2, Art. 1.1, Final Act at 353, House Document at 1654 ("The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding"). As noted *supra* at note 35, a Ministerial Declaration recognizes the need for consistent resolution of AD and CVD disputes.

37. Annex 2, Art. 3.2, Final Act at 354, House Document at 1655.

38. *Id.* at Art. 11, Final Act at 360, House Document at 1661.

settlement of disputes involving AD cases.³⁹ Among these special rules are two provisions on standards for panel reviews of antidumping matters that supplement the standards set forth in Annex 2. With respect to issues of fact, Article 17.6 of the Antidumping Agreement provides that

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned.⁴⁰

For issues involving the interpretation of the Antidumping Agreement, Article 17.6 states that

the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.⁴¹

The additional language on standards of review set forth in the Antidumping Agreement can be traced to a last minute proposal submitted by the United States.⁴² The United

39. AD Agreement, Arts. 17.3-17.7, Final Act at 164-65, House Document at 1472-73.

40. *Id.* at Art. 17.6(i), Final Act at 165, House Document at 1473.

41. *Id.* at Art. 17.6(ii), Final Act at 165, House Document at 1473.

42. Proposals to Amend the Draft Antidumping Agreement (Nov. 26, 1993). The Uruguay Round negotiations were concluded less than one month later on December 15, 1993.

The language proposed by the United States follows:

In examining the matter referred to in paragraph 4, the panel:

- (i) in its objective assessment of the facts of the matter, shall not reweigh the facts made available to the domestic authorities, but instead shall determine whether the authorities' evaluation of those facts was reasonable; and
- (ii) in its objective assessment of the applicability of the Agreement to a measure and the conformity of that measure with the Agreement, shall determine and interpret the relevant provisions of the Agreement. Where a panel finds that a relevant provision of the Agreement is ambiguous or does not specify how the obligation under that provision is to be performed, the panel shall determine whether the authorities' action is outside the range of actions consistent with that obligation.

Id. Although the United States sought parallel changes in the Subsidies and Countervailing Measures text, *see id.*, no such standard appears in the Subsidies Agreement. *See* Subsidies Agreement, Art. 30, Final Act at 260, House Document at 1564.

States reportedly was concerned that WTO panels would examine AD and CVD cases *de novo*, without giving proper deference to administering authorities. The greater deference found in the U.S. proposal is similar to the deferential review accorded to AD and CVD determinations by the United States Court of International Trade and therefore would have been similar to the standard applied by NAFTA panels reviewing U.S. determinations.⁴³ However, the language of the Final Act differs from that of the U.S. proposal.⁴⁴

In sum, in analyzing the standards of review under NAFTA and the WTO Agreement, a party should bear in mind that under the NAFTA, the relevant question is whether the authority's decision is supportable under the domestic standard of review as it would be interpreted by a local court, whereas under the WTO Agreement, the relevant question is whether the authority's decision is consistent with the WTO Agreement under the less deferential WTO standard of review.

II. Procedures for NAFTA and WTO Agreement Dispute Settlement

NAFTA Chapter 19 dispute resolution resembles appellate court proceedings, whereas the WTO Agreement provides a structure that strives for a mutual settlement between the parties in dispute. In many respects, the WTO Agreement structure is more like NAFTA Chapter 20, which governs disputes of the NAFTA countries, than the AD/CVD dispute resolution procedures of NAFTA Chapter 19.

A. NAFTA PROVIDES FOR ADJUDICATIVE PROCEDURES WITH ARBITRAL PANELS, TIGHT DEADLINES AND THE OPPORTUNITY FOR APPEAL

1. Initiation of Dispute Settlement Proceedings

NAFTA Chapter 19 dispute settlement begins with a written request for panel review submitted within 30 days of the date of publication of the decision in question.⁴⁵ A

43. See, e.g., *American Spring Wire Corp. v. U.S.*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984) ("[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* ...'" (quoting *Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22 (1st Cir. 1983))).

44. For instance, concerning the facts, the U.S. language prohibiting the reweighing of facts was changed to language calling for a determination of whether the establishment of the facts was proper and the evaluation of the facts unbiased and objective; U.S. language calling for a determination of whether the facts were reasonable was changed to call for a determination of whether the evaluation of the facts was unbiased and objective even though the panel would have reached a different conclusion.

As for challenges to the interpretation of the Antidumping Agreement, the U.S. language stated that if a provision was ambiguous or did not specify how an obligation was to be performed, the panel would determine whether the authority's action was outside the range of actions consistent with the obligation whereas the language of the Antidumping Agreement calls for an interpretation in accordance with the customary rules of interpretation of public international law and specifies that if more than one interpretation is permissible, the authority's measure is in conformance as long as it rests upon one of the permissible interpretations.

45. NAFTA, Art. 1904.4, 32 I.L.M. at 683.

request for panel review may be made by a party to the NAFTA (the U.S., Canada or Mexico) or "on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination."⁴⁶ The administering authority that issued the decision in question and any persons who could participate in domestic judicial review proceedings have the right to appear and be represented by counsel before the panel.⁴⁷ The rules of procedure for Chapter 19 panel review are based upon judicial rules of appellate procedure⁴⁸ and closely resemble the rules of the United States Court of International Trade.⁴⁹

2. Panel Selection

NAFTA panels consist of 5 persons selected from a roster.⁵⁰ The roster must contain at least 75 candidates, at least 25 provided by each party, and "shall include judges or former judges to the fullest extent practicable."⁵¹ Candidates must be citizens of Canada, Mexico or the United States and may not be affiliated with or take instructions from a party.⁵²

46. *Id.* at Art. 1904.5, 32 I.L.M. at 683.

47. *Id.* at Art. 1904.7, 32 I.L.M. at 683. NAFTA's provision for the appearance of any interested party before the panel creates a substantial benefit over WTO dispute settlement. As explained below, only members to the WTO Agreement (governmental representatives) participate in WTO dispute settlement, although private parties can have input through their governments.

48. *Id.* at Art. 1904.14, 32 I.L.M. at 684.

49. The NAFTA Chapter 19 panel rules cover:

the content and service of requests for panels; a requirement that the competent investigating authority transmit to the panel the administrative record of the proceeding; the protection of business proprietary, government classified, and other privileged information (including sanctions against persons participating before panels for improper release of such information); participation by private persons; limitations on panel review to errors alleged by the NAFTA member countries or private persons; filing and service of documents; computation and extensions of time; the form and content of briefs and other papers; pre- and post-hearing conferences; motions; oral argument; requests for rehearing; and voluntary terminations of panel reviews.

NAFTA Art. 1904.14, 32 I.L.M. at 684. *Cf. id.* with U.S. Court of International Trade Rules.

50. NAFTA, Annex 1901.2 (1), 32 I.L.M. at 687. "Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law." *Id.*

51. *Id.* The same preference for judges or former judges as panelists does not appear in the U.S.-Canada Free Trade Agreement. *See* U.S.-Can. FTA, Annex 1901.2 (1), 27 I.L.M. at 393. The preference for judges reportedly derives from a U.S. concern that panelists who are practitioners rather than judges would conduct a more probing review than the deferential standard provided in U.S. law. (The U.S. has so far been unable to find any judge to serve on an FTA panel.) The NAFTA also requires that the majority of panelists be lawyers and that the chairman of the panel be appointed from among the lawyers. NAFTA, Annex 1901.2 (2) and (3), 32 I.L.M. at 687. Again, the preference for lawyers reflects the fact that the NAFTA binational panel system is designed to replace *judicial* review. Lawyers apparently are perceived to be more qualified to render decisions as a domestic court would render a decision.

52. NAFTA, Annex 1901.2 (1), 32 I.L.M. at 687.

In general, panelists are selected for a particular case within 60 days of the request for panel review.⁵³ Each party involved must appoint two panelists, normally from the roster,⁵⁴ and may exercise four confidential peremptory challenges to panelists proposed by the other party.⁵⁵ By the 55th day after the request for panel review, the parties involved must agree on the fifth panelist.⁵⁶ If a party fails to appoint a panelist or if the parties fail to agree on the fifth panelist, that panelist will be selected by lot.⁵⁷

3. *Deadlines for Panel Review*

One of the most beneficial aspects of NAFTA dispute settlement is the fixed time period for panel review. Under Chapter 19, final panel decisions must be issued within 315 days of the date on which a request for a panel is made.⁵⁸ This period includes the following time allowances:

- (a) 30 days for the filing of the complaint;
- (b) 30 days for designation or certification of the administrative record and its filing with the panel;
- (c) 60 days for the complainant to file its brief;
- (d) 60 days for the respondent to file its brief;
- (e) 15 days for the filing of reply briefs;
- (f) 15 to 30 days for the panel to convene and hear oral argument; and
- (g) 90 days for the panel to issue its written decision.⁵⁹

Under the U.S.-Canada FTA, panels almost always met their deadlines for review.⁶⁰ NAFTA panels are expected to have the same efficient record.

4. *Challenges to Panel Decisions*

A NAFTA country⁶¹ may challenge a panel decision through an Extraordinary Challenge Committee (ECC)⁶² based on an allegation that:

53. *Id.* at Annex 1901.2 (2) and (3), 32 I.L.M. at 687.

54. *Id.* at Annex 1901.2 (2), 32 I.L.M. at 687.

55. *Id.*

56. *Id.* at Annex 1901.2 (3), 32 I.L.M. at 687.

57. *Id.* at Annex 1901.2 (2) and (3), 32 I.L.M. at 687.

58. *Id.* at Art. 1904.14, 32 I.L.M. at 684.

59. *Id.*

60. Horlick and DeBusk, *Dispute Resolution under NAFTA: Building on the U.S.-Canada FTA, GATT and ICSID*, 27 JOURNAL OF WORLD TRADE 21, 29 (Feb. 1993).

61. Interested parties other than the governments of the United States, Canada and Mexico may not request Extraordinary Challenge Committee review. NAFTA, Art. 1904.13, 32 I.L.M. at 683.

62. Under the U.S.-Canada Free Trade Agreement, three Extraordinary Challenge Committees were convened. See *Fresh, Chilled and Frozen Pork from Canada*, ECC-91-1904-01USA (U.S.-Canada FTA Extraordinary Challenge Committee Proceeding June 14, 1991); *Live Swine from Canada*, ECC-93-1904-01USA (U.S.-Canada FTA Extraordinary Challenge Committee Proceeding April 8, 1993); *Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA (U.S.-Canada FTA Extraordinary Challenge Committee Proceeding Aug. 3, 1994). Each of these challenges was initiated by the United States and each ECC upheld the underlying panel decision.

- (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- (ii) the panel seriously departed from a fundamental rule of procedure, or
- (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and
- (b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process.⁶³

ECCs are comprised of 3 judges or former judges selected from a 15 person roster.⁶⁴ The parties involved in the dispute must establish the ECC within 15 days of the request for the review,⁶⁵ and ECC proceedings must be completed within 90 days of the establishment of the Committee.⁶⁶

B. THE WTO AGREEMENT STRIVES FOR MUTUAL SETTLEMENTS OF DISPUTES, WITH PANELS TO BE CONVENED IF CONSULTATION OR MEDIATION FAILS

Dispute settlement under the WTO Agreement consists of several levels. Article 2 of Annex 2 creates the Dispute Settlement Body (DSB) as the committee charged with administering the rules provided in the Understanding on Dispute Settlement.⁶⁷ The DSB is authorized "to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."⁶⁸

1. Initiation of Dispute Settlement Proceedings

Unlike NAFTA, only representatives of member countries initiate and participate in the WTO Agreement dispute settlement process. Thus, in order for an interested party (such as a company) in the underlying dispute to pursue WTO dispute settlement, that party must convince its government to commence WTO proceedings on its behalf. This obstacle raises several concerns for the affected party: first, a government may be unwilling to pursue WTO dispute settlement if its domestic law also is inconsistent with the WTO Agreement; second, a government may be unwilling to enter into WTO dispute settlement for political reasons unrelated to the case in dispute; third, the interested party is likely to have difficulty controlling and monitoring the proceedings since the proceedings have been closed to non-government representatives; and fourth, the government may

63. NAFTA, Art. 1904.13, 32 I.L.M. at 683. *See supra* note 32. NAFTA clarified that failure to apply the appropriate standard of review is an example of how a panel could manifestly exceed its powers, authority or jurisdiction.

64. NAFTA, Annex 1904.13 (1), 32 I.L.M. at 688. "Each Party shall name five persons to this Roster. Each involved Party shall select one member from this roster and the involved Parties shall decide by lot which of them shall select the third member from the roster." *Id.*

65. *Id.*

66. *Id.* at Annex 1904.13 (2), 32 I.L.M. at 688. The U.S.-Canada FTA provides only 30 days for ECC review. U.S.-Can. FTA, Annex 1904.13(2), 27 I.L.M. at 395.

67. Annex 2, Art. 2.1, Final Act at 353, House Document at 1654.

68. *Id.*

enter into a settlement that does not benefit the interested party.

2. Consultation

The first layer of dispute settlement under the WTO Agreement is consultation whereby parties to the dispute discuss a mutual settlement of the complaint. Article 4.2 of Annex 2 provides that

[e]ach Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former.⁶⁹

Upon receipt of a written request for consultations, the WTO member to which the request is made must reply to the request within 10 days of receipt and enter into consultations within thirty days of receipt of the request.⁷⁰ If a member fails to respond to the request for consultations, or if consultations fail to resolve the dispute within 60 days of receipt of the request, the complaining party may request the establishment of a panel.⁷¹ The complaining member may request a panel review prior to the expiration of the 60 day period if the parties to the dispute agree that the consultations have failed.⁷²

3. Establishment of a Panel

The next phase in the WTO Agreement dispute settlement process is the establishment of a panel. Panels are charged with assisting the DSB in making recommendations or issuing rulings.⁷³ Panel review is confidential, and interested parties may only appear before the panel when invited to do so.⁷⁴ While the confidential nature of panel review may encourage a negotiated settlement of the dispute, which is the preferred means of

69. *Id.* at Art. 4.2, Final Act at 356, House Document at 1657.

70. *Id.* at Art. 4.3, Final Act at 356, House Document at 1657.

71. *Id.* at Arts. 4.3, 4.7, Final Act at 356, House Document at 1657. "In cases of urgency, including those which concern perishable goods, Members shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the complaining party may request the establishment of a panel." *Id.* at Art. 8, Final Act at 358-59, House Document at 1659-60.

72. *Id.* at Art. 4.7, Final Act at 356, House Document at 1657. During consultations, WTO members may resort to good offices, conciliation or mediation as an alternate means of resolving the dispute. *Id.* at Art. 5, Final Act at 357, House Document at 1658. Good offices, conciliation and mediation are voluntary and may be terminated without prejudice to the rights of any party to pursue further proceedings. *Id.* at Arts. 5.1, 5.2, Final Act at 357, House Document at 1658. Good offices, conciliation and mediation may continue after panel proceedings have begun. *Id.* at Art. 5.5, Final Act at 357, House Document at 1658.

73. *Id.* at Art. 11, Final Act at 360, House Document at 1661.

74. *Id.* at Appendix 3, Final Act at 375, House Document at 1676.

75. *Id.* at Art. 3.7, Final Act at 354-55, House Document at 1655-56 ("A solution mutually acceptable to the parties to the dispute . . . is clearly to be preferred").

dispute settlement under the WTO,⁷⁵ this lack of transparency has raised concerns about the legitimacy of a system that restricts public scrutiny of the proceedings. The United States is pressuring other members of the WTO to make WTO dispute resolution more transparent.⁷⁶ By contrast, NAFTA Chapter 19 provides for a higher degree of transparency by allowing, for example, public access to the non-proprietary case files.⁷⁷

4. Panel Selection

To facilitate the panel selection process, the Secretariat is directed to maintain an "indicative list" of qualified individuals.⁷⁸ This list includes the roster created under the GATT as well as names periodically provided by members.⁷⁹ Upon the establishment of a panel, the Secretariat will propose nominations for the panel to the members in dispute, and members may only object to a panelist "for compelling reasons."⁸⁰ If the members can-

76. See "U.S. Calls for New GATT Rules to Make Public Most Documents," *Inside U.S. Trade*, Oct. 7, 1994, at 13; see also "U.S. Proposal to Boost GATT Transparency Garner No Support In GATT," *Inside U.S. Trade*, Sept. 23, 1994, at 17.

The U.S. effort to create greater transparency in the WTO dispute resolution process is to some extent an outgrowth of litigation. In October 1994, the Center for Auto Safety filed suit in the U.S. District Court for the District of Columbia seeking public access to panel submissions by GATT members. See *Center For Auto Safety v. USTR*, No. 94-2238 (D.D.C. filed Oct. 17, 1994). See also *Citizen Groups File New Suits Against USTR*, 11 INT'L TRADE REP (BNA) 1619 (1994). In a similar suit filed in 1992, the same court determined that unadopted GATT panel reports, which up to that time had been confidential, must be disclosed under the Freedom of Information Act unless covered by a statutory exemption. See *Public Citizen v. USTR*, 804 F. Supp. 385 (D.D.C. 1992).

U.S. legislation implementing the WTO Agreement provides that documents submitted to a panel or appellate body shall be made available to the public promptly except for proprietary or confidential information. The Uruguay Round Agreements Act, Pub. L. No. 103-465, sec. 127(c), 108 Stat. 4809 (1994).

77. North American Free Trade Agreement: Rules of Procedure for Article 1904 Binational Panel Review, Rule 16(2)(a), 59 Fed. Reg. 8686, 8689 (Dep't Comm. 1994) [*hereinafter* NAFTA Panel Rules].

78. Annex 2, Art. 8.4, Final Act at 359, House Document at 1660. The qualifications for panelists under the WTO Agreement dispute settlement procedures are as follows:

Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

Id. at Art. 8.1, Final Act at 358, House Document at 1659.

79. *Id.* at Art. 8.4, Final Act at 359, House Document at 1660. See also Dispute Settlement Procedures, GATT BISD 31S/9 (Nov. 30, 1984).

80. Annex 2, Art. 8.6, Final Act at 359, House Document at 1660.

81. *Id.* at Art. 8.7, Final Act at 359, House Document at 1660. Under the GATT, panelists typically were chosen by mutual agreement of the members involved in the dispute rather than from the roster.

not agree on the panelists within 20 days of the establishment of the panel, the Director-General will appoint the panelists after consultations with the members involved.⁸¹

In contrast with the NAFTA, WTO panelists may not be citizens of members whose governments are parties to the dispute, unless the parties agree.⁸² Although this provision most likely was added to ensure the impartiality of panel decisions, the experience under the U.S.-Canada FTA generally demonstrates that panels comprised of nationals of the parties in dispute can render impartial decisions.⁸³

Finally, unlike NAFTA Chapter 19, which creates a preference for lawyers as panelists, the WTO Agreement has no preference for lawyers.⁸⁴ Annex 2 has language calling for diversity among panel members: "[p]anel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."⁸⁵ However, that goal is significantly qualified by Article 8.1⁸⁶ favoring candidates with experience in international trade law or policy, previous GATT panels, or the WTO or predecessor agreements.⁸⁷ Again, since NAFTA dispute settlement replaces judicial review, the preference for judges and lawyers seems logical; however, since the WTO Agreement calls for an examination of the rights and obligations of the members, experience with the WTO Agreement, previous panels or predecessor agreements seem to be appropriate qualifications.

5. *Deadlines for Panel Review*

The panel review portion of the WTO Agreement dispute settlement process generally should not exceed 6 months but in no case may it exceed 9 months.⁸⁸ The general working procedures for panels provides for written submissions by the WTO members, rebuttal submissions, and panel meetings with the WTO members.⁸⁹ Of particular note, the panel process includes two interim review periods whereby the WTO members can (1) review and comment on the factual and argument portions of the panel report, and (2) review the panel's findings and conclusions and request that the panel reconsider its findings and conclusions before issuing its final report.⁹⁰

82. *Id.* at Art. 8.3, Final Act at 358, House Document at 1659.

83. Twenty-six panel reviews have been completed under Chapter 19 of the U.S.-Canada FTA. Of those, eighteen decisions were unanimous. Of the three ECC decisions which have been rendered, two were unanimous. See NAFTA Secretariat, U.S. Dept. of Commerce, *Status Report: Completed NAFTA and FTA Dispute Settlement Panel Reviews* (January 1995).

84. In this respect, the WTO is similar to NAFTA Chapter 20, which also has no preference for lawyers as panelists. NAFTA, Art. 2009, 32 I.L.M. at 695-96.

85. Annex 2, Art. 8.2, Final Act at 358, House Document at 1659.

86. See *supra* note 79.

87. At present, there are reportedly no women on the GATT roster. In practice, most GATT panelists have been ex-GATT diplomats or officials. The WTO Agreement's objective of selecting panelists with diverse backgrounds and a wide spectrum of experience could promote public acceptance of WTO panel decisions.

88. Annex 2, Art. 12.8, 12.9, Final Act at 361, House Document at 1662. In cases of urgency, the panel should issue its final ruling within 3 months of the establishment of the panel.

89. *Id.* at Appendix 3.12, Final Act at 376, House Document at 1677.

90. *Id.* at Arts. 15.1, 15.2, Final Act at 363, House Document at 1664. Cf. with NAFTA, Arts. 2016.2-2016.3, 32 I.L.M. at 697.

The interim review process marks an interesting difference between WTO and NAFTA dispute settlement. WTO dispute settlement aims for the *mutual* settlement of the dispute at every level of the dispute settlement process.⁹¹ The interim review period provides the last opportunity to settle the dispute before a final report is circulated among the members. Under NAFTA, although the parties to the dispute may terminate the review prior to conclusion, they do not have the opportunity to do so after having seen the panel's determination.⁹²

6. Panel Appeals

If the parties fail to reach a mutual settlement following this interim stage, the panel will issue its final report to the DSB.⁹³ Final panel decisions are circulated among the members of the WTO,⁹⁴ and the report will be adopted "unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report."⁹⁵

Panel decisions may be appealed to the Appellate Body (AB).⁹⁶ The AB consists of seven people, each of whom serves a four year term, and three members of the AB serve on each case.⁹⁷ AB proceedings generally shall not exceed 60 days, but in no case shall they exceed 90 days from the date that a party notifies the DSB of its intent to appeal.⁹⁸

Appeals to the AB are "limited to issues of law covered in the panel report and legal interpretations developed by the panel,"⁹⁹ and the AB may uphold, modify or reverse the legal findings and conclusions of the panel.¹⁰⁰ Like panel determinations, AB decisions will be adopted unless the DSB decides by consensus not to adopt the AB report.¹⁰¹

The maximum time period for WTO dispute settlement from the request for consultations to the DSB meeting at which a panel report will be considered is 11 months if the panel report is not appealed,¹⁰² or 14 months if the panel report is appealed.¹⁰³ These timelimits

91. See Annex 2, Art. 3.7, Final Act at 354-55, House Document at 1655-56 ("A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred.")

92. NAFTA Panel Rules at 71(1) - (2), 59 Fed. Reg. at 8697.

93. Annex 2, Art. 12.7, Final Act at 361, House Document at 1662.

94. *Id.* at Art. 16.1, Final Act at 363, House Document at 1664. Members may submit objections in writing at least 10 days prior to the DSB meeting at which the report will be considered. *Id.* at Art. 16.2, Final Act at 363, House Document at 1664.

95. *Id.* at Art. 16.4, Final Act at 363, House Document at 1664.

96. *Id.* at Art. 17.1, Final Act at 364, House Document at 1665.

97. *Id.* at Arts. 17.1, 17.2, Final Act at 364, House Document at 1665. Each member may be reappointed once. *Id.* at Art. 17.2, Final Act at 364, House Document at 1665.

98. *Id.* at Art. 17.5, Final Act at 364, House Document at 1665.

99. *Id.* at Art. 17.6, Final Act at 364, House Document at 1665.

100. *Id.* at Art. 17.13, Final Act at 365, House Document at 1666.

101. *Id.* at Arts. 17.11, 17.14, Final Act at 365, House Document at 1666.

102. Sixty days for consultations, *id.* at Art. 4.7, Final Act at 356, House Document at 1657, plus 9 months from the date of establishment of the panel to the date the DSB considers the report, *id.* at Art. 20, Final Act at 366, House Document at 1667.

103. Sixty days for consultations, *id.* at Art. 4.7, Final Act at 356, House Document at 1657, plus 12 months from the date of establishment of the panel to the date the DSB considers the report, *id.* at Art. 20, Final Act at 366, House Document at 1667.

are slightly longer than under the NAFTA, which allows just over 10 months to complete panel review, if there is no ECC appeal,¹⁰⁴ and 13.5 months if there is an ECC appeal.¹⁰⁵

To summarize, NAFTA Chapter 19 and WTO Agreement dispute resolution have many features in common, including procedures designed to select impartial panelists, tight deadlines and a process for challenging panel decisions. However, they also differ significantly in that NAFTA Chapter 19 provides for resolution of AD/CVD disputes following an adjudicative, legal process allowing for full participation by interested parties and governments and open proceedings whereas the WTO Agreement provides for dispute resolution with an emphasis on settlement by the concerned governments, limited opportunities for non-government participation and generally closed proceedings.

III. Remedies

In deciding whether to pursue an AD/CVD dispute through the NAFTA or the WTO Agreement, a key factor to consider is the remedy available in each forum.¹⁰⁶ The NAFTA and the WTO Agreement provide different remedies, and a comparison of the two suggests that NAFTA is the more practical route to the remedy most often sought by companies facing the imposition of antidumping or countervailing duties — the removal and repayment of duties. The WTO Agreement may be the best choice for the resolution of recurring, global and potentially long-term problems, such as the improper application of a particular WTO provision that could affect several products subject to AD/CVD proceedings in different WTO member countries.

A. NAFTA PANELS MAY UPHOLD OR REMAND AGENCY DETERMINATIONS

NAFTA Article 1904 provides: "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."¹⁰⁷ Although it is clear that a panel can uphold an agency determination, it is not as evident that, in effect, the authority to remand for action not inconsistent with the panel's decision may be used to reverse an agency decision.

For example, if a NAFTA panel were to determine that a U.S. International Trade Commission causation determination was not supported by substantial evidence on the record, the remand, if properly crafted, could force the ITC to reverse its original determination.¹⁰⁸ Panel decisions are binding on the parties involved.¹⁰⁹

104. Three hundred fifteen days from the date of request for panel review to the panel's final determination. NAFTA, Art. 1904.14, 32 I.L.M. at 684.

105. Three hundred fifteen days from the date of request for panel review to the panels' final determination, *id.*, plus 90 days for ECC review, *id.* at Annex 1904.13(2), 32 I.L.M. at 688.

106. Other key factors include the likelihood of success, which depends on the merits of the case, and the cost. NAFTA dispute resolution is probably more expensive than WTO Agreement dispute resolution because it is more adjudicative in nature.

107. NAFTA, Art. 1904.8, 32 I.L.M. at 683.

108. *See, e.g., Softwood Lumber From Canada*, USITC Pub. 2753 at 1, Inv. No. 701-TA-312 (2d remand) (Mar. 1994) ("In our view, the panel's second decision requires us to conclude that the information we have collected on the issue of the effects of the price of imports on prices in the U.S. softwood lumber market does not demonstrate whether subsidized Canadian imports are having any injurious effects on U.S. lumber prices") (emphasis in original document).

109. NAFTA, Art. 1904.9, 32 I.L.M. at 683.

B. WTO DISPUTE SETTLEMENT SEEKS COMPLIANCE WITH THE AGREEMENT

The remedies available under the WTO Agreement are more amorphous than those under NAFTA Chapter 19. "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."¹¹⁰ A panel can only recommend changes to a WTO member's law or practice; the DSB cannot directly enforce those changes. Moreover, in a case involving an AD or CVD determination, the United States takes the position that the DSB cannot force the member to remove or refund the unjustifiable duty.

The remedy for noncompliance with a panel determination is indirect. Where a party fails to bring its decision into compliance with the WTO Agreement, the members involved may negotiate compensation for the nullification or impairment of the benefits accruing to it.¹¹¹ If these negotiations fail, the injured member may request authorization from the DSB to suspend the application of concessions to the noncomplying member.¹¹²

This compensation/suspension scheme raises several concerns for the company facing antidumping or countervailing duties. Concerning compensation, the company is unlikely to benefit from any compensation that might be negotiated since the compensation offered by the offending government is likely to be in a different industry. For example, if the DSB found that AD duties were illegally applied to desks, the offending WTO member could offer a tariff reduction on steam engines as compensation.

Concerning suspension of concessions, the suspension of concessions may not benefit the company's industry. As a guiding principle, the WTO Agreement recommends that the suspension of concessions apply to the same sector as that involved in the dispute.¹¹³ However, with respect to goods, the term "sector" is defined as "all goods."¹¹⁴ Therefore, if the United States won a ruling that a WTO member should not have imposed AD duties on desks and the WTO member did not provide compensation, the U.S. could raise tariffs on screwdrivers exported to the U.S. by that WTO member.¹¹⁵ If compensation or suspension of concessions is pursued, the company still may be subject to the AD or CVD order from which it seeks relief.

In comparison to NAFTA remedies, the WTO Agreement remedies may appear hollow to a company seeking relief from an AD or CVD order. Because of the direct and precise remedies available, NAFTA dispute settlement is better suited to provide the more practical and tangible remedy most often sought, the elimination of duties.

110. Annex 2, Art. 19.1, Final Act at 365, House Document at 1666 (footnotes omitted).

111. *Id.* at Art. 22, Final Act at 367-70, House Document at 1668-71.

112. *Id.*

113. *Id.* at Art. 22.3(a), Final Act at 368, House Document at 1669.

114. *Id.* at Art. 22.3(f), Final Act at 368, House Document at 1669.

115. The "Chicken War" of the early 1960's between the United States and the European Communities is a fitting example of how retaliation strikes different industries. See James Bovard, *The Fair Trade Fraud* 231 (1991). In 1963, in retaliation for an EC tariff on imports of American poultry, the U.S. government imposed duties on trucks, brandies, starches and dextrine imported from the European Communities but not on poultry, which the EC did not export to the U.S. The U.S. poultry industry, therefore, obtained no direct relief.

IV. Conclusion

Both the NAFTA and the WTO Agreement create improved mechanisms for companies seeking relief from the ever increasing number of AD and CVD cases. NAFTA does not contain substantive rules governing AD and CVD determinations; rather, it replaces domestic judicial review. By contrast, the WTO Agreement contains substantive AD and CVD rules and establishes a process for determining whether a WTO member is in compliance with these rules.

NAFTA and the WTO Agreement have similar selection processes, tight deadlines and a means for challenging panel decisions. However, NAFTA Chapter 19 provides an open adjudicative process whereas the WTO Agreement emphasizes a process of conciliation and mediation with limited opportunities for non-government participation.

Concerning remedies, the WTO Agreement calls for a member to come into compliance with the WTO Agreement, and failing that, provides for compensation or suspension of benefits. In contrast, a NAFTA panel decision can result in the revocation of an AD/CVD order and the refund of duties.
