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U.S.-Canadian Grain Disputes

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The United States and Canada are two of the world's largest exporters of grain—especially wheat and barley—and compete with each other in major foreign markets.¹ They share a common interest in reducing government interference in world agricultural markets and encouraging freer world trade.

The Canada and U.S. Free Trade Agreement (CUSTA)² and the North American Free Trade Agreement (NAFTA),³ which includes Mexico, became effective in 1989 and 1994, respectively. The CUSTA has been fully implemented for bilateral trade between the United States and Canada. NAFTA, when fully implemented, will create the largest single market in the world, a market of more than 350 million consumers with trade valued at over \$230 billion annually.

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1. See *e.g.*, INTERNATIONAL GRAINS COUNCIL, WORLD GRAIN STATISTICS (1997/98).

2. The CUSTA created a free trade area comprised of Canada and the United States. The objectives of the Agreement are to eliminate barriers to trade in goods and services between the two countries; facilitate conditions of fair competition within the free-trade area; liberalize significantly conditions for investment within this free-trade area; establish effective procedures for the joint administration of this Agreement and the resolution of disputes; and lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement. The CUSTA established rules of origin for determining whether goods were "originating" and entitled to CUSTA benefits. Tariffs were to have been eliminated on all goods by January 1, 1998. See *generally* INT'L TRADE COMMUNICATIONS GROUP, DEP'T OF EXTERNAL AFFAIRS, THE CANADA-U.S. FREE TRADE AGREEMENT (1987).

3. The NAFTA created a free trade area that encompasses Canada, Mexico, and the U.S. In a nutshell, the basic format of NAFTA closely follows that of the CUSTA and a number of provisions of NAFTA have been designed to rectify difficulties experienced under the CUSTA. See *generally* NAFTA: WHAT'S IT ALL ABOUT?, 12-16 (External Affairs and International Trade Canada, 1993); RICHARD G. LIPSEY ET AL., THE NAFTA, WHAT'S IN, WHAT'S OUT, WHAT'S NEXT, 26-29 (C.D. Howe Institute Policy Study 21, 1994).

Although the economies of the three NAFTA partners are highly interdependent, the degree of interdependence has been asymmetric. Mexico and Canada depend much more on the United States than the reverse. Prior to the implementation of NAFTA, 75 percent of Canadian exports and 88 percent of Mexican exports were destined for the United States. However, only 22 percent of U.S. exports were shipped to Canada and 7 percent to Mexico, mainly because of differences in economic conditions, relative sizes of the economies, and social structures among these countries. While the United States and Canada are similar in terms of economic conditions and social structure, Mexico differs significantly from its trading partners. The United States has the highest per capita gross domestic product (GDP) (\$28.6 thousand), followed by Canada (\$19.4 thousand) (see Table 1). Per capita GDP in Mexico is about one-ninth of that in the United States. Farm population is approximately 27 percent of the total population in Mexico and is less than 2.5 percent in the United States and Canada. Per capita farmland in Mexico (0.6 acres) is smaller than the United States (1.7 acres) and Canada (4.1 acres). On the other hand, the United States is about 9 times larger than Canada in terms of population and about 3 times larger than Mexico. According to the Heckscher-Ohlin theorem⁴, the effects of the free trade agreement will be larger between the United States and Mexico mainly because of the dissimilarity in resource endowments between these two countries.

The agreements have increased trade volume among the countries, especially for agricultural commodities and products between the United States and Canada under CUSTA. The average Canadian export of wheat and barley to the United States was larger in volume than the average U.S. exports to Canada for the 1990-97 period (see Table 2). In addition, Canadian exports to the United States have increased faster than U.S. exports to Canada. U.S. imports of Canadian western redspring (CWRS) wheat, for example, increased from 8.0 million bushels 1990 to over 65.7 million bushels in 1993 and then decreased to 56.7 million bushels in 1997. However, U.S. exports of HRS wheat to Canada averaged only about 0.4 million bushels per year during the same period. Bilateral trade of durum wheat between the two countries was similar to that for HRS wheat.

4. See JAMES R. MARKUSEN ET AL., *INTERNATIONAL TRADE: THEORY AND EVIDENCE* 106 (1995) (theorem says that a country has a comparative advantage in producing a commodity that intensely uses its relatively abundant factors).

The import surge in 1993 led to the negotiation of a temporary agreement to limit Canadian wheat exports to the United States.⁵ U.S. barley imports from Canada also grew rapidly from 9.9 million bushels in 1990 to nearly 89.2 million bushels in 1994 and then decreased to 45.4 million bushels in 1997. The imports accounted for over 10 percent of U.S. domestic consumption. During the same period, U.S. barley exports to Canada were less than 0.2 million bushels (See Table 2).

Because of rapid increases in Canadian export supply of agricultural commodities into the U.S. in the post CUSTA era, grain producers in Minnesota, Montana, and North Dakota have sought protection through trade laws. In addition, producers in these states have also engaged in the blockade of Canadian grain and livestock shipments to the United States. Furthermore, South Dakota Governor Bill Janklow announced new inspection requirements for all trucks carrying Canadian grain and livestock beginning at noon, September 16, 1998.⁶ Governors of North Dakota, Montana and Idaho followed the South Dakota measures and announced a stepped-up effort to inspect Canadian trucks as they cross the border into these states.⁷ On December 2, 1998, in the aftermath of series of trade disputes, the United States and Canada announced the Record of Under-

5. The agreement was effective only for one year from September 12, 1994 to September 11, 1995. See U.S. Statement Regarding Trade Between the United States and Canada on Wheat, U.S. TRADE REPRESENTATIVE RELEASE 94-43.

6. See Governor William J. Janklow, *Janklow Starts Truck Inspection of Canadian Grain and Livestock on Wednesday at Noon*, Press Release by Office of the Governor, State of South Dakota (September 15, 1998). Trucks carrying Canadian grain must supply proof that the grain is free of Karnal Bunt and wild oats. In addition, the grain should be free of the following six chemicals; dimetridazole, Ipronidazol, nitroimidazoles, fluoroquinolones, glycopeptides, and sulfamethazine.

7. See Governor Ed Schafer, *Schafer Says North Dakota Will Inspect and Inventory All Trucks at North Dakota Weigh Stations*, Press Release by Office of the Governor, State of North Dakota (September 15, 1998); Governor Marc Racicot, *Governor Racicot Joins Midwestern Governors in Inspecting Canadian Agricultural Trucks*, Press Release by Office of the Governor, State of Montana (September 18, 1998); Governor Phillip E. Blatt, *Governor Blatt Supports Midwestern Governors in Inspecting Canadian Agricultural Trucks*, Press Release by Office of the Governor, State of Idaho (September 18, 1998). In addition, North Dakota proposed a law that would restrict the entry of Canadian products under the guise of technical requirements. The proposed new law would prohibit a wide range of Canadian agricultural products from entering North Dakota without the necessary scientific justification required by NAFTA and by domestic U.S. regulations. Canadian government vigorously protested to defend the rights of Canadian exporters agricultural goods. In this regard, Canada requested NAFTA consultations on North Dakota trade barrier.

standing in agricultural trade to ease tension between the two countries.⁸

The primary purpose of this paper is to examine the market conditions conducive to trade flows and the causes of trade disputes between the U.S. and Canada with respect to wheat and barley. To this end, the interwoven dynamics of free trade agreements, trade remedy laws in the United States, profit seeking interest groups, and the geopolitical economy will be analyzed. The paper will then discuss new developments for conflict resolution between the two trade partners. The last section provides concluding remarks.

I. CONTRIBUTING FACTORS FOR TRADE FLOW OF GRAINS BETWEEN THE UNITED STATES AND CANADA

Bilateral trade flows of wheat and barley between the United States and Canada under CUSTA are influenced by differences in resource endowments, marketing systems, availability of marketable surpluses, differences in crop quality, and farm policies between the two countries.

The sizes of Canadian domestic markets for durum wheat and barley are much smaller than the U.S. domestic markets. However, quantities of durum wheat and barley produced in Canada are larger than those produced in the United States.⁹ As a result, Canada has larger marketable surpluses of grain and, therefore, is more dependent upon export markets than the U.S. On average, Canada exports about 75 percent of its wheat and 15 percent of its barley. Under CUSTA, the U.S. market has become attractive to Canadian producers mainly because it is the closest and single largest market to Canadian producing regions.

In Canada, wheat and barley exports are marketed by the Canadian Wheat Board (CWB). The CWB pays producers an initial price when the grain is delivered and returns any revenue surplus to producers as final payments.¹⁰ In the United States, grain is marketed by individual grain trading firms. U.S. wheat and barley in the world market often compete with CWB grain.

8. See Record of Understanding Between the Governments of Canada and the United States of America Regarding Areas of Agricultural Trade (Dec. 2, 1998) <<http://www.agr.ca/cb/trade>>.

9. INTERNATIONAL GRAINS COUNCIL, WORLD GRAIN STATISTICS (1996/97).

10. Simonot, *The Economics of State Trading in Wheat* (1997) (M.S. Thesis, University of Saskatchewan) (on file with author).

The CWB controls grain exports to both offshore and U.S. markets through export licenses. It is perceived in the United States that the CWB may distort trade flows.¹¹ Some constituencies argue that it has monopsony power in purchasing agricultural commodities from producers. At the same time, the CWB is a single desk sales agency that has the exclusive right to make marketing decisions regarding prices and quantities. Thus, it is argued that the CWB is able to exercise price discrimination to maximize profits in world markets. This is perceived to be an unfair advantage of the CWB over private firms in the United States. However, the WTO, under Article XVII:1, allows a state trading enterprise to charge different prices between markets provided it is done for commercial reasons based on market conditions in export markets. In addition, it is argued that the CWB does not provide sufficient information regarding its general operation. This is especially true regarding purchase and sales price information for agricultural commodities. Some analysts argue that these practices by the CWB represent an unfair advantage over their U.S. competitors.¹²

The Canadian rail subsidy was an indirect subsidy provided to farmers by the Canadian government under the *Western Grain Transportation Act* (WGTA) for shipments of the designated grains from producing regions to export ports.¹³ U.S. grain producers argued that, under the Act, Canadian grains were more competitive in offshore markets. Canada, however, eliminated the controversial rail subsidy under the WGTA in 1995. Contrary to the expectations of U.S. grain producers, the elimination of the rail subsidies induced larger inflows of grains into the United States. The elimination of the WGTA has ulti-

11. See generally MERLINDA INGCO AND FRANCIS NG, DISTORTIONARY EFFECTS OF STATE TRADING IN AGRICULTURE: ISSUES FOR THE NEXT ROUND OF MULTILATERAL TRADE NEGOTIATION, 31-32 (Development Research Group, The World Bank, Feb. 1998).

12. See TROY G. SCHMITZ AND WON W. KOO, AN ECONOMETRIC ANALYSIS OF INTERNATIONAL FEED AND MALTING BARLEY MARKETS: AN ECONOMETRIC SPATIAL OLIGOPOLISTIC APPROACH (North Dakota State Univ. Agric. Econ. Report No. 357, 1996).

13. Canada enacted the *Western Grain Transportation Act* in 1983. Under the WGTA, the Canadian government provided rail companies with annual payment of up to C\$658 million with adjustment for inflation to cover the transportation costs of eligible grain shipments to selected shipping terminals at western and eastern ports. Under this Act, shipping costs from Canadian prairies to offshore markets were lower than the shipping costs from U.S. producing regions to the same offshore markets. It is argued by U.S. grain producers that Canada enjoyed a comparative advantage over the U.S. in shipping grains to these markets.

mately made the U.S. market more attractive for Canadian producers, because transportation costs from the Canadian prairies to the United States are lower than those from the Canadian prairies to most offshore markets.¹⁴

The exchange rate between the two currencies also plays an important role in bilateral trade of agricultural commodities and products. Since the U.S. economy has been stronger than the Canadian economy since 1985, the U.S. dollar has appreciated against the Canadian dollar. The U.S. dollar appreciation makes U.S. agricultural commodities more expensive in the Canadian market and, at the same time, Canadian agricultural commodities less expensive in the U.S. market.¹⁵

Another important contributing factor affecting trade flows of grain between the two countries is differences in the quality of grain produced in the countries. This is especially true for durum wheat trade between the two countries. U.S. millers demand high quality durum wheat. Whenever the United States cannot produce enough high quality durum wheat (due to weather conditions and diseases during the growing season) to meet domestic demand, U.S. millers have imported high quality durum wheat from Canada.

The U.S. Export Enhancement Program (EEP) has also played an important role in maintaining U.S. competitiveness of wheat and barley exports in off-shore markets.¹⁶ However, EEP adversely affected the bilateral trade of the crops by raising the U.S. domestic prices of the crops. Higher relative prices in the

14. See Demcey Johnson and William W. Wilson, *Canadian Rail Subsidies and Continental Barley Flows: A Spatial Analysis*, 31 LOGISTIC AND TRANSPORT. REV. 31-46 (1995) (predicting that removal of the rail subsidies will likely result in increased shipments to the United States); WEINING MAO ET AL., WORLD FEED BARLEY TRADE UNDER ALTERNATIVE TRADE POLICY SCENARIOS (North Dakota State Univ. Agric. Econ. Report No. 350, 1996).

15. For example, assume that Canadian wheat priced at C\$5.00/bushel is sold at \$3.57/bushel in the U.S. market at an exchange rate of C\$1.40/\$1.00. If the U.S. dollar appreciates from C\$1.40 to C\$1.50, the price of Canadian wheat decreases from \$3.57 to \$3.33 in the U.S. market. On the other hand, U.S. wheat priced at \$3.57 will be C\$4.90 in Canada at an exchange rate of C\$1.40/\$1.00 and will be C\$5.25 at an exchange rate of C\$1.50/\$1.00. An appreciation in the value of the U.S. dollars against Canadian dollars, in the integrated U.S.-Canadian grains market, makes Canadian grains export more attractive in the U.S. market. There are numerous empirical studies confirmed this hypothesis. See e.g., J.R. Coleman and Karl D. Meilke, *The Influence of Exchange Rates on Red Meat Trade Between Canada and the United States*, 36 CANADIAN J. OF AGRIC. ECON. 401-424 (1988).

16. See Julian M. Alston et al., *The Wheat War of 1994*, 42 CANADIAN J. OF AGRIC. ECON. 231-251 (1994); See also MAO, *supra* note 14, at 25; SCHMITZ, *supra* note 12, at 5.

U.S. market attracted flows of the crops from Canada. The U.S. government has not used EEP since 1995 except for barley.¹⁷

II. TRADE BARRIERS OF GRAINS IN THE PRE- AND POST-CUSTA ERA

Prior to the CUSTA/NAFTA, there were barriers (e.g., tariffs and non-tariff barriers) in trading small grains (including durum wheat) between the United States and Canada. Tariffs imposed by the United States prior to 1989 were \$7.70/ton for wheat, \$2.30/ton for malting barley, and \$3.40/ton for other barley; and those imposed by Canada were C\$4.40/ton for wheat and C\$2.30/ton for all barley. Under the CUSTA, tariffs on wheat and barley were placed on a schedule of elimination in 10 equal segments and, therefore, were eliminated completely by January 1, 1998. In Canada, imports of wheat from the U.S. had been subject to import licenses, administered by the Canadian Wheat Board,¹⁸ but these were removed immediately after the CUSTA. In 1991, however, Canada instituted a legal regime that American wheat destined for processing in Canada must be accompanied by an end-use certificate (EUC), permitted under CUSTA Article 705(1). Canadian processors importing American wheat must request the EUC from the Canadian Grain Commission. Subsequently, the United States government also instituted an end-use certificate (EUC) requirement for all Canadian wheat entering the U.S. effective February 27, 1995.¹⁹

III. ESTIMATED PRICES AND INCOME EFFECTS OF INCREASED EXPORT SUPPLY FROM CANADA

In the post-CUSTA era, increased exports of wheat (including durum wheat) from Canada into the U.S. market became a major trade irritant, particularly in the Northern Plains states. Producers in the Northern Plains states generally believe that increased export supply of grains from Canada has resulted in

17. EEP was used for barley once in 1998 in response to a U.S. import of EU barley.

18. This requirement allowed the CWB to operate the "two-price wheat policy". The CWB has an explicit policy to sell to domestic millers at a price equal to or less than the landed price of equivalent U.S. grain. Interest groups in the U.S. argues that as a result of CWB policy on wheat imports into Canada from the U.S. have been limited to very small volumes, and restricted at times when there is a shortage of specific qualities of Canadian wheat.

19. The use of EUCs on commodities requires only when Canada requires them of American products. See North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, §321(f), 107 Stat. 2111 (1993).

the loss of potential income through price and income effects. Economic theory, based on the law of supply and demand, predicts that increased supply of a commodity lowers the price of the commodity if demand for the commodity remains the same. Increased supply of a commodity, *ceteris paribus*, reduces the price of the commodity.

Industry econometric models for durum wheat and barley in the United States were developed to evaluate this allegation based on the relationship between the price and the quantity of supply.²⁰ In the model, the total supply is divided into domestic supply and imports, mainly from Canada. The price and supply relationship was estimated by using time series data. The statistical relationship between price and supply in the durum wheat model is statistically significant, implying that the increased domestic supply and imports of durum wheat in the United States, *ceteris paribus*, lower the price of durum wheat.

The estimated price flexibility coefficients for import of durum wheat is 0.24 at mean levels of price and quantity, indicating that the price of durum wheat decreases 2.4 percent when the import volume increases by 10 percent.²¹ The estimated price flexibility coefficient for domestic supply is 0.76, which is larger than that for imports. The difference in the magnitude of price flexibility coefficients between imports and domestic supply is mainly because domestic and imported wheat are differentiated in the U.S. domestic market. The domestic price of durum wheat is more sensitive to domestic supply than imports from Canada because durum wheat imported from Canada is of higher quality.

The estimated price flexibility coefficient for domestic supply of barley is 0.41 and that for imports from Canada is 0.07, indicating that domestic price of barley decreases by 4.1 percent and 0.7 percent, respectively, when both domestic supply and imports increase by 10 percent. The price flexibility coefficients

20. See WON W. KOO, *BILATERAL TRADE OF DURUM WHEAT AND BARLEY UNDER CUSTA AND IMPLICATIONS FOR FARM PRICE AND INCOME* (North Dakota State Univ. Agric. Econ. Report No. 385, 1998).

21. Price flexibility coefficient is defined as a percentage change in price resulting from a one percent changes in quantity of supply. It should be noted that the estimated price effects of export supply of wheat and barley from Canada are based on the estimated price flexibility coefficient, which is derived from a partial equilibrium model. Market equilibrium conditions in North American market are explicitly considered in the specification of the econometric model, while the equilibrium conditions in other parts of the world are assumed to be constant.

indicate that domestic prices are more sensitive to Domestic supply than imports.

When applying the estimated price flexibility coefficients to the U.S. durum wheat industry, the U.S. domestic price of durum wheat was estimated to be reduced by about 11 percent annually for 1994-1996 period because of increased Canadian durum wheat exports to the United States. Similarly, U.S. barley prices were estimated to be reduced by about 4.3 percent annually because of increased Canadian barley exports to the United States. The decreased prices of durum wheat and barley led to reductions in farm income. The average farm income loss is estimated to be \$148 million/year for both U.S. durum wheat and barley producers: \$47 million/year for durum wheat producers and \$101 million for barley producers (see Table 3).

Given uncertainties about the estimated income loss resulting from the increased Canadian exports into the U.S., upper and lower bounds of the estimates of farm income loss are considered. In the upper bound scenario,²² the average farm income loss is estimated to be \$192 million/year for both durum wheat and barley producers: \$64 million/year for durum wheat producers and \$128 million/year for barley producers. This resulted from a 15.3 percent reduction in durum wheat price and a 7.6 percent reduction in barley price in the United States. In the lower bound scenario²³, average income loss is estimated to be \$104 million/year for both durum wheat and barley producers in the United States: \$31 million/year for durum wheat producers and \$73 million/year for barley producers. The estimated price reduction under this scenario is 6.5 percent for durum wheat and 1.3 percent for barley.²⁴ These estimated income losses, however, are not necessarily a loss to the U.S. economy. The intermediate and/or end users of durum wheat and barley, for

22. Using the price flexibility coefficient calculated from the estimated parameters for the import variable of the model plus one standard error corresponding with the variable. In this scenario, Price is about 50% more sensitive to changes in quantity supplies than the base case. See Koo, *supra* note 21, at 11-21

23. Using the price flexibility coefficient calculated from the estimated parameters for the import variable of the model minus one standard error corresponding with the variable. In this scenario Price is about 50 percent less sensitive to changes in quantity supplies than the base case. See *id.*

24. It should be noted that the estimated magnitude of the impact of Canadian export supply on prices and income in the U.S. may differ depending on the scope and specification of the model (i.e., partial versus general equilibrium analysis, time period considered, coverage of the world market, etc.).

example, are beneficiaries of the lower prices of durum wheat and barley arising the surge on Canadian exports.

IV. U.S. COUNTER MEASURES BY USING THE U.S. TRADE STATUTES

The recent history of grain trade disputes between the two countries reveals that U.S. wheat producers have attempted, using trade statutes and other means such as border blockades, to stop or at least to reduce the flow of Canadian wheat and barley into the U.S. market to minimize their income loss (see Table 4). A number of U.S. trade statutes are available to protect domestic producers of like goods from unfair trade practices by foreign exporters, including anti-dumping duties²⁵ and countervailing duties.²⁶ (Table 4). Although these two laws are aimed at different forms of unfair trade, they have many procedural and substantive similarities. Dumping generally refers to a form of international price discrimination, whereby goods are sold in one export market at prices lower than the prices at which comparable goods are sold in the home market of the exporter, or in its other export markets.²⁷ The purpose of the countervailing duty law, on the other hand, is to offset any unfair competitive advantage that foreign manufacturers (or exporters) might enjoy over U.S. domestic producers as a result of subsidies.²⁸

25. Title VII, Subtitle B of the Tariff Act of 1930, *as amended*, Pub. L. No. 103-465, 108 Stat. 4995 (1994).

26. Title VII, Subtitle A of the Tariff Act of 1930, *as amended*, Pub. L. No. 103-465, 108 Stat. 4995 (1994).

27. Section 731 of the Tariff Act of 1930, *as amended*, provides that an anti-dumping duty shall be imposed, in addition to any other duty, if two conditions are met. First, the Department of Commerce must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the U.S. at less than its fair value". Second, the USITC must determine that "an industry in the U.S. is materially injured, or is threatened with material injury, or the establishment of an industry in the U.S. is materially retarded, by reason of imports of that merchandise." 19 U.S.C. § 1673 (1999).

28. Subtitle A of Title VII of the Tariff Act of 1930, *as amended* by the Trade Agreements Act of 1979 and *amended* by the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, and the Uruguay Round Agreements Act of 1994, provides a countervailing duty shall be imposed, in addition to any other duty, equal to the amount of net countervailable subsidy, if two conditions are met. First, the DOC must determine that a countervailable subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold into the U.S." and must determine the amount of the net countervailable subsidy. Second, the USITC must determine that "an industry in the U.S. is materially injured, or is threatened with material injury, or the establishment of an industry in the U.S. is materially retarded, by reason of

In addition to AD and CVD provisions, import relief (safeguard) under section 201 of the *Trade Act* of 1974, as amended by section 1401 of the *Omnibus Trade and Competitiveness Act* of 1988, and sections 301-304 of the *Uruguay Round Agreements Act*, sets forth the authority and procedures for the President to take action, including import relief to facilitate efforts by a domestic industry which has been seriously injured by imports to make a positive adjustment to import competition.²⁹

Section 22 of the *Agricultural Adjustment Act* of 1933, as amended, also provides relief if imports "render or tend to render ineffective, or materially interfere with" domestic farm programs.³⁰ If interference is suspected, the President can order an investigation by the International Trade Commission.³¹ Section 332 of the *Tariff Act* of 1930, as amended, also provides that the USITC investigate and report to President and Congress on the administrative, fiscal and industrial effects of the customs laws of the United States.³² Section 301 of the *Trade Act* of 1974 also provides the authority to respond to certain unfair foreign practices.³³

The first legal challenge to bilateral asymmetric wheat trade flows in the post-CUSTA era was started in 1989 when North Dakota durum wheat producers complained that the Canadian freight subsidies provided under the *Western Grain Transportation Act* (WGTA) constituted an export subsidy, in violation of CUSTA Article 701.2. The United States Trade Representative (USTR) examined the allegation and concluded that "subsidies under the WGTA would not appear to be classified as export subsidies" since the freight subsidy under the WGTA applied to all shipments to Thunder Bay, whether destined for export or domestic use. Subsequently, the controversial WGTA was eliminated by the Canadian government in 1995.

The second legal challenge was initiated on October 26, 1989 by the U.S. Congress, under the provisions of Section 332

imports of that merchandise or by reason of sales of that merchandise for importation." *Uruguay Round Agreements Act*, Pub. L. No. 103-465, Title VII, Subtitle A, § 701, 108 Stat. 4995 (1994).

29. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 105TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 98-99 (Comm. Print 1997).

30. *Id.* at 616

31. *Id.*

32. *Id.* at 1066-68.

33. *Id.* at 80.

of the *Tariff Act* of 1930.³⁴ In accordance with section 332(g) of the *Tariff Act*,³⁵ the USITC instituted investigation No. 332-285, *Durum Wheat: Conditions of Competition Between the U.S. and Canadian Industries*. The Senate Committee on Finance requested that the Commission report the results of its investigation by June 22, 1990. On that date, the Commission reported the results of its investigation to the House Committee on Ways and Means and Senate Committee on Finance.³⁶ The USITC rejected the U.S. wheat industry's allegation that the Canadian Wheat Board (CWB) had been "dumping" durum wheat into the U.S. market (i.e., selling below acquisition price).

Subsequently, based on complaints filed by grain producers in North Dakota and Montana, the U.S. Congress requested that the Government Accounting Office (GAO)³⁷ conduct a study analyzing the responsiveness of durum prices to market forces. The results of the GAO study, presented during a Congressional field hearing in Bismarck, North Dakota, in December 1989, indicated that prices of durum wheat for 16 years (1973-88) had generally followed the movement of market forces such as stocks-to-use ratios (i.e., price level bears a strong inverse relationship to stocks on hand at the end of the year).³⁸ These were followed by a bi-national panel hearing, held in 1992 pursuant to Article 701(3) of the CUSTA, which unanimously ruled that there was no compelling evidence that the CWB was selling wheat below acquisition cost into the U.S. market.

Having failed to reduce Canadian export supply of wheat (including durum) into the U.S. market through the use of U.S. trade statutes and CUSTA Articles, the U.S. wheat industry pressured the Clinton Administration in 1993 to take further legal action through the Executive Branch under the provisions of Section 22, the *Agricultural Adjustment Act* (AAA).³⁹ As di-

34. On November 15, 1989, the USITC received a letter from the Committee on Finance, US Senate, containing an identical request.

35. 19 U.S.C. § 1332(g) (1999).

36. See *Durum Wheat: Conditions of Competition Between the U.S. and Canadian Industries*, USITC Pub. 2274, Inv. No. 332-285 (June 1990).

37. The US General Accounting Office undertook an audit of CWB pricing practices. However, it is generally viewed in the U.S. that the GAO was not able to complete the study mainly because the CWB refused to provide the information required for this GAO's investigation.

38. Canadian exporters viewed these investigations as indirect investigation of dumping allegation.

39. The USITC received a letter from the President Clinton stating that he had been advised by the Secretary of Agriculture, "that there is reason to believe that wheat, wheat flour, and semolina are being or a practically certain to be imported into the U.S. under such conditions and in such quantities as to

rected by the President, the Commission instituted investigation No. 22-54, on November 17, 1993, under Section 22(a) of the AAA.⁴⁰

The USITC determined, by the majority rule, that wheat, wheat flour, and semolina were being imported into the US. under such conditions and in such quantities as to "materially interfere" with USDA price support programs for wheat.⁴¹ The Commission's report to the President⁴² indicates that the Commission had seriously considered five economic analyses, *inter alia*, containing empirical evidence submitted by the participants of the investigation as well as the USITC staff.⁴³ The

render or tend to render ineffective, or materially interfere with, the price support payment and production adjustment program for wheat conducted by the U.S. Department of Agriculture (USDA)."

40. 7 U.S.C. § 624(a) (1999).

41. Material interference is defined by the Commission in the past cases as "more than slight interference but less than major interference. When determining whether material interference is occurring or would occur the Commission has examined factors such as: (i) the available supply of imports, including import levels, changes in import volumes, world production, and world stocks of the imported products; (ii) pricing data, including the relationship between import prices, U.S. prices, and the support price; (iii) information relating to domestic supply and demand; (iv) data relating to the government programs, including CCC outlays, CCC surpluses, and changes in the cost to the government of running a program. Three Commissioners (i.e., Rohr, Newquist, and Bragg) determined that the subject goods are imported into the U.S. under such conditions and in such quantities as to materially interfere with the price support programs conducted by the USDA for wheat. However, three other Commissioners (including the Chairman Watson, Vice Chairman Nuzum, and Commissioner Crawford) determined that (i) wheat, wheat flour, and semolina are not being imported under such conditions and in such quantities as to render, or tend to render, ineffective the USDA wheat program; and that (ii) the evidence of the recent impact of increased wheat imports could support the President finding either material interference or not material interference. When the vote by the six commissioners is tied, it is considered an affirmative determination.

42. See *Wheat, Wheat Flour, and Semolina*, USITC Pub. 2794, Inv. No. 22-54 (June 1994).

43. During the investigation, the Commission has received four economic submissions from parties to the proceeding. They are SAG (on behalf of the CWB by Sumner, Alston, and Gray); LECG (the Law and Economic Consulting Group); USDA (U.S. Department of Agriculture); ADE (Abel, Draft and Earley on behalf of the Millers National Federation, the National Pasta Association, and the National Grade Trade Council, all users of grain). The most detailed is the one submitted on behalf of the CWB by SAG. The SAG submission presents a partial equilibrium simulation model of the world market consisting of the U.S., Canada, and the "rest of the world". The SAG submission suggested that Canadian wheat export supply have had very small effects on U.S. wheat prices and on U.S. wheat program costs. The Commission's report indicated that the SAG analysis contains an extensive discussion of the parameters underlying a model of the effects of imports on a market. The Commission's report stated

USITC report to the President, in fact, led to a negotiated settlement for the 1994/95 crop year, which is known as the Wheat Peace Agreement.⁴⁴ In response to the agreement, the U.S. domestic price of durum wheat increased from \$4.67/bushel in 1994 to \$5.75/bushel in 1995, but dropped again to \$3.95/bushel in 1997.

V. CONFLICT RESOLUTION THROUGH BORDER BLOCKADES OR NEGOTIATED SETTLEMENTS?

Despite long and exhaustive legal actions, the volume of Canadian exports into the U.S. has not significantly abated. Grain producers in Minnesota, Montana, and North Dakota have waged an increasingly hostile war of words and actions against Canadian grain. Producers in these states have engaged in blockades of Canadian grains and livestock shipments to the United States. For example, Governor Bill Janklow of South Dakota announced his intention to inspect all trucks carrying Canadian grain and livestock beginning on September 16, 1998. Governors of North Dakota, Montana and Idaho followed suit immediately.⁴⁵ These unilateral actions against Canadian agricultural products were vigorously protested by Canadian government.

On December 2, 1998, in the aftermath of a series of legal actions, hostile words, and border blockades, the United States and Canada announced a Record of Understanding on bilateral agricultural trade that included the U.S.-Canada Action Plan to strengthen and expand agricultural trade relations between the two countries.⁴⁶ The various provisions of the Record of Understanding seek to ease the tension between the United States and Canada in grain and livestock trades.

- The action plan is designed to improve access for U.S. farmers to primary elevators in Western Canada, while preserv-

further that "on the basis of this discussion, parameters are chosen such that the effects of Canadian wheat on the U.S. market are small." *See id.* at II-80.

44. *See generally* Alston, *supra* note 16, at 231-251. The Agreement was effective only one crop year from September 12, 1994 to September 11, 1995.

45. *See* Press Releases by Office of the Governors, State of South Dakota, North Dakota, Montana, and Idaho on September 15-18, 1998, *supra* notes 6 and 7.

46. The Record of Understanding is the result of negotiations between the United States and Canada on a number of trade issues in the fall of 1998. Many of these issues fall into the category of technical barriers to trade for grains, livestock and meats, and horticultural products. *See* Record of Understanding, Annexes 6-9, *supra* note 8.

ing the integrity of the Canadian grain quality control system. In this regard, four grain companies have proposed a total of 27 elevators within 60 miles of the border to receive U.S. grains. The program complements existing arrangements that facilitate the direct movement of U.S. wheat and barley to Canadian feedlots, feed mills, and flour mills, effective as of January 1, 1999.

- Growers in the U.S. are able to ship wheat under a "Master Phytosanitary Certificate" without the requirement to have each individual shipments tested. Wheat must originate from an approved grower in states eligible under the program and at least one sample per grower, per crop, must be officially tested and found free of Karnal bunt spores. The Master Phytosanitary Certificate must additionally satisfy requirements for dwarf bunt and flag smut based on area freedom or official testing as appropriate. The program was implemented for both North Dakota and Montana as of January 1, 1999.

- The Canadian Food Inspection Agency has developed an alternative certification program that permits shipments of wheat, barely, rye and/or triticale, excluding seed, to transit through Canada based on a certificate of origin in lieu of a phytosanitary certificate with mandatory sampling and testing. This allows U.S. grain to be shipped on the Canadian rail system to final destinations in the United States beginning January 1, 1999 for producers from Montana, Minnesota, and North Dakota.

- Other grain related measures include phased in changes in phytosanitary regulations for grain shipments to Canada and efforts to harmonize pesticide regulations. In addition, Canada and the United States agreed to meet quarterly, or more frequently on request, to consult on global grain production and marketing in order to strengthen cooperation and trust on issues of mutual interest.

Although this U.S.- Canada action plan has provided opportunities for U.S. growers to ship their grains to Canada and to use the Canadian rail system to ship grain to destinations in the United States, the plan did not fully satisfy grain producers in the United States because the major issue is not U.S. access to the Canadian market. Grain producers' major concerns are rapidly increasing volumes of Canadian exports of wheat and barley into the United States and their impacts on grain prices and farm incomes, particularly in the Northern Plains region. For grain producers in the U.S., the problem persists.

More recently, the North Dakota Farmers Union proposed a marketing pool for durum and hard red spring wheat outside the purview of the Record of Understanding. The main purpose of the marketing pool would be to enhance net farm income for wheat producers in spring wheat producing regions. A feasibility study for the wheat pooling scheme concluded that a durum wheat pool would provide additional revenue to durum wheat producers by raising the U.S. domestic prices jointly with the CWB in the North American Market. However, a hard red spring wheat pool does not appear economically feasible mainly because of close substitution with other wheat types.⁴⁷ Others have doubted the long-term viability of the wheat pool given its potential to conflict with the liberalization trend in agricultural markets started during the Uruguay Round of global trade talks.⁴⁸

VI. CONCLUDING REMARKS

There have been several trade disputes over agricultural commodities during the post-CUSTA era. Even though Canadian exports of wheat and barley are not found to have violated U.S. trade remedy laws, friction seems likely to continue as long as the surge in Canadian export supply is unabated and national differences persist in grain marketing and delivery systems, farm subsidy programs, and trade policies. The geopolitical economy (i.e., dynamic interface of NAFTA, trade remedy laws, and regional interest groups' welfare and politics) in the U.S. would likely lead to further conflicts along the U.S. - Canada border. Gradual harmonization of trade policies, farm subsidy programs, and marketing institutions may reduce further trade disputes between the two countries in the future. To diffuse the threat of future trade disputes stemming from either a pursuit of self-interest among parties or misunderstandings about the nature of grain trade flows between the two countries, a Canada - U.S. joint research team should be formed on the subject matter. The research team should investigate the causes of changed trade flows in the context of world market perspectives and find workable and realistic conflict resolutions.

47. See WON W. KOO ET AL., *ECONOMIC ANALYSIS OF THE PROPOSED NORTH DAKOTA WHEAT POOL* (North Dakota State Univ. Agric. Econ. Report No. 410, 1999).

48. See generally Jon Lauck, *Against the Grain: The North Dakota Wheat Pooling Plan and the Liberalization Trend in World Agricultural Markets*, 8 MINN. J. GLOBAL TRADE 289 (1999).

TABLE 1. CHARACTERISTICS OF THE PARTICIPATING COUNTRIES, 1996

	United States	Canada	Mexico
Population (million)	266.6	30.0	96.6
Per Capita GDP (1000 US\$)	\$28.6	\$19.4	\$3.4
Population in Agriculture (%)	2.5	1.6	27.0
Land (million acres)	465.0	122.0	57.3
Per Capita Land (acres)	1.7	4.1	0.6
Average age (years)	32.0	32.8	22.0
Education (years in school)	11.0	12.0	7.5

Source: International Financial Statistics.

TABLE 2. BILATERAL TRADE OF THE SELECTED AGRICULTURAL COMMODITIES BETWEEN THE UNITED STATES AND CANADA, 1990-1997

	1990	1991	1992	1993	1994	1995	1996	1997	Average
	million bushels								
<u>U.S. Imports from Canada</u>									
HRS	8.0	15.8	35.3	65.7	51.4	30.0	53.0	56.7	36.4
Durum	15.4	16.4	15.7	20.6	12.3	8.4	13.7	19.1	13.8
Barley	9.9	18.6	20.2	26.4	89.2	62.2	48.1	45.4	29.4
<u>U.S. Exports to Canada</u>									
HRS	0.0	0.7	0.8	1.0	0.6	0.0	0.2	0.2	0.4
Durum	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Barley	0.1	0.0	0.1	0.1	0.0	0.4	0.4	0.3	0.2

Source: U.S. Department of Agriculture.

TABLE 3. DECREASES IN NET FARM INCOME FOR DURUM WHEAT AND BARLEY PRODUCERS IN THE UNITED STATES, 1994-1996

Year	Base	High Price Effect	Low Price Effect
	million \$		
<u>Wheat</u>			
1994	55.1	72.6	38.5
1995	42.4	57.6	28.2
1996	44.1	62.8	26.5
Average	47.2	64.3	31.1
<u>Barley</u>			
1994	100.2	127.6	72.7
1995	95.5	121.3	69.7
1996	106.3	135.3	77.3
Average	100.7	128.1	73.3

Source: Agricultural Economics Report 385, Department of Agricultural Economics, North Dakota State University.

