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Mechanisms to Resolve Technical Agricultural Trade Disputes between Canada and the United States

Background and Purpose:

The vast majority of agricultural trade between Canada and the United States flows unfettered within the framework of rules established under the NAFTA and the WTO. However, there are a limited number of incidents where trade disputes arise. One example was the detection of the 'potato wart' virus in a field in Prince Edward Island (PEI) in the fall of 2000. This discovery resulted in phytosanitary restrictions imposed by the United States on imports of potatoes from PEI to prevent the spread of the virus. A disagreement arose between Canadian and U.S. regulatory officials as to the appropriateness of the control measures applied by the United States. A resolution was achieved in the spring of 2001 through extensive consultations.

In the wake of that case, Canadian provinces and U.S. states acting through the Provincial/State Advisory Group (PSAG) asked their respective federal governments to consider jointly whether there is need for a better dispute resolution mechanism to resolve technical agricultural disputes between the two parties.

The purpose of this paper is to briefly describe the existing mechanisms that are used, or are available, to resolve technical trade disputes between Canada and the United States. Part of this survey will also refer to the means by which potential disputes are avoided, recognizing that an important component of a dispute resolution process is the avenues by which potential trade problems are settled before they become major issues.

The mechanisms discussed in this paper, whether government or industry-led, are premised on the same principles of dispute avoidance and informal resolution and thereby follow a similar process: dialogue and information-sharing with the view to prevention and early resolution; informal settlement procedures; and finally, if necessary, formal dispute settlement mechanisms

The paper is organized into six sections: **A) Bilateral Mechanisms; B) Regional Mechanisms; C) Multilateral Mechanisms; D) Industry-Led Mechanisms; E) Other Mechanisms for Commercial Disputes; and F) Conclusion.**

A. Bilateral Mechanisms:

1) Informal Exchanges

Informal discussions and ongoing exchanges between Canadian and U.S. federal officials at all levels are a key aspect of the bilateral relationship. In fact, informal exchanges are the most important and most often utilized means to manage bilateral issues. Agriculture and trade officials are in constant contact with each other in informal, ad-hoc ways. Officials routinely discuss specific issues on an ad-hoc basis, but usually need to meet or speak more formally in response to a particular >hot= issue or event. Moreover, they frequently exchange e-mails, phone calls and other forms of communication at the working-level. Such exchanges are an essential part of managing bilateral agricultural trade issues. Senior-level officials do not meet or speak as frequently, but do contact each other as necessitated by events.

A recent example of how informal exchanges can help resolve problems in the early stage of their development is the swede midge issue. An elaboration is provided in an annex to this report.

2) 1998 Record of Understanding: Canada-U.S. Action Plan Regarding Areas of Agricultural Trade

The U.S.-Canada Record of Understanding (ROU) on Agricultural Trade signed on December 4, 1998 established an ongoing process to improve the management of bilateral agricultural trade relations by establishing a comprehensive early-warning and consultation process to resolve problems at an early stage in their development.

Consultative Committee on Agriculture (CCA)

The CCA was established as the primary means to implement the ROU. The CCA=s main objectives are to:

1. Provide a high-level forum to strengthen agricultural trade relations between Canada and the United States through cooperation and coordination.
2. Facilitate discussion and cooperation on matters related to agriculture between the two countries including, but not limited to: agricultural trade and market access; sanitary and phytosanitary (SPS) issues; and cooperation in areas of mutual interest in agriculture.

The CCA usually meets twice a year, alternating between Canada and the United States. The CCA Co-Chairs are senior level officials from the Canadian and U.S. agriculture and trade departments. Topics for discussion typically run the gamut of Canada-U.S. agricultural trade issues, from longstanding concerns to the latest

topical points of contention, and cover economic, policy and regulatory issues that affect each country's trade interests.

Provincial/State Advisory Group (PSAG)

The CCA also created the PSAG under its rubric, although it operates at arms-length from the CCA. The PSAG provides a forum where producers and exporters, through their provincial and state governments, can raise bilateral agricultural trade issues. PSAG exchanges act as an opportunity to enhance cooperation and coordination in areas of common concern. The PSAG meets about twice a year, usually at different intervals than the CCA and refers matters as appropriate to the CCA for consideration.

Quarterly Grains Consultations

Another important institution that emanates from the ROU is the Quarterly Grains Consultations normally held four times per year between Canadian and U.S. officials. Information is exchanged on grain market conditions and comprehensive discussions are held on the global market situation including bilateral grain flows, the outlook for trade internationally, and other programs and policies that affect production and trade.

3) Ministerial/Secretarial Level Discussions

As indicated in the 1998 Record of Understanding (ROU), Ministerial/Secretarial and Deputy Ministerial/Under Secretarial level discussions between both Trade and Agriculture Ministries/Departments from Canada and the U.S. occur with regular frequency. These discussions may take the form of a formal bilateral meeting, an issue-specific telephone discussion as required, or on the margins of one of the many plurilateral or multilateral fora in which Canada and the United States participate.

B. Regional Mechanisms

1) NAFTA Article 723: Technical Consultations

Under NAFTA Article 723, Parties can request consultations with another Party regarding any matter covered under the SPS Section of Chapter Seven. At the same time, Article 723 encourages Parties to use offices of relevant international and North American standardizing organizations for advice and assistance on SPS matters within their respective mandates. In fact, once consultations are requested on an SPS issue, the Committee on SPS Measures may facilitate the consultations (if it does not consider the concern itself) by referring the matter for non-binding technical advice or recommendations to a working group, including an ad-hoc working group, or to another forum. The North American Plant Protection Organization is recognized as a forum available to provide technical assistance in this regard (see B3). The Committee is also obligated to consider any referred matter as expeditiously as possible (particularly regarding perishable goods)

and to promptly forward any technical advice or recommendations that it develops or receives. Each Party involved provides a written response to the Committee concerning the technical advice or recommendations within such time as is requested. A further requirement in Article 723 is that the Party asserting that an SPS measure applied by another Party is inconsistent with the NAFTA has the burden of establishing the inconsistency.

2) NAFTA Dispute Settlement (Chapter Twenty)

With certain limited exceptions, the dispute settlement provisions in Chapter Twenty can be used for disputes regarding the interpretation or application of any part of the NAFTA, including agriculture and SPS measures. The first step in dispute settlement is consultations on the disputed matter. By agreement of the Parties involved consultations pursuant to Article 723 may be considered consultations under Chapter Twenty. Otherwise consultations take place under Article 2006. A Party may move to the next step in dispute settlement by requesting a meeting of the Free Trade Commission (cabinet level representatives of the Parties) following 30 days from the request for consultations where the consultations are bilateral, following 45 days for trilateral consultations, and following 15 days for a matter regarding perishable agricultural goods. The Commission is required to convene within 10 days. If the Commission fails to resolve the issue within 30 days of convening, a consulting Party may request the establishment of an arbitral panel. The panel considers written submissions and holds hearings in order to make findings, determinations and recommendations regarding the matter at hand. To this end, the panel may (depending on the circumstances) seek information and technical advice from experts or request a report from a scientific review board on a factual issue concerning environmental, health, safety or other scientific matters. The time allowed for the entire dispute settlement process, from the request for consultations to the final report of the arbitral panel, is between seven and a half and nine and a half months depending on whether a report of a scientific review board is requested. However, the disputing Parties can agree to extend these deadlines, and as a matter of practice many steps in dispute settlement take longer than the allotted time. Following adoption of a Panel report by the Free Trade Commission, additional time might be required to implement the report, e.g., if its implementation requires major policy, legal or regulatory changes.

Since 1994, 24 NAFTA Chapter Twenty cases covering the range of commercial sectors have been launched. Three of these cases were carried through to a final panel report. Of the 24 cases, 8 involved agricultural products, and one of the 8 produced a final panel report.

3) North American Plant Protection Organization (NAPPO)

NAPPO is a regional plant protection organization of the International Plant Protection Convention (IPPC-discussed below), and it coordinates the efforts among Canada, the United States and Mexico to protect their plant resources from the entry, establishment and spread of regulated plant pests, while facilitating intra/interregional trade. NAPPO focuses on the development of regional phytosanitary standards, which can be used by member countries to resolve disputes. These standards may eventually be submitted by NAPPO to

the Secretariat of the IPPC as a new international standard for phytosanitary measures (ISPM) or for the review or revision of an existing ISPM. It is important to note that NAPPO is not constituted as a dispute settlement body. Rather, its standards are developed as recommendations to be implemented by member countries through internal regulatory and legislative processes.

NAPPO, along with the International Plant Protection Convention (see C3) are recognized by the NAFTA Parties as the prime organizations responsible for the development of North American phytosanitary standards. Canada, the United States and Mexico have agreed that NAPPO should be available upon request to provide technical assistance to the NAFTA SPS Committee in order to assist the Committee in dispute resolution. To this end, it was agreed that:

i) This technical assistance could include, for example: the development of regional standards; the establishment of panels to provide recommendations to the NAFTA SPS Committee on particular issues; providing the names of international experts who might contribute to the resolution of the dispute; the review of Pest Risk Assessments; and other tasks which may be agreed upon by the two parties.

ii) NAPPO will continue to play a key role, within the region and internationally, in the development and uniform application of phytosanitary measures for the facilitation of global trade.

iii) NAPPO will be prepared to consider NAFTA requests for items to be included on the NAPPO agenda, either at their work planning sessions at the annual general meeting, or via meetings of the Executive Committee.

iv) The NAPPO annual report and work plan will be available to the NAFTA SPS Committee upon request or via the NAPPO homepage.

NAPPO has been involved on two occasions in assisting the NAFTA SPS Committee to successfully resolve bilateral disputes on phytosanitary measures.

However, NAPPO is currently considering an internal mechanism to encourage identification and timely resolution of bilateral irritants related to phytosanitary measures. This regional mechanism would complement the existing arrangement with the NAFTA SPS Committee and would be consistent with the arrangement between the WTO SPS Committee and the IPPC. Such a mechanism would likely take the shape of a non-binding arbitration process with the emphasis on providing technical and scientific advice and assistance.

C. Multilateral Mechanisms

1) WTO SPS Committee

Members are increasingly using the WTO SPS Committee as a mechanism to raise bilateral issues. Both the United States and Canada have made extensive use of this Committee to raise bilateral issues with third countries. While neither has used it to discuss Canada/U.S. SPS issues, it remains a mechanism available for that purpose.

Additionally, Article 12.2 of the WTO Agreement on the Application of SPS Measures provides that the “Committee shall encourage and facilitate ad hoc consultations or negotiations among Members on specific SPS measures.” As such, the Article empowers the SPS Committee to serve in the role of informal facilitator, but does not establish any requirements for this process. It provides a flexible and informal mechanism for resolving disagreements, which does not in any way seek to duplicate the formal dispute system established for the WTO Agreements as a whole (and described further below).

Any member is entitled to request the Committee’s assistance in the resolution of a disagreement. The Committee would only facilitate consultations or negotiations upon the mutual agreement and consent of both parties.

While this provision exists, there have been few instances since the WTO Agreements came into force that this consultative mechanism has been used.

2) WTO Dispute Settlement

The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) emphasizes that prompt settlement of trade disputes is essential if the WTO is to function effectively. It sets out in detail the procedures and the timetable to be followed in dispute settlement.

The Dispute Settlement Body (DSB), which is made up of the entire WTO membership, oversees WTO dispute settlement.

Although the DSU's panel and appellate procedures are adversarial, like in a court procedure, the preferred solution is for the WTO Members concerned to arrive at a mutually acceptable solution to their dispute. The first stage of dispute settlement is therefore consultations between the governments concerned, and even when the case has progressed to other stages a negotiated solution is always possible.

Good offices, conciliation or mediation may also be requested at any time, although in practice this option has not been used.

Following consultations, the next stage in WTO dispute settlement is the panel procedure. The panel process involves written submissions and oral hearings and results in a final report containing the panel's findings of fact and law. The panel may consult experts and, if a party to a dispute raises scientific or technical matters, may request an advisory report from an expert review group.

The parties to a dispute may appeal a panel's report and regularly do. Appeals must be based on points of law such as the interpretation of a WTO agreement & they cannot re-examine existing evidence or examine new evidence. Each appeal is heard by three members of a permanent seven-member Appellate Body that is set up by the DSB and broadly represents the range of WTO membership. The appeal can uphold, modify or reverse the panel's legal findings and conclusions.

If a case runs its full course, it should normally take no more than a year for the panel report and 15 months if the panel report is appealed. There is some flexibility in the time limits. For instance, if a case is considered urgent (e.g. if perishable goods are involved), the panel is encouraged to deliver its report in three rather than six months.

Panel and Appellate Body reports are automatically adopted by the Dispute Settlement Body unless there is a consensus to reject a report & any country wanting to block adoption of a report has to persuade all other WTO members (including its adversary in the case) to share its view. After the WTO DSB adopts a panel report and any related Appellate Body report, a Member found to have a practice, policy, law or regulation that is inconsistent with a WTO agreement has a "reasonable period of time" to bring the measure into conformity with the agreement. It sometimes takes as much as 12-15 months, or even longer, before an offending measure is effectively brought into WTO conformity.

Since the WTO came into effect in 1995, 273 disputes covering the range of commercial sectors have been initiated through the DSB, an average of 34 cases per year. Of the 273 disputes, 90, or about one-third, dealt directly with agricultural products.

3) International Plant Protection Convention (IPPC)

The IPPC provides guidance, support, and information to governments concerning phytosanitary measures and facilitates the exchange of information between governments with respect to regulatory requirements and pest status. In the event that governments question or challenge the requirements of others, the IPPC provides a neutral forum for technical issues and has provision for non-binding dispute settlement.

Dispute settlement under the IPPC requires that countries first consult bilaterally with the aim of resolving the problem. The Secretariat can provide technical support and facilitate the exchange of views and information in this process. If further action is deemed necessary, the disputing parties can request that the Director-General of the Food and Agriculture Organization (FAO) form an expert committee to review the situation and recommend a course of action.

Each disputing party nominates one expert to the committee and the IPPC provides three independent experts. One of these independent experts becomes the chair of the committee. The committee reviews the issue and prepares a report with recommendations for resolution. If the expert committee does not reach consensus, the Chair will report on the points of agreement and disagreement. The final report goes to the Director-General of FAO, who then forwards it to the disputing parties for consideration in resolving the dispute.

Although the dispute settlement process in the IPPC is non-binding, the process and results can be expected to carry significant weight if the issue is subsequently taken to the WTO under the SPS Agreement, particularly if the issue is related to the use of international standards under the IPPC. The IPPC provides technical background to the WTO and nominates experts for WTO panels evaluating technical issues in that forum.

The IPPC dispute settlement procedure is relatively new and therefore has not been used frequently, but there are a number of cases where intervention by the IPPC Secretariat to provide information and assistance has avoided a more formal procedure.

4) Office des International Epizooties (OIE)

The OIE is currently composed of 162 member nations, each of which is represented by a delegate who, in most cases, is the chief veterinary officer of that country. The WTO has recognized the OIE as the international forum for setting animal health standards, reporting global animal situations and disease status, and presenting guidelines and recommendations on sanitary measures relating to animal health.

The OIE facilitates intergovernmental cooperation to prevent the spread of contagious

diseases in animals by sharing scientific research among its members. The major functions of the OIE are to collect and disseminate information on the distribution and occurrence of animal diseases and to ensure that scientifically justified standards govern international trade in animals and animal products. The OIE aims to achieve this through the development and revision of international standards for diagnostic tests, vaccines, and the safe international trade of animals and animal products. Through its Regional Commissions, the OIE also attempts to address animal health issues that are of regional concern. The United States, Canada, Mexico and other countries in the Western Hemisphere participate in the OIE Regional Commission for the Americas.

The OIE specialized commissions and working groups undertake the analysis, development and preparation of draft standards that are then circulated to member countries for review and comment. Member country comments are adopted if such comments are based on sound science. The standards become recommendations, which countries can adopt when trading in animal and animal products.

Although the OIE historically has not been involved in mediating trade disputes, it has now established a voluntary in-house mechanism for assisting Member Countries to resolve differences. Upon request by member countries, the OIE's Director General will assemble a panel of technical experts to mediate disputes and if possible, resolve the issues at a technical level.

D. Industry-Led Mechanisms

1) Canada-US Potato Committee

The Committee includes industry representatives drawn from the two major industry organizations: the Canadian Horticultural Council and the National Potato Council in the United States. The main objective of the Committee is to facilitate bilateral potato trade by managing bilateral policy issues or irritants through information sharing, cooperation and dialogue. The Committee meets once a year to discuss cross-border issues related to potato trade, including: Canada and U.S. shipping requirements; food safety issues; phytosanitary issues; pesticide registration harmonization; grade and standard harmonization; and trade policy issues. No formal dispute resolution mechanism has been developed.

2) Tomato Trade Working Group

The Group was established as an industry-led initiative to act as a forum to discuss tomato-related trade issues before they become serious trade problems. The Group came into being in January 2002 following the separate filing of anti-dumping petitions on bilateral tomato trade by Canadian and U.S. industry in their respective countries in 2001, and has met three times since. The Group will determine future scheduled meetings. One of the key objectives of the Group is to work at the technical and commercial level to resolve disputes in order to prevent costly and lengthy litigation. Mexican industry was also invited to participate in the Group to reflect more accurately the trilateral realities of the North American tomato trade. Government representatives from the three countries have been invited to participate in the Group and provide policy advice.

The Group has worked on a draft Dispute Resolution System that is designed to provide Group members with an alternative to trade litigation. At the time of writing, this "System" was still being considered by Group members and had not been finalized or approved. The System is predicated on prevention and early resolution of disputes and is intended to prevent litigation and enable tomato trade to continue uninterrupted while respecting the business relationships and confidentiality of the parties. The System is composed of five stages. The first stage is *Preventive Measures* whereby self-policing, communication and information dissemination is stressed. Stage 2, *Informal Complaints*, consists of parties engaging in unassisted discussions and fact-sharing with the view to resolving the potential dispute themselves. If a member is dissatisfied with the outcome of this stage, in Stage 3, *Formal Complaint- Mediator*, parties can file a complaint leading to the appointment of a mediator. The mediator then arranges a confidential process where the parties can discuss the specifics of the complaint as well as potential remedies. If either party is not happy with the outcome, they can then proceed to Stage 4, Arbitration. Each member country appoints one member of a three-person tribunal, with the Chair coming from the member country not involved in the dispute. Only if the member/organization does not abide by the

decision of the arbitration panel, or the member who filed the complaint is not satisfied with the decision, can the member country/organization proceed with seeking trade remedies. This last stage, Filing of a Trade Complaint, involves the normal rules and procedures under each country's trade legislation.

E. Other Mechanisms for Commercial Disputes

1) NAFTA Article 2022

This Article calls for parties to encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties in the NAFTA region. To this end, the Advisory Committee on Private Commercial Disputes was established to encourage the further development of the alternative dispute resolution regime in North America. An important component of the Advisory Committee's work is the educational aspect relating to judicial recognition and acceptance of alternative dispute resolution systems.

2) Fruit and Vegetable Dispute Resolution Corporation (DRC)

The DRC was established in 1999 pursuant to Article 707 of the NAFTA, which facilitates the creation of private commercial dispute resolution organizations for agricultural goods. The DRC is a private, non-profit organization of produce companies trading in North America dedicated to providing fair, efficient, affordable and enforceable dispute resolution services.

Under this system, firms that join the DRC adhere to a common set of trading practices and mediation and arbitration procedures. Decisions of the DRC can be registered with, and are enforceable in, the courts of the three countries. The primary incentive for participation is the commercial benefit to suppliers and customers that results from greater assurance of reputable business behaviour.

The focus of the DRC system is on prevention and early settlement. Services are provided by a combination of in-house staff and outside organizations experienced in mediating and arbitrating disputes between produce companies (e.g. Blue Book and CAMCA - the Commercial Arbitration and Mediation Center for the Americas). DRC procedures avoid litigation, enable business relationships to continue and respect the confidentiality of the parties.

Since the DRC began offering its services in mid-2000, 280 cases affecting an estimated C\$15-20 million in produce have been brought forward under its auspices. Of this figure, 255 were resolved before resorting to binding arbitration, in an average of less than 2 months after instigating DRC procedures. The remaining 25 cases that proceeded to binding arbitration were resolved in an average of 4 months, with total arbitration awards of C\$1.5 million.

F. Conclusion

The U.S. and Canadian agriculture and trade agencies have numerous informal and formal mechanisms available to consult on and resolve differences on regulatory and policy issues that impact trade. The CCA notes that there are many effective government-to-government mechanisms available to address potential trade problems before they become major issues, and, if necessary, to formally resolve disputes. The CCA also supports bilateral industry groups working together to enhance communication and cooperation to resolve differences as appropriate.

Annex: Swede Midge

In May 2002, the Canadian Food Inspection Agency (CFIA) announced that it had completed a Pest Risk Assessment and that it would implement control measures to limit the spread of swede midge, a small fly that attacks *brassica* crops such as broccoli, cauliflower, cabbage and canola. The fly was found in nine counties in Ontario and one in Quebec in 2001. Significant crop damage can occur if the flies attack crops, although midge poses no threat to human health.

The CFIA control measures were designed to address the risk posed by swede midge, prevent its spread (and protect susceptible species in other parts of Canada), as well as minimize the impact on trade. Since swede midge had been previously unreported in North America, CFIA officials travelled to Europe on a fact-finding mission to assess how the pest is handled. After this mission, CFIA held workshops for field inspectors from across Canada to provide awareness and training on how to detect symptoms of the disease. In the end, it was determined that the containment of swede midge was being adequately managed under the May 2002 control measures and no further steps were required.

Throughout the process, beginning with the drafting of the Pest Risk Assessment, CFIA was in close contact with USDA's Animal and Plant Health Inspection Service (APHIS) officials at the working level and, when needed, at the senior level. The initial Pest Risk Assessment was shared with APHIS officials and U.S. officials were invited to accompany the Canadian fact-finding mission to Europe (although the U.S. officials were not able to attend). U.S. regulatory officials and scientists also travelled to Canada to meet with their Canadian counterparts, conduct a first-hand assessment of the CFIA control measures, as well as take part in the seminar for Canadian field inspectors. As a result of the close involvement of U.S. officials in the implementation of the CFIA control management plan, in August 2002 APHIS announced that it was satisfied with the control measures undertaken in Canada and that no further import-related measures needed to be taken in the United States.