Review Essays of Dispute Settlement Mechanisms: Regional or Multilateral: Which One is Better?

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Review Essays of

Dispute Settlement Mechanisms
Regional or Multilateral: Which One is Better?


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Two important publications on dispute settlement mechanisms appeared recently. They offer two perspectives to dispute resolution: bilateral and multilateral approaches. Professor Davey published a critique of the dispute settlement case-law developed under the Canada–U.S. Free-Trade Area in *Pine & Swine*, and Professor Petersmann published an introductory book on multilateral trade dispute rules in *The GATT/WTO Dispute Settlement System*. These two works subsume the interesting issue of whether regional and world dispute settlement mechanisms can be used in parallel by the same countries without becoming a source of dichotomies, or abuse. This note will first review these two excellent books and the authors' assessments of the FTA/NAFTA and GATT/WTO dispute settlement rules. Second, it will offer a few comments on the legal compatibility and co-existence of GATT/WTO and other regional dispute settlement mechanisms between the same countries.

*The GATT/WTO Dispute Settlement System*, by Ernst-Ulrich Petersmann

Professor Petersmann's introductory book to the General Agreement on Tariffs and Trade/World Trade Organization (GATT/WTO) dispute settlement is timely, as the old GATT (GATT 1947) was terminated on 31 December 1995 while the WTO and its new binding and integrated dispute settlement mechanism came into force on 1 January 1995. It would, however, be wrong to consider that the experience and the case-law developed under GATT should now be set aside. Article 3.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that:

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* From the Legal Affairs Division of the WTO. Any opinion expressed is strictly personal and cannot be attributed to the WTO.

1 The old GATT 1947 and the new WTO Agreement co-existed for a period of 12 months. For further discussion on the transition from GATT to WTO see *Transition from GATT to WTO—A Most Pragmatic Operation*, Gabrielle Marceau, 29 J.W.T. 4, August 1995, p. 147.
"Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein."

This general principle of continuity is also mentioned in Article XVI:1 of the Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement):

"Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947."

This principle was further clarified by the Appellate Body in the Japan: Taxes on Alcoholic Beverages dispute:

"...Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947—and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT acquis. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."

Professor Petersmann's overall presentation of the GATT principles and case-law, including the brief summaries of all panel reports (adopted or not) under GATT (Annex A) and under the 1979 Tokyo Round Agreements (Annex B), is therefore most useful before undertaking any discussion on specific issues of the new WTO dispute settlement mechanism. Professor Petersmann argues in the first chapter of his book and in line with his constitutional approach to GATT law, that for a proper interpretation and application of WTO law, it is important to understand the broader context and the constitutional functions of the WTO such as its guarantees of freedom, non-discrimination and rule-of-law. In this context Professor Petersmann argues that, for instance, an increasing number of WTO provisions no longer focus one-sidedly on rights of governments and producer interests, but explicitly emphasize their task to protect the "public interest" and also "private rights", including those of "representative consumer organizations". Professor Petersmann submits that the political distinctions between "international trade law", "international environmental law", and other areas of legal regulation of international relations must not overlook the fact that world-wide trade agreements, like the GATT and the WTO Agreement, are an integral part of the international legal system and not "self-contained regimes" isolated from other areas of international law. In view of the global significance of WTO law and the WTO dispute settlement system, Chapter 1 also addresses briefly the question of whether the Uruguay Round negotiations and WTO law could serve as a model for the needed reforms of other areas of the UN system.
Chapters 2 to 4 of *The GATT/WTO Dispute Settlement System* contain a legal description of the historical evolution of the GATT dispute settlement system and practice since 1948. First, in Chapter 2 Professor Petersmann describes the different types of complaints possible under GATT, i.e. the violation, non-violation and situation complaints, the concepts of “rulings and recommendations” of panels’ conclusions, the evolution of the procedural aspects of the dispute settlement process and the often-condemned weaknesses of the GATT dispute settlement mechanism that WTO Members attempted to correct when they established the WTO/DSU mechanism. Chapters 3 and 4 are most informative on GATT panels’ practice. Professor Petersmann analyses selected GATT panel reports to confirm the application of his argued parameters of the GATT dispute settlement mechanism.

Chapter 3 focuses on eight panel reports in the topical area of trade-related environmental measures since the 1980s. This very interesting section of his book is a summing-up of his analysis developed in his previous book *International and European Trade and Environment Law after the Uruguay Round*. Professor Petersmann exploits well the interface problems of trade and environmental policies, which were hardly considered by the drafters of GATT in the 1940s, to argue that the GATT/WTO dispute settlement system has been flexible enough to respond to modern global challenges such as environmental pollution. However, the weakness of Professor Petersmann’s analysis is that it is based—and there was no other way to do so—on one set of WTO panel and Appellate Body reports (the Gasoline case) and seven GATT panel reports, three of which have never been adopted, with a fourth for which the Appellate Body has already issued serious reservations in *obiter dictum*. Indeed, it is extremely difficult for any observer to offer any legal assessment of what is the legal situation of trade-related environmental issues. A different view from that of Professor Petersmann is that the Appellate Body, in the latest Gasoline report, has reversed the traditional GATT case-law on the environmental exceptions under Article XX(g) when it stated that:

1. the very wording of the provisions of Article XX(g) must be considered and namely ‘measures related to the conservation of natural sources’ is to be distinguished from ‘measures necessary to...’;
2. the scope of the analysis under Article XX is not the aspect of the measure that violates a GATT rule but rather the measure itself;
3. the provisions of the chapeau of Article XX cannot logically refer to the same standards by which a violation of a substantive rule has been determined to have occurred; (the criteria to assess whether a violation of Article III has occurred cannot be the same to assess the compatibility with the provisions of the chapeau of Article XX);
4. concept of ‘disguised restriction’ and ‘unjustifiable discrimination’ referred to in the chapeau of Article XX are meant to exclude unforeseen, not merely inadvertent or unavoidable, discrimination.”

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In this context and taking into account the literal analysis made by the Appellate Body of the criteria of Article III.2 for the national treatment obligation in *Japan: Taxes on Alcoholic Beverages*, it seems clear that the Appellate Body is suggesting a systemic change to the interpretations and the relationship between Articles III and XX of the GATT.

Along the same constitutional analysis, Professor Petersmann offers guidelines for further legal reflection on the relationship between GATT obligations and trade restrictions imposed pursuant to multilateral environmental agreements, a most topical issue both before the Trade and Environment Committee and WTO panels.

Chapter 4 of *The GATT/WTO Dispute Settlement System* first addresses the important concepts of “measures” and “remedies” and the limitations set by Article 19 of the DSU which provides for a specific remedy:

> “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...”

One question that remains is whether this wording of Article 19 excludes any other remedy or whether it provides for a minimum requirement to be declared by panels or the Appellate Body (while additional remedies could also be “recommended”).

Then Professor Petersmann discusses fourteen “non-violation complaints” under GATT Article XXIII, in order to explain the peculiar GATT/WTO concept of “nullification or impairment” of treaty benefits as the basis of the GATT/WTO dispute settlement system. Only four of these fourteen panels where claims of non-violation were argued led to the adoption of panel reports’ findings that competitive benefits, which the complainant could reasonably expect under agreed tariff concessions, had been nullified or impaired by unforeseen trade measures that as such did not violate the GATT. For Professor Petersmann these panel reports illustrate that non-violation complaints have strengthened the function of GATT, as well as WTO, as a negotiating forum by offering additional safeguards against the impairment of GATT and GATS market access commitments through unforeseen subsequent policy measures that are not prohibited by GATT/WTO law. Then the author argues that the progressive limitation and more precise definition of this vague legal concept are signs of the increasing maturity of the GATT/WTO legal system. Professor Petersmann keeps for a future publication his assessment of whether new conditions of application of non-violation claims would be applicable under the WTO.

Chapter 5 describes the new dispute settlement system of the WTO Agreement and its far-reaching and ambitious legal improvements, such as the compulsory jurisdiction of the independent Appellate Body. Chapter 6 analyses the first practical experiences and remaining problems. In that last chapter, Professor Petersmann touches upon topical

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4 See footnote 2.
5 This concept of non-violation is parallel to the controversial concept in international State responsibility of “international liability for injurious consequences arising out of acts not prohibited by international law”.
6 General Agreement on Trade in Services.
issues such as the place of developing countries in the WTO dispute settlement process, disputes in the sector of textile products, in the services sector, in intellectual property matters, the issues of restrictive business practices and the "res judicata" of past panel reports.7

In sum Professor Petersmann's *The GATT/WTO Dispute Settlement System* is and is not an introductory book to the GATT/WTO dispute settlement. It is an introduction to very difficult and GATT/WTO-specific issues such as the concepts of measures, non-violation complaints and limited remedies. At the same time *The GATT/WTO Dispute Settlement System* is a manuscript prepared by an expert for experts, as it provides an excellent overview of all relevant issues of the dispute settlement matters under GATT and draws the parameters of any discussion on fundamental questions to be answered by the new WTO rules on dispute settlement.

*Pine & Swine*, by William Davey

The latest book by Professor Davey is also timely and most unique, as it is the only comprehensive critique of all the case reports issued pursuant to the dispute settlement procedures of the Canada-U.S. Free Trade Agreement (FTA), which were replaced, on 1 January 1994, by those of the North American Free Trade Agreement (NAFTA). In *Pine & Swine*, Professor Davey analyses every single panel report under the FTA, and draws some parallels with the GATT dispute settlement mechanism from which the FTA and the NAFTA have borrowed extensively. The FTA contained two significant innovations in trade dispute settlement: it established a general dispute settlement mechanism for trade disputes between Canada and the United States; and it permitted private parties to choose to have administrative decisions in antidumping and countervailing duty cases reviewed by binational panels—applying national laws—instead of national courts. The object of Professor Davey’s book is to evaluate the effectiveness of these two main dispute settlement mechanisms of the FTA in resolving trade disputes between Canada and the United States.

First, Professor Davey discusses the various goals of trade dispute settlement including rule-based disputes, promotion of friendly relations, trade promotion, fairness and transparency. For Professor Davey, the proper identification of the goal of the dispute settlement concerned “is not an empty academic exercise [since] if a system is designed to stress the achievement of one goal instead of another, there will be differences in the outcomes of the disputes.”

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7 Since this publication, the Appellate Body has clarified this issue in *Japan: Taxes on Alcoholic Beverages* when it stated: “Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the WTO Agreement.”
In the three chapters of Part 1 of *Pine & Swine*, Professor Davey undertakes a detailed analysis of the operation of Chapter 18 of the FTA, which was the FTA's basic dispute settlement mechanism. After a description of the dispute settlement system in Chapter 2, Chapter 3 analyses the five cases that arose under Chapter 18. For each of these cases, Professor Davey presents the relevant facts of the dispute, the legal arguments submitted to the panel, the panel’s findings, an evaluation of the quality of the panel process and its success in settling the dispute between the parties. Finally, in Chapter 4, the overall role and success of the FTA Chapter 18 process is considered, in light of the cases that were brought to the FTA dispute settlement process and the cases that were not. The consultation process and the panel process with a comprehensive assessment of the quality of the legal interpretation of the specific technical rules involved are scrutinized by the author. Professor Davey also assesses the effective use and relevance of the Chapter 18 dispute settlement process for Canada and the United States in relation to disputes which have (or could have) also been brought to the GATT. Finally the author concludes that the Chapter 18 procedures of the FTA have not been used in significant disputes (while those of the GATT were) and that there has been some indication that the procedures have not worked as well as the parties had originally hoped and expected.

In Part II of *Pine & Swine*, Professor Davey examines the Canada–U.S. FTA Chapter 19 binational panel process for antidumping and countervailing duty appeals. The new dispute settlement process of Chapter 19 of the FTA is original. It has replaced the last level of the national review process of antidumping and ant subsidy determinations with a review process performed by a binational panel whose function is to apply the national law of the importing country. It is therefore an international tribunal that applies national law. For Professor Davey, the Chapter 19 process is one of the success stories of the FTA and although not fully respected—the *Pine and Swine* dispute is an example of a frustrating dispute—this new mechanism has been used extensively. Chapter 5 describes the general operation of the system, while Chapters 6 through 10 examine thirty cases, divided according to the country and the underlying issue involved—dumping, subsidies, or injury in a chronological manner. For each of these cases, Professor Davey examines the relevant facts of the dispute, the legal arguments submitted to the panel, and the panel’s findings. Then Professor Davey submits his evaluation of the quality of the panel process and its success in settling the dispute between the parties. Chapter 11 then analyses the so-called extraordinary challenge process, which provides a limited oversight review of binational panel decisions and which has dealt with the three most controversial cases—those involving U.S. countervailing duties on Canadian pork, swine, and lumber.

Finally, in Chapter 12, Professor Davey undertakes an overall assessment of the

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8 (1) The panel on *Canada Requirement for Pacific Coast Salmon and Herring*, 1989, is thoroughly analysed and compared with the finding of the previous GATT panel on a related measure; (2) Panel on *Lobsters from Canada*, 1989; (3) Panel on *Article 304 and the Definition of Direct Cost of Processing or Direct Cost of Assembling*, 1992; (4) Panel on *The Interpretation of and Canada’s Compliance with Article 701.3 with respect to Dunn Wheat Sales*, 1992; and (5) Panel on *Puerto Rico Regulations on the Import, Distribution and Sale of Ultra Milk from Quebec*, 1993.
binational panel process which he argues "has worked relatively well, although some cases have generated substantial controversy". But for Professor Davey that controversy was not un-anticipated. When the underlying trade issues have been controversial—and then he cites the "pine and swine" dispute—and when the trade laws involved have been a focus of close legislative attention and special interest lobbying efforts, it would be naïve, argues Professor Davey, to expect that decisions significantly affecting trade flows of these products would be happily accepted by all participants. For some participants, the dispute settlement process is but one stage of a much larger effort by which they hope to obtain government intervention to assist them in the marketplace. This overall assessment is remarkable. Case reports are thoroughly analysed and the author does not hesitate to address sensitive issues such as the coherence of the Binational Panel system, the characteristics and qualities of panelists, the influence of non-lawyers as panelists, the allegations of conflict of interests and nationalism and the misuse of the binational process.

Finally, the book concludes with suggestions for improving the two dispute settlement mechanisms, focusing in particular on changes that may be appropriate if additional countries accede to NAFTA. As Professor Davey is also a well-known GATT/WTO expert, and in line with his article Dispute Settlement in GATT, where he had proposed changes to the GATT dispute settlement process, most of which were taken on board by the new WTO dispute settlement system including the Appellate Body, Professor Davey uses his severe critique to propose that alternative panelists should be designated at the outset of the case so that delays may be reduced in case of their withdrawal. In order to reduce conflicts of interest, the number of panelists could be reduced from five to three, become subject to increased disclosure obligations and not be trade practitioners; the creation of a permanent binational panel instead of ad hoc panels composed of outsiders would also reduce the risk of conflicts of interests. In addition, Professor Davey suggests that an Appellate Body could be put in place and ultimately a new regime of unfair trade law applicable to the NAFTA internal trade should be adopted. Pine & Swine is very impressive because it cumulates an accurate description and comprehensive analysis of all cases under the FTA—and there is no such other work—and is an authentic critique of the success and failure of their regional regime. With Pine & Swine the intellectual appetite and curiosity of all experts is thoroughly satisfied. While being the authoritative work on dispute settlement in the FTA, it is of particular interest to all those affected or interested by the NAFTA dispute settlement system, governments, businesses or general readers, as the FTA’s dispute settlement provisions were carried over with relatively minor modifications into NAFTA.

The co-existence of the GATT/WTO and a regional dispute settlement mechanism

Neither of these studies addressed the legal compatibility of multiple dispute
settlement mechanisms used by the same countries and the issue whether exclusive preferences can be agreed upon by some countries to the detriment of a dispute settlement mechanism. Professor Davey does provide the reader with a chart containing disputes raised both before the FTA (Chapters 18 and 19) and the GATT, where he concludes that the most important disputes between Canada and the United States were resolved in GATT rather than the FTA. Professor Davey therefore assumes, since he does not challenge or discuss that issue, that multiple dispute settlement procedures between the same countries for the same legal and factual issues are possible and legal. Unfortunately, and arguably because it was not the scope of his analysis, Professor Davey does not go further to discuss the legal compatibility of the preference clause agreed by countries in some agreements with regard to so-called “two-forum disputes”.

The dispute settlement mechanisms of FTA/NAFTA and GATT/WTO provide a good background for such a discussion. Article 1801 of FTA envisaged that disputes arising under both FTA and GATT (including the Tokyo Round Codes) could be settled in either forum at the discretion of the complaining party but that once a matter had been brought before either forum, the procedure initiated should be used to the exclusion of any other. Article 2005 of NAFTA goes further. It maintains the same principle as in the FTA but imposes on the eventual complaining party an obligation to notify any third party of its intentions. Then, if a third party wishes to have recourse to NAFTA dispute settlement procedures on the same matter, it must inform the notifying party promptly. Those parties should thereafter consult with a view to agreeing on a single forum. If the NAFTA parties cannot agree, Article 2005 provides that “the dispute normally shall be settled under this Agreement”. From this wording, it can be argued that primacy, or at least a preference, is given to NAFTA dispute settlement over that of the GATT/WTO.

Paragraphs 3 and 4 of Article 2005 go further and prescribe the exclusive application of NAFTA to the detriment of GATT. When the responding party claims that its action is subject to Article 104 of the Environmental and Conservation Agreements (inconsistency with certain environmental and conservation agreements), sanitary and phytosanitary measures, or standards-related measures adopted or maintained by a party to protect its human, animal or plant life or health, or its environment, and that raises factual or scientific issues on these aspects “the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under [NAFTA]” (emphasis added). According to paragraph 5 of Article 2005, if the complaining party has already initiated GATT procedures on the matter, “the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007” (emphasis added). This obligation imposed

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10 Article 2005(7) concludes that for purposes of Article 2005, dispute settlement proceedings under the GATT are deemed to be initiated by a party’s request for a panel, such as under Article XXIII.2 of GATT 1947.
on the NAFTA parties is quite strong, but would it have any legal value before a panel established under the GATT or the WTO?  
This preference given to NAFTA proceedings over those of GATT/WTO raises further questions in light of the provisions of Article 23 of the DSU. Article 23.2(a) of the DSU reads as follows:

"...Members shall:

(a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the Covered Agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;" (emphasis added).

This means that a violation of the WTO Agreement can be addressed only according to the WTO/DSU rules. How can this provision be reconciled with the preference and in some circumstances the exclusive priority given to the NAFTA dispute settlement process (contained in Article 2005 paragraphs 3 or 4 of NAFTA) concerning obligations which are similar in NAFTA and in WTO? Do the provisions of Article 23.2(a) of the DSU clash with those of Article 2005 of NAFTA? For instance, Article 301 of NAFTA refers explicitly to Article III of the GATT. In the hypothetical case where a NAFTA country's domestic regulation would violate Article III of the GATT and Article 301 of NAFTA, impairing the benefits of any of the two other NAFTA countries, the defending party may prefer to have the matter submitted to a NAFTA panel—the defending party may have a valid defence under NAFTA—but the complaining party may prefer to have the matter addressed in the WTO. The situation may also be reversed. The defending party may have some procedural or political advantage to have its case debated in the WTO. In agreeing to Article 2005, have NAFTA countries forgone their parallel WTO/DSU rights between themselves in certain circumstances?

If a dispute is initiated under the DSU, it is extremely doubtful that a DSU panel would give any consideration to a party's request to halt the procedures because similar or related procedures are taking place under a regional arrangement, such as NAFTA. A WTO panel would certainly not examine any allegation of a NAFTA violation but it could be asked to examine an alleged WTO violation which would be similar to a NAFTA violation. It would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure inconsistent with the WTO, because the complaining or defending Member is alleging to have a more specific or more appropriate defence or remedy in another forum, concerning the same legal facts. The situation would be the

11 Indeed, the explicit references to "GATT" and to "General Agreement on Tariffs and Trade 1947" raise the question whether the same rules would continue to apply to the new DSU of the WTO. However, it seems that since the first paragraph of Article 2005 refers to "any successor agreement (GATT)" and taking into account the conclusion of the recent NAFTA panel on Tariffs-Poultry where GATT was described as "an evolving system of law" that includes the results of the Uruguay Round, the provisions of Article 2005 of NAFTA would be applicable to the dispute settlement rules of the WTO.

12 See Margin of Preference, panel report adopted on 9 August 1949, BISD II/11 where a GATT Panel refused to consider the provisions of a bilateral agreement between the contracting parties.
same should the NAFTA parties have explicitly waived their rights to initiate dispute settlement proceedings under the WTO. Since there is no “international constitution” regulating the relationship between regional and other multilateral agreements such as the NAFTA and the WTO, the position taken by the parties to one of these agreements has no legal binding effect in the other Agreement.

On the other hand, in initiating a parallel WTO dispute, a NAFTA party may be in violation of its obligation under NAFTA, and may become the object of a related violation claim under NAFTA. In these circumstances, the NAFTA party opposed to the parallel WTO panel (the “opposing NAFTA party”), would claim that the WTO panel initiated by the other NAFTA party was impairing its benefits under NAFTA. The opposing NAFTA party would arguably win its case before the NAFTA panel. Theoretically, that opposing NAFTA party would then be entitled to some retaliation, the value of which would probably correspond to the benefits that the other NAFTA party would (could) gain in initiating its WTO panel. In other words, it may not be pragmatic or useful for a NAFTA party to duplicate in the WTO a dispute that should be handled in NAFTA, but there would be no legal impediment against such possibility since strictly the NAFTA and WTO panels would be considering different “matters” and would be addressing different “applicable law”: the WTO panel would be looking at allegations of WTO violations and the NAFTA panel would be looking at NAFTA violations.

The reverse argument in favour of an exclusive preference for the WTO forum is also dubious. Could one argue that Article 23 of the DSU goes as far as denying WTO Members the right to ignore voluntarily their WTO dispute settlement rights in favour of regional dispute settlement rules for legal situations which can be addressed both in regional and WTO fora? The practice of States seems to prove the opposite. Rather, it could probably be argued that the dispute settlement mechanism of NAFTA is compatible and ancillary to the provisions of Article XXIV of GATT 1994 and Article V of GATS which envisage the right for WTO Members to form regional agreements where preferential treatment on goods and services are given to parties to these regional arrangements.

If multiple fora are possible for the same conflictual situations, is there a risk of abuse or duplication of disputes? When a party has a choice of fora it will look for the forum most favourable in a variety of respects: the specific defence, the rights of third parties, the panelist selection process, the timetable, the availability of appellate review etc. It is interesting to note that countries do not appear to have used the possibility of two different dispute settlement fora to duplicate proceedings. In Chapter 4 of *Pine & Swine*, Professor Davey submits a chart of disputes between Canada and the United States with which he concludes that their important disputes have been brought before the GATT rather than the FTA. In fact, except for the *Salmon/Herring* disputes, the disputes between Canada and the United States concerning beer, lumber and pork arose from the application of the special procedure of Chapter 19 of the FTA dealing with antidumping and anti-subsidy measures where the national law of the importing country
is applied at the request of a private or public entity. On the face of these FTA disputes, no legal parallel can be drawn with the government-to-government disputes which took place before GATT panels concerning the same products. As for the Salmon/Herring disputes, the GATT and FTA panels examined two consecutive Canadian regulations, four years apart; the measures, the matters and the applicable law were different and interpreted differently by the GATT and FTA panels. It can be said, however, that the Salmon/Herring panels constituted a genuine example of cross-fertilization where the FTA panel continued the work initiated by the GATT panel. Indeed Professor Davey argues that the subsequent FTA panel felt that it had “to elaborate” the legal test suggested by the first GATT panel.13

Countries will probably continue to adhere to regional or sectorial dispute settlement mechanisms, such as in NAFTA, in parallel to their participation in the WTO. Regional and multilateral dispute settlement systems are not mutually exclusive although their enforcement may be legally problematic. For pragmatic reasons, States will tend not to duplicate their dispute, especially when they would be infringing a preferential clause of one of these Agreements. What matters is rather the mutual influence of the regional, sectorial and WTO dispute settlement mechanisms. In this context, The GATT/WTO Dispute Settlement System of Ernst-Ulrich Petersmann and Pine & Swine by William Davey are first-class books that provide lawyers, business people, diplomats and students with thought-provoking and practice-oriented analyses of the GATT/WTO and FTA/NAFTA dispute settlement rules, procedures and problems which will remain very topical for years to come.

13 In 1986, a first GATT dispute settlement process was initiated by the United States against Canada concerning the Canadian prohibition to export unprocessed salmon. The Panel concluded that the Canadian regulation violated GATT Article XI and was not “primarily aimed at the conservation of natural resources and in conjunction with domestic measures primarily aimed at rendering effective these restrictions”; therefore it could not qualify for the purposes of Article XX of GATT. This GATT Panel Report was adopted on 22 March 1988. In 1989, Canada (implementing the recommendations of the 1988 GATT panel report) changed its legislation and modified its export prohibition of unprocessed salmon and herring in favour of a requirement that all salmon and herring caught in Canadian waters be landed on Canadian ports for control purposes before exportation. The United States requested the establishment of a panel under Chapter 18 of the FTA and claimed that this new Canadian regulation was still a violation of Articles XI and XX of GATT which applied under the terms of the FTA. The FTA Panel concluded that this Canadian landing requirement violated the provisions of Article XI of GATT, as incorporated into the FTA. As for the general exception for measures “relating to the conservation of exhaustible natural resources” which Canada claimed was applicable, the FTA Panel elaborated the GATT “primarily aimed at” test.